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THE
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(68 Ohio St. 608)

SHOEMAKER et al. v. CITY OF CINCINNATI et al.

(Supreme Court of Ohio. June 23, 1903.)

MUNICIPAL IMPROVEMENTS—ASSESSMENT—COLLECTION—INJUNCTION—CONSTITUTIONAL LAW—FRONT FOOT ASSESSMENT—RES JUDICATA.

1. An owner of land which has been assessed for the improvement of a street is not entitled to an injunction restraining the collection of such assessment, where a statute in all material respects the same as the one under which the improvement was made and the assessment levied, and the bonds of the municipality to pay the cost issued, had theretofore been adjudged valid by the highest court of the state, simply because similar legislation was held by the same court long afterwards to be in violation of the Constitution.

2. An assessment for street improvements, otherwise lawful, is not rendered invalid because assessed in terms by the abutting foot, where it appears that the amount of the assessment did not exceed the special benefit to the land. *Schroder v. Overman*, 55 N. E. 158, 61 Ohio St. 1, 47 L. R. A. 156; *Walsh v. Barron*, 55 N. E. 164, 61 Ohio St. 15, 76 Am. St. Rep. 354; *Same v. Sims*, 62 N. E. 120, 65 Ohio St. 211.

(Syllabus by the Court.)

Error to Circuit Court, Hamilton County.

Action by one Shoemaker and others against the city of Cincinnati and another. From a judgment for defendants in the circuit court, plaintiffs bring error. Affirmed.

The action below was begun July 15, 1901, in the court of insolvency of Hamilton county, by the plaintiffs in error against the city and the auditor, to enjoin the collection of an assessment for the improvement of Mercer street which had been levied on a lot owned by them on the corner of Vine and Mercer streets. It was shown by the petition that the ordinance providing for the improvement was passed by the board of legislation of the city February 8, 1897, and the ordinance providing for the payment of the costs, the issuing of the bonds, and the levying of the assessments, being "levied and assessed on each abutting foot of the several lots of land bounding and abutting on Mercer street from Vine street to Walnut street," was passed by the board of admin-

istration October 12, 1897. The plaintiff had paid the installments for the years 1898, 1899, and 1900, and it was to restrain the collection of the balance that suit was brought.

The answer of the city contained the following averment, viz.: "Further answering, the defendant says that the said assessment levied as described in the petition is in proportion to the special benefits conferred by the improvement of Mercer street on said property of the plaintiffs and each abutting foot thereof upon which said assessments were levied; that said assessments levied upon said property and each abutting foot thereof are not in excess of the special benefits conferred upon said property and each abutting foot thereof; that said special benefits do in fact, as to said property, and each abutting foot thereof, fully equal the assessments levied thereon, and as to each parcel of land and each abutting foot thereof upon which the assessments for said Mercer street were levied, the assessments are in proportion to the special benefits conferred thereon by said improvement of said street."

In the insolvency court a demurrer to this answer was sustained, and judgment awarded plaintiffs. On error the circuit court reversed this judgment and remanded the cause. The plaintiffs ask the reversal of the last judgment, and affirmance of that of the court of insolvency.

Charles B. Wilby and Charles E. Tenney, for plaintiffs in error. Charles J. Hunt and Albert H. Morrill, for defendants in error.

SPEAR, J. (after stating the facts). Plaintiffs' action was based upon section 5848, Rev. St. 1892, which confers jurisdiction to enjoin the illegal levy or collection of taxes and assessments, and the grounds on which this assessment is claimed to be illegal are two: One, that the statute under which the assessment was made, being section 2264b, Bates' Ann. St., is unconstitutional, in that it deals with a subject of a general nature and has not a uniform operation throughout the state; in other words, that it applies only to Cincinnati. The other, that

¶ 2. See *Municipal Corporations*, vol. 36, Cent. Dig. § 1113.

the method of assessment, being by the abutting foot, instead of according to benefits, renders the assessment void; but no claim is made that there is any want of notice of intention to improve, nor any irregularity in the passage of the resolutions or ordinances providing for the improvement.

We think neither proposition can be maintained. It is true that the section referred to is obnoxious to the late rulings of this court condemnatory of special legislation, but that conclusion by no means concludes the inquiry. The section, or the act of which it is a part, repeals former laws upon the subject; and, if the act in the particular complained of be unconstitutional, the repealing clause, by a well-understood rule, would also fall with it. It cannot be important to pursue this inquiry in detail, and thus settle upon the next preceding act which would meet the present view as to uniform operation. It is enough to say that the original Municipal Code, in its provision for special assessments (66 Ohio Laws, pp. 245-247), provides generally for street improvements "by any city or incorporated village"; and, while the specific steps there provided are not precisely the same as those enjoined by the later acts including the act in question, yet the substance is the same. The later ones equally protect the rights of the landowner; and in this inquiry we are to be controlled by substantial considerations, and not by mere technicalities. Sections 2289, 2327, Rev. St. 1892.

But another consideration sufficiently answers the proposition. This improvement was made in the year 1897. Prior to that date legislation in its essential features identical with that which is here assailed had been distinctly sustained by the courts upon a full consideration of the precise objection which is here urged. The case of *Scheer v. Cincinnati*, 15 Wkly. Law Bul. 66, brought to enjoin a street assessment, decided by the superior court of Cincinnati in 1885, involved an inquiry into the validity of the act of April 25, 1885 (82 Ohio Laws, p. 156), which was supplementary to section 2293, Rev. St. 1892. The act authorized the improvement by paving with granite blocks, etc., streets in cities of the first grade, first class, and the holding was (opinion by Harmon, J.) that it was not invalid by reason of section 1, art. 13, or of section 26, art. 2, of the Constitution; and the assessment was sustained. That case was prosecuted by plaintiff to this court, and the judgment of the superior court affirmed January 19, 1886. This holding was cited approvingly, and the principle involved affirmed, in *State v. Hudson*, 44 Ohio St. 137, 5 N. E. 225, and repeatedly reaffirmed by decisions of this court, and remained the law of the state until the decisions involving the government of the cities of Toledo and Cleveland, announced June 26, 1902. *State v. Jones*, 66 Ohio St. 453, 64 N. E. 424; *State ex rel. v.*

Beacom, 66 Ohio St. 491, 64 N. E. 427. So that the inquiry comes finally to this: Is the owner of property which has been assessed for the improvement of a street entitled to an injunction restraining the collection of such assessment, where a statute in all material respects the same as the statute under which the improvement was made and the assessment levied, and the bonds of the municipality to pay the cost issued, had been theretofore adjudged valid by the highest court of the state, simply because similar legislation was held by the same court long afterwards to be in violation of the constitution? We answer the question unhesitatingly in the negative.

It is a principle of universal application that a cause of action once finally determined between parties by a competent tribunal cannot afterwards be litigated between the parties or their privies by a new proceeding. It is the principle of *res judicata*. It rests not only on the private rights of the parties, but is a principle of public policy, having been characterized as a "fundamental concept in the organization of civil society." *Jeter v. Hewitt*, 22 How. 352, 16 L. Ed. 345. It is equally well settled as a general proposition, admitting, however, of exceptions, that courts will adhere to and follow decisions of the highest court of the jurisdiction, where the same points come again in litigation; and the rule is of universal application where the law has become settled as a rule of property by reason of such earlier decisions, and rights have become vested on the faith of them. This is the doctrine of *stare decisis*. The broad principle lying at the base of both of these rules is embraced in the translation of the term *res judicata*, viz.: "That the matter has been decided." So that, if a matter or point in issue has been decided in such a way as to bind the parties to the new action, whether they were parties to the former suit or not, and whether, where the validity of a statute is involved, the precise statute was in question or not, the former decision will control. Such is the case we have. The city's bonds have been issued to pay for the improvement, and such as have not been paid are held by innocent investors, and thus property rights and liabilities have grown up and become fixed beyond change on the faith of the decisions of this court upon the precise question which is involved in this inquiry; and the decisions do, for the reasons stated, bind all persons affected by the street improvement thus made. It would be glaring injustice to the city and its general taxpayers to now hold that the acts of public agencies which carried on governmental functions by the authority and upon the faith of those decisions were invalid, even though, were the question presented in a way to affect only new conditions, a contrary holding would be imperative.

The underlying principle presented is not dissimilar from that involved in *City of Cincinnati v. Taft*, 63 Ohio St. 141, 58 N. E. 63.

There was present in that case a question as to the constitutionality of an act supplementary to that which authorized the issue of bonds for the construction of the Cincinnati Southern Railway. This act, if it were new legislation, would be now condemned as unconstitutional; but, it having been sustained by the decision in *Walker v. Cincinnati*, 21 Ohio St. 14, 8 Am. Rep. 24, the court held in the Taft Case, without regard to the constitutional question, that "an act of the General Assembly to authorize a municipality to issue bonds for the construction of a public improvement having been adjudged by this court to be constitutionally valid, and the bonds having been thereafter sold and the improvement made, the court will follow the former decision as to the validity of supplementary acts relating to the renewal or extension of such bonds." It would appear that this branch of the present case might be disposed of on the authority of that case.

Nor is the assessment invalid because made in terms by the abutting foot, instead of in terms according to benefits; the record showing that the assessment did not exceed the special benefit to the land. *Schroder v. Overman*, 61 Ohio St. 1, 55 N. E. 158, 47 L. R. A. 156; *Walsh v. Barron*, 61 Ohio St. 15, 55 N. E. 164, 76 Am. St. Rep. 354; *Walsh v. Sims*, 65 Ohio St. 211, 62 N. E. 120.

Judgment affirmed.

BURKET, C. J., and DAVIS, SHAUCK, PRICE, and CREW, JJ., concur.

(68 Ohio St. 543)

CONE et al. v. BRIGHT.

(Supreme Court of Ohio. June 16, 1903.)

TRIAL BY JURY—WRITTEN INSTRUCTIONS—
TAKING TO JURY ROOM—REFUSAL
CAUSE FOR ERROR.

1. On the trial of a cause to a jury, if a party thereto presents written instructions to the court on matters of law, and requests the same to be given to the jury before argument is commenced, as provided for in subdivision 5, § 5190, Rev. St. 1892, which is done, and such party, at the close of the general charge, asks the court to permit the jury to take the written instructions, so given, in their retirement, or send the same to the jury during its deliberations, as provided for in subdivision 7 of said section, a refusal by the court to grant the request is error, for which a judgment against the party making the request will be reversed. (Syllabus by the Court.)

Error to Circuit Court, Hancock County.

Action by John Bright against Frank Cone and W. J. O'Dell. Judgment for plaintiff, and defendants bring error. Judgment against Cone affirmed, and against O'Dell reversed.

The defendant in error, John Bright, brought his action in the court of common pleas to recover of the plaintiffs in error a considerable sum of money which, he alleges, he lost to them during the month of February, 1899, while dealing in margins at

their place of business conducted in Findlay, Ohio. He alleges that the dealings with the defendants below were, in their nature, wagers or bets on the prices of commodities for sale in the markets at Chicago and other cities, and therefore in violation of the statutes of this state, which authorize a recovery back from the owner of money lost on such wagers or bets. The plaintiffs in error denied all the allegations of the petition made against them respectively. The case was tried to a jury. Numerous exceptions were taken, on the introduction of plaintiff's testimony, by O'Dell, and at the close of the testimony, and before the beginning of arguments of counsel to the jury, the defendants, now plaintiffs in error, each requested the court to give certain written instructions in their behalf before the arguments commenced. The instructions presented by Cone were given as requested. Some of the instructions asked by O'Dell were given before argument, and others were refused. There was no request that the general charge of the court should be reduced to writing, and it was not a written charge. O'Dell excepted to the charge, and thereupon requested the court to send the special instructions, which were given before argument, to the jury room during their deliberations. This was objected to by the plaintiff, on the ground "that the charge is not in writing, and the special instructions should not be sent to the jury unless a written charge be sent therewith." The court sustained this view and refused to send the instructions so given to the jury, to which O'Dell excepted. Cone made no such request, and took no exceptions on the subject. The jury found against both Cone and O'Dell, and assessed the recovery at \$3,888.14. A motion for new trial was overruled and judgment was entered on the verdict. The circuit court affirmed the judgment, and error is prosecuted here to reverse the judgments of both courts.

Harlan F. Burkett, Shay & Cogan, and George H. Phelps, for plaintiffs in error. James A. Bope, E. V. Bope, and E. Y. Dunn, for defendant in error.

PER CURIAM. While the record shows that Frank Cone, one of the defendants in the court of common pleas, joins O'Dell in the petition in error, it is quite evident that he has no ground of complaint. The evidence against him was not only competent, but was sufficient in weight to justify the verdict against him. The court gave the special instructions he requested, and he took no exception to the general charge. An affirmance of the judgment against him naturally follows.

The record as to O'Dell is not so clear. He interposed numerous objections to the evidence of the plaintiff, which consisted mostly of his own testimony, and struggled

against its admission where the plaintiff testified to the statements and declarations of Cone, his codefendant. The reason which he presented and urged repeatedly against the admission of such statements by Cone appears to be that they were not made in the presence of O'Dell, and that it was not shown that they were jointly interested in the transaction through which the money was lost, nor that there was a combination or conspiracy on their part to perpetrate the wrongs complained of.

In order to properly decide upon the competency of such evidence, we have looked carefully into the record, and the result of our investigation is that the facts against O'Dell are rather meager and frail. But there is some evidence coming from his own lips which, if true, indicates that, at the close of the unfortunate investments of the plaintiff, O'Dell was personally interviewed and appealed to for some relief from the losses plaintiff had sustained, whereupon he informed the plaintiff that he had no more goods to sell him, was out of the commodities in which plaintiff had been dealing, etc. This remark is significant as implying a knowledge of and connection with what had preceded, and his part in it, and the statement, when coupled with a few other facts against him, furnishes some basis, although weak it is, for the finding of the jury, and also for the refusal of the court to rule out the evidence objected to.

The court gave certain instructions asked by O'Dell to be given before argument, and refused others; but we perceive no error in such refusal. Nor do we find reversible error in the general charge. After this charge, O'Dell requested the court to send to the jury room, during the deliberations of the jury, the special instructions given before the argument to the jury commenced. The court denied this request, for the stated reason that the general charge was not in writing. O'Dell excepted to the ruling of the court, and this exception presents the most substantial question in the case.

Subdivisions 5, 7, § 5190, Rev. St. 1892, provide:

"5. When the evidence is concluded, either party may present written instructions to the court on matters of law, and request the same to be given to the jury, which instructions shall be given or refused by the court before the argument to the jury is commenced."

"7. The court, after the argument is concluded, shall, before proceeding with other business, charge the jury; any charge shall be reduced to writing by the court, if either party, before the argument to the jury is commenced, request it; a charge or instruction, when so written and given, shall not be orally qualified, modified, or in any manner explained to the jury by the court; and all written charges and instructions shall be taken by the jurors in their retirement, and

returned with their verdict into court, and shall remain on file with the papers of the case."

The instructions referred to were, beyond doubt, in writing. They appear in the record, each one bearing its respective number, and only written instructions are recognized by subdivision 5. They had a physical existence, for the court was asked to send them to the jury room. Therefore, had the court any discretion to refuse the request? We think not. The purpose, in part at least, of having proper instructions given before argument, is that counsel for each party may know, in advance of argument to the jury, what the law of the case is on certain, or all, of the questions of law involved. They become a guide by which counsel may regulate and govern their arguments, and, having this important part to play, they become a part of the papers of the case, and they "shall be taken by the jurors in their retirement, and returned with their verdict into court, and shall remain on file with the papers of the case." These special instructions oftentimes cover about all questions in controversy, so that, when given to the jury, little, if any, further charge becomes necessary. And the fact that the general charge is not in writing does not release the court of the duty imposed by statute as to written instructions which have been presented and given before argument to the jury. The request of O'Dell directed the attention of the court to this duty, and the refusal to perform it is error, for which the judgment as to O'Dell must be reversed.

The judgment as to Frank Cone is affirmed, but the judgment against W. J. O'Dell is reversed, and the cause is remanded for further proceedings according to law.

Judgment against W. J. O'Dell reversed.

BURKET, C. J., and SPEAR, DAVIS, SHAUCK, PRICE, and CREW, JJ., concur.

(68 Ohio St. 614)

METROPOLITAN LIFE INS. CO. v.

HOWLE.

(Supreme Court of Ohio. June 23, 1903.)

LIFE INSURANCE—COPIES OF APPLICATION TO ACCOMPANY POLICIES ISSUED—ESTOPPEL TO DENY TRUTH OF APPLICATION—PHYSICIAN—PRIVILEGED COMMUNICATION—TESTIMONY AS TO HEALTH OF PERSON—CONDITIONS OF POLICY—INSTRUCTIONS.

1. Where, under section 3623, Rev. St. 1892, a full and complete copy of the application for insurance has not been returned with the policy, the insurance company, while so in default, is estopped from denying the truth of such application, but, to make such estoppel available, the facts constituting the estoppel must be pleaded by the plaintiff.

2. It is not competent to prove by a physician the communications made to him by his patient in that relation, but such physician may testify as to facts which are within his knowledge independent of such communications. He may

¶ 1. See Estoppel, vol. 19, Cent. Dig. §§ 300, 302.

testify as to the condition and state of health of his patient, as well as the treatment by him prescribed for his patient.

3. Where the state of health of a person is in question, and one side introduces evidence showing that such person could and did, about the time in question, walk about the house and on the streets and in other places, it is competent for the other side to prove that about the same time the person in question walked but little.

4. Where a policy of life insurance has a condition to the effect that the company assumes no obligation unless the insured is at the date of the policy alive and in sound health, and there is an issue as to whether at that time the insured was in sound health, the insurance company is entitled, upon the trial, to have the jury instructed unconditionally to find for the company, in case they find that the insured was not in sound health at the date of the policy.

(Syllabus by the Court.)

Error to Circuit Court, Cuyahoga County.

Action by one Howle against the Metropolitan Life Insurance Company. Judgment for plaintiff, and defendant brings error. Reversed.

This same cause was here once before, and is reported in *Life Ins. Co. v. Howle*, 62 Ohio St. 204, 56 N. E. 908; the cause now here being the one brought upon the two small policies, one for \$126, dated September 25, 1893, and the other for \$500, dated November 12, 1894. The policies were on the life of Sarah Howle, and ran in favor of her husband, said Henry Howle. She died September 5, 1895.

The petition is in the usual form, and avers that he and she duly performed all of the conditions of said policies on their part to be performed, made proofs of death, and demanded payment, which was refused; followed by a prayer for judgment.

The amended answer is as follows:

"First ground of defense: Now comes the Metropolitan Life Insurance Company, defendant in this action, and, for its first ground of defense, admits its corporate existence under the laws of the state of New York, the execution of two policies of insurance upon the life of Sarah Howle, in the sums and for the considerations stated in the petition in this case, the payment of the premiums, the death of said life; and denies each and every other allegation in said petition.

"Second ground of defense: For its second ground of defense, this defendant says said policies were issued in consideration of the warranties, answers, statements, and agreements in the applications therefor by said deceased made to defendant on September 9, 1893, and October 24, 1894, respectively, copies of which are hereto attached, marked respectively 'Exhibit C' and 'Exhibit D,' and made part hereof, in which said deceased declared and warranted that the representations and answers therein made were strictly correct and wholly true, that any untrue answer would render the policy issued thereunder null and void, and that neither of said contracts of insurance should bind the

defendant, unless, upon their dates and delivery, she was in sound health.

"And defendant says the following answers, warranties, and statements in the application, 'Exhibit C,' were willfully false and fraudulently made, to wit: That the deceased never had pneumonia, or disease of the heart or kidneys; never been under any treatment in any dispensary, hospital, or asylum; and was on the said September 9, 1893, in sound health.

"And that the following answers, warranties, and statements in said application, 'Exhibit D,' were willfully false and fraudulently made, to wit: That the deceased on said October 24, 1894, was not insured in any other company except this defendant's; never had pneumonia, or disease of the heart or kidneys; never had been under treatment in any dispensary, hospital, or asylum; never been seriously ill; was on said day in sound health; and that no application for insurance on her life had been, prior to said day, rejected or declined by any other company.

"And defendant says that prior to said respective days in September, 1893, and October, 1894, said insured had pneumonia and disease of the heart and kidneys; had a miscarriage; had been under treatment in the Wooster University Dispensary or Hospital at Cleveland, Ohio; had been seriously ill; and an application for insurance on her life had been rejected or declined by an insurance company. And that on neither of said days, nor on the respective days and dates of delivery of said policies, was said insured in sound health. All of which was well known to plaintiff and said insured.

"Defendant further says that said answers in said application were material, and induced it to issue said policies; that, but for such answers and warranties, neither of said policies would have been issued; and that the defendant's agent had no knowledge of the falsity or fraud of said answers or any of them.

"Wherefore this defendant prays to be hence dismissed with its costs."

The reply is a general denial of the answer.

Upon trial to a jury there was a verdict for the plaintiff for the full amount claimed on both policies. A motion for a new trial was overruled, and judgment entered on the verdict. Proper exceptions were taken and saved throughout. The circuit court affirmed the judgment, and thereupon the insurance company came to this court, seeking to reverse the judgments of the courts below. The grounds of error will be stated in the opinion.

O. L. Holtze, for plaintiff in error. Hart & Canfield, and W. S. Kerruish, for defendant in error.

BURKET, C. J. (after stating the facts). Upon the trial the defendant insurance company had a witness upon the stand with one

of the applications for insurance in his hand, and was proceeding to prove that the answers to the several questions therein were made by said Sarah Howle, and that said answers were false, when counsel for plaintiff below objected on the ground that said defendant had failed to prove in open court that it had returned with said policy a complete copy of said application, as required by section 3623, Rev. St. 1892. The court sustained the objection, and excluded both of said applications, to which the defendant excepted. Said section 3623 is as follows: "Every company doing business in this state shall return with, and as part of any policy issued by it, to any person taking such policy a full and complete copy of each application or other document held by it which is intended in any manner to affect the force or validity of such policy, and any company which neglects so to do shall, so long as it is in default for such copy, be estopped from denying the truth of any such application or other document; and in case such company neglect, for thirty days after demand made therefor, to furnish such copies, it shall be forever barred from setting up, as a defense to any suit on such policy, any incorrectness or want of truth of such application or other document." Under the provisions of this section a failure to return a full and complete copy of the application, with the policy, works an estoppel so long as the company shall be in default, and, in case of neglect to furnish such copy for 30 days after demand made therefor, such neglect shall be a bar to any and all defenses growing out of such applications and the answers to questions therein contained. The bar here provided for is a permanent estoppel. To make an estoppel or such bar available, the facts constituting the same must be pleaded in all cases where the same is practicable. In this case the plaintiff below should have pleaded the estoppel in his reply, but, instead of so doing, he contented himself with a general denial, and thereby denied the existence of such applications. As the applications in this case in fact existed, he should have admitted that fact in his reply, and avoided their effect by pleading the failure to return copies, and thereby made the estoppel available. The defendant company was not required in its answer to say whether a full and complete copy of the application had been returned with each policy or not. The denial of the existence of the applications might be taken as an argumentative denial of their return with the policies, but pleadings should be direct, and not argumentative. As the pleadings stood, the court erred in excluding the evidence.

In the court's charge as to expert testimony, the word "plaintiff's" was used when the word "deceased's" was evidently intended. The intention was so clear that it would seem that the jury could not have been misled thereby. The real meaning of the court in other regards as to expert testimony was not

so clear as the above mistake, and is not approved, and should not be followed.

The defendant company introduced Dr. Steiner as a witness in its behalf, and asked him the following question: "Now, Doctor, what, if anything, did Mrs. Sarah Howle say to you, during the times that she came to you for examination and treatment, as to the length of time of her disease?" Objection being made, the witness was not allowed to answer. Under section 5241, Rev. St. 1892, this ruling was correct. That section provides as follows: "The following persons shall not testify in certain respects: A physician concerning a communication made to him by his patient in that relation, or his advice to his patient." This question clearly sought to have the physician disclose a communication made by his patient to him in the relation as patient, and was therefore incompetent.

Each policy had this condition: "Provided however that no obligation is assumed by this company prior to the date hereof, nor unless on said date the insured is alive and in sound health." In view of this condition the defendant company introduced Dr. Crooks as a witness, and the record discloses the following: "Q. From your treatment of Mrs. Sarah Howle, and the facts you have testified to, what do you say was her state of health on November 12, 1894? A. She was not in sound health on that day. Q. You may state what was her condition on that day. (Objected to. Objection sustained.) Q. What, if anything, did you prescribe for her, if you remember, in November, 1894? (Objected to. Objection sustained.)" In each instance the defendant company, by its counsel, excepted, and stated what the answer would be, and the same was in each instance pertinent and competent. The evidence so offered was not a communication by the patient to the physician, but was as to the independent knowledge of the physician, and was clearly competent, and the court erred in excluding the same.

The plaintiff offered evidence to the effect that his wife, during the dates in question, walked around the house and to market, and walked as naturally as anybody. To contradict this, the defendant company introduced a Mrs. Kendall, a neighbor, and asked her the following question: "Did the woman walk a great deal or very little? What do you know, of your own knowledge, as to her going out much or little in those days, if you know?" Objection being made, she was not allowed to answer. She would have answered, if permitted, that in those days Mrs. Howle walked out but little. The insurance company was clearly entitled to this evidence, because it had a direct bearing as to whether or not she was in sound health. As an element to show sound health, the plaintiff attempted to prove that she did much walking, and the defendant had a clear right to show that the statements as to the walking were not true.

The insurance company, by its counsel, requested the court to give the following charges to the jury: "(2) If you find from the evidence that Mrs. Sarah Howle was not in sound health on the 12th day of November, 1894, and on the 25th day of September, 1893, the respective dates of the two policies upon which this suit is brought, you must find in favor of the defendant company. (3) If you find from the evidence that Mrs. Sarah Howle was not in sound health on the 12th day of November, 1894, the date of one of the policies, you must find for the defendant upon that particular policy. (4) If you find from the evidence that Mrs. Sarah Howle was not in sound health on the 12th day of November, 1894, and on the 25th day of September, 1893, or on either of said days, you must find for the defendant, and it makes no difference whether she knew or did not know that she was not in sound health." The court refused to give either of said requests, and said to the jury: "I have been asked by the defendant to make certain charges. Except as I have given the matter in a qualified way in the general charge, I decline to give these requests." The charge as given on the subject, and which the court conceded to the jury to be in a "qualified way," was as follows: "I say to you, gentlemen, that if you find Mrs. Howle was not in sound health, within the meaning of the definition I have given you, if she was not thus in sound health on September 25, 1893, and November 12, 1894, under such circumstances it would be your duty to render a verdict for the defendant. If you find that the plaintiff has complied with the terms of the policy in question, and if Sarah Howle was in sound health at the time of the issuance of these policies in question, under such circumstances the plaintiff would be entitled to recover." The charges as requested are direct and to the point, and should have been given, while the charge as given referred to the circumstances, and was well calculated, if not intended, to furnish a suggestion to the jury by which they might ease their consciences and bring in a verdict against the insurance company. A court in charging a jury should so evenly balance the scales of justice as not to indicate by a wink, look, shake of the head, or peculiar emphasis, as to his notions as to which way the verdict should go. When a case is to be submitted to a jury at all, it should be impartially submitted, and, if the court feels that the case is so clear as to require an indication from him, he should direct a verdict, and then his action can be easily reviewed in a higher court; but if he gives a charge which looks fair on paper, but which is in fact distorted by his looks, attitudes, emphasis, winks, and rolling of the eyes, an unjust result is often attained which cannot be corrected in a higher court. There is not much difference between the charge as requested and as given, yet there is enough to disclose to any good trial lawyer that a jury would understand

that the court felt that the plaintiff ought to recover, and therefore the insurance company did not have a fair trial.

The judgments of the lower courts will be reversed, and the cause remanded for a new trial.

Judgments reversed, and cause remanded.

SPEAR, DAVIS, SHAUCK, PRICE, and CREW, JJ., concur.

(68 Ohio St. 500)

SMITH v. RHODES et al.

(Supreme Court of Ohio. June 16, 1903.)

ADMINISTRATOR—ACCOUNTING—ATTORNEY'S FEES—LIABILITY ON BOND.

1. Where the administrator of an estate is required by the probate court to file an account of the expenses of his administration, preparatory to his stating a final account, and does so, which expense account includes an amount due his attorney for services rendered in the settlement of the estate, and for necessary expenses paid by him in discharge of his duties as such attorney, and said account, on hearing by that court, is approved and allowed, and the administrator is ordered by the court to pay to said attorney the sum so found due him out of the assets of the estate in his hands for distribution, a failure to comply with such order is a breach of the administration bond, for which the surety thereon is liable. *Thomas v. Moore*, 39 N. E. 803, 52 Ohio St. 200, distinguished.

2. It is no defense to the action on the administration bond for the surety to plead and prove that exceptions to the account of the administrator, filed by a creditor of the estate, had been withdrawn by him in consideration of the part payment of his claim by the administrator.

(Syllabus by the Court.)

Error to Circuit Court, Sandusky County.

Action by J. H. Rhodes against George F. Wilt and J. F. Smith. Judgment for plaintiff, and defendant Smith brings error. Affirmed.

On February 13, A. D. 1875, George F. Wilt, one of the defendants in error, was appointed administrator of the estate of his father, Harrison Wilt, deceased, which appointment was accepted and letters of administration were duly issued. The administrator gave bond, which was approved, in the sum of \$4,000, conditioned according to law, with J. F. Smith, plaintiff in error, as one of his sureties. Having so qualified, he entered upon the duties of his trust. One of the provisions of said bond is: "Fourth. Shall pay any balance remaining in his hands upon the settlement of his accounts to such persons as said court or the law shall direct." The estate became involved in protracted litigation in the federal courts, in which J. H. Rhodes, defendant in error, was employed as attorney for the administrator, and he acted in that capacity in that litigation, and also rendered such other legal services as were desired by the administrator. In August, 1880, the administrator filed an account, which showed assets in his hands

¶ 1. See *Executors and Administrators*, vol. 22, Cent. Dig. § 2397.

amounting to \$1,223.85. This account was approved. On May 3, 1897, the probate court ordered the administrator to "file forthwith an account of all expenses of administration preparatory to filing an account of distribution on order of court." On May 12, 1897, the administrator filed an account of the expenses of administration, being for the administrator personally, \$782.50, and for his attorney, J. H. Rhodes, \$527.25. These expenses were itemized, showing in detail the nature and amount of each item. Mrs. E. K. Byrnes, one of the creditors of the estate, filed exceptions to the account of the administrator, which were afterwards withdrawn, and on October 11, 1897, the expense account was "approved and confirmed as presented and filed," and the administrator was ordered to file his final settlement without delay, which was done on October 26, 1897. Due notice was given of the pendency of this account by publication, and after several continuances the account came on for hearing on March 22, 1898. No exceptions were filed and the court made the following finding and order:

"In the Matter of the Estate of Harrison Wilt, Deceased. March 22, 1898. Final account confirmed. Notice of the time for hearing and settlement of the final account of George F. Wilt, administrator of the estate of said Harrison Wilt, deceased, having been duly published according to law, and there being no exceptions thereto pending, it was this day examined, found correct, approved, allowed, and confirmed by the court. And the court finds the sum of \$1,223.85 in the hands of said administrator belonging to said estate, and that there is due to J. H. Rhodes, for attorney's fees and moneys advanced to pay necessary expenses for said estate, the sum of \$527.25, as heretofore found by the court on the hearing of the expense account of said administrator. It is therefore ordered that, of said sum of \$1,223.85 so in his hands, said administrator pay the costs herein, taxed at \$7.50; to said J. H. Rhodes, said sum of \$527.25; and that the balance in his hands, \$688.70, is hereby allowed to him to apply on his bill of \$782.50 as allowed him on the hearing of said expense account. And said administrator is ordered to report the vouchers for the payments and allowance hereinbefore ordered back to this court.

"Samuel Brinkerhoff, Probate Judge."

The administrator paid J. H. Rhodes, the attorney, the sum of \$50, but failed to pay the balance found due him, and after demand upon the administrator, and upon the plaintiff in error as surety on the bond, for the balance, suit was brought in the court of common pleas upon the administrator's bond, in which breach of the bond was alleged in not complying with the foregoing order of the probate court. The surety, now plaintiff in error, answered, admitting his suretyship on the bond and that said George F. Wilt became administrator, and denied each and

every other allegation in the petition. The answer of the administrator is similar, with the additional averment that, if the probate court made the order referred to, it was made without authority of law and is void. The cause was tried to a jury, and the plaintiff in error excepted to the ruling of the court excluding testimony offered, and also to refusing him leave to amend his answer during the progress of the trial, so as to render competent the testimony excluded. The jury found for the plaintiff, Rhodes, the amount of his claim, and the court refused a new trial and rendered judgment on the verdict. The circuit court affirmed the judgment, and error is prosecuted in this court to obtain a reversal of the judgments of the lower courts.

George H. Withey and Hunt & De Ran, for plaintiff in error. S. S. Richards and J. H. Rhodes, for defendants in error.

PRICE, J. (after stating the facts). The parties to this proceeding submitted their controversy to a jury, and we assume that it was properly instructed by the court, inasmuch as the charge is not found in the printed record, nor is fault found with it in the brief for plaintiff in error. Complaint is made that the trial court erred in excluding evidence offered by the defendants below, and also erred in not permitting them to amend their answers during the progress of the trial.

The action was against George F. Wilt as principal, and the plaintiff in error as his surety, on the administrator's bond. The record shows that, in attempting to make out their defense to the action brought by Rhodes, the defendants propounded to the administrator, Wilt, certain questions to elicit from the witness what, if any, consideration was paid to any one to induce the withdrawal of the exceptions which had been filed to his account as to expenses of administration. The court permitted inquiries as to any amount which had been paid to plaintiff, Rhodes, but refused to admit testimony as to what, if anything, had been paid to the excepting creditor, or any one else. When the court sustained objections to such inquiries, no statement was made of what the expected proof would be, and, as it occurred during the examination in chief, the ruling of the court is not reviewable in the absence of such statement. The rule requires a profert of the desired evidence, in order that a reviewing court can determine whether or not the action of the trial court was prejudicial. However, if we may glean from the current of the examination what counsel for defendants desired, it would appear that such inquiries were properly shut out. The judgment and orders of the probate court could not be thus impeached. In that court the party excepting to the administrator's account had a right to withdraw the exceptions at any time before final submission,

and that was done, and at a later date the account was approved and settled. The administrator was well aware of what had been done, and it would seem that such withdrawal was entirely satisfactory to him, as it was his account that had been assailed. Several months intervened between the withdrawal of the exceptions and the final order. No other objections were made. The surety on the bond was not a party to that proceeding, and he had no right to be. He undertook to secure the performance of duties and obligations imposed on the administrator, and after the probate court had settled the account, to which no objection existed, we think, the surety, when sued upon the bond, cannot inquire into the motives or consideration which led to the withdrawal of objections to the account.

These remarks dispose of the other complaint, that the defendants were not allowed to amend their answers. Counsel informed the trial court that they desired to so amend the answers as to make the excluded evidence competent; but no amended answer was tendered to the court to act upon, for we find none in the record. Stating what was desired as an amendment was not sufficient. However, if an amendment had been tendered, containing the averments orally disclosed to the court, they would have been irrelevant, and the tender of an immaterial issue as already stated.

It is also claimed that the plaintiff in error is not liable as surety on the bond of the administrator for the services rendered by Rhodes as attorney of such administrator, because they are not a debt against the estate, but against the administrator personally. Counsel for plaintiff in error state their position as follows: "Can the surety on an administrator's bond be held liable to the attorney of the administrator for services performed for the administrator as such, or is the failure of the administrator to pay his attorney fee a breach of the conditions of the bond? We think not." To support their decision on the question as they put it, they cite *Thomas v. Moore*, 52 Ohio St. 200, 39 N. E. 803. That was an action brought before a magistrate by Moore, as the surviving partner of the firm of McKnight & Moore, against Elizabeth J. Thomas, as administratrix, to recover for legal services rendered her by that firm. The bill of particulars stated the services were performed at her request in various suits brought by and against her as such administratrix. Judgment was obtained in the justice's court for the amount sued for, and the defendant gave notice of appeal, and filed a duly certified transcript, but gave no appeal bond. In the court of common pleas the appeal was dismissed for want of an appeal bond; the court holding the appeal was not in the interest of the trust she represented. This court, in reviewing and affirming the order of dismissal, laid down this rule: "Executors and adminis-

trators are personally liable for the services of attorneys employed by them, but their contracts therefor do not bind the estate, although the services are rendered for the benefit of the estate, and are such as the executor or administrator may properly pay for, and receive credit for the expenditure in the settlement of his accounts."

That case is used to show that the administrator or executor may not be allowed in his settlement the full amount he has actually paid his attorneys, but only such amount as he shows was reasonable compensation for the services rendered. We think that case was correctly decided; but how does it relieve the surety in this case? It is true that Wilt, the administrator, had paid but a small part of the attorney's fees; but, as shown in the statement of this case, he was required by the probate court to file an account of the expenses of administration preparatory to the filing of his final account. This was done, and due notice by publication was given of the filing and pendency of the expense account, which was heard on a day to which its hearing had been adjourned. The itemized bill of Mr. Rhodes for attorney fees was before that court, and we must assume that sufficient legal proof of the nature and value of the services rendered was made. The court approved the account as to the expenses of the administrator and his attorney as separately stated. Then came the final account and order of distribution, wherein the administrator was ordered to pay out of the assets in his hands the amount found due the attorney, and from the balance to pay his own expenses as allowed. The administrator paid Rhodes \$50, and no more, and, on refusal to pay as ordered by the probate court, the action was brought on his bond.

The probate court examined and approved the expense account in advance of its payment. That court had all the light on the facts that could have been shed on an examination of the claim for reimbursement, had the administrator paid the attorney in advance and taken credit for the same in his account. In this instance the attorney fees were examined and approved in advance of payment, and on final account ordered paid from the assets of the estate. The subject had been fully adjudicated and ended. We think the probate court had authority to do this. Section 6188, Rev. St. 1892, after fixing the ordinary compensation for executors and administrators, provides that "in all cases such further allowance shall be made as the court shall consider just and reasonable for actual and necessary expenses, and for any extraordinary services, not required of an executor or administrator, in the common course of his duty. * * *" Section 6090 provides, as to the order of paying debts: "First, the funeral expenses, those of last sickness, and the expenses of administration." Section 524 gives the probate court

exclusive jurisdiction "to direct and control the conduct and to settle the accounts of executors and administrators, and to order the distribution of estates." The administrator, Wilt, was ordered to make distribution, a part of which order was that he pay to Rhodes, the attorney, the sum of \$527.25, before that time found by the court to be due him.

This was an order which the court had power and was authorized to make, and it was binding upon the administrator and his sureties. A failure to comply with it was a breach of his bond, for which the sureties are liable. The bond involved provides, among other things, that the administrator "shall pay any balance remaining in his hands upon the settlement of his accounts to such person as said court or the law shall direct." The amount so found in his hands and the order to pay the same, in the absence of fraud and collusion, are conclusive, not only upon the administrator, but also upon his sureties, unless reversed on error or vacated by appeal. As supporting our views in this case, see *Slagle v. Entekin*, 44 Ohio St. 637, 10 N. E. 675; *Braiden v. Mercer*, 44 Ohio St. 339, 7 N. E. 155; *Foster, Admr. v. Wise, Admr.*, 46 Ohio St., 20, 16 N. E. 687, 15 Am. St. Rep. 542.

The judgment of the circuit court is free from error, and it is affirmed. Judgment affirmed.

BURKET, C. J., and SPEAR, DAVIS, SHAUCK, and CREW, JJ., concur.

(184 Mass. 156)

CASSADY v. OLD COLONY ST. RY. CO.
(two cases).

(Supreme Judicial Court of Massachusetts.
Plymouth. Sept. 3, 1903.)

CARRIERS—ELECTRIC CARS—INJURIES TO PASSENGER—BURNING OF FUSE—NEGLIGENCE—EVIDENCE—RES IPSA LOQUITUR—WAIVER.

1. The ordinary burning out of a fuse used to prevent an excessive amount of electricity to enter the motors of electric street cars is not *prima facie* evidence of negligence in an action for injuries to a passenger alleged to have been caused thereby.

2. In an action for injuries to a passenger on an electric street car by fire alleged to have been caused by the burning out of a fuse, the expert evidence on both sides showed that the report, flash, and vapor-like puff attendant on the burning out of a fuse in proper condition was instantaneous and harmless. Other evidence established that the fuse on the car in question was located directly under plaintiff's seat, and that the burning thereof was attended with a flame lasting a few seconds, which partly enveloped plaintiff, and burned her face and clothing; while other witnesses testified that they noticed only the smoke, and no flame. *Held*, that a verdict finding that the flame was not the instantaneous and harmless flame which results from the ordinary burning out of a fuse in proper condition; that the fuse was therefore defective, and that the company was guilty of negligence in placing the fuse where it was, was not contrary to the evidence.

3. Where, in an action for injuries to a passenger on a street car from the burning out of

a fuse, there was evidence which would have warranted the conclusion that the duration and intensity of the flame produced by the explosion was greatly in excess of that which would have been the result if the fuse had been in proper condition, and that the improper condition of the fuse could have been discovered by the use of reasonable care, an instruction that the doctrine of *res ipsa loquitur* did not apply was properly refused, since how far negligence could be inferred from the accident itself under such circumstances was for the jury.

4. In an action for injuries to a passenger on an electric car by the burning out of a fuse, plaintiff's unsuccessful attempt to prove by direct evidence the precise cause of the burning out of the fuse did not estop her from relying on the doctrine of *res ipsa loquitur*.

Exceptions from Superior Court, Plymouth County.

Actions by one Cassady against the Old Colony Street Railway Company. From a judgment in favor of plaintiff, defendant brings exceptions. Exceptions overruled.

Geo. R. Swasey and Thos. H. Buttimer, for plaintiff. Henry F. Hurlburt and Damon E. Hall, for defendant.

HAMMOND, J. The first ground of defense is that there was no evidence of negligence of the defendant. It is conceded that the fuse burned out, but the defendant contends that the burning out of a fuse is not negligence *per se*, nor does it import negligence. The box containing the fuse was fastened to the sill of the open car, at a place directly underneath the portion of the seat upon which Mrs. Cassady was sitting. A fuse consists of a piece of metallic alloy, similar in nature to soft solder, one or more inches in length, connected at each end with a small circular piece of copper. These pieces of copper are called the "terminals," and they are so cut that they can easily be slipped under the thumb screws and clamped in place. The fuse and thumb screws are held in what is called the "fuse box." A wire leading from one thumb screw up through the roof of the car to the trolley wire conducts the electricity from the trolley wire to the box. From the other thumb screw there is a wire leading to the motors. When the two screws are connected by the fuse, there is a direct path for the electricity from the trolley wire to the motors. The purpose in using the fuse is to protect the wiring and the motors from an excessive current of electricity. It is constructed to withstand something less than the maximum current which the wires and motors are capable of carrying. When the current of electricity exceeds the maximum strength of the fuse, the metallic alloy melts with more or less of a report and flame, and the electrical path between the trolley wire and motors being thereby broken, the wire and motor are saved from possible harm. As the safety valve in a locomotive engine allows the escape of steam when the pressure is too strong for safety or for the ordinary operation of the engine, so in electric cars the fuse is used to prevent the electrical

mechanism from injury which might otherwise arise from the variations in the electrical current, which are practically unavoidable in the operation of the trolley cars.

A fuse of the character above described is in general use upon cars run by electrical power. It is a safety device, and the evidence in this case shows that, in view of the rapid action of electricity, the practical difficulty of controlling it at all times, the inability of the motorman to ascertain the amount of power upon the wires or on the motors, the variable weight of the load to be carried, the reasonably necessary conditions of the traffic as to weight of machinery and cost of transportation, it is a proper device. It is intended to prevent harm to the machinery which otherwise might result from the practically unavoidable fluctuations of the power. The fuse is expected to burn out when, for any cause, the electrical current exceeds its carrying capacity; and the evidence of the experts in this case shows that in the ordinary operation of cars properly wired and equipped such an event is liable often to happen without negligence upon the part of any one. When, therefore, a fuse burns out, it cannot be said that the connection between the occurrence and negligence is such as, in the absence of other evidence, to justify the conclusion that the result was due to negligence. As well might it be said that the escape of steam from the safety valve of a locomotive engine momentarily stopping at a station is evidence of negligence. The ordinary burning out of a fuse, therefore, is not *prima facie* evidence of negligence; and, if there had been nothing else in this case, the defendant would have been entitled to a verdict.

But the jury may properly have found that there was something else in this case. The expert evidence on both sides showed that the report, flash, and vapor-like puff attendant upon the burning out of a fuse like this when in proper condition are instantaneous and harmless, and no physical injury, either by burning or by an electrical shock, could be expected to result therefrom. The evidence for the plaintiff tended, however, to show something more than a mere instantaneous, harmless flash. Upon this Mrs. Cassady testified as follows: "I was sitting on the car, and all at once a large flame of fire, or a blaze, came all over me, and I sprang off my seat, and started to go out of the car on the other side of the car, and a lady prevented me, and pushed me back, and that's the last I remember until about three weeks afterwards, when I found myself in bed." Her daughter, who was seated a few seats in the rear of the one upon which her mother sat, testified that she "saw a flash of fire come into the car right over my mother, on the left-hand side; and she sprang away from it. * * * The flame seemed to come up and over her—to come

from under the seat. The duration of the flame was a few seconds." She could not tell how long it lasted, but it was long enough for her "to see it plainly come in the car and flash right over" her mother. "The flame only partly enveloped" the person of her mother. "I should say it came over half of her face and body." Again, she says, "As the car started up the hill, there was this flash and flame." "I saw this flash and flame come up around or near my mother." Henry O. Rideout, a witness called by the plaintiff, testified that at the time of the accident he was driving a two-seated carry-all, and that he "saw a flame and smoke come out of the car ahead." He continued: "It might have been a flame of three or four seconds duration. It came up over the side of the car. Seemed to come from underneath, I don't know where. I was too far away to tell. * * * I was probably a hundred yards behind the car at the time. I was on the same side of the car that the flame was. * * * I noticed the flame more than I did the smoke. I can't say from where I was, whether the flame went inside or within the car." Henry A. Rideout, another witness called by the plaintiff, testified that he was the father of the preceding witness, and at the time of the accident was driving in a team ahead of his son; and continued: "I saw a flash of light. * * * The car was ahead of me. I was driving towards it, and was about the length of this room from it. I simply saw a flash of light, and then I had to attend to my horse. * * * It was quite a flash of light come out near the front end of the car, I thought. My horse saw it, and, of course, shied, and I had to pay more attention to the horse." "I don't recollect seeing any smoke." As to the witnesses called by the defendant, one Thompson testified that he was sitting directly opposite the female plaintiff; and continued: "As the car was going, the fuse blew out. * * * There was a kind of a puff, and there was some smoke kind of come into the car. Looked to me like smoke. Everybody jumped. I jumped. There was this smoke, and, I suppose, flame, together; but I didn't notice much flame." On cross-examination he said: "My clothing was not burned, and I never told anybody that it was. It might have been scorched. I smelled the scorch of it." One Hunt, who was seated by the side of the preceding witness, did not notice any smoke, vapor, or flame. The conductor of the car testified that at the time he was standing on the running board on the right-hand side of the car, at about the fifth seat from the front, collecting fares; heard a slight noise; did not turn around instantly, but soon turned, and saw no flame, but only "a slight vapor." One McPhee testified that he was about 400 or 500 feet behind the car at the time the fuse burned out. The first thing which attracted his attention was the stopping of the

car, and he saw no flash or flame. So much as to the testimony of the witnesses as to what they saw at the time.

There was evidence also tending to show that the flame existed long enough to burn. The jury may have believed that holes were made by the flame in the veil worn by Mrs. Cassady at the time of the accident. The daughter testified that she went to her mother while in the car immediately after the accident, and that she then noticed that little red blotches were breaking out all over her mother's face; that, while bathing her mother's face a few hours afterwards at home, she noticed a "fine red mark about an inch or an inch and a half long," near her mother's left eye, and that her eyebrows appeared as if they had been "scorched or burned off," and that there was a very slight appearance of scorching of hair elsewhere near the face. Margaret Pierce, called by the plaintiff, testified to the existence of "red marks or spots" on the left side of the eye, and just above the eye, and to the scorched appearance of the eyebrows and hair. The evidence as to these spots and marks was confirmed by several other witnesses. The plaintiffs contended that these holes in the veil, these spots and marks upon the face, and this scorching of the eyebrows and hair were caused by the flame. It is true that the expert testimony for the defense tended to show that there could have been no such flame, and hence that there could have been no such burning; but an irreconcilable conflict between what eyewitnesses say they saw and what expert witnesses say could not have happened is not unusual in the trial of causes, and within reasonable limits the jury may decide upon which they will rely. The jury, upon the evidence, may have found that the flame in this case was not the instantaneous and harmless flame which results from the burning out of a fuse when in proper condition; that the burning of this fuse was attended with unusual results, which would not have occurred if the fuse had been in proper condition; and that the most reasonable conclusion was that, if proper care had been exercised, there would have been no such flame. We cannot say that such a conclusion was not warranted by the evidence.

Moreover, there is another feature in this case of some importance. This was an open car, and this fuse box was placed directly under a seat intended for passengers, so that if, for any reason, there should be a harmful flame resulting from the burning out of a fuse, it might be reasonably apprehended that it would reach and injure a passenger. While, therefore, the mere burning out of a fuse properly located and in proper condition does not of itself import negligence on the part of the defendant, still, if the fuse be so located as, by its burning out, to injure a passenger, such a location may be inconsistent with the degree of care which a common carrier owes to its passengers. It would be

something like arranging the safety valve of a locomotive engine so that the escaping steam might reach a passenger in his seat. Upon the whole, we think that the plaintiff had a right to go to the jury on the question of the negligence of the defendant.

It is very strongly urged by the defendant that in a case like this the doctrine of *res ipsa loquitur* does not apply, and in its sixteenth request it asked for an instruction to that effect. The court instructed the jury that the mere fact that the accident occurred is not in and of itself, as matter of law, *prima facie* evidence of negligence, and continued as follows: "That is, you cannot assume, just because an explosion may have occurred, in connection with the testimony in this case and the procedure in this case, that that is of itself negligence as matter of law. I cannot instruct you, as matter of law, that you are to find that *prima facie* evidence of negligence. But it is some evidence of negligence. It is for you to consider that as evidence tending to show negligence, but it is a question of fact for you to decide how far that shows negligence." There was no error in refusing to give the ruling requested. There was evidence, as above stated, which would warrant the conclusion that the intensity and duration of the flame produced by this explosion was greatly in excess of what could have been the result if the fuse had been in proper condition, and that this imperfect condition of the fuse could have been discovered by the use of reasonable care. Such being the case, the defendant was not entitled to the ruling requested. And the jury were properly instructed that the matter was before them to decide how far negligence could be inferred from the accident itself. If the defendant desired to call the attention of the court to the precise phase of the testimony where the principal would not apply, it should have done so more distinctly.

The defendant also contends that, even if originally the doctrine would have been applicable, the plaintiff had lost or waived her rights under that doctrine, because, instead of resting her case solely upon it, she undertook to go further, and show particularly the cause of the accident. This position is not tenable. It is true that, where the evidence shows the precise cause of the accident, as in *Winship v. New York, New Haven & Hartford R. R.*, 170 Mass. 464, 49 N. E. 647, and *Buckland v. N. Y., N. H. & H. R. R.*, 181 Mass. 3, 62 N. E. 955, and similar cases, there is, of course, no room for the application of the doctrine of presumption. The real cause being shown, there is no occasion to inquire as to what the presumption would have been as to it if it had not been shown. But if, at the close of the evidence, the cause does not clearly appear, or if there is a dispute as to what it is, then it is open to the plaintiff to argue upon the whole evidence, and the jury are justified in relying upon

presumptions, unless they are satisfied that the cause has been shown to be inconsistent with it. An unsuccessful attempt to prove by direct evidence the precise cause does not estop the plaintiff from relying upon the presumptions applicable to it.

The defendant strenuously contends that there was no evidence of physical injury, either by the flame or by electricity, and that the sufferings of the plaintiff were due simply to fright. It would not be profitable to recite further in detail the evidence bearing upon this question. The charge to the jury was sufficiently full and clear upon this point, and, while a decision for the defendant might reasonably have been expected, still we cannot say that the jury could not find upon the evidence that the plaintiff was physically injured by the flame or electricity, or both combined.

It was within the discretion of the court to allow the question to be put to Morse the expert, concerning the possibility of an electric shock.

No error appears in the manner in which the court dealt with the requests of the defendant.

Exceptions overruled.

(184 Mass. 123)

ATWOOD v. BAILEY.

(Supreme Judicial Court of Massachusetts.
Suffolk. Sept. 2, 1903.)

BANKRUPTCY—ACTIONS BY BANKRUPT— DISMISSAL.

1. Where, in an action by a bankrupt, it appeared that the claim sued on had not been included in his schedule, and the only evidence that the trustee had elected not to treat the same as a part of the bankrupt's estate was the fact that he had taken no action to indicate that he intended to assume possession of the claim without evidence of his knowledge thereof, plaintiff's bankruptcy deprived him of capacity to sue thereon.

Exceptions from Superior Court, Suffolk County; Elisha B. Maynard, Judge.

Action by one Atwood against one Bailey. Judgment in favor of defendant, and plaintiff brings exceptions. Exceptions overruled.

J. Merrill Browne, for plaintiff. Geo. R. Swasey and Francis R. Mullin, for defendant.

LORING, J. In this case the plaintiff was held not to be entitled to maintain his action, because he was duly adjudicated a bankrupt after the action was begun. The present bankruptcy act, under which the plaintiff was adjudicated a bankrupt, vests the title to the bankrupt's property in the assignee without an assignment in fact. Act July 1898, c. 541, § 70, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451]. It is settled that an assignment in bankruptcy is a defense to a prior action brought by the bankrupt, unless it affirmatively appears that either the prior action in the name of the bankrupt is being prosecuted by the assignee, or that the

assignee has elected not to assume the burden of it (see *Smith v. Chandler*, 3 Gray, 392; *Gay v. Kingsley*, 11 Allen, 345; *Mayhew v. Pentecost*, 129 Mass. 332; *Herring v. Downing*, 146 Mass. 10, 15 N. E. 116; *Kenyon v. Wesley*, 147 Mass. 476, 18 N. E. 227, 1 L. R. A. 348), or that the property is not needed for the payment of the debts of the bankrupt, as in *Jones v. Dexter*, 125 Mass. 469. The plaintiff's contention here is that the jury would have been warranted in finding that the assignee elected not to assume the chose in action now before us, and that he was entitled to go to them on that issue. There was no direct evidence of an election by the assignee. The plaintiff undertakes to make out an election by showing knowledge on the part of the assignee, followed by inaction. But in our opinion there was no such knowledge shown on the part of the assignee as would warrant a finding that his inaction was an election not to assume this chose in action. The bankrupt did not insert the claim against the defendant in his schedule, and there was no evidence that the trustee in bankruptcy has ever had actual knowledge of it. All the evidence of knowledge on the part of the trustee was this: On being asked on cross-examination whether he had stated that he had any claim against the defendant, the plaintiff said "Not in my schedule, but to the referee"; and after testifying that the claim in question was covered by a general item, "Claims against various parties," said: "I put it in," and on being asked where, "To the trustee, and it was appraised there, too." The "claims against various parties" were put down as "aggregating \$2,000," and "probably worth \$100." On the plaintiff's testimony, his claim against the defendant was for \$2,750 and interest. This is not enough to make out an election by inaction. To make out an election in that way, actual knowledge on the part of the person who had the right to elect must be shown. In *Gay v. Kingsley*, 11 Allen, 345, it was held that an election by an assignee's not taking action was not made out by its being shown that he had taken the schedule of the bankrupt from the files without its being shown that the claim in question was on the schedule. In *Mayhew v. Pentecost*, 129 Mass. 338, actual consent on the part of the assignee was proved, and in *Herring v. Downing*, 146 Mass. 10, 15 N. E. 116, the assignee was in court when the case was tried, and made no objection.

The plaintiff relies on the case of *Lancey v. Foss*, 88 Me. 215, 33 Atl. 1071. That case, like this, was the case of an action pending when the assignment in bankruptcy took effect. It came up on an agreed statement of facts, from which it appeared that no action had been taken by the assignee for 14 years. The court held that knowledge on the part of the assignee might be inferred from the fact that the action was a matter of public record, being upon the docket and files of a

court of general jurisdiction, and directed the case to stand for trial; adding: "If, however, the defendants desire, they can have an order of notice of this action served upon the assignee, which will conclude him of record." There is nothing in the cases cited in *Lancey v. Foss* which supports the proposition that knowledge in this connection may be inferred from the fact that the action is pending in a court of general jurisdiction, and, so far as that case goes on that ground, we are not prepared to follow it.

Exceptions overruled.

(184 Mass. 89)

JONES v. NEW YORK, N. H. & H. R. CO.
(Supreme Judicial Court of Massachusetts.
Suffolk. Sept. 1, 1903.)

MASTER AND SERVANT—DEATH OF SERVANT
—CONTRIBUTORY NEGLIGENCE.

1. Exceptions to the exclusion of evidence not argued on appeal will be deemed waived.

2. In an action for the death of a railroad engineer in a collision with a work train, evidence reviewed, and held to show that plaintiff's intestate was guilty of contributory negligence in running his train down a grade at such a rate of speed that he was unable to stop the same, and avoid the collision.

Exceptions from Superior Court, Suffolk County; Richardson, Judge.

Action by one Jones, as administratrix of the estate of her husband, against the New York, New Haven & Hartford Railroad Company. Judgment in favor of defendant, and plaintiff brings exceptions. Overruled.

Joseph Bennett and Dexter W. Reid, for plaintiff. Chas. F. Choate, Jr., for defendant.

MORTON, J. The plaintiff's husband was an engineer in the service of the defendant company, and was killed in a collision between his train, which was an express freight bound to Boston, and a construction train near what is called the Dedham road, from two to two and a half miles towards Boston from Canton Junction. This is an action by the plaintiff, as administratrix of her husband's estate, to recover damages, under St. 1887, p. 899, c. 270, and acts in amendment thereof, for his injuries and death.

The declaration is in five counts, but the grounds of recovery chiefly relied on are that there was evidence tending to show negligence on the part of the defendant and of the servants in charge of the construction train and of the locomotive attached to it, in suffering the train and the locomotive to be where they were at the time of the accident without warning or notifying the plaintiff's intestate of its presence, and also that there was evidence tending to show negligence on the part of one Morse, who had charge of signal flags and torpedoes, in not going back from the construction train as far as required by the rules to warn approaching trains of the danger. During the trial some evidence was offered by the plaintiff which was excluded,

and the plaintiff excepted. At the conclusion of the plaintiff's evidence, the court directed a verdict for the defendant. The case is here on exceptions by the plaintiff to the exclusion of the evidence that was offered, and to the ruling directing a verdict for the defendant.

The exceptions to the exclusion of evidence have not been argued, and we therefore treat them as waived. We think that the ruling directing a verdict for the defendant was right, and that the evidence showed that the plaintiff was not in the exercise of due care. The train to which the locomotive of the deceased was attached consisted of 44 loaded cars and a caboose. Some of the cars, at least, if not all, were heavily loaded. The locomotive was also a heavy locomotive. The grade from Canton Junction to the place of collision was a heavy down grade, and the evidence showed that it was not customary to use steam going down it unless the train had stopped at Canton Junction, which the train of the deceased did not do on the morning of the accident. The train was three hours late, and there was uncontradicted testimony tending to show that plaintiff's intestate was making up time, and was using steam as he ran down the grade towards the place of the accident. The construction train was on a curve, and the testimony left it somewhat uncertain how far it could be seen in the direction of Canton Junction. But it seems clear that it could have been seen about a third of a mile, at least, though that is not very material. Between the place of the accident and Canton Junction were two banjo signals, as they are termed. The signals were operated by electricity from batteries placed along the roadbed. If within the sphere of their operation the track was unobstructed, the signals showed white. If it was obstructed, they showed red. The nearest of these signals to the place of collision was about 1,750 feet from it, and the other was about a mile still further towards Canton Junction. These signals were intended to convey warnings of obstructions only within the sphere of the operation of each signal. Neither signal was intended to warn approaching trains of obstructions or dangers within the sphere of operation of the other signal. The fact that the signal nearest Canton Junction was, as the testimony tended to show, at safety, did not show whether the track was or was not obstructed beyond the other signal. The testimony tended to show that the flagman went back upwards of 2,000 feet from the construction train, and beyond the signal nearest to the place of collision. How far he could or ought to have been seen by plaintiff's intestate is not clear, but it is manifest that he could or ought to have been seen for a considerable distance.

The testimony tended to show that plaintiff's intestate endeavored to stop his train, and did check the speed somewhat, but the

train was going at such a rate of speed that he was unable to stop it, and it ran the whole distance between the flagman and the place of the accident, and collided with the construction train with such force as to throw the locomotive of the freight train from the track, and to wreck 17 cars so badly that they had to be burned where they were in order to clear the track. The testimony tended to show that plaintiff's intestate was running from 18 to 25 miles an hour. There is nothing to show that he was required to make up time, or to run at the rate of speed at which he was running. The rules required him to "be vigilant and cautious, not trusting alone to signals or rules for safety." Assuming, without deciding, that the flagman was a person in charge or control of a signal, within the meaning of the statute, and that he was negligent in not going back as far as required by the rules and also assuming, without deciding, that there was negligence on the part of the defendant in omitting to warn the plaintiff's intestate of the presence of the construction train, we think that, under the circumstances, his train was going at an excessive speed, and that the accident would or might have been avoided by the exercise of due care on his part, and therefore that the plaintiff is not entitled to recover.

Exceptions overruled.

(184 Mass. 147)

HALL v. INHABITANTS OF TOWN OF WAKEFIELD.

(Supreme Judicial Court of Massachusetts.
Middlesex. Sept. 2, 1903.)

HIGHWAYS—DANGEROUS TREES—DUTY TO REMOVE—EVIDENCE.

1. Where, at the time plaintiff was injured by coming in contact with a tree while he was riding on a street car, the town had accepted the provisions of St. 1882, c. 154, providing for the establishment of parks and board of park commissioners, and the trees had been selected by a formal vote of the selectmen, to be preserved for ornament and shade, the town had no authority to remove the trees if dangerous to travelers on electric cars, but was only entitled to apply to the proper tribunal to have them removed.

2. The conductor of an electric car attempted to swing around a large man standing on the running board, and in so doing he was struck by a tree standing near the track. The nearest part of the tree was 38½ inches from the nearest rail of the track, 31 inches from the sill or side of the car, and 18¼ inches from the outside of the running board. The distance from the side of the car to the outer edge of the running board was 13 inches. Plaintiff had been by the trees nearly a thousand times, and had never considered them dangerous. *Held*, that such facts did not authorize a finding that the town authorities had reason to anticipate injuries to passengers or employés of the railway company from the tree, so as to require them to take steps to have it removed.

Exceptions from Superior Court, Middlesex County; Frederick Lawton, Judge.

Action by one Hall against the Inhabitants of the town of Wakefield. From a judgment in favor of defendants, plaintiff brings exceptions. Exceptions overruled.

Robt. W. Nason and Thos. W. Proctor, for plaintiff. M. E. S. Clemons, for defendants.

KNOWLTON, C. J. This is an action to recover for injuries caused by an alleged defect in a highway in the defendant town. The plaintiff was a conductor on an electric car, which passed three shade trees standing near the railway track, with one of which he came in collision as the car passed by. The only negligence alleged against the defendant is that it failed to make an effort to have the tree removed, as an object dangerous to travelers using the electric cars. The town, as a municipal body, had no part in the location of the track in that place, but the general location was authorized by a board of public officers, acting independently, and the track was laid by the street railway company. Pub. St. c. 113, § 7; St. 1898, p. 787, c. 578; Rev. Laws, c. 112, § 7. Nor had the town a right to remove the shade trees. These were under the control of public officers. Pub. St. c. 54, § 6; St. 1885, c. 123; St. 1890, c. 196; Rev. Laws, c. 53, § 6; Washburn v. Easton, 172 Mass. 525, 52 N. E. 1070. The provisions of St. 1882, c. 154, had been accepted by the town, and at the time of the accident there was a duly elected board of park commissioners, but no tree warden. On May 31, 1893, these trees had been selected and designated to be preserved for purposes of ornament and shade by a formal vote of the selectmen. The only thing that the defendant could do for the safety of travelers on electric cars, if the tree was a defect, was to apply to the proper tribunal to have it removed. Washburn v. Easton, *ubi supra*. The question is whether the conditions were such as to make it the duty of the town to do this. It appears that the nearest part of the tree was 38½ inches from the nearest rail of the railway, and was 31 inches from the sill or side of the car, and was 18¼ inches from the outside of the running board. The plaintiff, at the time of the accident, was upon an open car, and the distance from the side of the car to the outer edge of the running board was 13 inches. It is plain that there was no danger from the tree to passengers on the railway who were using due care. Passengers are not expected to ride with any part of their persons projecting 31 inches beyond the sill or side of the car. The town authorities had no reason to anticipate injuries to passengers from the tree, nor had they any reason to expect an injury to a conductor. If a conductor, in the performance of his duties, may take positions upon the car different from those of passengers, he is, at the same time, expected to take corresponding precautions. A conductor could not have charge of a car upon this track without quickly observing the trees, and noticing that they might call for particular care if he was about to swing around a man weighing more than 250 pounds, standing on the running board. The

town authorities had no reason to expect that a conductor would attempt to do this as the car was about to pass the trees, or, if he attempted it, that he would fail to take precautions against coming in contact with a tree.

It is stated in the bill of exceptions that the plaintiff had been by these trees about one thousand times, and that he had never considered them dangerous trees. There was no more reason for the town authorities to consider them dangerous trees than for him so to consider them. His opportunity for observation in reference to their proximity to the car as it was passing, and in reference to the danger to one standing on the running board, was better than that of the town authorities.

We are of opinion that there was no evidence of negligence on the part of the town in reference to its failure to take measures to have the tree removed, and there was no evidence that the tree was a defect, within the meaning of the statute. This view of the case makes it unnecessary to consider various other defenses relied on.

Exceptions overruled.

(184 Mass. 130)

PLUNGER ELEVATOR CO. v. DAY.

(Supreme Judicial Court of Massachusetts.
Worcester. Sept. 2, 1903.)

SALES—ACTIONS FOR VALUE—TITLE—RIGHT OF REMOVAL—RESERVATION—ACCEPTANCE—CONTRACTS—SUBSTITUTION—ACTIONS—AUDITOR'S REPORT—PRIMA FACIE CASE—EVIDENCE—CONCLUSIONS.

1. Where an auditor's report, in an action to recover the value of an elevator, found that the original contractor had no legal existence, and no power to make contracts, but that plaintiff corporation assumed and accepted as its own the written agreement for the elevator before any work was done under it, and that defendant knew, or had reasonable cause to know, that plaintiff was placing the elevator on his premises, and that plaintiff was acting under, and attempting to carry out, the terms of the written agreement, and assented to the same, and that the elevator had become a part of the realty, the introduction of such report on the trial, without regard to the auditor's conclusions of law that the elevator became a part of the realty, and that the original contractor had no power to make contracts, constituted a sufficient prima facie case in favor of plaintiff.

2. Where, in an action to recover the price of an elevator, the plaintiff on the trial introduced an auditor's report, and rested, which report, without regard to certain conclusions of law contained therein, established a prima facie case in favor of plaintiff, it was not error for the court at that time to refuse to rule that such conclusions of the auditor should be disregarded by the jury.

3. Where, in an action for the value of an elevator, defendant contended that the title had never passed, because the elevator had not been constructed according to the details of the specifications, a question asked defendant, as to whether the elevator was ever approved by him, was properly excluded, as calling for the witness' conclusion.

4. Where, in an action for the value of an elevator, plaintiff contended that, before any work had been done under a written contract between defendant and another, it was orally

agreed between plaintiff and defendant that plaintiff should do the work, and should be substituted for the contractor in the written contract, it was no objection to plaintiff's right to maintain the suit that the written contract had not been assigned to plaintiff by the original contractor.

5. Where, in an action to recover the value of an elevator, the auditor found that defendant accepted the elevator before it was destroyed by fire, and that he had agreed to waive his objections to its failure to comply with certain details of the specifications if plaintiff would make certain repairs on another elevator, which was done, it was no defense to an action for the value of the elevator that the title had not passed to defendant at the time it was destroyed, by reason of a clause in the contract authorizing the builder to remove the elevator if not paid for.

Exceptions from Superior Court, Worcester County; Francis A. Gaskill, Judge.

Action by the Plunger Elevator Company against one Day to recover the value of an elevator. From a judgment in favor of plaintiff, defendant brings exceptions. Exceptions overruled.

E. H. Vaughan, for plaintiff. Herbert Parker and Frank L. Dean, for defendant.

LORING, J. In this case the defendant accepted in writing a proposition for the construction and installation of an elevator in a building owned by him. The proposition, which was accepted, was in writing, and purported to have been made by the "Washburn Shops." Work on the elevator stopped on or about November 1, 1896, and thereupon the defendant put a man in charge of it, "who operated it for the uses of the building in which it was constructed until March 4, 1897," when the building in question was totally destroyed by fire. Before the fire the defendant had refused to pay for the elevator, because it did not conform to the contract in every detail, and after the fire the defendant took the position that the title to the elevator had not passed to him, and the loss from its destruction was not his. The case was sent to an auditor, who found that the Washburn Shops was a branch of or annex to the Worcester Polytechnic Institute; that it had no legal existence, and therefore no power to make contracts; that the plaintiff corporation assumed and accepted as its own the written agreement for the elevator before any work was done under it; "that the defendant knew, or had reasonable cause to know, that the plaintiff corporation was placing said elevator upon his premises; that said plaintiff corporation was acting under, and attempting to carry out, the terms of said written agreement, and assented to the same." The auditor also found that the elevator became a part of the realty. The plaintiff had a verdict, and the case is here on exceptions taken by the defendant.

1. The plaintiff put the auditor's report in evidence, and rested. The defendant then asked the court to rule that the auditor's findings that the elevator became part of the

reality and that the Washburn Shops had no power to make contracts were rulings of law, and should be disregarded by the jury. The presiding judge replied: "At present I shall decline to accede to your suggestion with reference to it. I think there is enough, independent of those two findings of law, to sustain the burden." To this the "counsel for the defendant replied to the court, 'We raise this question now that there may be no question of its being seasonably raised, and beg we might be saved our exception.' At no subsequent time was this matter further called to the attention of the court." The ruling of the presiding judge was right. The auditor's report made out a case for the plaintiff aside from the two findings complained of as rulings of law. The time had not come when the defendant had a right to have the jury instructed as to the way in which the auditor's report should be dealt with by them, and no exception lies to the refusal of the judge to give the instruction requested. The requests were not renewed when the case was submitted to the jury, and the court was not bound to act at that time upon the previous requests.

2. The defendant's counsel asked the defendant: "Was the elevator in question ever approved by you?" The presiding judge excluded the question. The question was one depending upon inferences to be drawn from the facts in evidence. In such a case, it is for the jury to find from the facts proved whether the elevator was or was not approved by him. The question asked called for the defendant's conclusion on the issue, which it was the province of the jury to decide, and was properly excluded. *Brewer v. Housatonic Railroad*, 107 Mass. 277; *Commonwealth v. Burton* (Suffolk, June 5, 1903) 67 N. E. 419; *Robbins v. Atkins*, 168 Mass. 45, 46 N. E. 425; *O'Donnell v. Pollock*, 170 Mass. 441, 49 N. E. 745.

3. The defendant asked to have the jury instructed that the plaintiff could not maintain its action. The ground on which he now contends that the ruling should have been given is that the contract was made with the Washburn Shops, and that, in the absence of an assignment of it by the Washburn Shops to the plaintiff, the plaintiff cannot recover for the elevator built under it. But the answer to this argument is that the plaintiff's contention at the trial, or one of its contentions, was that the plaintiff and defendant made an oral agreement, on the terms set forth in the written contract between the Washburn Shops and the defendant, which was substituted for that written contract with the assent of all concerned, before any work was done under it, and the auditor must be taken to have found that the defendant assented to this substitution. How the defendant could be found to have assented if he had reason to know, but did not know, of the substitution, it is hard to see. But no question on that point was

68 N.E.—2

raised by the defendant. Moreover, there may have been further evidence on the point. There is no statement in this bill of exceptions that all the evidence is set forth. No error is shown in not giving the ruling.

4. The defendant asked to have the jury told that the elevator had not become the property of the defendant before its destruction. This request was asked for in connection with a clause in the contract providing that until paid for the Washburn Shops could remove the elevator, and the defendant's contention that until then, by reason of this clause, neither the elevator nor the loss was his. But in the first place the auditor found as a fact that the defendant accepted the elevator as it was before the fire, and in the second place there was evidence at the trial that the defendant had agreed to waive his objection, founded on a failure to comply with some details of the specifications, if the plaintiff would make some repairs on another elevator, which, on the evidence, the jury were warranted in finding was done. Under those circumstances, the ruling was rightly refused.

The other exceptions have not been argued, and we treat them as waived.

Exceptions overruled.

(184 Mass. 150)

RILEY v. NEW ENGLAND TELEGRAPH & TELEPHONE CO.

(Supreme Judicial Court of Massachusetts.
Suffolk. Sept. 2, 1903.)

TELEGRAPHS AND TELEPHONES—POLES—LOCATION IN HIGHWAYS—INJURIES TO DRIVERS—STATUTES—CONSTRUCTION—CONTRIBUTORY NEGLIGENCE.

1. Rev. Laws, c. 122, § 15, provides that a telegraph company shall be liable in damages to a person injured in his person or property by the poles, wires, or other apparatus of such company; and if they are erected on a public way the city or town shall not, by reason of the statute, be discharged from liability, but all damages and costs recovered against it on account of such injury shall be reimbursed by the company owning the poles, wires, or other apparatus. *Held*, that under such statute a person injured by being thrown from a wagon, on its striking a telephone pole located in a public street, was entitled to recover against the telephone company owning the pole, without reference to the latter's negligence.

2. Such section did not make the owner of the pole an insurer of the safety of persons using the street, and hence a person injured by coming in contact with the pole could not recover if he was guilty of contributory negligence.

Lathrop, J., dissenting.

Exceptions from Superior Court, Suffolk County; Lemuel Le B. Holmes, Judge.

Action by Jeremiah Riley against the New England Telegraph & Telephone Company. From a judgment in favor of defendant, plaintiff brings exceptions. Sustained.

C. E. Washburn and A. S. Hutchinson, for plaintiff. Powers, Hall & Jones and F. A. Houston, for defendant.

KNOWLTON, C. J. The plaintiff was driving along Bridge street in Cambridge upon a

market wagon, the hubs of whose wheels projected six inches beyond the rims and spokes. The body of the wagon had wings extending laterally as far as the hubs. A telegraph pole of the defendant was set close to the curbstone on the inside, and it leaned a little towards the center of the street. A standpipe used to fill watering carts stood beside the telegraph pole, and the dripping from it caused a sinking or depression in the cobblestone pavement, small in area, but two or three inches in depth near the curbstone and opposite the telegraph pole. As the right forward wheel of the plaintiff's wagon fell into this hollow, the body of the wagon lurched to the right towards the pole, so that the wing struck the pole, and the collision threw the plaintiff out and injured him. The pole was erected in accordance with a license granted by the board of aldermen, which required the defendant to maintain it as nearly perpendicular as practicable. There was a question whether its leaning was a departure from the requirements of the license.

The plaintiff asked the judge to instruct the jury as follows: "The defendant is liable to the plaintiff in this action if the latter, while traveling on the public highway and in the exercise of due care, was injured by reason of a telegraph pole belonging to the defendant, although said pole was erected and maintained by the defendant in accordance with the license granted by the board of aldermen of the city of Cambridge." The judge refused to give the instruction requested, and gave the jury this instruction: "If you find that the pole was erected and maintained in accordance with the specifications of the municipal officers, and that there was no negligence on the part of the defendant in its construction or maintenance of the pole, then the plaintiff cannot recover, even if in the exercise of due care, in the absence of any direction by the municipal officers to alter the location or construction of said pole." The exceptions to the refusal and to the instruction bring us to the consideration of the statute under which the pole was erected. St. 1851, p. 739, c. 247, § 2, is as follows: "Whenever injury shall be done to any person, or to the buildings or other property of any person or corporation, by the posts, wires or other apparatus of any telegraph line, the company or individual being proprietor of the same shall be held responsible in damages to the person or corporation so injured." St. 1859, p. 417, c. 260, § 1, which was doubtless enacted to change the law stated in *Young v. Yarmouth*, 9 Gray, 386, provides that "towns which may be otherwise liable in damages to any person for injury to his person or property, occasioned by telegraphic posts or other fixtures erected on highways or town ways, shall not be discharged from such liability" by reason of anything contained in the act authorizing the erection of such posts, and makes the companies erecting the posts or fixtures liable to reimburse and repay to towns

the full amount of damages and costs recovered by any party injured. These two statutes were combined in Gen. St. 1860, c. 64, § 11, with a slight change, and re-enacted in Pub. St. 1882, c. 109, § 12, and again re-enacted with only verbal changes in Rev. Laws, c. 122, § 15. The first of these two statutes creates a liability without any reference to negligence. The Legislature seems to have recognized that the erection of the poles and fixtures in public ways would create obstructions which might interfere to some extent with the use of the public streets, and increase the liability of travelers to accidents. Such obstructions, whether placed in a sidewalk or in a part of street designed for use by vehicles, being there when the streets are lighted and when they are in darkness, and in every variety of possible conditions, subject persons in the exercise of due care to risks which otherwise would not exist. While the Legislature saw fit to authorize the use of the streets for telegraph lines, it provided at the same time that the telegraph company should be liable for damages to all persons injured in person or property by these erections. Doubtless the fact that electricity is a subtle and dangerous agency, which was less understood in 1851, when this statute was enacted, than it is now, was an added reason for creating this legal liability without regard to negligence. Wires and other apparatus, as possible causes of injury, are treated by the statute like the posts. It might be difficult to prove, in case of an injury by a transmitter of electricity, whether the injury was caused by negligence or by pure accident. The statute indicates an intention on the part of the Legislature that these erections in the street, which in many places would constitute a public nuisance if not authorized by the statute, should be permitted only upon condition that those who use them to their own profit should make compensation for damages caused by them. Both the principle involved and the statutory declaration of liability are substantially the same as appear in Rev. Laws, c. 102, § 146, which declares that "the owner or keeper of a dog shall be liable in an action of tort to a person injured by it, in double the amount of damages sustained by him." The keeping of dogs is authorized by law, and in many cases is meritorious. Usually, in individual cases, it is not attended with obvious danger; but the fact that it materially increases the risk of injury to innocent persons is a reason for making dog owners liable for injuries caused by their dogs, even though the owners are free from fault. We are therefore of opinion that this instruction should have been given.

The second instruction requested, that "contributory negligence on the part of the plaintiff is no defense to this action, unless so gross as to amount to fraud," was rightly refused. In this respect the statute is like that last quoted. The statute as to dogs is silent in regard to care on the part of the injured

person. But owners of dogs are not insurers against injuries inflicted by them upon persons whose negligence contributes to the injury. *Munn v. Reed*, 4 Allen, 431; *Plumley v. Birge*, 124 Mass. 57, 28 Am. Rep. 645. To make a defendant, under this statute, an insurer against injuries to persons whose own fault is one of the causes of the injury, imposes too great a liability upon the corporation. It would be contrary to the usual rule of liability in actions of tort where the cause of the liability is not more culpable than negligence. The language of this statute does not indicate that this absolute liability to persons injured applies to persons who by their own conduct would be precluded from recovery against a defendant in an action for negligence.

Rev. Laws, c. 111, § 270, in relation to the liability of railroad companies for damages by fires kindled by sparks from locomotive engines, deals with a different kind of subject, and it has been construed a little more strictly. *Bowen v. Boston & Albany Railroad Co.*, 179 Mass. 524, 61 N. E. 141. Railroad companies are held accountable for fires set by their engines under ordinary conditions. The condition of the property does not ordinarily contribute as an active agent to the kindling of the fire. It is a passive state which was contemplated when the statute was passed. That statute leaves the owner entitled to his remedy, unless guilty of gross negligence which is culpable.

The instructions in regard to the duty of the plaintiff in reference to care, and as to what constitutes due care of a plaintiff in a case like this, were correct and sufficient. The third request for instructions was rightly refused.

Exceptions sustained.

LATHROP, J. (dissenting). I am unable to agree with the opinion of the majority of the court. If the only question involved were that of the construction of a statute I should not write a dissenting opinion, but as there are other questions involved, which I have pointed out to my Brethren, but to which no answer is made in the opinion, I feel justified in discussing the whole case.

I understand that, while there was evidence that the pole leaned a little, the instruction asked for assumes there was no fault on the part of the defendant, and that the opinion of the majority proceeds upon the theory that the pole was properly placed and maintained. While this pole was next to the inner edge of the curbstone, its base, as appears by the bill of exceptions, was nine inches from the outer edge of the curbstone, and so it is manifest that if the wagon had remained in an upright position, and the pole had been upright, no part of the wagon could have struck the pole. As is stated in the opinion of the majority, there was a defect in the street into which one of the fore wheels went, and this caused the wagon to

lurch and to throw the top of the wagon against the post, throwing the plaintiff out and causing the injury. It seems to me very clear that the defect in the highway, and not the post, was the proximate cause of the injury. The majority of the court liken the statute under consideration to the dog law, but there is a dog case precisely in point. In *Sherman v. Favour*, 1 Allen, 191, a man was driving along a highway in a chaise drawn by a horse. A dog attacked the horse, and the horse was frightened. While the driver was attempting to guide the horse, one of the reins broke, and the chaise struck against a post on the side of the way and was damaged. The attack of the dog was held to be the proximate cause of the injury. I venture to think that in the present case the proximate cause of the injury was the defect in the street, and not the pole. The dog law was first enacted by St. 1791, c. 38, § 4, and applies to a case where a dog assaults a person, and not to a case where a dog is the passive cause of the injury. Thus in *Sherman v. Favour*, 1 Allen, 191, it was said by Chief Justice Bigelow: "We do not mean to say that any liability would be incurred for an accident or injury caused by the mere presence or passing of a dog, when no act is done or attack is made by him, as, for instance, where a horse is frightened merely by seeing a dog lying or running in the street. In such a case the dog would be only the passive cause of the injury."

If, however, these questions are not worthy of consideration, it is necessary to consider the construction of the statute. In the first place, it is to be noticed that it applied only to poles of a telegraph company, and not to those of a telephone or of an electric light or power company. See Rev. Laws, c. 122. And it has been held that an electric light company is not liable irrespective of negligence. *Hector v. Boston Electric Light Co.*, 161 Mass. 558, 37 N. E. 773, 25 L. R. A. 554; *Illingsworth v. Boston Electric Light Co.*, 161 Mass. 583, 37 N. E. 778, 25 L. R. A. 552; *Griffin v. United Electric Light Co.*, 164 Mass. 492, 41 N. E. 675, 32 L. R. A. 400, 49 Am. St. Rep. 477; *Reagan v. Boston Electric Light Co.*, 167 Mass. 408, 45 N. E. 743; *Hector v. Boston Electric Light Co.*, 174 Mass. 212, 54 N. E. 539, 75 Am. St. Rep. 300. If, therefore, the opinion of the majority is right, our statutes impose a liability on a telegraph company for the mere keeping of a licensed pole on a highway, while no such liability is imposed on a company owning similar poles and using a far more dangerous current of electricity.

It seems to me that the view taken by the majority of the court is one which ought not to be reached. The question is not a new one, though it has not before been definitely decided. It was considered by Mr. Justice Hoar in *Commonwealth v. Boston*, 97 Mass. 555, 558, a case arising under Gen.

St. 1860, c. 64, § 11, which is the same as the one before us. He uses this language: "Whether the eleventh section is to be construed as giving or preserving a right of action, where the injury is caused by the mere placing of the poles at the places appointed for them, may perhaps admit of doubt. The liability of poles to decay and fall, or to lean over and the wires to become displaced, would give the provision effect, if the right of the original location of them were regarded as unquestionable." These remarks of Mr. Justice Hoar seem to me to be the true rule in the case. The opinion of the majority holds that the plaintiff must be in the exercise of due care. This is reading the law of negligence into the statute, so far as the plaintiff is concerned. It seems to me just as reasonable to read the same law into the statute as to the defendant.

It will be curious to see how far the majority of the court will carry its interpretation of the statute. It frequently happens at the present time that an automobile gets beyond the control of the person in charge, and plunges into a telegraph pole outside the traveled part of the way, and the automobile or the person in charge is injured. Is the owner of the pole to be held liable? Again, an open trolley car leaves the track owing to a defective rail, and a passenger is thrown against a telegraph pole. Is the owner thereof liable?

I cannot think that the Legislature intended any such consequence to result from the language used in the statute. Statutes are to be construed reasonably, and it seems to me that the construction put by the majority of the court tends to most unreasonable results.

(29 Ind. App. 506)

CHICAGO & S. E. RY. CO. v. KENNEY et al.
(Appellate Court of Indiana, Division No. 2.
Aug. 22, 1902.)

INJUNCTION PENDING APPEAL—RECEIVERS.

1. An order was made appointing a receiver and directing him to take possession of the property of a corporation, which gave him right of possession at once. The order was affirmed on appeal therefrom, which by provision of Burns' Rev. St. 1901, § 1245, suspended the receiver's authority only till the final determination of such appeal. *Held*, that the Appellate Court will not enjoin the receiver from taking possession pending appeal by the corporation from judgment in the main action; it not being essential to a due and effective exercise of appellate jurisdiction.

Appeal from Circuit Court, Putnam County.

Application by the Chicago & Southeastern Railway Company against Charles Kenney and others for a temporary injunction pendente lite. Denied.

Henry Crawford, N. C. Stover, W. L. Taylor, and O. J. Lotz, for appellant. A. H. Ratcliffe, S. D. Coffey, and Knight & Knight, for appellee.

PER CURIAM. Appellant applied to and obtained from this court a temporary restraining order, and the question now for determination is whether appellant is entitled to a temporary injunction pendente lite.

The record shows that, upon the application of appellees and others to the judge of the Clay circuit court in vacation, a receiver for appellant was appointed. The receiver was appointed on the ground that appellant was insolvent, and in the order of appointment a finding was made that it was insolvent. At the time of the appointment the Clay circuit court, or the judge thereof in vacation, had jurisdiction both of the person of the defendant and the subject-matter. The appointment of a receiver was made under the provisions of the fifth subdivision of section 1236, Burns' Rev. St. 1901, and from such appointment appellant appealed to the Supreme Court under the provisions of section 1245, Burns' Rev. St. 1901. The judgment or order appointing the receiver was by the Supreme Court affirmed. *Chicago, etc., R. Co. v. Kenney* (Ind. Sup.) 62 N. E. 26. Pending that appeal, the main action came on to be heard and determined. A change of venue was taken both from the judge and county, and the venue was changed to the Putnam circuit court. In the latter court judgment was rendered in favor of the several appellees, from which judgment appellant prosecutes this appeal, and now seeks to keep the receiver from taking possession of and operating the property by an application for a temporary injunction.

A receiver is a ministerial officer of the court appointing him. His possession is not adverse to either party, but is for the benefit of all the parties to the suit, according to their respective rights, and it is his duty to prevent the destruction of the corporate assets. A receiver, duly appointed, is empowered by statute, under the control of the court or the judge thereof in vacation, "to take and keep possession of the property." Section 1242, Burns' Rev. St. 1901. The receiver's right of possession accrued at once upon his appointment, under the order then made; for in the order of appointment he was directed to take possession of the property. High on Receivers, § 136; 20 Am. & Eng. Ency. of Law (1st Ed.) 132. By reason of the appeal and the provisions of section 1245, Burns' Rev. St. 1901, the authority of the receiver was suspended, and he had no right, pending the appeal, to take possession of and operate the property. Until the enactment of section 1245, Burns' Rev. St. 1901, no appeal could be taken until the final disposition of the cause. *Buchanan v. Berkshire Life Ins. Co.*, 96 Ind. 510. Such appeal suspended the authority of the receiver, under the express language of the statute, only "until the final determination of such appeal." The appeal having been determined by an affirmance of the order or judgment appointing the receiver, it left such

judgment effective and operative, and thereupon his duty and power were not different from what they were when he was appointed, and before the appeal was taken. His right to the possession of the property was fixed by the order appointing him, and the express terms of the statute.

So far as the record before us shows, there has been no order discharging or removing him. So far as the receiver is concerned, the cause is regarded as still pending. *Brinkman v. Ritzinger*, 82 Ind. 358-364. Injunctive relief is granted by this court only in aid of its own jurisdiction and to enforce its own judgments or orders. *Baltimore, etc., Ry. Co. v. Wabash R. Co.*, 28 Ind. App. 185, 62 N. E. 520; *Lewis v. Fillion*, 4 Ind. App. 105, 29 N. E. 443. An injunction such as is here asked cannot be essential to a due and effective exercise of appellate jurisdiction. It is wholly unnecessary at this time to determine what court or judge has power to give the receiver directions or orders relating to the management, control, and operation of the property. His right of possession has been determined by his appointment, and by an affirmance of the order or judgment of appointment by the Supreme Court. For all subsequent orders he must apply to the court having jurisdiction.

The temporary restraining order is dissolved, and the temporary injunction is denied.

(68 Ohio St. 469)

MARINE INS. CO., LIMITED, OF LONDON, ENGLAND, v. WALSH-UPSTILL COAL CO.

(Supreme Court of Ohio. June 16, 1903.)

MARINE INSURANCE-POLICY CONTAINS "CONTRACT PROPOSITION"—PROPERTY COVERED.

1. Where, by what is denominated a "contract proposition," request is made of an insurance company for a policy of marine insurance, in which "contract proposition" it is stated, "Insurance is wanted by the Walsh-Upstill Coal Company covering all shipments of the following description of articles, viz.: Sundry coal cargoes, belonging to them and as agents, at risk," etc., a policy of insurance issued upon such application, which states that insurance is made "as per said contract," will apply to and cover only such cargoes shipped by the Walsh-Upstill Coal Company as shall belong to it as owner, and to such as shall be shipped by it as agent in which it shall have some pecuniary interest at risk.

(Syllabus by the Court.)

Error to Circuit Court, Cuyahoga County.

Action by the Walsh-Upstill Coal Company against the Marine Insurance Company, Limited, of London, England. Judgment for plaintiff, and defendant brings error. Reversed.

The Walsh-Upstill Coal Company, the nominal plaintiff in said suit, brought the action, as averred in its petition, for the use of the R. P. Elmore Company, a corporation of Milwaukee, Wis. In its petition the Walsh-Upstill Coal Company alleged: "On

April 26, 1897, the defendant, in consideration of the agreed premiums to be paid it by plaintiff, duly issued and delivered to plaintiff an open cargo policy of insurance, with certain contract propositions thereto attached, a copy of which is hereto attached, marked 'Exhibit A.' In and by said policy defendant insured plaintiff on all shipments of coal cargoes belonging to plaintiff, or represented by it as agent, provided the shipments thereof be reported to defendant's Cleveland agent by plaintiff as soon as plaintiff should receive advice of such shipment; and such insurance, by the terms of said policy, was against the adventures and perils of the lakes, rivers, canals, railroads, fires, jettisons, and all other perils and misfortunes that have or shall come to the hurt, detriment, or damage of the said property, or any part thereof. In and by said policy defendant insured all such shipments of coal made from and after April 1, 1897, to and including December 1, 1897; and said policy provided that the risk thereunder upon each such shipment should begin from and immediately following the loading thereof at the port or place named in the indorsement, and should continue and endure until the same should arrive and be safely landed at the port of destination, and not exceed 48 hours from the time of arrival. On November 29, 1897, plaintiff, acting as agent of the R. P. Elmore Company of Milwaukee, shipped a cargo of 1,836 tons 900 pounds of coal, at Cleveland, Ohio, on the steam propeller *Egyptian*, consigned to the R. P. Elmore Company, Milwaukee, Wisconsin; and said steam propeller sailed from Cleveland on said voyage, November 29, 1897. * * * Said steamer *Egyptian*, while making said voyage, caught fire and burned to the water's edge, a short distance above Thunder Bay Island, on Lake Huron, at a place covered by said insurance, on the night of December 1, 1897, the hull of said steamer filled with water, and such portions thereof, and of said cargo, as were not consumed by said fire, sank to the bottom of Lake Huron in very deep water, whereby said cargo became a total loss." There was the further averment of due proof of loss and of the refusal of defendant to pay, and the allegation that there was due plaintiff from the defendant, by reason of the premises, the sum of \$3,990.72, with interest thereon from January 18, 1898, and a prayer for judgment for that sum.

The contract proposition attached to said policy of insurance was in the words and figures following, to wit:

"Contract Proposition.

"To The Marine Insurance Co., Limited, of London, England: Insurance is wanted by the Walsh-Upstill Coal Co. covering all shipments of the following description or articles, viz.: Sundry coal cargoes, belonging to them and as agents, at risk, and reported

as herein stipulated, from April 1, 1897, until December 1, 1897, at and from lake ports, by the following routes, modes, and conveyances, and rates of premium, viz.: From Lake Erie to Detroit and St. Clair river, and to Lakes Huron, Ontario, Michigan, and Superior, 15 cents per \$100, on standard sail and steam vessels not classing below A2½. B1 vessels, 22½ cents per \$100. B1½ vessels, 30 cents per \$100 to September 1st; 40 cents per \$100 to October 1st; 60 cents per \$100 to November 1st; 75 cents per \$100 to November 30th. Subject to the conditions of cargo policy No. —, of — Insurance Co., Ltd., of —. All shipments attaching under said policy shall be valued at invoice cost, with ten (10) per cent. added, unless otherwise agreed upon prior to shipment; each shipment to be reported to the agent of the said insurance company, at Cleveland, Ohio, as soon as receiving invoices. Shipments on any one vessel limited to \$—. Premiums payable monthly.

"Dated, Cleveland, Ohio, April 1, 1897.

"The Walsh-Upstill Coal Co.,

"J. P. Walsh, General Manager, Applicant.

"Accepted —, 189—.

"Hutchinson & Co., Agents.

"This contract is not binding until approved by C. A. Macdonald & Co., general agents."

The Marine Insurance Company by way of answer alleged: "That under and by the provisions of said contract so attached to said policy, as aforesaid, it was provided that only coal cargoes belonging to the plaintiff and as agent, at risk and reported as therein stipulated, should be covered by said policy; and it was provided in said policy that the defendant made insurance as per said contract, dated April 1, 1897, on account of the Walsh-Upstill Coal Co. Defendant says that these stipulations in the policy were material to the risk taken by it in issuing said policy of insurance, and binding upon plaintiff. Further answering, it says that the plaintiff did not, at the time of shipment, or any other time, have any ownership or interest in two hundred and twenty-three (223) tons one hundred (100) pounds of the coal shipped upon said steamer; that it sold to the R. P. Elmore Co. one thousand seven hundred and thirteen (1,713) tons eight hundred (800) pounds, of the coal so shipped, delivered free on board vessel at Cleveland, and that when said coal was delivered upon said vessel it became and was the property of the R. P. Elmore Co., and that the plaintiff had no ownership or interest therein; that all of said coal was shipped as belonging to plaintiff; that no part of said coal so shipped was at the risk of damage or loss to the plaintiff; that plaintiff had no insurable interest in any of said coal at time of shipment or loss; and that plaintiff, with intent to deceive defendant, sought to obtain insurance upon said shipment by representing to the

agents of the defendant that said coal belonged to the plaintiff and was shipped on its account."

Replying to these averments of defendant's answer, the plaintiff "denies the allegation that it did not at any time have any interest in 223 tons 100 pounds of the coal shipped upon the said steamer Egyptian; denies the allegation that plaintiff had no interest in the 1,713 tons 800 pounds of said coal which it sold to the R. P. Elmore Co.; denies the allegation that no part of said coal so shipped was at the risk of damage or loss to the plaintiff; denies the allegation that plaintiff had no insurable interest in any of said coal, and that plaintiff, with intent to deceive defendant, sought to obtain insurance upon said shipment by representing to the agents of defendant that said coal belonged to the plaintiff and was shipped on its account; and denies the allegation that said policy of insurance never attached to said cargo of coal and said cargo was not covered by said policy."

Numerous other averments and denials are made in the pleadings, but they are not material to a determination of the question here presented, and need not be stated. In the court of common pleas, the Walsh-Upstill Coal Company recovered a judgment for the full amount claimed, to wit, \$4,633. This judgment was affirmed by the circuit court, and it is to reverse this judgment of affirmance that the present proceeding in error is prosecuted by the Marine Insurance Company.

Goulder, Holding & Masten, for plaintiff in error. Roger M. Lee, for defendant in error.

CREW, J. (after stating the facts). Whether the judgment of the circuit court was erroneous is in this case to be determined from, and is dependent upon, the interpretation and effect proper to be given to the contract of insurance on which this suit was brought. The facts of this case are not in dispute, and if, as contended by the defendant in error, the contract in suit is, because of the language therein employed, equally comprehensive with, and in legal effect the equivalent of, an open cargo policy containing the phrase, "for themselves or whom it may concern," whereby the Walsh-Upstill Company was authorized to cover and insure either cargoes owned by it or cargoes shipped and insured by it as agent for the consignee, but in which it had neither ownership nor interest, then the judgment of the circuit court was right; but if, on the other hand, the terms and provisions of said policy, when rightly construed and interpreted, are such as to limit its application to cargoes of coal belonging to the Walsh-Upstill Company, or to cargoes shipped by said company in which it had and held some pecuniary interest as owner or agent, then and in that event the judgment of the circuit court was erroneous. The single question presented here for determi-

nation is, was this cargo of coal shipped by the Walsh-Upstill Company to the R. P. Elmore Company of Milwaukee, Wis., covered by the policy of insurance on which this suit is brought? The answer must be found in the proper interpretation of the contract or policy itself.

It is conceded in this case that the Walsh-Upstill Coal Company, at the time it applied for insurance on this cargo of coal, was neither the owner of said cargo, nor had it any interest in the same as agent or otherwise. But it is claimed by defendant in error that, although it had no ownership in the coal at the time of procuring the insurance, it was the agent of the Elmore Company in securing the insurance and shipping the coal, and that by the terms of its contract, under which the policy was issued, such policy covered as well coal shipped by it as agent as that shipped by it as owner, and that the words of the contract, "covering all shipments of the following description of articles, viz., sundry coal cargoes belonging to them and as agents, at risk," etc., is in effect a contract and agreement to insure such cargoes of coal as should be shipped by it as owner, and also such as should be shipped by it as agent, although, when shipped as agent, it might be without interest in the cargo shipped. If this provision in said contract is the equivalent of, and carries with it the same legal interpretation as, the phrase "for themselves or whom it may concern," then under this policy the Walsh-Upstill Company was, as claimed by defendant in error, authorized to cover, not only such cargoes as were owned by it, but all cargoes shipped and insured by it as agent, by whomsoever owned. Such, we think, was not the intention of the parties to this contract, nor is such the effect and meaning proper to be given to the terms and provisions of the contract itself, when rightly construed and interpreted. That it was not the purpose of the Walsh-Upstill Company to procure a general authority to solicit and take risks, or to cover by insurance all cargoes of coal that might be shipped by it, whether interested therein or not, would seem to be evidenced by the language of its application to said insurance company for insurance. This application, the so-called "contract proposition," recites that: "Insurance is wanted by the Walsh-Upstill Coal Co. covering all shipments of the following description of articles, viz.: Sundry coal cargoes, belonging to them and as agents, at risk," etc. And the policy issued on this application by the insurance company contained the recital that it was issued "on account of the Walsh-Upstill Coal Co., as per contract dated April 1, 1897," etc. By this application insurance was requested by the Walsh-Upstill Company only upon "cargoes belonging to them and as agents, at risk," and the policy issued covered only such cargoes. Insurance was not asked by the Walsh-Upstill Company "for whom it might

concern," nor was it asked for or on behalf of the R. P. Elmore Company, who were the owners of this cargo, and who alone were at risk in case of loss, but it was asked and obtained for and on account of the Walsh-Upstill Company on cargoes belonging to them and as agents, at risk. The parties to this contract of insurance are chargeable with knowledge of the law governing this character of insurance, and it is, we think, under the facts of this case, fair to assume they were not without knowledge that in marine insurance it is a matter of common usage to issue policies "for whom it may concern," upon application made for that purpose. If it had been the purpose of the Walsh-Upstill Company to obtain such a policy, or to procure authority to act as agent for the Marine Insurance Company in soliciting and taking risks, and if it had been the purpose of the insurance company to constitute said Walsh-Upstill Company its agent for that purpose, we may reasonably assume that the application and policy would have taken some such form. But the Walsh-Upstill Company did not apply for such a policy, nor did the insurance company issue such a one, unless the words "belonging to them and as agents," in this policy, carry the same legal interpretation as the phrase "for whom it may concern."

The contract of marine insurance, in its essential nature and in all its incidents, is purely a contract of indemnity; hence, ordinarily, an insurable interest of appreciable value on the part of the assured in the subject of insurance is of the very essence of the right to recover upon such contract. If there is no interest, there can be no loss; and, if there is no risk of loss on the part of the assured, there can be no valid contract of indemnity. This policy of insurance is not subject to the same construction and interpretation that might be given it, if the provision in question were made to read "for whom it may concern," or if the policy were made to run to "A. B., as agent," or "to C. & L., for the owners," as was the form of policy in some of the cases cited by counsel for defendant in error; for in such case the policy itself would, on its face, clearly indicate and show that the person intended to be insured thereby was a person other than the person making the application, and to whom and in whose name the policy issued. But the contract we are considering was not of that character, but was by its terms a personal contract between the Walsh-Upstill Company and the insurance company, whereby the Walsh-Upstill Company sought and obtained insurance for itself and on its own account, and not generally "for whom it may concern." That the words "at risk," in this contract, are there for some purpose and have some meaning, must be presumed, and in the construction of said contract these words may not be omitted or disregarded, nor may other words which change or en-

large the meaning of said contract, or change the intentment of the parties thereto, be substituted in their stead. Looking to their place and position in this contract, and taken in connection with the other language and provisions thereof, we think these words "at risk" must be held to qualify, and were so intended, the words which immediately precede them, and in connection with which they are used, viz., the words "and as agents," and, so construed, they are a limitation on the authority of the Walsh-Upstill Company, and restrict the application of this policy of insurance to such cargoes as belong to said Walsh-Upstill Company as owner, or such as it has some interest and risk in as agent; and such, we think, was the intention of the parties to this contract. The Walsh-Upstill Company was a coal company doing business in Cleveland, Ohio, and engaged in the business of selling and shipping coal. The coal sold by it was sometimes delivered "free on board" vessels at Cleveland, or other port of shipment, and sometimes delivery was to be made at the port of destination, so that it might very well be in certain cases that the Walsh-Upstill Company, as consignor, might have an insurable interest in a cargo of coal, the title to which had by delivery to the carrier passed to the consignee; and to the extent of such interest it might have insurance under this contract and policy.

The case of *Insurance Co. v. Wilson*, 6 Ohio St. 553, cited and relied upon by defendant in error, is clearly distinguishable from this case. In that case Wilson & Co. were insurance brokers and were acting for the Protection Insurance Company. The syllabus in that case is as follows: "Insurance brokers, holding an open policy of insurance for themselves and whom it may concern, may, in case of damage to property covered by their policy, maintain in their names an action for the use of the owners, although the latter are not named in the policy, if it sufficiently appear that the insurance was procured for their benefit." Bowen, J., announcing the opinion in that case, speaking of the authority of Wilson & Co., and the character of their policy, said: "They had been agents intrusted with the business of taking risks upon property against the perils of transportation, of fire and of thieves. For the purpose of executing this agency they received from the insurance company an open policy 'to themselves, or whom it might concern,' etc. So that in this case the policy itself was one 'for whom it might concern' and clearly showed that Wilson &

Co., in whose name it issued, were not required to have any beneficial interest in property that might be covered by it." But the policy issued to the Walsh-Upstill Company covered only property belonging to it, or in which as agent it had some risk. We are of opinion that under the admitted facts of this case the cargo of coal lost was not covered by the policy of insurance on which this suit was brought, and therefore that no recovery can be had on said policy, because of the loss of said cargo.

Judgment of the circuit court reversed, and judgment for plaintiff in error.

SPEAR, SHAUCK, and PRICE, JJ., concur.

DAVIS, J. I concur in the syllabus and in the judgment; but I do not concur in all of the reasoning by which the conclusion is reached in the opinion. The question to be determined in this lawsuit is who is insured, not what is insured. The words "at risk" define the property to be insured, and not the person, and they are customarily used for that purpose. I regard it as both bad law and bad grammar to construe this phrase as qualifying the term "agents," instead of "cargoes." I therefore, for the purposes of this controversy, construe only so much of the application, or, as it is here called, the "contract proposition," as precedes and includes the word "agents." It recites that insurance is wanted for the Walsh-Upstill Company. "*Expressio unius est exclusio alterius.*" Therefore insurance was not asked for nor issued for anybody else. It was requested and issued upon cargoes "at risk," etc., belonging to the Walsh-Upstill Company as principal "or as agents"; but when it is a conceded fact that the particular cargo in question did not belong to the Walsh-Upstill Company, as agents or otherwise, it seems to me to be a very violent construction of the contract which would permit them to insure the cargo which did not belong to them for the use and benefit of strangers to the contract to whom it did belong; and it would, in my opinion, be a still more violent strain upon the law to allow such owners to recover as beneficiaries in the name of the Walsh-Upstill Company. Such procedure would be essentially a fraud upon the insurance company, and is not justified by any fair interpretation of the language of the contract proposition.

BURKET, C. J., concurs in the above.

(194 Mass. 169)

BASSETT v. NICKERSON.

(Supreme Judicial Court of Massachusetts. Barnstable. Sept. 5, 1903.)

WILLS—CONSTRUCTION—ESTATE TRANSMITTED—FEE OR LIFE ESTATE—LIMITATION BY SUBSEQUENT CODICIL.

1. Under Pub. St. 1882, c. 127, § 24, providing that every devise shall be construed to convey all the estate which the testator could lawfully devise in the lands mentioned, unless it clearly appears by the will that he intended to convey a less estate, words of inheritance are not necessary to be used in a will to create a devise in fee.

2. Where testator devised to his niece, his present housekeeper, all the residue of his estate, both real and personal, after paying certain legacies, funeral expenses, and other debts, and provided that such niece should have full power to do with the remainder of his estate as she might deem proper during her natural life, the niece took the residue of testator's estate in fee.

3. The estate so created was not limited by a subsequent codicil bequeathing a certain amount in trust, provided so much remained after the decease of such residuary legatee and the payment of all her funeral and legal expenses, to be used for the improvement of certain burial lots.

Appeal from Supreme Judicial Court, Barnstable County.

Petition by Charles Bassett, as administrator de bonis non with the will annexed of Clement Kendrick, against Darius M. Nickerson, as executor of the estate of Sarah A. K. Turner, deceased, for the construction of the will of said Kendrick. On appeal from probate by defendant case reserved. Reversed.

D. M. Nickerson, Jr., and T. H. Armstrong, for appellant. Chas. Bassett, for appellee.

LATHROP, J. While this case is before us in a very irregular manner, yet, as all parties interested, although not made parties, have filed briefs, and desire the case to be determined on the merits, we proceed to consider the case, first mentioning the irregularities.

The petition is brought by Charles Bassett, as administrator de bonis non with the will annexed of Clement Kendrick, against the executor of the will of Sarah A. K. Turner, who was the residuary devisee and legatee of Clement Kendrick, and who left a will disposing of all her property. The principal question in the case is whether Turner took an estate in fee in the real estate, and an absolute estate in the personal property, or whether she took only an estate for life, with a power of disposal during her life, but without a power of disposal by will. It is obvious in such a case that the petitioner had nothing to do with the real estate unless it was needed for the payment of debts. Hall v. Cogswell (Mass.) 67 N. E. 644. And there is no allegation of this, nor did the executor of the will of Turner, the only respondent named, have anything to do with the real estate, unless needed for the payment of debts. There is also a statement of facts in the case

signed by the petitioner and the respondent, but whether this was filed in the probate court or in the Supreme Judicial Court does not appear. The case was reserved for our consideration on the agreed facts, and it does not appear that either the heirs at law of Kendrick, or the legatees and devisees under the will of Turner, have been made parties. We proceed to consider the case as if the proper parties were before us, as they have appeared and filed briefs.

By the first two clauses of the will of Clement Kendrick, dated September 27, 1882, he left to his two brothers, John C. and Zemira, \$500 each.

The third clause of his will reads as follows: "I give, devise and bequeath to my niece, Sarah A. K. Turner, my present housekeeper, all the rest and residue of my estates, both real and personal that I may die possessed of, after paying the above-named legacies and my funeral expenses and all other debts that I may be owing at my decease (if any) and after the payment of the above-named debts and legacies I hereby give her, my said niece, Sarah A. K. Turner, full power to do with the remainder of my estates as she may deem most proper during her natural life." The fourth clause of the will appointed Sarah A. K. Turner executrix of the will. The first codicil to the will was dated June 1, 1891. In it after describing himself as of Chatham, was the following language: "I give and bequeath to the treasurer of the People's Cemetery in said Chatham, and to his successors in said office the sum of five hundred dollars, in trust nevertheless (providing there should be so much remaining at the decease of my niece Sarah A. K. Turner and the payment of all her funeral and legal expenses are paid) to be kept by said treasurer safely invested and so much of the interest thereof as may be necessary therefor to keep my father's, Josiah Kendrick, my brothers, John C. Kendrick, Henry Kendrick and my own burying lots in said cemetery in good order forever; and if the said interest should be more than is necessary for that purpose, the balance of interest may be used to be put into a fund to be used for the repairs of the fence around said cemetery. Hereby ratifying and confirming my said will as aforesaid except as the same may be altered or changed by this my said codicil thereto." The third codicil, dated August 8, 1894, gave \$1 to the heirs of his deceased brother Tracy, and the same amount to the heirs of his deceased brother Josiah. To his brother John C., if he outlived the testator, he left the sum of \$100, and expressly canceled the bequest of \$500 made in the will. The same amount was bequeathed to Zemira on the same conditions, and the bequest of \$500 in the will was expressly canceled.

Clement Kendrick died on November 28, 1894. At the time of making his will and at his death his heirs at law were brothers and heirs of deceased brothers. Sarah A. K.

Turner was a niece of the testator's wife, and not a relation of the testator. She was appointed executrix of the will January 8, 1895. She filed an inventory showing personal estate to the amount of \$5,434, and real estate, including the homestead, to the amount of \$1,475. In her probate accounts she transferred to herself all the remaining personal estate, after the payment of the testator's bills and the expenses of administration. Sarah A. K. Turner died May 8, 1901, leaving a will and codicil, which were duly admitted to probate, and the respondent was appointed the executor of her will. The inventory of her estate shows personal estate to the value of \$8,642, and real estate to the value of \$2,000. This inventory includes all the property or the proceeds thereof which the testatrix had before transferred to herself from the estate of Clement Kendrick. The judge of the probate court made a decree that Sarah A. K. Turner took a life estate in the residue of the testator's property, with a power to manage the life estate, and to expend in her lifetime, for her own use and benefit, so much of the principal as she should deem proper, and that no power to dispose of the property by will was given to Sarah A. K. Turner; that \$500 was the maximum amount given in the codicil to the treasurer of the People's Cemetery, and that the words "whatever be remaining" refer to a sum less than \$500, and that the heirs at law of Clement Kendrick, living at the time of his decease, are entitled to the residue of his property not expended by Sarah A. K. Turner, after payment of the legacies named in the first and second codicils, and the further payment of the funeral and legal expenses of Sarah A. K. Turner. The decree further ordered that the respondent, Nickerson, as executor, turn over and deliver to Bassett, as administrator, all the rest and residue of the real and personal estate of Clement Kendrick which was in the hands of his testatrix, Sarah A. K. Turner, at the time of her decease.

It seems to us very clear that the heirs at law and next of kin of Clement Kendrick are entitled to take nothing which is not expressly given to them by the will as modified by the second codicil. The testator evidently did not intend to die intestate as to any of his property.

Nor can we doubt that, under the third clause in the will, Turner took a fee in the real estate and an absolute right in the personal property, and that the power to dispose of the property given her during her life was simply an attempt to add something to that which was already complete. Unless there is a difference between a devise containing words of inheritance and a devise without these words, the case is governed by the case of *Damrell v. Hartt*, 137 Mass. 218. In that case a man devised land to his son, "to have and to hold the same to him, his heirs and assigns forever; and if he shall die

not having disposed of the same," then over. It was held that his son took an absolute estate. See, also, *Briggs v. Shaw*, 9 Allen, 516; *Joslin v. Rhoades*, 150 Mass. 301, 23 N. E. 42.

We consider it as well settled in this commonwealth that words of inheritance have never been considered as necessary to pass a fee in a will. As long ago as 1651 there was a colony law providing that, in deeds and conveyances of houses and lands wherein an estate of inheritance was to be passed, the words "his heirs and assigns forever" should be included, but there was a proviso "that this law shall not extend to houses or lands given by will or testament," 3 Mass. Col. Rec. 222; *Anc. Chart.* 85. Col. Laws (Whitm. End.) 32. Whether this law remained in force after the adoption of the Constitution of this commonwealth, by reason of chapter 6, art. 6, is unnecessary to consider, because the will and codicils were made while the Public Statutes of 1882 were in force. By chapter 127, § 24, it is provided: "Every devise shall be construed to convey all the estate which the testator could lawfully devise in the lands mentioned, unless it clearly appears by the will that he intended to convey a less estate." See, also, *Rev. Laws*, c. 135, § 22. The section in question first appears in the form of law in *Rev. St.* 1836, c. 62, § 4, in this form: "Every devise of land, in any will hereafter made, shall be construed to convey all the estate of the deviser therein, which he could lawfully devise, unless it shall clearly appear by the will that the deviser intended to convey a less estate." It first appears as an amendment adopted by the committees on the report of the commissioners on the Revised Statutes (page 85).

The rule of law adopted as to the construction of wills made before the Revised Statutes took effect was that the intention of the testator was to govern, if such intention could be carried into effect consistently with the rules of law, but words of limitation were not considered necessary. *Richardson v. Noyes*, 2 Mass. 56, 3 Am. Dec. 24. The fact that there is no devise over is an indication that the testator did intend to give a fee. *Baker v. Bridge*, 12 Pick. 237, 31. In *Godfrey v. Humphrey*, 18 Pick. 537, 29 Am. Dec. 621, the language was: "I do give and bequeath to my wife Sarah Thayer all my real and personal estate of every description, she paying all my just debts and legacies." This was held to pass an estate in fee. In *Parker v. Parker*, 5 Metc. 134, 138, it is said by Shaw, C. J.: "In the first place, it is apparent that in the principal devise to the sons there are no words of limitation; that is, it is not, in terms, devised to them and their heirs. But as it is a will, and not a deed, which we are considering, we are inclined to the opinion that, if it stood upon that clause alone, it would be sufficient to create an estate in fee simple, without words

of limitation, for two reasons: First, because it is a devise of all his real estate; and, secondly, because by another clause in the will he charges these devisees, personally, with a considerable sum of money to his sisters, which circumstances are regarded, for well-known reasons, as legal indicia of an intent to give an estate in fee. 18 Pick. 537; 8 T. R. 1." In *Plimpton v. Plimpton*, 12 Cush. 458, the testator, by a will made before the Revised Statutes took effect, gave to his wife the "improvement" of his dwelling house during her life, and after his wife's decease he gave the dwelling house to his son. It was held that the son took a fee, notwithstanding there were no words of limitation. See, also, *Leland v. Adams*, 9 Gray, 171.

It thus appears that down to the passage of the Revised Statutes a fee would pass without words of limitation, and that it made no difference whether these words were contained in the will or not. The statute in question was meant to be a rule of construction. Its language is: "Every devise of land, in any will hereafter made, shall be construed to convey all the estate of the devisor therein, which he could lawfully devise, unless it shall clearly appear by the will that the devisor intended to convey a less estate." It is evident that the statute did not intend to apply a stricter rule than had been applied before, or to make words of limitation necessary. See *Gleason v. Fayerweather*, 4 Gray, 348, 350. In *Willcut v. Calnan*, 98 Mass. 75, eight articles of a will made specific devises of land, with the words "to have and to hold to him, his heirs and assigns." The sixth article gave, bequeathed, and devised a parcel of land, without these words of inheritance. There was a residuary clause to the testator's widow. It was held that the devisee under the sixth clause took a fee. There is also a class of cases like the case at bar, where the testator has given, without words of limitation, all the rest and residue of his estate, and has either given a power to dispose of the same by will or during life, and there has been no remainder over. In these cases it has been held that the residuary devisee took a fee. *Spooner v. Lovejoy*, 108 Mass. 529; *Todd v. Sawyer*, 147 Mass. 570, 17 N. E. 527; *Veeder v. Meader*, 157 Mass. 413, 32 N. E. 358. See, also, *Lloyd v. Lloyd*, 173 Mass. 97, 53 N. E. 148. We, of course, concede that where there is a gift or devise to A. for life, with a power of disposition either during life or by a will, with a remainder over, A. takes only an estate for life, coupled with a power, which, if not exercised, gives effect to the remainder. *Collins v. Wickwire*, 162 Mass. 143, 38 N. E. 365.

If the conclusion we have reached is correct, that Turner took a fee under the will, the question remains as to the effect of the codicil. The codicil is to be read with the will, as if it formed a part thereof, both

speaking the language of the testator at the time of his death. *Gray v. Sherman*, 5 Allen, 198, 199; *Richardson v. Willis*, 163 Mass. 130, 39 N. E. 1015; *Kelley v. Meins*, 135 Mass. 231. We do not doubt the power of a testator to change his will in any way that he may see fit. But to accomplish his purpose he must use apt words, and must comply with the rules of law. If he has simply left \$500 to the treasurer of the cemetery corporation, in trust, etc., this well might be considered a legacy added to his will. But he does not do this. Having given a fee in all his remaining property to Turner, he assumed to exercise control over what she may leave. Such attempts are very common, but have never yet been successful, either by will or codicil. The rule was laid down as early as 1809 in this commonwealth, and has never been departed from. *Ide v. Ide*, 5 Mass. 500. This was a case of a devise of real estate, where a fee was given to A., and a devise was made to B. in the same will of what A. should leave. The same rule applies to personal estates. In *Merrill v. Emery*, 10 Pick. 507, a testator left to his wife one-half of all the money he might leave in the house, and one-half of all the family stores at that time on hand, and that one granddaughter should have all the family stores his wife should leave, and that the money remaining in the house at his wife's decease should be divided among his grandchildren. It was held that, the gift to his wife being absolute, the limitation over was void. See, also, for cases where the attempt is made in the same instrument, *Burbank v. Whitney*, 24 Pick. 146, 35 Am. Dec. 312; *Damrell v. Hartt*, 137 Mass. 218; *Sherburne v. Sischo*, 143 Mass. 439, 9 N. E. 797; *Joslin v. Rhoades*, 150 Mass. 301, 23 N. E. 42; *Foster v. Smith*, 156 Mass. 379, 31 N. E. 291; *Hunting v. Damon*, 160 Mass. 441, 35 N. E. 1064. In *Knight v. Knight*, 162 Mass. 460, 38 N. E. 1131, the testator after disposing of six-sevenths of the residue of his estate, used the following language: "And the other one-seventh part I give and devise to my said wife, to be disposed of as she shall think best, but if any part of her said seventh part shall not be disposed of at the time of her decease, then the part of her seventh part remaining undisposed of, shall be equally divided among my said six children." It was held that the widow took the absolute property in the one-seventh of the residue of her husband's estate, and not a life estate, with power of disposal during her lifetime.

The case of *Kelley v. Meins*, 135 Mass. 231, seems precisely in point in this case. There the testatrix devised all her property, real and personal, to her son. The first codicil provided that, if her son should die without living issue, "then any portion of my estate and property which may remain shall be equally divided among my sisters and nieces, and their female heirs and assigns." It was held that the first codicil, so far as

it attempted to cut down to a life estate what was given absolutely by the will, was void, though it was admitted that, had apt words been used in the codicil, the result would have been different.

A majority of the court is of opinion that Turner took a fee in the real estate, and an absolute title in the personal property, and that the second codicil is of no effect. The decree of the probate court must be reversed, and a decree entered in accordance with this opinion. So ordered.

(184 Mass. 96)

**EARL CARPENTER & SONS v. NEW YORK, N. H. & H. R. R. CO.
GORHAM MFG. CO. v. SAME.**

(Supreme Judicial Court of Massachusetts.
Suffolk. Sept. 1, 1903.)

**DISMISSAL AND NONSUIT—HEARING BEFORE
AUDITOR—TIME OF APPLICATION.**

1. Since a hearing on the trial before an auditor cannot terminate in a judgment for either party, such hearing does not constitute a trial so as to preclude the plaintiff from being entitled to a nonsuit after the hearing but before the filing of the auditor's report.

Report from Superior Court, Suffolk County; Henry K. Braley, Judge.

Actions by Earl Carpenter & Sons and Gorham Manufacturing Company against the New York, New Haven & Hudson River Railroad Company. An order granting a nonsuit was entered after a trial before an auditor, and the case reported. Order affirmed.

These were two actions to recover for damages to property alleged to have been caused by fire resulting from sparks from a locomotive. After hearings in the case before an auditor, and after the hearings had ended, but before the auditor filed his report, the plaintiffs made a motion to be declared nonsuit. In the superior court Judge Henry K. Braley allowed a nonsuit to be entered in each case, ruling that, as matter of law, no trial had been begun within the meaning of the rule as to the right to become nonsuit at any time before trial, and reported the case to the Supreme Judicial Court.

Robert F. Herrick and Alfred B. White, for plaintiffs. Choate & Hall, for defendant.

LORING, J. It has always been a recognized principle of the English law, on the equity as well as on the common-law side of the court, that a plaintiff is not bound to prosecute a suit or action to a finish because he has begun it; but, on the contrary, he is at liberty to abandon it without losing the right of action on which it is founded, and he can enforce that right subsequently on paying the costs of the former proceeding. In this respect a plaintiff is more fortunate than a defendant, who has a day in court to interpose his defense if he would not have final judgment given against him. What

is not so clear is how far the plaintiffs' proceeding (whether it be a suit in equity or an action on the common-law side of the court) must have gone for it to have reached the stage where this right of abandonment is lost.

In England the plaintiff originally had a right to abandon an action at law and become nonsuit at any time before verdict, if not before judgment. *Derick v. Taylor*, 171 Mass. 444, 445, 50 N. E. 1038. That it was before verdict, and not before judgment, is laid down in *Outhwaite v. Hudson*, 7 Ex. 380, 381; 2 *Tidd's Practice* (3d Am. Ed.) 867. This rule was adopted here by an ordinance of the Colony in 1641 (Anc. Ch. 46); and in *Locke v. Wood*, 16 Mass. 317, it was contended by Webster and Shaw in 1820 that that was the rule of practice of the commonwealth, and that the plaintiff had a right to become nonsuit at any time before judgment. But the court "were of opinion that there was no such right, and that, after a cause is opened to the jury and begun to be proceeded in before them, the parties are entitled to a verdict, unless the court should, in its discretion, allow a nonsuit or discontinuance." And since then it has been held or said to be the rule that a plaintiff can become nonsuit as of right at any time before the trial has begun, but not afterwards. *Means v. Welles*, 12 Metc. 356, 361; *City of Lowell v. Merrimack Mfg. Co.*, 11 Gray, 382; *Shaw v. Boland*, 15 Gray, 571; *Inhabitants of Truro v. Atkins*, 122 Mass. 418; *Burbank v. Woodward*, 124 Mass. 357; *Kempton v. Burgess*, 136 Mass. 192; *Derick v. Taylor*, 171 Mass. 444, 50 N. E. 1038; *City of Worcester v. Lakeside Mfg. Co.*, 174 Mass. 299, 54 N. E. 833. See, also, the previous case of *Haskell v. Whitney*, 12 Mass. 47.

The reason for denying in this commonwealth the rule of the English common law was the injustice done to the defendant, who was subjected to being harassed a second time on one and the same cause of action on receiving costs, which in this commonwealth are nominal. In that respect the burden of being subject to a second action is much greater here than in England, where costs are substantial. But the common-law rule has now been abolished in England. By Order 26 of the Rules of the Supreme Court, 1883, adopted under the Judicature Act, it is provided that "the plaintiff may at any time before receipt of the defendant's defence or after receipt thereof, before taking any other proceeding in the action (save any interlocutory application) by notice in writing" discontinue the action. *Wilson's Practice of the Supreme Court of Judicature* (7th Ed.) 234.

The Massachusetts rule as to when a plaintiff could become nonsuit in a common-law action was established when substantially, if not absolutely, all such cases were tried to a jury. No question could arise as to what the rule was when applied to cases tried by the court, as so many cases are now

tried since St. 1874, p. 163, c. 248, § 1; St. 1875, p. 834, c. 212, § 1; St. 1894, p. 380, c. 357, now Rev. Laws, c. 173, § 56—directing all cases to be tried by the court unless a trial by jury is claimed by one of the parties. Until the case is opened, the right to become nonsuit exists.

A question did arise as to the application of the rule in case of a preliminary trial before commissioners in case of a petition to recover compensation for property taken under the right of eminent domain. It was held that when the hearing before the commissioners was begun the right to become nonsuit was lost. *City of Worcester v. Lake-side Mfg. Co.*, 174 Mass. 299, 54 N. E. 833.

The case at bar presents the question whether the right is lost when a hearing before an auditor has been finished, but before the auditor's report is filed. The cases relied on at the bar are not decisive of the point. It was held on the one hand, in *Haskell v. Whitney*, 12 Mass. 47, that after an action has been sent to arbitrators, under an agreement of submission voluntarily entered into, the plaintiff cannot become nonsuit even before a hearing before the arbitrators has begun. But that is a decision that when the action has by agreement of the parties been sent to arbitrators it ceases to be an action at law and becomes a submission to arbitration, and a party to a submission has no right to become nonsuit. On the other hand, it was held in *Stone v. Sargent*, 129 Mass. 503, that a case could be removed to a court of the United States, on the ground of prejudice, after an auditor's report had been filed. But the statute under which the removal in that case was allowed provided that the suit might be removed "before the final hearing or trial of such suit." See Act March 2, 1887, c. 196, 14 Stat. 558. As re-enacted in Rev. St. U. S. c. 639, cl. 3, it provides that the case may be removed "before the trial or final hearing of the suit." It is settled that the trial referred to is the final trial. *Hess v. Reynolds*, 113 U. S. 73, 5 Sup. Ct. 377, 28 L. Ed. 927; *Baltimore & Ohio Railroad v. Bates*, 119 U. S. 464, 7 Sup. Ct. 285, 30 L. Ed. 436. This was the law in 1879, when the petition for removal in *Stone v. Sargent* was filed, and continued to be the rule until 1887, when Act March 3, 1887, c. 373, 24 Stat. 552, corrected by Act Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508], was enacted, adopting, for removal for local prejudice, the rule as to removal by reason of diverse citizenship alone, to wit, "before any trial."

Were the question now before us a question of first impression, depending entirely on the advantages and disadvantages to the plaintiff and the defendant respectively, it is

by no means clear that it ought not to be held to be too late for a plaintiff to become nonsuit when an order had been made sending the case to an auditor. A hearing before an auditor is not now, as it was, a preliminary investigation of complicated accounts and nothing more. The rule laid down in *Whitwell v. Willard*, 1 Metc. 216, was altered by St. 1856, p. 119, c. 202, now Rev. Laws, c. 165, § 55. Although this rule was altered so long ago, it was not until lately that the practice as to what cases should be sent to an auditor was changed. It has become the practice now, however (owing to the overcrowding of the dockets), to send to auditors cases involving a long investigation, no matter what the kind of investigation may be. The result is that an auditor's hearing is now a different thing from what it was. Not only that, but this change has been recognized by the Legislature. St. 1900, p. 358, c. 418 (Rev. Laws, c. 165, § 59; Id. c. 173, § 81), provides that the court may set a day for the "trial" before the auditor, and upon such order being made the trial shall proceed from day to day until it is concluded; that the actual engagement of counsel in a hearing before an auditor shall be an excuse in another cause as if he were engaged in court; and each party is required to proceed before the auditor at the time appointed, and "to produce in good faith the testimony relied upon by him."

But in spite of the character which auditors' hearings have now assumed, it is still true that such hearings result in evidence merely, and cannot result in an adjudication; and we are of opinion that a hearing which results in evidence, and cannot per se result in an adjudication, is not a trial within the rule which has now been laid down for over 80 years, namely, that a plaintiff can become nonsuit at any time before the trial begins, and not afterward. Moreover, this seems to have been assumed by the Legislature in this very statute. St. 1900, p. 358, c. 418 (Rev. Laws, c. 165, § 59, and Id. c. 173, § 81). It is there provided that if the plaintiff does not comply with the provisions of the act and attend before the auditor, or if he refuses in good faith to put in the testimony relied on by him, the court is authorized to direct him to become nonsuit. In making that provision it is assumed that the court has no power to enter judgment for the defendant at that state of the proceeding.

Under these circumstances we do not feel at liberty to dispose of the question on its merits. If, under the practice which now obtains, the rule, which we feel we are bound by, does injustice to defendants, the remedy is with the Legislature.

Entry of nonsuit to stand.

(184 Mass. 107)

In re SELECTMEN OF WESTBORO et al.
(Supreme Judicial Court of Massachusetts.
Worcester. Sept. 2, 1903.)

RAILROADS—GRADE CROSSINGS—ABOLITION—
COSTS—NEW STATION—CREDITS—STATION
GROUNDS—WITNESS AND COUNSEL FEES.

1. Where, in proceedings for the separation and abolition of certain railroad grade crossings in a town, it became necessary to move the station about 1,300 feet, and the railroad company, instead of moving it, built a new station of a similar character, and the auditor found that the cost of constructing the same was fair and reasonable, the railroad company was not limited to charge the actual cost of reproducing the old station in substantially as good condition as it was in the old location, but was entitled to charge the cost of the new one.

2. Where proceedings for the abolition of certain grade crossings contemplated the removal of the railroad station, and the land occupied by the old station was not acquired as a part of the proceeds of the alteration, but had been owned by the railroad for many years, the town was not entitled to credit for the value of such land in the accounting as to the cost of the removal of such crossings.

3. Where, in proceedings for the removal of grade crossings, the town paid certain sums in settlement of land damages, when no action had been brought by the landowner therefor, and his claim, if any, was barred by limitation, such sums could not be charged as a part of the costs of the proceedings as against the railroad company.

4. In proceedings for the abolition of grade crossings, expert witness and counsel fees incurred by a town in disputing at a former hearing, on an accounting, the propriety of the allowance of certain items in the account presented by the railroad company, were incurred by the town in the preparation of its side of a disputed controversy for trial, and were not a part of the costs of alterations or of the hearing, for which the town was entitled to credit.

Report from Superior Court, Worcester County; John H. Hardy, Judge.

Proceedings by the selectmen of Westboro and the Boston & Albany Railroad Company for the separation and abolition of certain grade crossings. On exceptions of both parties to the auditor's report. Exceptions of railroad company sustained, and those of the town overruled.

Thayer & Rugg and A. F. Brown, for town of Westboro. Samuel Hoar and Woodward Hudson, for Railroad Co.

MORTON, J. This is a petition by the selectmen of Westboro and the Boston & Albany Railroad Company for the separation and abolition of certain grade crossings in the town of Westboro. The case has been here once before on the validity of the decision of the special commission, and is reported in 169 Mass. 495, 48 N. E. 763. Since then the auditor has made a third report, to which the town and the railroad company have both filed objections and exceptions. The case came up in the superior court for a hearing on the report and the exceptions and objections thereto, and thereupon the presiding justice reported to and reserved for this court the questions arising upon the report, and the evidence reported therewith, and the excep-

tions and objections thereto. The special commission's decision and plan, and the decree of the court thereon, are made a part of the auditor's report.

The questions are whether the cost of the new passenger station erected by the railroad company upon the location to which the railroad was changed shall be included as a part of the cost of the alterations, whether the value of certain land belonging to and occupied by the railroad company prior to the alterations in connection with the passenger station shall be credited to the general account, and whether certain sums paid by the town in settlement of a claim for land damage and for counsel and expert fees shall be included in the cost of the alterations.

1. As to the cost of the new station: The auditor finds that the total cost is \$16,716.33, and that this is fair and reasonable. But, relying apparently upon the Case of Newton, Petitioner, 172 Mass. 5, 51 N. E. 183, and adopting the contention of the town, he finds that the railroad company is entitled "only to the actual cost of removing and reproducing the old station in substantially as good a condition as it was on the old location." Certain other items connected with and growing out of the construction of the new station, and about which there is now no controversy, and which, therefore, need not now be considered, are also allowed. The report of the commission provided that the railroad location should be changed from a point about 2,500 feet easterly of the old station to a point about 5,000 feet westerly of it, and moved northerly so that at the point where the new station was constructed it was about 1,300 feet from the old station. The old station was on Main street, and so, as we understand the situation, is the new. The old station is of brick, and is of the same size practically as the new. In order to remove it to the new location, it would have to be moved through the public streets about 1,400 feet. The report of the commission does not provide, in terms, at least, for the construction of a new station as a part of the alterations. But it was said, when the case was here before, that "the position of the station would naturally and necessarily be changed as an incident of the location of the change of the track." Selectmen of Westborough, Pet'r, 169 Mass. 495, 498, 48 N. E. 763, 764. Nothing is said in the commission's report about a removal of the old station, and we think that the reasonable construction of the report is that it contemplated the erection of a new station as a part of the alterations rendered necessary by the change in the location. The town does not, indeed, contend that a station is not to be provided as a part of and as incident to the alterations. But it relies upon the Case of Newton, Pet'r, 172 Mass. 5, 51 N. E. 183, and contends that, according to the rules there laid down, the railroad is to be allowed only what it would cost to remove and fit up the old station or to build a new one of similar

size. But this case differs from the Newton Case. In that case the new station was regarded rather as an improvement which the railroad company had availed itself, rightfully enough, of the changes required to make, than as an alteration contemplated or required by the changes provided for. Moreover, in that case the new station was upon the same site, or substantially upon the same site, as the old. In this case the decision of the commission required an entire relocation and removal of the tracks for a longitudinal distance of about a mile and a half, and the plan filed by them as a part of this report shows a new location of the station at a point 1,300 feet from, and opposite to, the old station. As already observed, we think that the report and plan of the commission contemplated the erection of a new station at the point thus designated, and not the removal of the old one to it. It appears that the new station is practically of the same size as the old, and there is nothing to show that the railroad company has availed itself of the opportunity afforded by the alterations required to make extensive and expensive improvements which could not be fairly included as a part of the alterations; and the auditor expressly finds, as already observed, that the cost of the new station is fair and reasonable. We think that the ruling of the auditor limiting the railroad company to "the actual cost of reproducing the old station in substantially as good condition as it was in the old location" was wrong, and that the company should have been allowed the cost of the new station. The fact that the railroad company gets a new station in the place of the old one, and that the new station is or may be better in other respects than the old one, is an incidental matter which cannot be taken into account in arriving at the actual cost of the alterations. *Newton, Pet'r, supra*. The view of the matter which we have taken renders it unnecessary to consider whether the commission could have required the old station to be moved to the new location. We may add, in passing, that the objection that such a removal would have to be through the public streets does not impress us very strongly. It is to be presumed that the officers of the town would have granted a request for such removal if the removal had been required as a part of the general scheme for separating and abolishing the grade crossing in question.

2. The old station was partly within and partly without the old location, and stood on land belonging in fee to the company. Part of the land was conveyed to it subject to restrictions requiring the company to establish and maintain a depot or place of deposit on the premises, and restricting the erection of any building within 50 feet of the street. One deed also contained the restriction that no tavern or victualling house should be erected on the land conveyed. The auditor finds that this land, comprising about 50,000 square

feet, is not necessary for railroad purposes, and that the value of it with or without the restrictions, as the court finds that it is or is not now subject to them, should be credited to the general account in computing the cost of the station. The old location over the land has not been discontinued, and the land is still used by the company for freight purposes, and the old passenger station still stands there.

There is no doubt that, in arriving at the total actual cost of alterations rendered necessary by the separation of grade crossings under the statute providing for such cases, the cost is to be arrived at by a proper system of credits as well as by a proper system of debits. *Newton's Case*, 172 Mass. 5, 51 N. E. 183. The account is to be debited with whatever the party charged with making the alterations has furnished or expended in money, labor, or materials—with whatever, in short, constitutes a part of the cost—and is to be credited with what is received or realized, or ought to be received or realized, from the alteration. Incidental benefits do not enter into the account. Neither does the question of betterments. The question in each case is one of cost—the total actual cost of the alterations. Whatever on the one hand should be fairly reckoned as a part of the cost of the alterations should be debited to the account, and whatever on the other may fairly be reckoned as a proceed of the alterations should be credited to the account. If, for instance, a railroad company, in changing its location as required for the separation of grade crossings, should in constructing its road in its new location open therein, in the process of such construction, a valuable quarry, and should sell the stone which it got out, or should open a valuable sandbank and should sell the sand, or should have on hand, as the result of the alterations, a quantity of old rails which it could sell or use, what was received from the stone or sand and the value of the old rails should be credited to the general account. But in the present case the land, the value of which the town seeks to have credited to the general account, was not a proceed of the alteration, and was not conveyed to the company as a gift, or otherwise, in consequence of it. The company had owned it for many years. It had the right, subject to the restrictions on which it held it, to use it for any purpose that it saw fit. And we do not see how or on what ground it can be compelled to account for its value, restricted or unrestricted, because the passenger station has been moved somewhere else and the town and the commonwealth are obliged to pay a part of the cost of the new station. We think, therefore, that the auditor was in error in crediting to the account the sum of \$3,500 for the "value of the portion of the old location lying between the east side of Main street and westerly line of the freight yard." The fact that, under some understanding or arrangement which is not before us, the com-

pany sold and conveyed to the town so much of its location as was on the westerly side of Main street, and the proceeds were credited to the general account in a previous accounting, has, of course, nothing to do with the question now before us.

3. The remaining questions relate to the sums paid by the town in settlement of a claim for land damages and for counsel and expert fees. The sums were disallowed by the auditor, and we think that his ruling was right. The sum paid in settlement of land damages was paid after it had become barred by the statute. No suit or petition had been brought by the landowner, and, so far as appears, the town was under no legal liability to pay. Whatever the town could have done if it and the landowner had been the only parties interested, we do not think that it could waive the statutory bar as against the other parties to the accounting. The expert and counsel fees were incurred in disputing, at a former hearing on an accounting, the propriety, both in law and fact, of the allowance of certain items in the account presented by the railroad company, being the same items disallowed by the auditor in the railroad company's account. We think that these expenses are to be regarded as incurred by the town in the preparation and trial of their side of a disputed controversy, rather than as constituting a part of the cost of the alterations or of the cost of the hearing before the commission. See *Providence & Worcester Railroad Co. v. Pet'r*, 172 Mass. 117, 121, 51 N. E. 459.

The result is that the exceptions of the railroad company are sustained, and those of the town are overruled. So ordered.

(124 Mass. 138)

BROWN v. FARMER et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. Sept. 2, 1903.)

WILLS—TRUSTS—CONSTRUCTION—DEATH OF BENEFICIARIES—DISTRIBUTION—TIME.

1. Testator, after giving a pecuniary legacy to each child, devised the residue of his estate to his wife for life, and on her death bequeathed \$180,000 in trust, and the residue equally among his three children. The clause creating the trust devised the fund to trustees to hold and collect the rents, incomes, and profits thereof, and pay over the same to such three children annually during the term of their natural life, and to divide after their decease the rest and residue of the trust premises equally among my [testator's] children then living and the issue of any deceased child or children, giving to the issue of any deceased child the share to which the parent, if living, would have been entitled. *Held*, that each of the three children became entitled to the income of an undivided third of the trust fund for life, and on the death of each life tenant there was to be a distribution of the principal of the third to which such life tenant was entitled among testator's children then living and the issue of deceased children, including the issue of the life tenant whose share was being distributed, such issue taking per stirpes.

Case reserved from Supreme Judicial Court, Suffolk County; James M. Morton, Judge.

Bill by Joseph T. Brown, as surviving trustee of the will of William Brown, deceased, against one Farmer, executor, and others, for the construction of the will. On reserved case from Supreme Judicial Court. Decree rendered.

Carleton Hunneman, for complainant. John K. Berry, Eugene C. Upton, for defendants Thos. Earle White and Harriet H. White. Roland W. Boyden and R. A. Jackson, for defendant Henry H. Brown. Roland Gray, for defendants Rachel M. Sedgwick, Josephine Griffith, and Henry Griffith.

LORING, J. This is a bill for instructions brought by the trustee under the seventh clause of the will of William Brown.

William Brown died leaving a wife and two daughters, Mrs. Parker and Mrs. Griffith, and a son, Henry Howard Brown. After giving a pecuniary legacy to each child, he gave the residue of his estate to his wife for life, and on her death, by the seventh clause now in question, he bequeathed \$180,000 in trust, and the residue equally among his three children. His estate amounted to about \$400,000.

The trust created by the seventh clause is as follows: "Seventh. At the decease of my wife I give and bequeath to Joseph T. Brown of Boston and Henry A. Church of West Roxbury and to the survivor of them his heirs and assigns forever as joint tenants and not as tenants in common, in trust nevertheless for the uses and purposes herein specified to wit:—The sum of one hundred and eighty thousand dollars to hold and to take charge of the same to collect the rents, incomes, interest and profits thereof, and, after deducting all reasonable and proper charges and expenses, to pay over the said rents, incomes, interest and profits to my children Lucy Josephine Parker—Olivia Howard Griffith and Henry Howard Brown equally, annually or semi annually, as they may prefer during the term of their natural life and to divide after their decease the rest and residue of the trust premises aforesaid under their charge equally among my children then living, and the issue of any deceased child or children giving to the issue of any deceased child the share to which the parent if living would have been entitled."

The widow of the testator has since died, the trust provided for by the seventh clause was duly created, and the plaintiff is now the trustee under it. Mrs. Parker died in 1902, without issue. Mrs. Griffith is a widow with three children and no grandchildren, and the son, Henry Howard Brown, is alive and has a wife and a married daughter, who, with her husband, Thomas Earle White, and a child, Thomas Earle White, Jr., are also alive.

The clause in question is obscure, and in no event can receive a construction which is altogether satisfactory. Where property is

given to several for life, and then over at their decease, it has been held in some cases to go over together on the death of the survivor, and in other cases to be distributed piecemeal on the respective deaths of the life tenants. Where the gift over was a gift per capita, it was held in *Loring v. Coolidge*, 99 Mass. 191, that the words "at their death" took the fund over as a whole on the death of the survivor, and conversely, in *Dole v. Keyes*, 143 Mass. 237, 9 N. E. 625, it was held that, where the life tenancy lasted until the death of the survivor, the gift over was a gift per capita. But on the contrary, where the gift over is to the issue of the life tenants per stirpes, the words "at their decease" have been construed to be taken distributively, and to mean that the stock of each life tenant takes on the death of its ancestor. *Gardiner v. Savage*, 182 Mass. 521, 65 N. E. 851, following the English cases there cited, and those cited in *Loring v. Coolidge*, 99 Mass. 191, 192, to which may be added *Waldron v. Butler*, 22 Beav. 284, and *In re Lavernock's Estate*, 18 Jur. 304. These are general rules of construction. The question in each case is what was the intention of the testator, and this intention is to be gathered from the particular provisions and the general scheme of the will, having in mind the general rules of construction as aids.

In the case at bar the general scheme of the will was equality among the testator's children. He gave each child \$10,000 and an equal share of the residue, and in addition he provided against the possible improbvidence of his children by putting in trust the \$180,000 in question. In the clause in question it is provided that the "children then living" of the testator are to share in the distribution when it takes place. That negatives the fund being kept together for the joint lives of the three life tenants. Again, it is provided that the income is to be paid to the three "during the term of their natural life," and that the distribution is to be made "after their decease." That negatives the distribution being made on the death of the first life tenant to die. The use of the word "life" in the singular, if significant, tends to show that the testator was thinking of the life of each, and to make it probable that he used the words "at their decease" in a similar sense.

We have been asked by Mrs. White to construe the words "after their decease" to mean after "their decease without issue," and by the guardian ad litem of Thomas Earle White, Jr., to construe the clause, "equally among my children then living and the issue of any deceased child or children giving to the issue of any deceased child the share to which the parent if living would have been entitled," to mean "among my issue then living, such issue to take according to the stocks," or that the gift to and among "my children" should be construed to and among "the children of my children." But we can-

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not do that. To do so would be to guess at what the testator may have meant, instead of construing the words which he used.

Counsel for the son, Henry Howard Brown, have argued that the thing to be divided "after their decease" is the "rest and residue of the trust premises aforesaid," and that that provision is not consistent with a distribution of one-third on the decease of the first life tenant. But, on the other hand, little weight can be given to the words "rest and residue" in any event. If the provision "after their decease" is not taken distributively, the words "rest and residue" can have no effect, because there would be in that contingency but one distribution, and that one a distribution of the whole, either on the death of the first or the last of the three life tenants. If the words "after their decease" are taken distributively, these words have a meaning when applied to the second and third distributions, although they have no meaning in connection with the first.

The clause, "giving to the issue of any deceased child the share to which the parent if living would have been entitled," is on its face absurd when applied to the issue of the life tenant on whose death a distribution takes place of the share to the income of which it was entitled during its life. But when applied to the issue of a predeceased life tenant on the distribution of the share of the second or last life tenant (speaking of a life tenant's share in the sense stated above), it is intelligible. And, if it is taken to mean that in the distribution any issue shall be per stirpes in all cases, it is intelligible in all connections.

Looking at the clause as a whole, and to the general scheme of the will, and bearing in mind the general rules of construction already established in this connection, we are of opinion that each of the three children become entitled to the income of an undivided third of the trust fund during their respective lives; that on the death of each life tenant there is to be a distribution of the principal of the third to the income of which that life tenant was entitled during its life; and that that third is to be then distributed among the children of the testator then living and the issue of deceased children, including the issue of the life tenant whose share (in the sense stated above) is being distributed, such issue taking per stirpes. The objection to this construction is the treatment which is given by it to the issue of the life tenant whose share is being distributed, if that life tenant dies leaving issue. The general scheme of the testator is to treat the three children and their issue equally. And yet by this construction the issue who have had the misfortune to lose their ancestor have the added misfortune of seeing two-thirds of the principal of his share go to the other two life tenants, or those representing them per stirpes. The answer is that the representatives of the life

tenant in question will get an equal amount from the other two shares when they are distributed, and a more equal provision is made for grandchildren than there would be made for them if we were to hold that the whole trust fund is to be kept until the death of the last surviving tenant; for under that it would have to be held that the income went to the children of the testator until the distribution was made, leaving the children of deceased children of the testator unprovided for until then. And although a distribution of the whole on the death of the first life tenant who dies would insure equality, yet we do not feel at liberty to adopt that construction of the clause, in view of the fact that the distribution is "after their decease," and the trust is to last "during the term of their [the life tenants'] natural life."

Decree accordingly.

(184 Mass. 126)

MCDERMOTT v. BOSTON ELEVATED RY. CO.

(Supreme Judicial Court of Massachusetts.
Suffolk. Sept. 2, 1903.)

**STREET RAILROADS—INJURIES AT CROSSINGS
—CHILDREN—CONTRIBUTORY NEGLIGENCE—
FAILURE TO LOOK AND LISTEN.**

1. For a child $6\frac{1}{2}$ years of age to pass over a crosswalk leading from one side of a street to the other while on her way to school, through which street runs a street railway track, is not of itself negligence as a matter of law.

2. That plaintiff, a child $6\frac{1}{2}$ years of age, while on her way to school crossed a street on which a street railway was operated, at a crossing, when she could have seen a car approaching had she looked, failed to look or listen before attempting to cross, did not constitute contributory negligence as a matter of law, precluding a recovery for injuries sustained by her being struck by the car.

Exceptions from Superior Court, Suffolk County; Robert R. Bishop, Judge.

Action by one McDermott against the Boston Elevated Railway Company. From a judgment in favor of defendant, plaintiff brings exceptions. Exceptions sustained.

Francis P. Curran, for plaintiff. E. P. Saltonstall, for defendant.

BRALEY, J. At the time of the accident the plaintiff, a child $6\frac{1}{2}$ years of age, was on the crosswalk at the intersection of Highland avenue with Cherry street, in the city of Somerville; and as she was passing over the track of the defendant one of its cars struck her. The defendant offered no evidence at the trial, but at the close of the plaintiff's case asked the court to rule that she was not in the exercise of due care, and could not recover. The court so ruled, and the case is here on her exception to the ruling.

The plaintiff did not testify, but from the evidence set out in the exceptions it appears that she was on her way to school with other children. The schoolhouse, known as the "Burns School," was on Cherry street, which ran westerly from the westerly side of High-

land avenue, and to reach it the plaintiff, and other children from the same section of the city attending that school, would be obliged to pass over Highland avenue at the crosswalk that ran from the east side of the avenue to Cherry street. While walking with the other children, some of whom preceded her, as she came up to the crosswalk through which ran the track of the defendant, and when within six or seven feet of the rail, the car that struck her was about 140 feet distant, and in full view from the crossing. At that time the conductor in charge of the car, which was running at "a pretty good rate of speed," first saw her, and, while it would be obvious to any one in the motor-man's place that children were in the street and passing over the crossing, the gong was not sounded until the car was within 10 or 15 feet of the plaintiff, who does not appear to have either seen it coming or heard the gong. The children in front of her kept on walking over the track. She followed, and as she stepped on the rail the accident happened.

It cannot be held as a matter of law that for a child $6\frac{1}{2}$ years of age to pass over a crosswalk that leads from one side of a street to the other, while on her way to school, and through which runs the track of a street railway, is of itself negligence. The question is narrowed to the inquiry, ought the plaintiff, when she could have seen the car, to have looked to see if one was coming, and also to have listened for the sound of the gong before attempting to cross the street, and, she having failed to do so, must therefore be held to have been guilty of such contributory negligence as bars her recovery?

In the cases that from time to time have been before this court in which the due care of children of tender years, while travelers upon the public ways, has been discussed, it has been said that the child "is to be held to the exercise of that degree of care which may reasonably be expected of children of his age, or which children of his age ordinarily exercise." *Collins v. South Boston Railroad*, 142 Mass. 301, 314, 7 N. E. 856, 56 Am. St. Rep. 675, and cases cited. The principle is clearly defined, but the difficulty arises in its application to the facts of different cases, and it often becomes a matter of great perplexity and doubt to determine if the child is of such tender years that the rule cannot be held to govern, and the doctrine of imputed negligence as applied to the conduct of parents, or those intrusted with his care, must be invoked. A child may be so young in years that if allowed by his parents, or those having custody of his person, to go unattended on the highways, such conduct on their part would unhesitatingly be condemned by the average judgment of men as careless, and to be imputed to the child if he should thereby be injured. It was accordingly held that to allow a child $2\frac{1}{2}$ years old, unattended, to pass across a public street in a city,

and which was traversed by a horse railroad, was prima facie evidence of want of due care of those having him in charge. *Wright v. Malden & Melrose Street Railroad Co.*, 4 Allen, 233, 239. See *Butler v. New York, New Haven & Hartford Railroad Co.*, 177 Mass. 191, 53 N. E. 592; also *Cotter v. Lynn & Boston Railroad Co.*, 180 Mass. 145, 61 N. E. 818, 91 Am. St. Rep. 267.

But in *Lynch v. Smith*, 104 Mass. 52, 6 Am. St. Rep. 188, and in *Hayes v. Norcross et al.*, 162 Mass. 546, 39 N. E. 232, the plaintiffs being respectively 4 years and 7 months and 5 years and 6 months of age, on the facts disclosed it was said that the issues involved were, did the plaintiff possess that degree of intelligence and knowledge that he could properly be allowed to go alone through the street? and, if it was found that he did, then did he use such care as an ordinarily prudent and careful boy of his age is accustomed to use under like circumstances? "School children who are properly sent to school, unattended, must use such reasonable care as school children can. It must be reasonable and adapted to the circumstances, or, in other words, the ordinary care of school children." The case at bar falls within the law of these cases, and whether a child of the age of the plaintiff is sufficiently intelligent to be allowed to attend the public schools in the ordinary way, unaccompanied, as well as the degree of foresight required of and used by the plaintiff under the circumstances, as shown by the evidence, are to be determined as questions of fact. *Lynch v. Smith*, *ubi supra*; *O'Brien v. Hudner*, 182 Mass. 381, 65 N. E. 788. The evident willingness to take chances, and the accompanying spirit of recklessness on the part of the plaintiff, that appears in cases like *Messenger v. Dennie*, 137 Mass. 197, 50 Am. St. Rep. 295; *Mullen v. Springfield Street Railway*, 164 Mass. 450, 41 N. E. 664; *Morey v. Gloucester Street Railway Co.*, 171 Mass. 164, 50 N. E. 530; and *Sewell v. N. Y., N. H. & H. R. R. Co.*, 171 Mass. 302, 50 N. E. 541—are wanting in this case.

The relative rights of the parties in the use of the street are clear. The plaintiff had a right to the use of the street as a traveler for the purpose of going to school, equal to that of the defendant to run its cars therein as a common carrier of passengers. It is difficult to distinguish in principle this case from *O'Shaughnessey v. Suffolk Brewing Co.*, 145 Mass. 569, 14 N. E. 779. In that case a girl 8 years and 1 month old, while on her way to school, sat down on the edge stone of the sidewalk for the purpose of sharpening a slate pencil. She knew that there was much driving on the street, and did not at any time look to see if a wagon was coming. As she sat with one leg under her and the other leg projecting into the street, she was struck by a wagon belonging to the defendant and run over, and the question if at the time she was in the exercise of due care was held to have been properly submitted to

a jury. Here the plaintiff was properly on the crosswalk, where foot travelers crossing Highland avenue at that point would be, and had a right to rely on the presumption that the servants of the defendant, knowing the use of the walk by children going to the Burns School, would pay that regard to those lawfully in the street at that place which reasonable care and diligence required. It might be found that it would be childlike and natural for her to follow her companions, and to pay no close attention to surrounding conditions. For these reasons it cannot be said as matter of law that the plaintiff's failure either to look and ascertain if a car was coming, or to listen for the ringing of the gong, or to fully appreciate the possibility that cars passing the crossing would run at such speed that she might be struck before she passed over the track, was contributory negligence. *Plumley v. Birge*, 124 Mass. 57, 28 Am. St. Rep. 645; *Moyuiban, Adm'r, v. Whidden et al.*, 143 Mass. 287, 292, 9 N. E. 645; *McNeil v. Boston Ice Co.*, 173 Mass. 570, 54 N. E. 257; *Aiken v. Holyoke Street Railway Co.*, 180 Mass. 8, 61 N. E. 557.

Upon the evidence a jury could find that the plaintiff was in the exercise of such care as might be expected of the ordinarily prudent child of her age, and there must be a new trial.

Exceptions sustained.

(184 Mass. 112)

FINNIGAN et al. v. SHAW.

(Supreme Judicial Court of Massachusetts.
Suffolk. Sept. 2, 1903.)

SALE—CONDITIONS—RESERVATION OF TITLE —PAROL EVIDENCE.

1. Where certain hides were sold to defendant's pledgor by plaintiff through brokers, and the brokers' sale notes described an absolute sale without reservation of title on terms "four months notes, renewable at 6 per cent." which were given, parol evidence was inadmissible to show that under a previous agreement all hides delivered by plaintiff to such buyer were to be delivered under tanning contracts only, reserving title in plaintiffs until the hides were paid for, and that such was the intention of the parties.

2. Plaintiffs notified their brokers that subsequent deliveries of hides to C. & Co. should be made under tanning contracts, reserving title to the hides in plaintiff until paid for. C. & Co. assented to this arrangement, and thereafter hides were sold to C. & Co., tanning contracts being taken in some instances and not in others without objection from plaintiffs. A lot of hides was subsequently sold to C. & Co. by the brokers without taking tanning contracts therefor, under sold notes showing an unconditional contract of sale, and plaintiff testified that, though there had been no change in the arrangements for sales of hides to C. & Co., the brokers had authority to make the sale in question. Held, that the agreement between plaintiffs and C. & Co. only obligated them to give tanning contracts when required, and hence the sale in question was unconditional.

Report from Superior Court, Suffolk County; Edgar J. Sherman, Judge.

Action by John Finnigan and others against one Shaw. A judgment was rendered in fa-

vor of defendant, and the case reported. Affirmed.

Ferdinand A. Wyman and A. A. Wyman, for plaintiffs. Geo. W. Morse and Chas. R. Darling, for defendant.

MORTON, J. This is an action of tort to recover the value of 4,128 hides, alleged to have been converted by the defendant to his use. The chief question in the case is whether the sale of the hides was a conditional one, in which the title was not to pass till certain notes had been paid by the purchasers, or whether it was an absolute sale. The hides were sold through brokers to the firm of L. B. Clark & Co., and were subsequently pledged by them to the Philadelphia Warehouse Company, which assigned for value, in good faith, its interest to the defendant. At the close of the evidence the court ordered a verdict for the defendant, and at the request of the parties reported the case to this court. If the ruling was right, judgment is to be entered for the defendant; otherwise, such entry is to be made as justice may require.

We think that the ruling was right, and that there was no evidence that would warrant a finding that the sale was a conditional one. The plaintiffs are a New York firm, dealing in hides. L. B. Clark & Co. carried on a tannery at Kingman, Me. As already observed, the sale was made through brokers. The brokers gave to each party a sale note, stating the particulars and terms of the sale. The sale notes recited that Sands & Leckie, the brokers, had "sold for account Messrs. John Finnigan & Co. to Messrs. L. B. Clark & Co.," at the prices and on the terms named in the sale notes, the hides therein described. The terms were "settlement by four months notes of purchasers, buyers having privilege of extending time if required, adding interest for such additional time at rate of six per cent p. a. To be shipped to L. B. C. & Co., Kingman, Me." The hides were shipped from New York by the plaintiffs, as provided in the sale notes, to L. B. Clark & Co. at Kingman, Me. Upon their receipt, L. B. Clark & Co. sent to the plaintiffs their notes for four months, as provided in the terms of sale, and thereupon the plaintiffs sent to L. B. Clark & Co. receipts marked "Paid," and stating that L. B. Clark & Co. had bought of John Finnigan & Co. the hides described in them upon "terms as per contract dated 2-15-98," which referred to the sale note of the brokers, which was dated February 15, 1898. Neither the sale notes nor the receipts contained anything to show that the contract of sale was a conditional one. So far, it is clear, we think, that there is nothing in the transactions between the parties warranting a finding that the sale was not an absolute sale. L. B. Clark & Co. afterwards failed, and went into insolvency, and did not pay

the notes when they fell due, but those facts cannot affect the character of the sale, and it is not contended that they do.

The plaintiffs seek to avoid the transaction as we have stated it by evidence admitted in part, at least, *de bene*, and which they contend tends to show that the brokers had no authority to make the sale except as a conditional one, and that it was so understood and agreed to by L. B. Clark & Co. But we think that the testimony relied on does not support the plaintiffs' contention, and that, even if it did, it was inadmissible to vary the terms of the contract as expressed in the sale note accepted by the plaintiffs. The testimony tended to show that Sands & Leckie had previously acted for the plaintiffs as brokers in making sales to L. B. Clark & Co., and that in 1896 the plaintiffs wrote to Sands & Leckie, requesting them to take tanning contracts for any hides that should thereafter be delivered to L. B. Clark & Co. By tanning contracts were meant contracts under which L. B. Clark & Co. should tan the hides, but the property should remain in the plaintiffs till the hides were paid for. The letter was read to L. B. Clark & Co., and they assented to it. After this, as the uncontradicted testimony showed, in some of the sales to L. B. Clark & Co. tanning contracts were taken, and in some they were not, and no objection appears to have been made at any time by the plaintiffs that Sands & Leckie had not authority to make the sale when the provision in regard to tanning contracts was omitted from the sale note. We do not see, therefore, how the jury would have been warranted in finding that the brokers had no authority to make an absolute sale, notwithstanding one of them testified that there had been no change, since the receipt of the letter above, as to the arrangements there proposed in regard to the sale of hides to L. B. Clark & Co., and that it was always understood by L. B. Clark & Co., though sometimes omitted from the contract, that the plaintiffs never made positive delivery of the goods till paid for. Moreover, one of the plaintiffs testified that Sands & Leckie had authority to make the contract of February 15, 1898, which was the contract of sale for the hides in question. The most that the conversation, at or about the time of the sale, with one of the members of the firm of L. B. Clark & Co., testified to by one of the brokers, amounts to is an agreement on the part of L. B. Clark & Co. to give a tanning contract, if one was required; but none was required. If the brokers had authority to make the sale, then, inasmuch as the sale note contained the contract, and purported to set out an absolute sale, evidence tending to show that the sale was not an absolute one, but was a conditional one, was inadmissible, as tending to vary or contradict the written contract. *Cabot v. Winsor*, 1 Allen, 546; *Remick v. Sandford*, 118 Mass.

102; *Engelhorn v. Reitlinger*, 122 N. Y. 76, 25 N. E. 297, 9 L. R. A. 548. The fact that the plaintiffs supposed, if they did suppose, that the sale was subject to the condition in regard to tanning contracts, is immaterial. They accepted the sale note as it was, and are bound by the contract contained in it.

In accordance with the report, the entry will be, judgment for the defendant.

(184 Mass. 145)

SKEHILL v. ABBOTT et al.

(Supreme Judicial Court of Massachusetts.
Middlesex. Sept. 2, 1903.)

RESULTING TRUST—PURCHASE OF LAND—CONTRIBUTIONS TO PRICE—EVIDENCE—"ALIQUOT PART"—FINDINGS—REVIEW.

1. Plaintiff's deceased husband purchased certain land for \$2,500, of which plaintiff contributed \$1,000. It was understood at the time that plaintiff should have the benefit of the money contributed by her, and it was first suggested that her husband give her a mortgage therefor, but she insisted that her name should appear in the deed for her interest in the property. The husband, however, took the whole title in his own name, plaintiff being ignorant of the meaning of the instrument. *Held*, that such facts were sufficient to raise a resulting trust in plaintiff's favor for a two-fifths interest in the land.

2. Though a person who contributes a part of the purchase price of land is not entitled to enforce a resulting trust to the extent of his interest unless it be stipulated for an aliquot part of the property, such aliquot interest should be construed to mean a particular fraction of the whole, and is not limited to a case where the amount so contributed would be contained in the whole purchase price a certain number of times without remainder.

3. A finding of the trial court on conflicting evidence will not be reviewed on appeal.

Appeal from Superior Court, Middlesex County.

Bill by one Skehill against one Abbott, as administrator, and others. From a decree in favor of plaintiff, defendants appeal. Affirmed.

Vahey & Innes, for appellants. Lafayette G. Blair and Chas. J. Flagg, for appellee.

LORING, J. This is a bill in equity by a widow, who claims an undivided two-fifths interest in a parcel of land by way of a resulting trust. The title to the land was taken in the name of her husband, now deceased, but she contributed \$1,000 of the \$2,500 which was paid for it. The judge who tried the case found these facts: The plaintiff was 60 years old, was not able to read or write, and was ignorant of business methods and the meaning of legal instruments. It was understood between the plaintiff and her husband that she should have the benefit of the \$1,000 contributed by her to provide for her old age, and it was at first suggested that this should be effected by the husband's taking the title, and giving a mortgage to secure the payment of the \$1,000. This was abandoned on the husband's reporting that a lawyer who was consulted by him said that

there could be no mortgage between husband and wife. The plaintiff then said that she wanted her name to be in the deed, and this was agreed to by the husband. In addition to these facts found by the judge, there was evidence that the plaintiff not only stipulated that her name should appear in the deed, but what she insisted on was that it should appear in the deed for her interest in the property. The judge further found that, in place of keeping his agreement, the husband took the whole title in his own name, and the title remained in him until he died, and that although the plaintiff did not stipulate for an undivided two-fifths interest in terms, yet that was what was understood between the plaintiff and her husband, and it was on that understanding that she parted with her money. We are of opinion that this brings the case within *Hayward v. Cain*, 110 Mass. 273, and takes it out of *McGowan v. McGowan*, 14 Gray, 119, 74 Am. Dec. 668; *Snow v. Paine*, 114 Mass. 520; *Bourke v. Callanan*, 160 Mass. 195, 35 N. E. 460; and *Dudley v. Dudley*, 176 Mass. 34, 56 N. E. 1011. See, also, *Bancroft v. Curtis*, 108 Mass. 47; *McDonough v. O'Neil*, 113 Mass. 92.

The defendants contend that unless a plaintiff has stipulated for such a fraction as is contained in the whole without a remainder no resulting trust can be created; that is to say, if one person contributes \$500 where the purchase money is \$2,500, stipulating for an undivided fifth interest, a resulting trust is raised in his favor, but if he has parted with \$1,000 for the same purchase, stipulating for an undivided two-fifths interest, he would not be entitled to anything by way of a resulting trust. They arrive at this extraordinary conclusion by finding, first, that the court, in some of the cases cited above, has said that it is not enough for a plaintiff to have contributed to the purchase money, but he must have stipulated for an aliquot interest in the property; and then by finding that it is laid down in the dictionaries that the word "aliquot" means something contained in another a certain number of times without leaving a remainder. Whatever definition may be given in the dictionaries, the word "aliquot" was used in these opinions to mean a "particular fraction of the whole," as distinguished from a general contribution to the purchase money. To that effect see *McGowan v. McGowan*, 14 Gray, 119, 121, 74 Am. Dec. 668.

The other point made by the defendants is that the judge was wrong in his findings of fact. There was a direct conflict between the witnesses on the question whether the plaintiff's \$1,000 was lent to the husband, or was contributed for an interest in the property. The judge saw the witnesses, and heard the testimony of the plaintiff. It is enough that his decision was not plainly wrong. *Dickinson v. Todd*, 172 Mass. 183, 51 N. E. 976, and cases cited.

Decree affirmed.

(184 Mass. 123)

DUNCAN v. JACOBS.(Supreme Judicial Court of Massachusetts.
Suffolk. Sept. 2, 1903.)**CONTRACT—CONSTRUCTION.**

1. Plaintiff's contract to excavate for defendant preparatory for a building he was to erect for the city of B. provided: "Excavate all material, load and cart same to C. Road, * * * and there deposit same subject to and under the conditions of a contract between the city of B., and * * *." Defendant's "price for excavated material except loam to be 62½ cents per cubic yard. * * * The loam to be placed on lot as directed by * * *." Defendant's "price for loam so placed to be 25 cents per cubic yard." *Held*, that "price for excavated material" means price for material excavated and loaded and carted to C. Road, and that for excavating material other than loam, where it is left on the premises and used for back filling, no price is provided.

Exceptions from Superior Court, Suffolk County; Francis A. Gaskill, Judge.

Action by Charles Duncan against James H. Jacobs, doing business as John S. Jacobs & Son. A verdict was directed for defendant, and plaintiff excepts. Exceptions overruled.

The issues submitted to the jury, their answers thereto, and the parts of the contract between defendant and the city of Boston printed in the exceptions, are as follows:

"First. Was the plaintiff at all times ready and willing to cart all material excavated to the Columbia Road? Second. Was he prevented from so carting it by the defendant or his foreman? Third. What was a fair price per cubic yard for excavating said material?" The jury answered said issues as follows: First Issue. "Yes." Second Issue. "No." Third Issue. "27½ cents."

Parts of contract between John S. Jacobs & Son and the city of Boston:

"Sec. 2. General Directions. (h) Soil. All soil from within a line thirty feet outside of the walls of the building in all directions is to be removed and piled upon the lot as may be directed, for future use."

"Sec. 4. Excavations. (a) Do all excavating required for the basement, fanroom, boiler-room, foundation walls, piers, steps, cold-air ducts, drains, coalbins, and all other excavations and filling required to complete the building. The drawings show in general the required levels of cellar bottom and trenches and broken stone on basement floor, and of area walls and cellar walls and basement piers and foundations, etc.

"(b) Such work is to include digging for foundations of every sort, and for the area and yard and cellar cesspools, and drains from same, as shown. Excavations are to be nowhere less than 1 ft. 6 in. wider than the face of the wall on both sides. No leveling up with loose material under the foundation will be allowed to secure these levels.

"(c) For the trap wells for the dry drain at all outside walls and the filling above the same on the outside of all outside walls, and the dry well for the same and connection to

the sewer, for the waste drains into the sewer and for the boiler, blow-off tank and receiving tank and blow-off from inside of cellar walls into the sewer, for foundations for machinery and boilers, and for the trenches shown in the cellar to receive drains and ventilation fixtures. Also dig for entering gas, electricity, and water from the street mains.

"(d) Any material not needed for filling under basement to be stacked as directed.

"(e) Excavated materials to be used by the contractor in grading around the building, to finish grade as shown on drawing, or removed as directed by the architect."

"(h) Excavate for French drains to surround the building and in such other location inside the building as shown on plans. Said drain to be placed at a distance of about 4 feet outside the walls, to have average width of 3½ feet, and of such depth as shown on plans."

"(k) Provide clean gravel filling to bring the basement floors and all portions of the site to the proper grade, and remove any gravel not needed for the same."

Alonzo D. Moran, for plaintiff. J. A. Denison, for defendant.

MORTON, J. This is an action of contract to recover a balance alleged to be due to the plaintiff under a written agreement between him and the defendants for excavating certain material preparatory to the erection of a high-school building by them for the city of Boston. The plaintiff has been paid according to the contract for all the material excavated, except 2,443 cubic yards, and for that he has been paid at the rate of 27½ cents per cubic yard. The question is whether he is entitled, as he contends, to 62½ cents per cubic yard, which is the price named in the contract "for excavated material except loam," or to 27½ cents per cubic yard, as the defendant contends, which the jury have found to be a fair and reasonable price for excavating the material, and which, as already observed, the defendant has paid. The case is here on exceptions by the plaintiff to the ruling of the court directing the jury to find for the defendant. If the court erred in directing the jury to return a verdict for the defendant, then the plaintiff is to have judgment for \$353.05, with interest from the date of the writ.

The question is a narrow one, and the answer to it depends on the construction to be given to the contract. So much of the contract as is material is as follows: "Excavate all material, load and cart same to Columbia Road, between Mercer street, South Boston, and Mt. Vernon street, South Boston, and there deposit same subject to and under the conditions of a contract between the city of Boston, Mass., and said Jacobs & Son dated Oct. 20, 1898, to which reference is hereby made. * * * Price for excavated

material except loam to be sixty-two and one-half cents per cubic yard. * * * The loam to be placed on lot as directed by said Jacobs & Son and to remain the property of said Jacobs & Son. Price for loam so placed to be twenty-five cents per cubic yard." It is to be observed that the plaintiff was to excavate all material and load and cart it to Columbia Road. The material in question was excavated, but was not loaded and carted to Columbia Road. It was left on the premises, and was used for back filling. There was testimony tending to show that the plaintiff knew when he made his contract that it was not to be carted to the Columbia Road, and that, if it had been, the defendant would have had to cart other material to be used for that purpose. The plaintiff contends that "price for excavated material" means the same as "price for excavating material," and is limited to that, and to that alone. If this contention is correct, then, notwithstanding the contract requires the plaintiff to excavate all material and load and cart it to the Columbia Road, it omits to fix any price for the loading and carting, or for material excavated and loaded and carted to Columbia Road. On the other hand, if, as the defendant contends, the words "price for excavated material" mean the same as "price for material excavated and loaded and carted to Columbia Road," then the contract omits to provide a price for the case that has arisen, namely, for material, not loam, excavated, but not loaded and carted to the Columbia Road. There are objections to, and arguments in favor of, each construction. But it seems to us, on the whole, that the construction for which the defendant contends is the more reasonable. Two things are contemplated by that part of the contract which we are considering: First, that all the material except the loam shall be excavated and loaded and carted to the Columbia Road; secondly, that the loam shall be excavated and left on the premises where the defendant directs. It would seem natural that the prices that are fixed should relate to those two things, and that therefore the words "price for excavated material except loam," etc., is simply a compendious way of saying "price for excavated material except loam loaded and carted to the Columbia Road." This construction is fortified by the difference in price which would otherwise exist between excavating the loam and placing it where directed on the premises, and the price which would otherwise be established for excavating the other material. The only reasonable way of accounting for that difference, it seems to us, is that the price was intended to include and does include loading and carting it to Columbia Road, as well as excavating it. The answers of the jury to the questions that were put to them do not, it seems to us, throw any light on the construction to be given to the contract; neither, it seems to us, does that part of the contract between the

defendant and the city of Boston which is printed in the exceptions.

The result is that the exceptions must be overruled. So ordered.

(184 Mass. 115)

GOULD et al. v. CHAMBERLAIN et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. Sept. 2, 1903.)

WILLS—CODICIL—SUBSTITUTION OF LEGACIES
—EVIDENCE—TESTATOR'S CONDITION.

1. In proceedings for the construction of a will and for the determination of testator's intention as to whether certain legacies in a codicil were cumulative or substitutional, parol evidence that subsequent to the execution of the will and prior to the execution of the codicil testator was told by his attending physician that with good care he would live through the summer of 1900, and probably into the fall, and that he replied that in such case he would make greater inroads into the principal of his property; that he knew that he was living on a steadily diminishing income, and before the execution of the codicil consulted his executors as to whether his estate was sufficient to carry out the provisions of his will, and stated that he doubted the sufficiency thereof—was admissible.

2. Testator made certain bequests by will, and thereafter executed a codicil, beginning with the words "my estate real and personal, I bequeath as follows," after which he bequeathed certain legacies to the same legatees named in the will. At the time of executing the codicil testator knew that his income was steadily diminishing, and that it was doubtful whether his estate was sufficient to comply with all the provisions of the will, and testator's intention as to disposing of certain of his property by the codicil would be defeated, at least in part, if the legacies bequeathed in the codicil were regarded as cumulative. *Held*, that the legacies bequeathed in the codicil should be regarded as substitutional.

Report from Supreme Judicial Court, Suffolk County; Marcus P. Knowlton, Judge.

Bill by C. W. Gould and others against Helen Chamberlain and others for the construction of the will of Mellen Chamberlain, deceased.

The following is a copy of the will and codicil, excepting formal parts:

Will.

"I, Mellen Chamberlain of Chelsea, Massachusetts, make this as my last will and testament.

"I appoint Hon. Albert D. Bosson of said Chelsea, and Henry A. Tenney Esqr. of Everett, both in said Massachusetts, Executors of this my will, without sureties on their official bond.

"I direct that my body may be laid by the side of that of my late wife in the little private burial ground at Danvers, not far from where she was born, and that a marble slab like that over her grave may be placed over mine.

"My estate real and personal, I give and bequeath as follows: To Mrs. John Whitman my faithful housekeeper, five thousand dollars to be paid to her out of the first mon-

eyes that shall come into the hands of my executors out of my estate, and without delay for the final settlement of my estate.

"To my brother in law, Hale E. Crosby, my brother Henry Chamberlain, both of Three Oaks, Michigan, and to my brother William Chamberlain, of said Michigan, I give each one thousand dollars (\$1,000).

"To Mrs. Mattie Fielding, daughter of my brother in law, John M. Putnam, to Miss Alice M. Putnam, niece of my late wife and to Mrs. Sarah W. Fuller, sister of my late wife, all of Danvers Mass. I give each the sum of one thousand dollars (\$1,000).

"To my name sake Mellen Chamberlain Hatch, son of Rev. George B. Hatch formerly of Chelsea, to Miss Mary A. Jenkins, formerly of the Boston Public Library, to Miss Elisabeth Porter Gould of Boston and to Miss Mary F. Colesworthy of Chelsea, I give each the sum of five hundred dollars (\$500).

"To the City of Chelsea, Mass., I give my twelve bound volumes of real estate titles, a portfolio of real estate plans, a large photograph of the estate on which I now reside already in the Fitz Public Library) all of which plans and volumes may, if the trustees of said Library consent, may be deposited in said Library for public use.

"To the Massachusetts Historical Society, I give my incompleated manuscript (type written) history of Chelsea with the ten bound folio volumes of manuscripts, plans, engravings, photographs and materials used in the preparation of said history and may be useful in its completion, with the copy right of said history and the profits from the sale thereof. I hope to communicate to said society in a separate paper my views in respect to the completion of said history; but lest I fail to do so, I will say here that I wish to have the manuscript placed in the hands of a thoroughly competent person for completion and revision, to whom I give the largest discretion in respect to omissions, condensation, changes and additions, and for this purpose I give said society the sum of five thousand dollars (\$5,000) and a share of the residue of my estate as is later provided.

"To Dartmouth College in N. H. I give my Library of Printed volumes save as otherwise herein disposed of. And for rebinding, repairs and for placing in each volume a book plate—"The gift of Mellen Chamberlain, Class of 1844." I give said College the sum of five hundred dollars (\$500) and a share in the residue of my estate as herein after provided.

"To the Trustees of the Boston Public Library I give my collection of Manuscripts (save those herein before given to the Historical Society), autographs, portraits and photographs collected for illustrating said collection (as distinguished from those framed and now hanging on the walls of my house), personal and family papers, correspondence and genealogical manuscripts, together with

two bound sets of my own historical and literary papers. I also give to said Trustees the presentation copies of books or pamphlets, including those containing autographs of distinguished persons once owning them whether now in my own house or in my room in the Library. These matters may be generally be recognized (if books) by their having my book plate—"The Chamberlain Collection"—on the inside of the cover. This bequest is upon the condition set forth in my letter to said Trustees, Feb. 11, 1893, and accepted by their vote March 28, of the same year.

"To Charles P. Searle of Boston, I give an old arm chair which belonged to my late wife, the pencil sketch (framed) of the mansion in which she was born and in which we were married, and the oil painting by Richard H. Fuller, called the 'Rye Field.'

"To Alonzo P. Searle of Honesdale Pa. I give the sea piece (painting) by George Curtis, called 'After the Gale.'

"To Mrs. Henry A. Tenney of Everett, I give the painting by R. H. Fuller, called the 'Oak Grove'; and the engraving of 'A Capital picture by Gasper & Nicholas Poussin' to Mrs. Jeremiah C. Chamberlain of Chelsea. These last two articles are given in grateful remembrance of the kindness of these ladies to my wife in her last illness. To my brother Henry Chamberlain aforesaid, I give my set of the Massachusetts Historical Society's Collection of which a few volumes have always been missing.

"To my nephew, Paul Mellen Chamberlain, of Chicago, I give my set of the Proceedings of the Massachusetts Historical Society's

"To Walter H. Kilham formerly of Beverly, now of Boston, I give my gold repeater, No. 11761, Georges Robert, Locle.

"All the paintings, water colors, photographs, silver and personal effects of my late wife and of myself, I give to Mrs. John Whitman aforesaid, but in trust to distribute them according to directions signed by self and deposited with my executors; and in case she should be prevented from executing this trust I direct them to follow my wishes as in said paper set forth.

"All legacies in this my will lapse with the death of the legatee. All the rest, residue and remainder of my estate including lapsed legacies, I direct my Executors to sell and dispose of at private sale, or at public auction, as they may deem for the interest of the estate. When said residue and remainder are reduced to money I direct my executors to divide them into nine equal parts and pay to the following parties: To Mrs. John Whitman aforesaid one part; to Pembroke Academy Pembroke, N. H. two parts; to the Third Congregational Church, Chelsea, two parts; to the Massachusetts Historical Society, two parts; to Dartmouth College, N. H. one part; to Mary F. Colesworthy, Mrs. Henry A. Tenney, Miss Eliza-

beth Porter Gould and Paul Mellen Chamberlain all aforesaid, each one fourth part."

Codicil.

"I, Mellen Chamberlain of Chelsea, Massachusetts, make this codicil to my last will and testament, which was executed the twenty sixth day of March in the year nineteen hundred.

"By the courtesy of Honorable Albert D. Bosson of Boston, I substitute the name of Willis Gould of said Chelsea for that of said Albert D. Bosson as co-executor of Henry A. Tenney in the execution of my will aforesaid.

"My estate real and personal I bequeath as follows:

"To Mrs. John Whitman my faithful housekeeper, Three thousand dollars to be paid to her out of the first monies that shall come into the hands of my executors or to my estate and without delay for its final settlement and the further sum of two thousand dollars which shall first appear to be a residue thereof.

"To my brother in law, Hale E. Crosby, my brother Henry Chamberlain both of Three Oaks, Michigan, and my brother William Chamberlain of Jackson, said Michigan, eight hundred dollars each.

"To Mrs. Mattie Fielding, daughter of my brother in law, John M. Putnam, to Miss Alice M. Putnam niece of my late wife, and to Mrs. Sarah M. Fuller, sister of my late wife, all of Danvers, Massachusetts, the sum of eight hundred dollars each.

"To Miss Mary A. Jenkins formerly of the Boston Public Library, to Miss Elizabeth Porter Gould, of Boston, to Miss Mary F. Colesworthy of Chelsea, the sum of five hundred dollars each.

"To Miss Dora J. Murray, of Revere, the sum of one hundred dollars."

Boyd B. Jones and Frederick P. Cabot, for Henry Chamberlain and others. Solomon Lincoln and John Abbott, for respondents.

MORTON, J. This is an appeal from a decree of the probate court for Suffolk county upon a petition for instructions by the executors of the will of Mellen Chamberlain. The single justice who heard the case affirmed the decree, and reported the case to this court for its determination. The questions are whether certain legacies given in the codicil are cumulative or substitutional in respect of legacies given in the will to the same persons, and whether certain evidence admitted subject to the exceptions of the heirs at law was rightly admitted. We take up the question of evidence first.

1. The evidence objected to was that the testator knew, after August, 1898, which was before the date of the will, that he was living on a steadily diminishing income; that subsequent to the execution of the will, and prior to the execution of the codicil, he was

told by his attending physician that with good care he would live through the summer of 1900, and probably into the fall, and that he replied that in such case he would make greater inroads upon his principal than he had expected to; and that twice after the execution of the will and before the execution of the codicil he consulted one or more of his executors on the question whether his estate was sufficient to carry out the provisions of the will, and said on these occasions that he doubted whether his estate was sufficient to carry out the provisions of his will. It is well settled that the situation and circumstances of a testator may be shown in order to enable the court to put itself as near as may be in his place and ascertain what he intended to express by the language used. *Crocker v. Crocker*, 11 Pick. 252, 256; *Popkin v. Sargent*, 10 Cush. 330; *Morse v. Stearns*, 131 Mass. 389; *Boys v. Williams*, 2 Rus. & M. 690; *Martin v. Drinkwater*, 2 Beav. 215. If every word had only one meaning, and was incapable of being used or understood in any other sense, there would be no occasion for the introduction of such testimony. But language is far from having this certainty, and hence the necessity that, in order to correctly interpret it, the court should understand the circumstances under which and in reference to which it was used. A testator's declarations of his intentions are inadmissible, though logically they would seem to be the best evidence obtainable. They are excluded, however, by reason of the statute which requires wills to be in writing, and also of the rule that forbids the introduction of parol evidence to alter or vary written instruments. In the present case the evidence that was admitted was not evidence of statements by the testator of his intentions, but was evidence tending to show a knowledge and appreciation on his part of his situation and circumstances, and as such was clearly admissible.

2. The question whether the legacies in the codicil are to be regarded as cumulative or substitutional is one of intention. In *Wainwright v. Tuckerman*, 120 Mass. 232, 238, it is said that: "When legacies are given by different instruments, the general rule is that the second is to be treated as additional to the first, in the absence of anything signifying a different intention; but in this as in all other questions of construction of testamentary instruments the apparent intention of the testator must be the guide of the court." See, also, *Bates, Pet'r*, 159 Mass. 252, 257, 34 N. E. 268. Taking into account the evidence of the statements of the testator and his knowledge of his circumstances, it seems to us clear that the legacies in the codicil, so far as given to the same persons to whom legacies are given in the will, are to be regarded as substitutional, rather than as cumulative. It is not reasonable to suppose that he could have intended those legacies to be in addition to the legacies already given,

when he had, in effect, expressed his doubts whether the estate was sufficient to pay the legacies already given. The more natural interpretation of the codicil is that the testator intended it as the last and final expression of his purposes in regard to the persons named in it, and as taking the place, as far as it went, of the will. The codicil itself, it seems to us, bears out this construction. Although it begins by saying that it is a codicil to his last will and testament, and that is the general character of the instrument, it purports also to be a disposition of the whole estate, real and personal, of the testator, as is shown by the phrase, "My estate real and personal, I bequeath as follows," which is copied from the will. The reasonable explanation of this language is that the testator intended by it to signify that the legacies which follow were to be all that the several parties named were to receive out of his whole estate. Again, the language of the codicil is copied from corresponding clauses in the will, and this has been held to indicate an intention to substitute in such cases the second legacy for the first. *Suisse v. Lowther*, 2 Hare, 424, 432. Moreover, the words, "out of the first monies that shall come to the hands of my executors," in the will and codicil, and the words, "which shall first appear to be a residue thereof," in the codicil, which words are used in each instance in regard to the legacy to Mrs. Whitman, and the general scheme of the will, tend to show, we think, that it was the intention of the testator that the savings bank deposits, bonds, and other securities should constitute the fund from which the cash legacies should be paid. This intention would or might be defeated, in part at least, if the legacies given in the codicil are regarded as cumulative. It is no doubt true, as the heirs at law contend, that a codicil makes and changes a will only so far as the intention to do so is manifest. But, as already observed, we think that it was the intention of the testator to substitute the legacies given in the codicil for those given to the same persons in the will, and that this is manifest from the will and codicil and the evidence that was admitted. Very likely, if it had occurred to the testator, he would have said in so many words that the legacies given in the codicil were in substitution of those given in the will. But the fact that he did not do so, and that some of the cash legacies given in the will, including one to his namesake, are not referred to in the codicil, does not necessarily show that the legacies in the codicil must be regarded as cumulative in respect to those persons who are named in the will. If the case of *Wilson v. O'Leary*, L. R. (1872) 7 Ch. App. 448, relied on by the heirs at law, is to be regarded as laying down the rule as "a positive rule of law of construction" that "gifts by two testamentary instruments to the same individual are to be construed cumulatively

(page 454), then all that need now be said of it is that that is not the law here. But even in England there are cases which hold, as we do, that the question is one of intention (*Gillespie v. Alexander*, 2 S. & S. 145; *Martin v. Drinkwater*, 2 Beav. 215; *Frazer v. Byng*, 1 Rus. & M. 90), and that, where it appears that the second legacy was intended as a substitute for the first, it will be so construed (cases *supra*).

The result is that we think that the decree of the probate court should be affirmed. So ordered.

(184 Mass. 184)

CHAPIN v. PIKE et al.

(Supreme Judicial Court of Massachusetts. Middlesex. Sept. 17, 1903.)

CONTRACTS—ASSIGNMENT—EFFECT—RIGHTS TRANSFERRED.

1. During part performance of a contract for public works, \$1,590.90 was retained by the city to insure performance before the contractor assigned the contract to a surety, who continued the work until the construction was taken out of his hands by the city, and the contract relet. The whole amount so retained during performance by the contractor and his surety amounted to \$2,008.60, and the contract provided that the contractor assigned, transferred, and set over unto the surety the said contract, etc. *Held*, that the contract was a single entity, and that the assignment operated to transfer to the assignee the right to the money unpaid.

Appeal from Superior Court, Middlesex County; Henry N. Sheldon, Judge.

Action by one Chapin against one Pike and others. From a judgment discharging a trustee, plaintiff appeals. Affirmed.

Henry W. Winslow, for plaintiff. John L. Harvey, for trustee. Johnson & Johnson, for claimant.

LORING, J. This is an action brought by a creditor of the firm of H. H. Pike & Son to reach and apply, in payment of a debt due from them, the sum of \$2,008.60, which has been found to be due under a contract between the city of Waltham and said firm of H. H. Pike & Son. This sum of \$2,008.60 was found to be due in an action brought in the name of Pike against the city, which was before this court in *Pike v. City of Waltham*, 168 Mass. 581, 47 N. E. 437. The facts found in *Pike v. Waltham*, 168 Mass. 581, were not fully disclosed in the case at bar. More than that, the case at bar has to be disposed of on the meager facts as to the claimant's rights disclosed in the answer of the trustee. The record before us does not contain a claim made by the claimant which would have raised an issue of fact between him and the plaintiff. In the absence of such a claim, the question which arises is whether, on the facts disclosed in the answer of the trustee, the fund is due to the claimant. If it is, he must be discharged. *Fuller v. Storer*, 111 Mass. 281, 282; *Taylor v. Collins*, 5 Gray, 50, note; *Richards v. Stephenson*, 99 Mass. 311. From

the answer of the trustee in this action, it appears that in May, 1888, Pike & Son made a contract with the city of Waltham for the construction of a bridge, and that one Benshimol went surety on their bond for the performance of the work. It is stated in the answer of the trustee that it is "claimed" that Benshimol "carried forward the work and furnished materials after the death of" one partner and the physical disability of the other, and until the surviving partner was ordered to cease work by a written notice from the city. Apparently the Pikes ceased work on October 5, 1888, and more or less work was done by Benshimol until March 25, 1889, when the construction was taken out of the hands of the contractors under the contract by written notice, and the work of completing the bridge was relet on April 15, 1889, to another contractor. On November 19, 1888, the surviving partner of H. H. Pike & Son made the following assignment to Benshimol: "Know all men that I, Henry H. Pike, surviving partner of the firm of H. H. Pike & Son, lately consisting of myself and Henry E. Pike, who has deceased, for valuable considerations proceeding to me from Joshua Benshimol, do hereby assign, transfer, and set over unto said Benshimol the contract made in May, 1888, between said firm and the city of Waltham for the construction of the Prospect Street Bridge in said Waltham." It appears that by the terms of the original contract between Pike & Son and the city, payments were to be made monthly on account of work done; 15 per cent. of the amount due therefor being retained until completion of the whole work. The amount retained out of money due for work done prior to October 1, 1888, was \$1,590.90, and the amount retained out of money due for work done after October 1st, until the work was taken out of the hands of the contractors, was \$1,048.99. How the finding was arrived at that \$2,008.60 is the amount due under the contract does not appear; but, as it is less than the two sums mentioned above retained out of the monthly payments otherwise due, it is apparent that the whole \$2,008.60 is made up of sums so retained. It appears that the amount retained at the date of the assignment was \$1,686.57. The question presented is whether the assignment of the contract carries all sums due for work previously done under it, but retained until completion, to insure performance. The plaintiff argues that it does not, because an assignment of money due under a contract is not an assignment of the contract, and cites *Segee v. Downes*, 143 Mass. 240, 241, 9 N. E. 565; *Staples v. Somerville*, 176 Mass. 237, 57 N. E. 380; *Somers v. Kellher*, 115 Mass. 165. The other case relied on by the plaintiff is a case where it was held that there was no assignment either of the contract or of money due under it. *Keefe v. Flynn*, 116 Mass. 563. Of course, that is true. Of course, it is true that an assignment of what is due, or is to become due,

under a contract is not an assignment of both the duty of performing the contract and receiving payment therefor. By the very terms of that assignment, the benefit of the payment is separated from the burden of performance. But where the contract, as a whole, is assigned, there is no separation between the benefits and burdens. A contract is a single entity, and if it is assigned as an entity, and everything is concluded except the payment of certain money earned under the contract, the assignee is entitled to it.

Order discharging trustee affirmed.

(184 Mass. 140)

McKAY v. TOWN OF READING.

(Supreme Judicial Court of Massachusetts. Middlesex. Sept. 2, 1903.)

DEED—CONSTRUCTION—COMMON—ADVERSE USER.

1. A deed of "all the land now used as a common, containing two acres, more or less, lying between L. street, S. street, and A. street," means not so much of the land as is a common, but all of the land, and that it is a common.

2. The repeated use of a strip of an open common for driving or walking is the exercise of the right in a common, and does not make it a public highway by prescription.

Exceptions from Superior Court, Middlesex County; John H. Hardy, Judge.

Action by McKay against the town of Reading. Verdict for plaintiff. Defendant brings exceptions. Exceptions sustained.

Saml. K. Hamilton and Chester W. Clark, for plaintiff. M. F. Dickinson, Arthur P. French, and Walter Bates Farr, for defendant.

LORING, J. This is an action for personal injuries suffered by a traveler from tripping over an indentation or rut three to six inches deep in a walk, caused by the washing away of the surface of the walk by rain water. It appeared that the indentation or rut had been allowed to remain without being mended for some two weeks before the accident to the plaintiff. The defense set up was that the walk in question was part of a public common. If it was, the defendant is not liable. *Clark v. Inhabitants of Waltham*, 128 Mass. 567; *Lincoln v. Boston*, 148 Mass. 578, 580, 20 N. E. 329, 3 L. R. A. 257, 12 Am. St. Rep. 601; *Howard v. Worcester*, 153 Mass. 426, 427, 27 N. E. 11, 12 L. R. A. 160, 25 Am. St. Rep. 651. The accompanying plan shows the common in question. It is a triangular lot of land bounded by what are now Salem, Harnden, and Lowell streets. The plaintiff's contention is that what is called "Short Street" on the plan was a public way through the common, and included within its limits the walk in question on which the accident happened. It appeared that this lot of land was an ancient common, the fee being in the Old South parish, and that by an indenture dated August 4, 1853,

¶ 2. See *Highways*, vol. 25, Cent. Dig. § 5.

between the parish and the defendant town, it was conveyed to the town, and the inhabitants of the town covenanted that it should "be forever used by the town as a common." The defendant asked to have the jury instructed that there was no evidence that the walk where the plaintiff was injured was at the time of the accident part of one of the public ways within the town of Reading. This was refused, and the jury were instructed that the place where the accident happened was originally part of a public common, and that the defendant was not liable unless it had become a public way by prescription. The plaintiff now seeks to sustain the refusal to give this ruling by the contention that there was no evidence that Short street was ever part of the common. This contention is based on the fact that the premises covered by the indenture of 1853 are described as "all the land now used as a common, containing two acres more or less, lying between Lowell [now Salem] street, Salem [now Harnden] street, and Ash [now Lowell] street." She argues that the deed did not cover all the land between the three streets named in it, but only so much of it as was then used as a common, and that there was no evidence that the part marked "Short Street" on the plan was then, or had been previously, so used. But, in our opinion, that is not so. In our opinion, the deed is not a conveyance of so much of the parcel of land described as is used as a common. It is a deed of all of a certain parcel of land, which parcel of land is used as a common, and contains two acres, more or less, and lies between Lowell street, etc. Had there been any doubt of this being the true construction of the description of the premises covered by the indenture, it would have been dispelled by the covenant of the grantee that "the land south of the row of small trees south of the Old South Meeting House shall be forever used by the town as a common." It is stated in the bill of exceptions that "the row of small trees was situated on the southerly side of what was then called 'Lowell Street,'" and is called "Salem Street" on the accompanying plan. All land shown on the plan south of what is now Salem street is covered by the covenant, including the part marked "Short Street."

The presiding judge instructed the jury that the whole triangle, including the part marked "Short Street," had been formerly a common. In this he was, in our opinion, right. But he also told the jury that, if Short street had been used as a way continuously for 20 years prior to the enactment of St. 1875, p. 729, c. 163 (now Rev. Laws, c. 53, §§ 17, 18) adversely under a claim of right, it became a way by prescription. In this we think that he was wrong. There was no evidence of such user. All that appeared in evidence was that persons going from Union street to Woburn street, or vice versa, were in the habit of passing over that portion of

the common which is marked on the plan as "Short Street," and that they passed and re-passed over this portion of the common in carriages and on foot; that the wheel marks were where Short street is shown on the plan, and that persons on foot were in the habit of going just north of the wheel marks, where there is now a walk shown on the plan. There was no evidence that the defendant town ever had constructed or repaired what is marked as "Short Street" as a street for travel. It did appear that in 1883 or 1884 a curb was put round the easterly of the four lots shown on the plan, and that the path where the plaintiff was walking was within the curb. The plaintiff's contention is that the place where she was walking had become part of a highway by prescription, and what took place in 1883 or 1884 did not change its character. But so long as a common is open, in the absence of regulations to the contrary, it is the right of any member of the public to drive or walk across it, and his doing so will be taken to be the exercise of that right, and cannot be made the ground for a title by prescription in himself or in the public. The principle is one of which there is no question, and was applied by this court 70 years ago to the very point now before us in the case at bar. In *Emerson v. Wiley*, 7 Pick. 68, the defendant justified a trespass on the ground that the locus was a public highway, and undertook to show that it was so by evidence that it had been used by the public on foot, with cattle, horses, and carts, for more than 30 years. But it appeared that the land, when so used, was an open common, and it was held that under these circumstances there was no evidence of user as a highway. Wilde, J., in delivering the opinion of the court, said: "The passing over a training field or open common is no uncommon usage, and, however long it may continue, it will not convert a field or common into a public highway." See, in this connection, *Langley v. Mayor, etc., of Town of Gallipolis*, 2 Ohio St. 107; *Cohn v. Parcels*, 72 Cal. 367, 14 Pac. 26. See, also, *Sprow v. Boston & Albany Railroad*, 163 Mass. 330, 39 N. E. 1024. The plaintiff relies on the case of *Veale v. Boston*, 135 Mass. 187. That was a case where the city of Boston put a fence around Boston Common, and in doing so threw into Park street what had been up to that time part of the common. It then constructed over a part of this strip that portion of Park street which was wrought for travel by horses and carriages, and it constructed a sidewalk over the balance of it. It was held that 20 years' use of this strip as part of Park street, under these circumstances, made it a part of that public way. There was no such fencing out of a part of the common in the case at bar. There was a curbing put round that portion of the common north of Short street in 1883 and 1884. But that was after St. 1875, p. 729, c. 163, and it is ex-

pressly stated in the bill of exceptions that "the plaintiff did not claim any additional rights by reason of what the town did upon that walk in 1883 or 1884." On the contrary, the plaintiff's contention is that the use of Short street "as a connecting link between Union street and Woburn street, as shown upon the plan, must have been adverse." In our opinion, it was nothing more than the exercise of the right which the public had in an unfenced common, and the repetition of the use in one part of the common does not change the character of the use.

Exceptions sustained.

(184 Mass. 108)

LORING v. THOMPSON.

(Supreme Judicial Court of Massachusetts.
Suffolk. Sept. 1, 1903.)

WILLS—REQUESTS—ABATEMENT FOR DEFICIENCY IN ESTATE—INCREASE FOR INCOME.

1. Testator made bequests in trust to pay the income to A. and P. for life, with remainder over, and made a bequest to T. absolutely. The estate was insufficient to pay the legacies in full. T.'s bequest being of the principal, she, if the estate had been sufficient, would have been entitled at the end of a year only to the amount of the bequest, without interest or income. Rev. Laws, c. 141, § 24, provides that, if income is given in trust for the benefit of a person for life, she is entitled to receive it from the death of the testator. *Held* that, in determining the amounts which shall proportionately abate because of the deficiency, there is to be added to the bequests in trust, not interest thereon, but the amount of income the trust funds would have produced for the year succeeding testator's death, had they been invested by a trustee; the assets not having been invested as income-producing funds.

Case Reserved from Supreme Judicial Court, Suffolk County; Henry K. Braley, Judge.

Bill by Augustus P. Loring, executor and trustee, against Caroline A. Thompson, for instructions in the matter of the will of Mary S. B. Thompson, deceased. Case reserved for the full court. Decree rendered.

Augustus P. Loring, in pro. per. John Noble, for respondent.

KNOWLTON, C. J. The testatrix, by her will, gave \$30,000 to trustees, to hold and invest, and pay the net income thereof to Charlotte S. Averill for life, and the remainder to others; \$15,000 upon the same terms to the same trustees for the benefit of Amy S. C. Perry for life, with remainder over; \$5,000 absolutely to Caroline A. Thompson; and the residue to Charlotte S. Averill. The estate is insufficient to pay these legacies in full. If the estate had been sufficient, one life tenant would have been entitled to the income of the fund of \$30,000 from the death of the testatrix, the other to the income of the fund of \$15,000 from the same time, and the trustee would have had the principal of each of these funds, to be held for future payments. *Sargent v. Sargent*, 103 Mass. 297, 299; *West-*

cott v. Nickerson, 120 Mass. 410; *Kinmonth v. Brigham*, 5 Allen, 270, 278; *Ayer v. Ayer*, 128 Mass. 575; Rev. Laws, c. 141, § 24. Caroline A. Thompson also would have been entitled to \$5,000 at the expiration of a year from the death of the testatrix. These are all general legacies, and, because of the deficiency of assets, they abate in equal proportions. *Bancroft v. Bancroft*, 104 Mass. 226; *Babbidge v. Vittum*, 156 Mass. 38, 30 N. E. 77. In considering these proportions, we must take into account the fact that each of the funds held in trust is to be increased by the income that it would earn in one year, in order to ascertain the amount that would belong to it at the time when the \$5,000 would be payable to Caroline A. Thompson. If the income on these funds were computed at the rate of 4 per cent. per annum, and if the estate had been sufficient to pay these legacies in full, the first trust fund, with its accrued income at the end of a year, would have been \$31,200, the second trust fund, with its accrued interest, would have been \$15,600, and the legacy to Caroline A. Thompson would have been \$5,000, making the aggregate \$51,800. At the end of a year from the death of the testatrix, when the estate was so far settled that the money could be paid over to the legatees, the amount available in the hands of the executor was \$47,000. Estimating the income on this basis, the several legatees are entitled to share this sum in the following proportions, namely: The trustee is to have $\frac{1200}{11800}$ of it for the first fund, he is to have $\frac{1500}{11800}$ of it for the second fund, and Caroline A. Thompson is to have $\frac{5000}{11800}$ of it.

An important question is whether the beneficiaries of the trust funds are to have income reckoned at the rate of 6 per cent. per annum, or at a lower rate. It is a fact of common knowledge that not so large an income as this can ordinarily be obtained from safe investments. Formerly this question was not of much practical importance, and was not often considered. Whenever interest is to be allowed for the failure to pay a legacy at the time when by the terms of the will it is payable, or for any other neglect to pay money, the law knows no other rate than 6 per cent. per annum. *Welsh v. Adams*, 152 Mass. 74, 25 N. E. 34, 9 L. R. A. 244; *Loring v. Massachusetts Horticultural Society*, 171 Mass. 401, 50 N. E. 936; *Bartlett, Petitioner*, 163 Mass. 509-521, 40 N. E. 890. Indeed, interest on a pecuniary legacy from the time when it becomes due is allowed, as incident to the principal demand, and is not imposed upon the executor for his neglect. *Kent v. Dunham*, 106 Mass. 586. So it was held in the case just cited that evidence to justify or excuse the executor in not paying the legacies at an earlier date was immaterial. A fundamental question in cases like the present is whether the income to which the beneficiary is entitled from the death of the testator is to be treated strictly as in-

come, or is to be brought within the law which allows interest as an incident to the failure to pay a debt which is due. There is much in favor of the proposition that it is income actually received, or that would have been received if the money had been invested in the usual way. The statute implies this. *Rev. Laws, c. 141, § 24.* So do some of the decisions. *Loving v. Minot*, 9 Cush. 151; *Pollock v. Learned*, 102 Mass. 49; *Ayer v. Ayer*, 128 Mass. 575. In *Edwards v. Edwards* (Mass.) 67 N. E. 658, where the creation of a fund to include the whole residuum of the estate was necessarily postponed for a considerable time to enable the executors to convert the property into income-producing securities, it was held that, for the purpose of apportionment of the fund between the life tenant and the remaindermen, the proportions should be ascertained upon the basis of the income that actually would have been obtained from the fund if it had been properly invested immediately after the death of the testator, rather than upon the basis of interest upon the fund at 6 per cent. before the property was converted. We are of opinion that it is better to hold, in reference to such funds, that the income to which the legatee is entitled from the death of the testator is the income actually obtainable, and not interest at an arbitrary statutory rate. Of course, if the principal of the legacy is payable to a trustee, it is due at the end of a year from the death of the testator, if there is nothing in the will providing otherwise, and interest at the legal rate goes with it, as an incident, from that time. So on pecuniary legacies to a wife or minor child, for whom no other means of support is provided, interest at the legal rate runs from the death of the testator. *Pollard v. Pollard*, 1 Allen, 490; *Welsh v. Adams*, 152 Mass. 74-78, 25 N. E. 34, 9 L. R. A. 244. But in a case of this kind the principal of the legacy cannot be paid at the death of the testator, and ordinarily a considerable time must elapse before an executor can be appointed, and assets can be collected from which to make payment. During this time, until the principal becomes payable, the beneficiary is entitled to the income, merely, which means the amount that the fund earns if it is properly invested; and, if not, the amount that it would have earned if so invested. In *Bartlett*, Petitioner, 163 Mass. 509-521, 40 N. E. 809, the legatee was allowed income at the rate of 6 per cent. per annum; but the question whether he should receive that, or the income which might have been actually earned, was not discussed or particularly considered either by counsel or by the court. If it had been, we are of opinion that the result would have been different. *Loring v. Massachusetts Horticultural Society*, 171 Mass. 401-404, 50 N. E. 936, although somewhat analogous, did not involve the precise question which we are now considering.

In the present case it does not appear that

the assets from which the trustee will be paid were invested as income-producing funds, so that the actual income of either fund can be ascertained. We are therefore of opinion that the income which was received by the executor while he was administering the property should be treated as a part of the general assets for division. The case will then stand for a hearing upon the question what income the trust funds would have produced during the year immediately following the death of the testatrix, if they had been invested by a trustee, and, when that is determined, the proportions in which the whole balance should be divided will be ascertained upon the principles stated above. If income would have been earned at the rate of 4 per cent. per annum, then the fractional shares of each will be those hereinbefore stated; if at a different rate, they will be varied accordingly.

So ordered.

(184 Mass. 92)

BENT v. STONE.

(Supreme Judicial Court of Massachusetts.
Middlesex. Sept. 1, 1903.)

POOR DEBTORS—ACTION ON RECOGNIZANCES— BREACH—EVIDENCE—RECORDS—AMEND- MENT—CONTRADICTION—PLEADING.

1. In an action on a poor debtor's recognizance for breach of condition to deliver himself up for examination, it is a fair inference that he did not submit himself for examination from evidence that no notice or information thereof came to plaintiff, or his counsel, or the officer holding the execution.

2. The superior court, in an action on a recognizance taken by a special justice of the district court, may allow the introduction into the case of an amendment of the records of the district court, made by the special justice, which, as such, he had power to make, showing that the recognizance was taken by him while holding court in the absence of the standing justice, so that he had authority to take it.

3. The record of a court may not be contradicted by a letter of the judge thereof.

4. It will be assumed, in an action on a poor debtor's recognizance, that there was an oath or affidavit justifying the issuing of the certificate of arrest, though the record of the court issuing it is imperfect in respect thereto, it not appearing that no oath or affidavit was made, it being agreed that four executions were issued, and that the arrest was made on the fourth, and that a certificate of arrest was made by the justice of the court, and attached to the alias or second execution, and that a copy of the certificate, certified by the clerk of the court from which the execution on which the arrest was made was attached to the execution, and it not appearing that objection was made by the debtor, when arrested, that the arrest was unlawful because there was no oath or affidavit.

5. In an action on a poor debtor's recognizance, the return on the execution that the debtor was duly arrested and admitted to bail is conclusive, so that it cannot be shown that there had been an escape, which continued when the recognizance was taken. Any remedy of the surety is an action against the officer for a false return.

6. A poor debtor's recognizance reciting that, whereas he has been arrested on execution by virtue of Pub. St. 1882, c. 162, is not void be

cause making no reference to amendments of the statute, even if they materially affect his rights, the statute as amended being complied with, as the statute referred to must be taken to be the statute as amended, amendments constituting a part of the statute amended.

7. It is not necessary that a poor debtor's recognizance, taken by a special justice, or the declaration in an action thereon, state the facts which gave such justice jurisdiction; Rev. Laws, c. 160, § 41, providing that, when a special justice holds the court or an inquest, the facts which gave him jurisdiction shall be entered on the general records of the court, but need not be stated in the record of the case heard by him.

Report from Superior Court, Middlesex County; Frederick Lawton, Judge.

Action by one Bent against one Stone. There was a finding for defendant, and the case is reported. Judgment for plaintiff.

Wm. Reed Bigelow, for plaintiff. Chas. F. Choate, Jr., for defendant.

MORTON, J. This is an action upon a poor debtor's recognizance. The breach relied on is that the debtor "did not appear and submit himself to examination according to the terms of said recognizance." The case was tried by the court without a jury. The answer set up, amongst other things, that the signature of the defendant to the recognizance was obtained by fraud and deception practiced on him by the debtor; that the true nature of the recognizance was concealed from him, and that its obligation was not explained to him; all of which it is alleged was fraudulently known to and consented to by the plaintiff. The court found that no deception was practiced, and that the defendant understood the nature of the recognizance. The court also found as a fact that there had been a breach of the recognizance. At the conclusion of the whole case the court found and ruled that the plaintiff could not recover, and refused the rulings asked for by the plaintiff, and found for the defendant. The plaintiff duly excepted to the refusal of the court to give the rulings requested. The case is here on a report by the presiding justice: "If upon the foregoing evidence [i. e., the evidence contained in the report] the court was not justified in finding a breach of the recognizance, judgment is to be entered for the defendant. If on the foregoing evidence as it stood, or as it would stand after striking out any evidence objected to and inadmissible, the plaintiff was entitled to recover, judgment is to be entered for the plaintiff in the sum of \$400 and interest from the date of the writ, if the plaintiff is entitled to it; otherwise judgment is to be entered on the finding for the defendant."

The first ruling requested by the plaintiff was that: "If the court finds that John Berry [the debtor] did not deliver himself up for examination, as required by the condition of his recognizance, then upon all the evidence the plaintiff is entitled to recover as matter of law." This covers the whole

case, and, in the view which we take of the case, it is unnecessary to consider particularly the other rulings requested by the plaintiff. Without going into the evidence in detail, we deem it enough to say that it seems to us clear that it justified the finding that there was a breach of the recognizance. If the debtor had submitted himself for examination, it is reasonable to suppose that some notice or information of that fact would have come to the knowledge of the plaintiff, or his counsel, or the officer holding the execution. It is a fair inference from the evidence that no such notice or information was received, and therefore that the debtor did not submit himself for examination as required.

The recognizance was taken by the first special justice of the First district court of Eastern Worcester at Westborough, but it does not show that it was taken by him while holding court in the absence of the standing justice. It was agreed that the only docket entries of that court in reference to the case were as follows: "Case No. 40, 1896. Russell S. Bent vs. John Berry. July 29, 1896. Ex'on filed and oath; notice issued, ret. Aug. 10, '96. Aug. 10, neither party appeared. July 14, 1897, Ex'on r't'd for renewal." And, relying upon *Stack v. O'Brien*, 157 Mass. 374, 32 N. E. 351, the defendant contends that the recognizance is invalid. The special justice had no authority to take the recognizance, except while sitting as a court in the absence of the standing justice, and that fact should appear of record. *Stack v. O'Brien*, supra. *Com. v. Fay*, 151 Mass. 380, 24 N. E. 201. But at a former trial the special justice had been allowed, on his motion, to amend the records of the court as they appeared in relation to the taking of the recognizance by stating that he was present and holding court on account of the absence of the standing justice, and at his request. It was within the power of the court to allow this amendment (*Com. v. Carney*, 153 Mass. 444, 27 N. E. 9; *Com. v. Quirk*, 155 Mass. 296, 29 N. E. 514; *Dewey v. Peeler*, 161 Mass. 153, 36 N. E. 800, 42 Am. St. Rep. 399), and the record, as thus amended, must be taken to be the true record, and to show that the recognizance was properly taken. The special justice did not derive the power to amend the records of his court from the action of the superior court. As special justice he had that authority. The only effect of the motion and its allowance was to introduce the amendment into the pending case. Whether the motion should be allowed was a matter within the discretion of the presiding justice, and it must be presumed that he found that the record had been or should be amended as set forth. In addition to this, there was also a certificate from Mr. Fowler, who had subsequently been appointed justice of the court, certifying to a copy of the record which contained the same things. The letter of Mr.

Fowler, if offered for the purpose of contradicting the record, was inadmissible. *May v. Hammond*, 146 Mass. 439, 15 N. E. 925.

The defendant also contends that the record of the district court shows that no oath or affidavit was made which justified the issuing of a certificate of arrest. The record is imperfect in respect to this matter, as well as in respect to the issuing of the certificate. But it is agreed that four executions were issued, and that the arrest was made on the fourth. It is also agreed that a certificate of arrest was made by the justice of the court, and attached to the alias or second execution; and that a copy of that certificate, duly certified to by the assistant clerk of the municipal court of Boston, from which the execution issued, was attached to the execution on which the arrest was made. It does not appear that no oath or affidavit was made, and no objection seems to have been taken by the debtor, when arrested, that the arrest was unlawful because there was no oath or affidavit. We think that it must be assumed that there was such an oath or affidavit. The annexing of the copy of the original certificate to the execution was in accordance with the statute. *Rev. Laws, c. 168, § 20.*

The defendant further contends that there had been an escape, which continued at the time when the recognizance was taken, and that the recognizance was invalid for that reason. In reference to this evidence was admitted against the objection and exception of the plaintiff, which tended to show the following facts: When arrested and taken before the special justice, the debtor desired an opportunity to give bail. Thereupon the justice directed a constable of Westborough, who was not qualified to serve civil process, to take the debtor to an adjoining town to obtain bail, and he did so, and returned to the courtroom with him. Upon his return the debtor was placed in the dock, and then admitted to bail. The deputy sheriff who made the arrest retained the execution all the time, and was present when the justice directed the constable to take the debtor to the adjoining town to enable him to procure bail, and also when the constable returned with the debtor, and the latter was placed in the dock, and admitted to bail. There was testimony tending to show that, after the justice had directed the constable to take the debtor into his custody, and go with him to get bail, the deputy sheriff exercised no further control or restriction over the debtor, and assumed no further responsibility in reference to him. The deputy's return on the execution was as follows: "Worcester—ss. January 22, A. D. 1898. By virtue of this execution, and for want of goods or estate of the within-named John Berry (and by virtue of the certificate hereto annexed), I have arrested the body of the said John Berry, and brought him before the First district court of Eastern Worcester at Westborough, and he was admitted to bail. Francis D. Newton,

Deputy Sheriff." It would seem that what took place constituted, or might have been found to constitute, an escape. *Benton v. Sutton*, 1 B. & P. 24; 2 *Davis*, At. 622; 2 *Bacon's At.* 513. If the arrest had been on mesne process, it might have been different. *Stevens v. Jackson*, 6 Taunt. 106. But the plaintiff contends that the evidence tending to show an escape was improperly admitted, and that it was inadmissible because contradicting the return. And in this we think that he is right. The return is conclusive, as between the parties and their privies, that the debtor was duly arrested, and duly admitted to bail. If the defendant has any remedy, it must be in an action against the officer for a false return. *Simmons v. Richards*, 171 Mass. 281, 50 N. E. 617, and cases cited. The recognizance is dated January 22, 1898, and recites that: "Whereas, the said John Berry has been arrested on execution * * * by virtue of the one hundred and sixty-second chapter of the Public Statutes of said commonwealth, and desires to take the oath for the relief of poor debtors: * * * Now if the said John Berry shall * * * deliver himself up for examination, * * * giving notice of the time and place as in said statute provided," etc. And the defendant still further contends that the recognizance is void because taken under a statute which had been amended in particulars essentially affecting his rights, and there is no reference to the amendatory statutes. *St. 1888, p. 465, c. 419; St. 1889, p. 1127, c. 415.* But we think that the statute referred to must be taken to be the statute as amended. *Pub. St. 1882, c. 162*, had no force or effect except as amended. The amendments constituted a part of it (*Fitzgerald v. Lewis*, 104 Mass. 495, 41 N. E. 637), and the reference to the Public Statutes was sufficient. It is not contended that the statute, as amended, was not complied with. We have assumed, without deciding, that the amendments materially affected the defendant's rights.

It is suggested that there was a variance between the pleadings and the proof, and one of the requests of the defendant was that the court should so rule. We do not think that there was any variance. It was not necessary that the recognizance should state the facts which gave the special justice jurisdiction, or that they should be set forth in the declaration. It was sufficient if they appeared of record (*Rev. Laws, c. 160, § 41*); and they did so appear upon the amended record.

We have considered all the objections argued by the defendant, and the result is that we think that the plaintiff is entitled to recover, and we do not see why he is not entitled to interest from the date of the writ. See *Whitehead v. Varnum*, 14 Pick. 523. In accordance with the terms of the report, the entry will be: Judgment for the plaintiff for \$400 and interest from the date of the writ.

So ordered.

(203 Ill. 505)

WILLIAMS et al. v. SPITZER.*

(Supreme Court of Illinois. June 16, 1903.)

TRUST DEEDS — FORECLOSURE — LANDS EM-BRACED — APPEAL — JURISDICTION — QUESTION OF FREEHOLD — MASTER'S REPORT — CONCLUSIONS OF LAW — EXCEPTIONS — NECESSITY.

1. A suit to foreclose a trust deed, involving the sole issue whether certain lots are subject to the lien of the deed, does not involve a freehold, within the statute regulating appeals.

2. An owner of land sold a number of lots to J. The contract provided that he should give warranty deeds on the payment of the purchase price, stipulated that J. might obtain a deed to any one or more of the lots on the payment of specific amounts for each lot, and declared that his default in payment of the purchase price should work no forfeiture of lots previously conveyed or contracted for by him, and that purchasers from J. might obtain a deed from the owner on payment to him of the amounts fixed for the respective lots. J. sold two lots to W., who made a part cash payment, and executed his notes for the balance, and entered on the premises, made improvements, and there resided. A year later W. made another payment to J., who had paid to the owner, on the purchase price on all the lots, a much larger amount than the sums paid by W. to him. Subsequently the owner and J. changed the contract, and pursuant to its terms the owner conveyed the property to J., who executed a trust deed as security for the purchase price. The lots purchased by W. were paid for in full to J., who had paid the owner a much larger sum. Afterwards the owner executed deeds conveying the lots to the heirs of W. The latter had no actual notice of the trust deed. A third person became the owner of the deed. *Held*, that the two lots were not subject to the lien of the deed.

3. Exceptions to the opinions of a master on propositions of law are unnecessary.

Error to Appellate Court, First District.

Suit to foreclose a trust deed by Sherman C. Spitzer against Annie Williams and another. From a decree of the Appellate Court (98 Ill. App. 146) reversing a decree in favor of defendants, they appeal. Reversed.

John C. Trainor, for plaintiffs in error.
Oliver & McCartney, for defendant in error.

CARTWRIGHT, J. On May 7, 1889, John G. Earle executed a contract for the sale of, over 200 lots in Elsdon, in Cook county, to August Jernberg, for \$40,000. Jernberg gave his five promissory notes for the purchase price; two being for \$5,000 each, payable in one and two years, and three being for \$10,000 each, payable three, four, and five years after date, respectively. The notes drew interest at 6 per cent., with 8 per cent. after due. Earle agreed to convey the lots by warranty deed on payment of the consideration, and it was provided that Jernberg might obtain a deed to any one or more of the lots on the payment of specific amounts, with interest thereon, for each lot; the rates for lots on Millard avenue being fixed at \$175 each. It was intended that Jernberg should sell lots, and the contract provided that, in case of his default in payment, such default

should work no forfeiture of lots previously conveyed or contracted for by him, and that the purchasers might obtain deeds from Earle on payment to him of the amounts fixed for the respective lots they might have purchased from Jernberg, with interest thereon. Edward Williams had been in possession of lot 9 in block 7, on Millard avenue, since March, 1887, as a tenant of Earle; and on May 27, 1889, he bought said lot and the adjoining lot 10 from Jernberg for \$550, taking a contract for a conveyance. He paid \$150 cash, and gave four notes, of \$100 each, payable in one, two, three, and four years, respectively, with interest. Williams took possession of both lots as purchaser, and continued to occupy the cottage on lot 9, and used lot 10 as a garden. He made improvements on the premises amounting to about \$200. A year later, on May 7, 1890, he had paid \$100, besides the cash payment and the interest due, making \$250 and interest paid on the lots. Jernberg had paid Earle \$5,000 on the purchase money, and the interest on the whole amount then due; and on that day, by mutual agreement, Earle and Jernberg changed their arrangement, and agreed to take up the contract, and that Earle should convey the property to Jernberg, who was to secure the unpaid purchase price by trust deed. Earle conveyed the lots, except a few which had already been conveyed; and Jernberg executed a trust deed to John Milton Oliver, as trustee, securing his notes, amounting to \$35,000, in the same amounts and due the same as under the original contract. Williams was in possession of the lots purchased by him, and was living in the house. The full purchase price of the lots was paid to Earle. Williams died February 3, 1893, leaving the plaintiff in error Annie Williams, his widow, and the plaintiff in error Ella Williams, his adopted daughter. All taxes on the lots from 1890 to 1898 were paid by Edward Williams or plaintiffs in error. Earle delivered to plaintiff in error Annie Williams a deed to lot 9, and to Ella Williams a deed to lot 10, both dated May 27, 1889, acknowledged June 5, 1893, and delivered and recorded August 5, 1893. Plaintiffs in error had no actual notice of the trust deed. Jernberg paid the first two notes, of \$5,000 and \$10,000, respectively, secured by the trust deed, and paid \$5,000 on the third note, due May 7, 1893, and the interest. The trust deed contained provisions for releasing lots sold by Jernberg and paid for, which were similar to those in the contract. It appears from the abstract that some lots were released, but it does not show what lots, or how many. Sherman C. Spitzer, defendant in error, became the owner of the notes secured by the trust deed, and, together with John Milton Oliver, the trustee, filed a bill in the circuit court of Cook county to foreclose the trust deed; making plaintiffs in error defendants, with others. Plaintiffs in error answered the bill, setting up the purchase and their pos-

*Rehearing denied October 7, 1903.

¶ 1. See Courts, vol. 12, Cent. Dig. § 570.

session of the lots, and disputing that the lots were subject to the lien of the trust deed, or that they ought to be sold to satisfy the unpaid notes. The issue was referred to a master in chancery, who took the evidence and reported the same, with his conclusion that the lots were subject to the trust deed. He recommended a decree including them in a sale to satisfy the balance due. The court entered a decree finding that the objections of plaintiffs in error to the report were well taken, and ought to be sustained, and that the trust deed was not a lien on the lots, and dismissing the bill as to plaintiffs in error and as to said lots. The other premises subject to the trust deed were sold, and there was a deficiency of \$1,000, for which a personal decree was entered against Jernberg. On appeal by the defendant in error, the branch Appellate Court for the First District reversed the decree as to said lots, and remanded the cause, with directions to enter a decree ordering them sold to satisfy the deficiency.

It is first contended by plaintiffs in error that the Appellate Court had no jurisdiction of the appeal from the circuit court, for the reason that a freehold was involved. The sole issue was whether the lots were subject to the lien of the trust deed, and there was no pleading which involved a question of title. The question whether the lien attached to these lots did not involve a freehold. *Van Meter v. Thomas*, 153 Ill. 65, 38 N. E. 1036.

Jernberg purchased all the lots from Earle under a contract by which he acquired an absolute right to a conveyance upon complying with the contract on his part. The contract provided for sales by Jernberg, and secured certain rights to the purchasers of lots from him. When Williams bought lots 9 and 10 from Jernberg in pursuance of the terms of the original contract, he became, in equity, the owner of the lots, subject to the rights of Earle and Jernberg, under the contracts. *Lombard v. Chicago Sinai Congregation*, 64 Ill. 477. He had a right to rely on the terms of the contract between Earle and Jernberg, which was duly recorded, and, by the terms of his contract with Jernberg, had a right to a deed on payment of \$550, conditioned that Jernberg should pay to Earle \$350, with interest, or \$175 and interest for each lot; and, in case of default of Jernberg, Williams would be entitled to a deed from Earle on the payment of \$175 for each lot, with the interest thereon. Earle and Jernberg could not, by any subsequent arrangement to which Williams was not a party, vary or affect his rights in any way. He was in possession as purchaser when the arrangement was changed, and the title was conveyed to Jernberg, and the unpaid purchase price was secured by the trust deed. Earle was bound to make inquiry as to the rights of Williams, and is chargeable with all information which he would have obtained by such inquiry. The

open and visible possession of land by the equitable owner is sufficient to charge a mortgagee with notice of the rights of such owner, and the mortgagee will take the lien subject to the rights of the person in such possession, whatever they may be. *Harris v. McIntyre*, 118 Ill. 275, 8 N. E. 182; *Joiner v. Duncan*, 174 Ill. 252, 51 N. E. 323. Defendant in error occupies the same position as Earle. The possession of Williams was notice that he was purchaser of the lots from Jernberg for \$550; that he had paid \$250 of the purchase price, and would be entitled to a deed upon the payment of the remainder of such purchase price if Jernberg paid Earle for those lots. Any inquiry would have informed Earle of these facts, and he was bound to take notice of them when he made the conveyance and took the trust deed. At that time Jernberg had paid to Earle \$5,000 of the principal and the interest then due. It does not appear what particular money had been paid to Earle, or that it was the same money paid by Williams, but it was not necessary to trace the particular bills or identify the money so paid. We think that, in equity, Williams was entitled to have his \$250 regarded as included in the money paid. The lots owned by Williams were paid for in full to Jernberg, and the most that Earle could claim under the trust deed, in any event, would be the balance of \$300, with the interest thereon. After the trust deed was executed, Jernberg paid \$20,000 of the principal and interest on the remainder—many times the amount necessary to pay for the lots—and the trust deed provided for the release of lots upon payments of specific sums. In our opinion, it would be inequitable to apply the payments of these large sums in such a way as to leave these lots subject to the trust deed, in view of the circumstances and the provisions of the contract and trust deed. Under the contract, which could not be changed by Earle and Jernberg, so as to affect the rights of Williams, without his assent, Williams became entitled to a conveyance of the lots upon payment to Jernberg, on condition that Jernberg should pay the amount to Earle. The purchase price of the lots was paid to Jernberg, who paid, in all, \$20,000 to Earle. We think that the price of the lots should be included in the payments made to Earle, and that the lots did not remain subject to the lien of the trust deed.

It is urged by defendant in error that plaintiffs in error are bound by the master's report, because no exceptions thereto were filed in the trial court. The decree recites the sustaining of objections by the court to the master's report, but no exceptions appear in the files. It is not necessary that there should be any exceptions to the opinions of the master upon questions of law, or his recommendations relating to such questions. Exceptions must relate to findings of fact, and exceptions are not necessary to raise the

question whether the findings of fact justify a particular decree.

We conclude that the Appellate Court was wrong in reversing the decree of the circuit court. The judgment of the Appellate Court is reversed, and the decree of the circuit court is affirmed. Judgment reversed.

(203 Ill. 553)

**CHICAGO HAIR & BRISTLE CO. v.
MUELLER.***

(Supreme Court of Illinois. June 16, 1903.)

SERVANT—INJURIES—VICE PRINCIPAL—NEGLIGENCE—PROXIMATE CAUSE—ASSUMPTION OF RISK—QUESTIONS FOR JURY—INSTRUCTION.

1. The mere fact that the assistant foreman of defendant company engaged in some labor as a common workman did not, as matter of law, make him any the less a vice principal.

2. Whether or not the negligence of defendant's assistant foreman in leaving a pile of bales of hair, six bales high, in such condition that they leaned over, the top bale extending half the width of a bale over the bale at the bottom, was the proximate cause of injury to plaintiff, an employe, caused by the fall of the bales, *held*, under the evidence, to be a question for the jury.

3. Whether plaintiff assumed the risk *held*, under the evidence, to be for the jury.

4. Where the only effect of the lack of clearness in an instruction was to lessen its force and directness, and decrease its value to the cause of the appellee, appellant could not complain.

Appeal from Appellate Court, First District.

Action by S. Mueller against the Chicago Hair & Bristle Company. From a judgment of the Appellate Court (106 Ill. App. 21) affirming a judgment for plaintiff, defendant appeals. Affirmed.

F. J. Canty and J. O. M. Clow, for appellant. Francis J. Woolley, for appellee.

BOGGS, J. The action below was in case by the appellee against the appellant company to recover damages for a personal injury inflicted, as it was alleged, by the actionable negligence of the servants of the appellant company. Judgment in the sum of \$8,500, awarded the appellee, was affirmed by the Appellate Court for the First District on appeal, and a further appeal in the same behalf has brought the case to this court.

The court refused to grant a motion, entered by the appellant company at the close of all the evidence, peremptorily directing the jury to return a verdict in its favor, and this action of the court is assigned as for error. The appellant company was engaged in the business of buying, baling, and selling hair and bristles. The hair was assorted according to quality, and pressed into bales, each of which was about 5 feet long, 3½ feet wide, 2½ feet thick, and of an average weight

of about 500 pounds. The appellant company maintained a shed 140 feet long and 40 feet wide, covering a single large storeroom, in which the bales of hair were stored. In its length the shed extended from north to south, and it was provided with a large double door, 12 feet wide, at either side, making a passageway east and west through the building of the width of 12 feet. The bales of hair were piled in rows, six bales in height, reaching from either side of the passageway to the north and south ends of the building, leaving a passageway 12 feet in width through the shed from east to west. In forming these rows of bales it was the custom to begin either at the north or south wall, and to place the first bale in the bottom of the pile a distance of 21 inches, being half the width of the bale, from the wall. The bale in the next layer of bales in the row would be laid so as to overlap the last bale in the bottom layer about 3½ or 4 inches, and the bale at the end of each successive layer of bales was so placed as to extend the same distance beyond the other toward the wall, until the last bale at the top of the pile would rest against the wall. A row of posts supporting the roof of the shed extended along the center of the storage room from north to south. Eight rows of bales could be piled on the floor of the building from east to west, four rows being on the east side of the posts and four on the west. These rows were numbered from 1 to 8, beginning at the east side of the shed or warehouse. On the day when the appellee was injured, the south end of the wareroom was full of bales of hair. The appellant company desired to remove from storage and ship a car of bales of a certain quality. The bales containing the hair of the quality needed were at the south end of rows 5 and 6, in the south end of the warehouse, and in order to reach them rows 3 and 4 were removed, making an opening to the passageway between the large doors at the center of the sides of the building. A switch track ran along the south end of the warehouse. There was a platform along the switch track at the southeast corner of the warehouse, from which a runway extended to the large door in the center of the east side thereof. Appellant's assistant foreman, Hermes, climbed to the top of rows 5 and 6, and proceeded to throw down upon the floor the bales that were to be shipped, and other employes of the appellant company would move them to the main passageway, where they were weighed and marked, and from thence other employes of the company trucked them along the runway and loaded them on the car. The appellee was in the employ of the appellant company to work in what is called the "hair field"—a place outside the shed or warehouse where the hair was received, assorted, and baled. On the day he received his injury he was transferred by the appellant company from the hair field, and ordered to wheel or truck the

*Rehearing denied October 7, 1903.

†1. See Master and Servant, vol. 34. Cent. Dig. § 452.

bales of hair that were to be shipped from the east door of the shed along the runway to the platform by the side of the switch. He worked there, trucking the bales, until about 3 o'clock in the afternoon of that day, when Mr. Sprafske, another of appellant's employes, who was engaged in moving the bales of hair which appellant's assistant foreman, Hermes, had thrown down from rows 5 and 6, at the south end of the warehouse, to the scales, fell sick, and appellee was ordered to take his place and do the work in which Mr. Sprafske had been employed. Appellee was engaged in this work until about 5 o'clock in the evening, when Hermes supposed a sufficient number of bales had been thrown down to fill the car. Hermes came down from the piles and went out to the car. Appellee and one Heinlein brought four or five bales to the scales, leaving two bales which had been thrown down by Hermes lying between the south wall of the warehouse and the south ends of rows 5 and 6 of the bales. Hermes, who was at the car, directed the appellee and Heinlein to go into the warehouse and bring those two bales. Weingart, chief foreman of the appellant company, reiterated the order. The appellee and Heinlein re-entered the warehouse, and went to the south end, brought out one of the bales, marked it, put it outside the warehouse, and went back for the other bale. The appellee took hold of the bale lying on the floor and placed it on its edge, when several bales from the end of row 6, which had been left there six bales high and overhanging the bottom bales a distance of some 21 inches, fell upon him and inflicted the injuries for which judgment for damages was awarded.

Counsel for appellant company do not contend that Hermes was not guilty of negligence in leaving row 6 with the topmost bale thereof overhanging the lower bales of the row, and also overhanging the two bales which he had removed from the rows and thrown down upon the floor; but their insistence is, that the court should have declared, as matter of law, that the appellant company was not liable to answer in damages to the appellee for three reasons, viz.: First, because, as they insist, Hermes, though usually, in the absence of Weingart, head foreman of the appellant company, a "sub-boss" and on many occasions exercising that authority, was on that day, Weingart being present, but a fellow servant of the appellee; second, that the negligence of Hermes was not the proximate cause of the injury, and hence not actionable, however negligent it might have been; and, third, the court should have directed a peremptory verdict on the ground that the condition in which the bales at the end of row 6 were left by Hermes was open and obvious to the appellee, and the dangers thereof, if any, were apparent and patent to him, and therefore it must be held, as a matter of law, that he assumed the

risk of continuing to engage in work in such a dangerous place.

The evidence showed that Hermes held the position of assistant foreman to the appellant company; that he hired and discharged employes; that he gave orders to appellee and other employes; and the evidence tended to show that on the day in question he had charge and control of the work of getting the bales out of the warehouse, and that he occupied a position of superiority to appellee and the other workmen. The mere fact that Hermes engaged in some labor as a common workman did not, as a matter of law, make him any the less a vice principal. *Pittsburg Bridge Co. v. Walker*, 170 Ill. 550, 48 N. E. 915; *Chicago & Alton Railroad Co. v. May*, 108 Ill. 288. It was a question of fact whether he sustained the relation of fellow servant to the appellee.

The trial court could not declare, as a matter of law, that the negligence of Hermes, the assistant foreman, was not the proximate cause of appellee's injury. When the assistant foreman came down from the pile of bales and went outside of the warehouse to the car, which was about five minutes before the appellee was injured, he left the south ends of rows 5 and 6 of the bales in the following condition, according to his own testimony, viz.: "Two or three bales were at the bottom of the first row from the post (row 5). The next pile (row 6) was six bales high. In the second row from the post (row 6) the first pile of bales was straight up, six high, and no bale at the bottom. The piles leaned over to the south. The top bale was half the width of a bale over the bale at the bottom. A bale was three feet six inches wide." Hermes directed appellee to return to the warehouse and get two more bales, which were upon the floor, or under the end of row 6. It was from the second row west of the posts (row 6) that the bales fell which struck and injured the appellee. Reasonable prudence and foresight would have suggested to any person of ordinary intelligence and common experience that the bales of hair so overhanging the floor at the top of row 6 would likely fall to the floor, and that the probable result would be an injury to any one standing near or beneath the overhanging bales. At least it was a question of fact, and not of law, whether the injury received by appellee was such as would likely follow from the manner in which the bales were left in row 6 by the assistant foreman. An act or omission is to be regarded as the proximate cause of an injury when, under all the attending circumstances, a person of ordinary prudence would have foreseen that the act or omission would probably result in the infliction of an injury on some one. 1 *Thompson on Negligence*, § 50; *Armour v. Golkowska*, 202 Ill. 144, 66 N. E. 1037. If the negligent act and the injury are known, by common experience, to be usual in consequence, and the injury such as is liable, in

the ordinary course of events, to follow the act of negligence, it is a question of fact for the jury whether the negligence was the proximate cause of the injury. *Chicago & Alton Railroad Co. v. Pennell*, 110 Ill. 435; *Armour v. Golkowska*, supra; *West Chicago Street Railroad Co. v. Feldstein*, 169 Ill. 139, 48 N. E. 193.

The circuit court also correctly refused to declare that, as a matter of law, the appellee had assumed the risk of the injury which he received. The peril was not one of the ordinary dangers of his employment. It was extraordinary and exceptional, and existed because of the negligence of the master. Extraordinary perils arising from the negligence of the master are not assumed, unless they are known and voluntarily encountered, or are obvious and expose the servant to dangers so imminent that an ordinarily prudent man would anticipate injury as so probable that, in view of it, he would not, even upon the order of the master, continue in the performance of his employment under like circumstances. *Swift & Co. v. O'Neill*, 187 Ill. 337, 58 N. E. 416; *Chicago & Alton Railroad Co. v. House*, 172 Ill. 601, 50 N. E. 151; *Wood on Master and Servant*, § 387. It appeared from the evidence that in the center of the south end of the building, at a distance of 11 feet from the floor, there was a window 2 feet and 11 inches square, and that there was no other window in the south half of the building; that the light admitted by the doors in the center of the warehouse was obstructed by the bales of hair piled up to the height of about 15 feet; that the injury was received at about 5 o'clock in the afternoon of a cloudy day; that the south end of the warehouse was filled with dust from the bales of hair which had been thrown down; and that the overhanging bales at the top of the sixth row were some 4 feet or more above the small window which admitted the only light that could come into that portion of the warehouse. The testimony of the appellee and of other witnesses was to the effect that one coming into the warehouse from without could scarcely distinguish any object until the eyes had adjusted themselves to the dusky light therein, and appellee and his fellow-workman, Heinlein, testified that they had not been in the warehouse long enough for their eyes to become adjusted to the light before the bales of hair fell upon the appellee. To what extent the conditions which constituted the danger to which appellee was exposed were apparent and open to his observation required careful consideration of the facts and circumstances disclosed by the proof. His experience and knowledge arising therefrom, or the lack of experience and knowledge, were also important facts for the consideration of the jury. Whether the appellee knew of the danger, or whether it was so open and obvious that he should be chargeable with such knowledge, could not be de-

termined as a matter of law. It was a question of fact for the jury.

The complaint preferred against instruction No. 3 given for the appellee is that it seems to be based on an exposure of the appellee to a danger not usual in his employment, and that the instruction is "confusing, muddled, and complex." The evidence fairly presented to the jury the question whether the danger to which the appellee was exposed and by which he was injured was incident to his employment, or whether it was unusual or extraordinary. Phrases introduced in the instruction for the evident purpose of making it clear to the jury that no assumption as to the truth of any contested question of fact was intended, operated to detract, to some extent, from the clearness of expression; but the only effect was to lessen the force and directness of the charge, and decreases its value to the cause of the appellee. The case for appellant was in no manner prejudiced thereby.

We do not think instruction No. 5 given in the same behalf is justly open to the criticism that it assumes that the piles of bales of hair were not left in a reasonably safe condition by the assistant foreman. The phrases which were incorporated in instruction No. 3 for the purpose of negating any imputation of an assumption of a matter of fact, and which provoked the contention that they served to render the instruction "confusing, complex, and muddled," are not to be found in instruction No. 5, and the omission forms, in the main, the ground of complaint to it. It is suggested that the instruction proceeds upon the theory it was negligence to order the appellee to go back after the bales of hair, and is erroneous for the alleged reason there is no evidence that such order was negligently given. The order was given. The evidence disclosed facts and circumstances on which the appellee relied to constitute the act of giving the order to be negligence, and the instruction did no more than to submit the question to the jury to be decided from the evidence before them.

The objection to instructions Nos. 6, 7, and 8, that they were confused and involved in form, structure, and language, is not entirely groundless. We are inclined to think the lack of clearness caused thereby may have tended to obscure the meaning of the instructions and to detract from their force; but we are unable to perceive that they were in any respect rendered misleading to the prejudice of the appellant company. The criticism of instruction No. 8, so far as it relates to the doctrine of the assumption of risks by a servant, has been answered by what we have said hereinbefore relative to that principle of the law.

There is no error in the record that justifies the reversal of the judgment, and it must be, and is, affirmed.

Judgment affirmed.

(203 Ill. 536)

CHICAGO SCREW CO. v. WEISS.*

(Supreme Court of Illinois. June 16, 1903.)

SERVANT — INJURIES — DEFECTIVE MACHINERY — EVIDENCE — SUFFICIENCY — NEGLIGENCE — ASSUMPTION OF RISK — INSTRUCTIONS — MINORS — RIGHT TO EARNINGS — SUBSTITUTION OF PARENT INSTEAD OF SISTER AS NEXT FRIEND.

1. In an action by a servant for injuries caused by a loosened lever in a machine for finishing screws, because of which plaintiff's hand dropped down on a set of revolving knives, the evidence considered, and *held* to support a finding that the defendant was negligent, and that its negligence was the proximate cause of the injury.

2. Evidence considered, and *held* to support a finding that plaintiff did not assume the risk.

3. The assumption of an uncontroverted fact in an instruction is not reversible error.

4. In an action by a servant for injuries from defective machinery, an instruction that if the jury believed the machine exposed plaintiff to danger, and defendant had knowledge of the danger, and that plaintiff was young and inexperienced, and did not appreciate the peril, it was defendant's duty to warn plaintiff of the danger, and if it failed to give such warning, and in consequence thereof plaintiff was injured without any lack of care on his part, defendant should be held liable, was not objectionable as not requiring the jury to find that defendant was guilty of negligence as a condition precedent to a verdict against it.

5. In an action by a minor servant for injuries, evidence of loss of earnings was admitted without objection. The suit was prosecuted by plaintiff in the name of a sister as next friend, and after verdict a motion was entered by her for leave to withdraw, and a motion was presented by plaintiff's father to be appointed as his next friend. Both were granted, and all the papers in the case were amended so as to designate the father as next friend. *Held* proper, so as to rebut the presumption that the father was entitled to plaintiff's earnings.

Appeal from Appellate Court, First District.

Action by John Weiss, by next friend, against the Chicago Screw Company. From a judgment for plaintiff, defendant appeals. Affirmed.

F. J. Canty and J. C. M. Clow, for appellant. Darrow & Thompson, for appellee.

BOGGS, J. The appellant company by this appeal questions the correctness of the judgment entered in the Appellate Court for the First District (107 Ill. App. 39), affirming the judgment of the circuit court of Cook county awarding the appellee damages in the sum of \$3,500 for personal injuries received by reason of the negligence of the appellant company. The alleged errors for which it is thought the Appellate Court should have reversed the judgment of the circuit court are (1) the refusal of the circuit court to direct a peremptory verdict in favor of the appellant company, and (2) giving to the jury instructions Nos. 1, 2, and 3 at the request of the appellee.

At the time of the injury the appellee, a youth then of the age of 17 years, was engaged, as an employé of the appellant com-

pany, in the work of operating a machine by which the heads of screws were shaped and finished. The screws were placed in a part of the machine called a "chuck," or holder, which chuck was so moved by an eccentric as to bring one side of the head of the screw in contact with a set of rapidly revolving wheels or knives, by which that portion of the head of the screw was shaped and finished. The chuck or holder was then moved backward by means of a lever or handle, and the screw turned so that the reverse side of the head thereof would be presented to the revolving wheels or knives to be shaped and finished. This handle or lever, in moving the chuck back, passed over the wheels or knives, and at a distance of $3\frac{1}{2}$ or 4 inches above them. It was the duty of the appellee to put the screws into the chuck or holder and to move the lever or handle forward and back. The machine worked automatically, and was set to finish 250 screws per hour. This made it necessary that the appellee should pull the lever or handle across the plate, over and above the wheels or knives, four times each minute. It was necessary that he should move the lever or handle with his left hand. While so engaged one of the fingers of his left hand came in contact with the wheels or knives, and the injury was inflicted for which the recovery of damages was awarded. Appellee began working on this machine on the afternoon of Monday, the 18th day of February, 1901, and had never worked on such a machine before. He worked that afternoon, and was injured at 8 o'clock on the morning of the next day. The testimony tended to show that one of several screws which fastened the lever or handle in place had fallen out, and two other of such screws had become loose, and that the appellee called the attention of the foreman to the fact that the lever was loose; that the foreman examined the lever, and told the appellee it was "all right," and to go on with his work; that by reason of the lever being thus out of repair it was caused to suddenly "stick" or stop while appellee was moving it above the wheels or knives, causing his hand to slip from the handle or lever down on the revolving wheels or knives.

Discussion and argument are wholly unnecessary to demonstrate that the evidence tended to show that the appellant company was guilty of negligence, and that such negligence was the proximate cause of the injury. Nor did the court err in refusing to hold, as matter of law, that the appellee assumed the risk of injury. The appellee knew of the defective condition of the lever or handle. The defects interfered with the working of the lever, and the appellee notified the appellant's assistant foreman. This representative of the appellant company inspected the lever, and told the appellee that it was "all right," and to "go ahead with the work." The case was that both master and

*Rehearing denied October 7, 1903.

servant knew of the defect. If the servant did not also know that the defect subjected him to the danger of injury, he would not be deemed to have assumed the risk, unless in the exercise of ordinary judgment and discretion he should have comprehended the danger. *Consolidated Coal Co. v. Haenni*, 146 Ill. 614, 35 N. E. 162; *Union Show Case Co. v. Blindauer*, 175 Ill. 325, 51 N. E. 709. The youth and inexperience of the appellee, the effect upon his mind of the assurance of the foreman, whom he had the right to regard as possessed of superior knowledge and judgment, that the machine was "all right," and the direction of the foreman given to him to "go ahead" with the work, were elements to be considered in determining whether he ought to be charged with knowledge of the danger arising or likely to arise from the defective machinery. It was a question of fact, to be determined by the jury, whether the appellee had such understanding and appreciation of the peril to which the defect in the fastening of the lever exposed him as to defeat his right of recovery, on the ground he had assumed the risk of continuing to work with the machine. Whether a servant had assumed the danger which he encountered is ordinarily a question of fact, and only becomes a question of law when but one conclusion can be drawn from the evidence by all reasonable minds. *Browne v. Siegel, Cooper & Co.*, 191 Ill. 226, 60 N. E. 815.

Instruction No. 1 given for the appellee declared, in the abstract, the doctrine that it is the duty of the master to provide reasonably safe machinery for the use of the servant, and to use reasonable care to keep such machine in a reasonably safe condition. The complaint that the instruction was likely to be understood by the jury to assume that the machine was defective is entirely without foundation. There is no such assumption declared or to be implied from the instruction. Moreover, Mr. Tilton, assistant foreman of the appellant company, testified that the lever of this machine would stick occasionally, and that such sticking was caused by the screws working loose, allowing the lever to drop, and rub a little harder on the pin, and catch and stick. There was no controverting proof. That the machine was so defective was not a controverted issue of fact; hence it would not be deemed error of reversible character, had the instruction proceeded upon the assumption that such was the fact.

The objection to instruction No. 2 given at the request of the appellee is that it "does not require the jury to find the defendant was guilty of negligence at all." The effect of the instruction was to advise the jury that if they believed, from the evidence, that the machine at which the appellee was working exposed him to danger, and that the appellant company or its foreman had knowledge of the danger and peril to which the appellee was thus exposed, and that the appellee was

young and inexperienced, and did not understand and appreciate the dangers or perils which attended upon performance of the work, it was the duty of the appellant company to warn or give notice to the appellee of such dangers, and that if the appellant company failed to give such notice or warning, and in consequence thereof the plaintiff was injured without any lack of ordinary care for his own safety on his part, the appellant company should be held liable to respond in damages. The right to recover was plainly made to depend on the state of the proof as to the alleged duty of the appellant company to warn and advise appellee and as to the alleged breach of the duty.

Instruction No. 3 given for the appellee was intended to enlighten the jury as to the elements of damage proper to be considered in case they found for the appellee. The loss of earnings while incapacitated from work was included as an element of damages. The appellee was a minor, and his father was alive, and it is urged that the right to recover compensation for his services and labor was in his father, and hence it is urged that the instruction was erroneous. The appellant company, without objection, permitted proof to be introduced as to the ability of the appellee to earn wages, and did not seek to raise the question of the right of the appellee to receive his earnings until after the verdict of the jury had been returned. The question was first raised in the motion for a new trial. The suit was instituted and had been prosecuted to verdict in the name of the appellee, by Rose Weiss, his sister, as his next friend. A motion was entered by said Rose Weiss for leave to withdraw as next friend of the appellee, and another motion was presented by Franz Weiss, his father, to be appointed as his next friend. These motions were granted, and Rose Weiss withdrew her appearance as next friend, and the father of the appellee was substituted in her stead, and he appeared in open court and accepted the appointment. An order was entered ratifying and affirming the acts of the former next friend, and authorizing the *præcipe*, summons, declaration, and all papers in the case to be so amended as to designate the said father as the next friend of the appellee, and such amendments were accordingly made.

The parent may relinquish his right to the earnings of his child, and that he has done so may be inferred from the conduct of the parent (21 Am. & Eng. Ency. of Law [2d Ed.] 1059); and the prosecution of a suit in the name of the child by the father as next friend, for the recovery of the earnings of the minor, would be equivalent to a relinquishment on the part of the father of the authority to collect or claim such earnings in his own right. It was so expressly ruled in *Baker v. Flint & Pierre Marquette Railroad Co.*, 91 Mich. 298, 51 N. W. 897, 16 L. R. A. 154, 30 Am. St. Rep. 471. In *Scott v.*

White, 71 Ill. 287, the judgment below was for the reasonable value of the labor of the appellee for services performed before he had reached lawful age. It was urged as ground of reversal that it appeared the father of the appellee was living, and therefore entitled to recover the earnings of the son while a minor. The father had appeared as a witness in behalf of the son, and gave testimony in support of the cause of action, and made no claim to the wages, and spoke of the transaction as his son's; and we held it was to be implied the father had emancipated the son, and that under such circumstances the action brought by the son would be a bar to any action the father might bring, and affirmed the judgment. Had the appellant company presented an objection to the introduction of evidence as to the ability of the appellee to earn wages as an element of damages, on the ground that the legal presumption was that the father was entitled to collect his earnings, the objection might have been obviated by proof that the father had emancipated the appellee. Not having made the objection, it was not error to allow it to be obviated after verdict by introducing the father as a party to the action as the next friend of the appellee, and thereby rebut the presumption that the legal right to recover for the services of the appellee remained in the father.

Twenty-nine instructions were granted at the request of the appellant company, and no complaint is or can be made that the jury were not fully advised as to every principle of law favorable to the defense sought to be made to the action. The judgment must be, and is, affirmed.

Judgment affirmed.

(203 Ill. 490)

DOWIE et al. v. DRISCOLL.*

(Supreme Court of Illinois. June 16, 1903.)

DEEDS—CANCELLATION—UNDUE INFLUENCE—BURDEN OF PROOF—EVIDENCE—CHANCERY PRACTICE—FINDINGS OF CHANCELLOR—CONCLUSIVENESS—APPEAL—REVERSIBLE ERROR—ADMISSION OF EVIDENCE.

1. Where the findings of the jury are accepted by the chancellor as advisory merely, and it appears that the decree was rendered upon the consideration by the chancellor of all the evidence produced by the respective parties, the fact that the jury were misdirected as to the law does not constitute reversible error.

2. In a suit to set aside a deed and trust agreement for mental incapacity of the grantor, evidence given by the grantor on a hearing for the appointment of a conservator for her, about a month subsequent to the execution of the deed, was admissible on the issue of her mental capacity at the time she made the deed.

3. Testimony given at the same time by the grantor's son, who was not jointly interested with the grantee and his codefendants in the subject-matter of the suit, should have been excluded.

4. In equity proceedings, as it is presumed

that the chancellor considered only competent testimony, and disregarded incompetent, the erroneous admission of evidence by him does not constitute reversible error, where there is ample competent evidence to sustain his decree.

5. In equity cases a court of review will not disturb the findings of fact of the chancellor, unless it is apparent that error has been committed, even though the chancellor has submitted the case to the jury for an advisory verdict, and part of the evidence is in the form of depositions.

6. Where an aged and infirm follower of a religious sect conveyed to the founder thereof her homestead, and executed to him promissory notes, under a trust agreement which left to her merely a life estate in the income of her property, the burden was on the transferee to show that the transferor was actuated by no undue influence in making the transfer; and this is true, though no actual fraud was shown, and though the influence exerted proceeded from another than the transferee.

Appeal from Circuit Court, De Kalb County; C. A. Bishop, Judge.

Bill by Theodore D. Driscoll, as conservator of Mary Tindall, against John Alexander Dowie and others. From a decree for complainant, defendants appeal. Affirmed.

This was a bill in chancery, filed October 15, 1901, by the appellee, Theodore D. Driscoll, as conservator of Mary Tindall, against the appellants, John Alexander Dowie, Orlando L. Tindall, Nancy H. Tindall, and Elizabeth T. Milner, in the circuit court of De Kalb county, to set aside a deed from Mary Tindall to said Dowie, bearing date August 5, 1901, conveying to him her homestead, located in Sycamore, in said county; also to set aside the transfer of two promissory notes, for \$1,500 each, indorsed and delivered by said Mary Tindall to said Dowie upon the same day upon which said deed bears date, and to require said Dowie to account for and pay over to the said appellee, as conservator, the sum of \$400, with interest from August 5, 1901, which said Dowie had before that date received from Mary Tindall; also to cancel a trust agreement entered into between said Dowie, Orlando L. Tindall, and Mary Tindall relative to said property so conveyed and transferred by Mary Tindall to John Alexander Dowie.

The bill, in substance, alleged that Mary Tindall, on the 5th day of August, 1901, was about 87 years of age; that she, by reason of her great age and feeble health, was mentally incapacitated to transact business, and was susceptible to the undue influence of persons surrounding her and in whom she had confidence; that said Dowie was the founder and overseer of a religious sect, and had great power and influence over his followers; that shortly prior to the 5th day of August, 1901, through the influence of said Orlando L. Tindall and Elizabeth T. Milner, the son and daughter of Mary Tindall, who were followers of said Dowie, said Mary Tindall, who was then under their influence and control, was introduced into the presence of said Dowie and became one of his followers; that said Dowie seeks to and does control

*Rehearing denied October 7, 1903.

¶ 4. See Appeal and Error, vol. 3, Cent. Dig. § 4125.

the property interests of his followers through various agencies, and represents that he can and does successfully conduct various business enterprises, aided and directed by the special and direct interposition of Deity, acting through him; that the said Mary Tindall, through the influence of said Dowie and her said son and daughter, was induced to intrust all her property, consisting of her homestead and personal property, of the value of \$3,400, to said Dowie, and that at the time of the conveyance and transfer of her property to Dowie she was mentally incapable of comprehending the effect of such conveyance and transfer; that the appellee was appointed conservator of Mary Tindall on September 23, 1901; that he made demand upon Dowie to surrender to him the property of Mary Tindall, which he declined to do—and prays that the deed conveying said homestead to Dowie be set aside, and he be decreed to restore to the appellee, as conservator of Mary Tindall, said personal property, and that said trust agreement be canceled.

A joint and several answer was filed by the appellants, denying the mental incapacity of Mary Tindall to make said deed, transfer said personal property, and execute said trust agreement, and that said deed, transfer, and trust agreement had been executed by Mary Tindall to Dowie by reason of the undue influence of the appellants, or either of them, over said Mary Tindall; admits that Dowie is the founder of a religious sect, believing in the doctrine of divine healing, and that Mary Tindall, at the time of the execution of said deed, transfer, and trust agreement, was an adherent of said Dowie; admits the great influence of Dowie over his followers, and that his influence is as strong over those whom he has not seen as over those who have been admitted to his presence; avers the great business success of said Dowie, which, it is alleged, shows that the enterprises under his management and control have been blessed and sustained by Deity; avers that the ultimate end of all of said enterprises is the extension of the kingdom of God on earth, through the Christian Catholic Church of Zion, of which said Dowie is the founder and general overseer; avers that said Dowie has provided by will for his successor, who will perpetually carry on the work of said church throughout the world after his death. The appellant Dowie specially answered, for himself, that if his codefendants were willing he stood ready to restore the property of Mary Tindall, but without their consent he averred he did not feel like aiding the six other children of Mary Tindall in preventing her devoting her property to the advancement of religion and the extension of God's kingdom on earth.

A replication was filed, and the questions of undue influence and mental incapacity were submitted by the chancellor to a jury. The jury found both issues in favor of the appellee, whereupon the appellants moved

the court to set aside the findings of the jury, and to again submit said questions to a jury, which the court declined to do, and afterwards the court entered a decree, upon consideration of all the evidence produced by the respective parties, finding that Mary Tindall was mentally incapacitated, on the 5th day of August, 1901, to make said deed, transfer said personal property, and execute said trust agreement, and that the execution of said deed and trust agreement and the transfer of said personal property were obtained through the undue influence of the appellants, and setting aside said deed, the transfer of said personal property, and said trust agreement, and requiring said Dowie to deliver up said notes to the appellee, and to account to him for said sum of \$400, with interest, from which decree the appellants have prosecuted an appeal to this court.

The deed sought to be set aside is in form a statutory warranty deed from Mary Tindall to John Alexander Dowie, conveying to him her homestead. The promissory notes assigned and delivered to Dowie were for the sum of \$1,500 each, bearing interest at 6 per cent., and the \$400 had been delivered by Mary Tindall to Dowie in cash, and by him invested in the Zion Land & Investment Association, and a certificate issued to Mary Tindall therefor. The trust agreement was executed by John Alexander Dowie, Orlando L. Tindall, and Mary Tindall, and provided that Dowie was to convert all of the property of Mary Tindall, received by him from her, into cash; that not to exceed \$2,500 thereof was to be invested in a house and lot in Zion City; that the balance was to be invested in the stock of the Zion City Bank, and that Orlando L. Tindall should hold all of said property in trust; that the income thereof was to be paid to Mary Tindall for life, then to Elizabeth T. Milner and Orlando L. Tindall for life, and then to Nancy H. Tindall, the wife of Orlando L. Tindall, for life, and upon the death of all of said beneficiaries said property was to vest absolutely in Dowie, his heirs, and assigns.

V. V. Barnes and Jones & Rogers, for appellants. Carnes, Dunton & Faissler, for appellee.

HAND, C. J. (after stating the facts). It is first contended that the court improperly instructed the jury as to the law. It appears from the record that the chancellor did not base the decree entered by him in this case upon the findings of the jury alone, but based the same upon his own conclusions as to the facts, which conclusions were reached by him from a full consideration of all the evidence in the case, and that the findings of fact by the jury were, at most, treated by him as only advisory. Where, in a case like this, the findings of the jury are accepted by the chancellor only as advisory, and it appears the decree was rendered upon the

consideration by the chancellor of all the evidence produced by the respective parties, the fact that the jury may have been misdirected as to the law is not ground for reversal. *Guild v. Hull*, 127 Ill. 523, 20 N. E. 665; *Kinnah v. Kinnah*, 184 Ill. 284, 58 N. E. 376; *Ring v. Lawless*, 190 Ill. 520, 60 N. E. 881. In the case of *Guild v. Hull*, supra, it was held (page 530, 127 Ill., and page 667, 20 N. E.): "In chancery cases, except in cases where the submission to a jury is required by law or the rules of chancery practice, the chancellor is the judge of the weight of the evidence and of the ultimate facts established by it. If he submits controverted questions of fact to a jury, as he may do, the verdict or finding of the jury is advisory merely. He may adopt the verdict, or set the same aside and resubmit the question to a jury, or he may disregard it and enter such a decree as in his judgment equity demands. He may enter his decree after setting the verdict aside, or without setting it aside." In *Kinnah v. Kinnah*, supra, the court said: "It appears from the record the chancellor did not adopt the finding of the jury, but rendered a decree setting aside and vacating the deed upon consideration of the evidence produced by the respective parties. In such state of the record it is not material to consider whether the jury were correctly instructed by the court as to the rules of law applicable to the cause. The decree is the result of the judgment of the court as to the facts established by the weight of the evidence, and it is only necessary we should determine whether the record discloses sufficient testimony, competent to be considered, to justify and uphold the conclusion as to matters of fact reached by the court, and that the decree of the court resulted from the application of correct legal principles to the state of case made by the proofs. *Guild v. Hull*, 127 Ill. 523, 20 N. E. 665. When the court, in such cases, accepts the verdict of the jury as establishing the facts and enters a decree pro forma thereon, the instructions given by the court to the jury may be reviewed in this court; but not so when, as here, the finding is the independent act of the chancellor." And in *Ring v. Lawless*, supra, on page 532, 190 Ill., and page 885, 60 N. E., it was said: "The verdicts rendered by the jury that the said Jeremiah Ring, Sr., had not sufficient mental power and capacity to execute the said eight several deeds in question, and that he was unduly influenced by appellants in making each of said deeds, were upon feigned issues arising out of chancery, and were advisory merely to the court. The chancellor did not accept the findings that the deeds were the result of the exercise of undue influence on the part of the appellants, and refused to be controlled by such findings. The findings that the said Jeremiah Ring, Sr., was wanting in mental power and ability to execute the said deeds coincided with the conclusions

reached by the chancellor as to the weight of the evidence. The decree that the deeds be vacated and canceled is the result of the application by the chancellor of the principles of law applicable, in his judgment, to the facts which he believed to be established by the preponderance of the evidence. It is therefore unimportant to consider the complaints that the court fell into error in instructing the jury as to the law applicable to these feigned issues."

It is next contended that the court erred in its rulings as to the admission of evidence offered upon behalf of appellee; the main contention being that the court erred in allowing the evidence of Mary Tindall and Orlando Tindall, given in the county court before the jury upon the hearing as to the mental condition of Mary Tindall which resulted in the appointment of the appellee as conservator, to be read to the jury upon this trial. The testimony of Mary Tindall, given at that time, was not offered for the purpose of impeaching the deed, transfer, and trust agreement, but for the purpose of showing her mental condition at the time of the execution thereof. While the declarations of a testator or grantor, made before or after the execution of a will or deed, are not admissible to show undue influence or fraud, they are admissible to prove the mental condition of the testator or grantor at the time of the execution of the instrument sought to be set aside, if not made at too remote a period prior to or subsequent to the execution thereof. *Massey v. Huntington*, 118 Ill. 80, 7 N. E. 269; *Bevelot v. Lestrade*, 153 Ill. 625, 38 N. E. 1056; *Waterman v. Whitney*, 11 N. Y. 157, 62 Am. Dec. 71. Here the instruments were executed on August 5th, and the inquisition of insanity was held in the following September. We are of the opinion the evidence given by Mary Tindall was properly admitted as bearing upon her mental condition on August 5, 1901.

The testimony of Orlando L. Tindall, given at the hearing in the county court, was objected to on the ground that he was not jointly interested in the subject-matter of this suit with his codefendants, and that admissions made by him were not binding on them. Under the authority of *McMillan v. McDill*, 110 Ill. 47, *Campbell v. Campbell*, 138 Ill. 612, 28 N. E. 1080, and *Boyle v. Boyle*, 158 Ill. 228, 42 N. E. 140, we think this testimony should have been excluded. The presumption, however, is that the chancellor only considered such testimony as was competent, and disregarded such as was incompetent. *Dorman v. Dorman*, 187 Ill. 154, 58 N. E. 235, 79 Am. St. Rep. 210; *Van Vleet v. DeWitt*, 200 Ill. 153, 65 N. E. 677. In the latter case it was said (page 156, 200 Ill., and page 679, 65 N. E.): "The hearing was before the chancellor, and the rule is that in such case this court will not reverse for errors in the admission of testimony, unless it appears that the decree cannot be sustained

except upon consideration of the incompetent testimony (*Yarde v. Yarde*, 187 Ill. 636, 58 N. E. 600); the presumption being that the chancellor considered only competent evidence in arriving at the findings embodied in the decree." As there is ample evidence in this record to sustain the decree, without considering the objectionable evidence, we are of the opinion the admission thereof does not constitute reversible error.

It is further contended that the evidence does not sustain the decree. The evidence was mainly heard in open court, and is conflicting; and the chancellor, having seen the witnesses and heard them testify, was in a much better position to judge which witnesses were worthy of belief than we are from a perusal of their testimony, when written out and read by us in the record. It has been wisely settled in chancery cases that a court of review will not disturb the findings of fact of the chancellor, unless it is apparent error has been committed; and the rule thus announced applies with full force, although the chancellor has submitted the case to a jury for an advisory verdict, and although part of the evidence is in the form of depositions. *Elmstedt v. Nicholson*, 186 Ill. 580, 58 N. E. 381, and cases cited. In the case of *Biggerstaff v. Biggerstaff*, 180 Ill. 407, 54 N. E. 333, in considering this question, on page 411, 180 Ill., and page 334, 54 N. E., it is said: "In a case of this character, where witnesses differ as to the mental capacity of the grantor and his ability to legally transact business and to dispose of his property, the weight to be given to the testimony of witnesses is much more readily to be determined by a just chancellor than by a court of record, which reads only the written evidence. The law is well established in this state that where a cause is heard by the chancellor, and the evidence is all, or partly, oral, it must appear that there is clear and palpable error before a reversal will be had. *Coari v. Olsen*, 91 Ill. 273; *Baker v. Rockabrand*, 118 Ill. 365, 8 N. E. 456; *Ellis v. Ward*, 137 Ill. 509, 25 N. E. 530; *Johnson v. Johnson*, 125 Ill. 510, 16 N. E. 891; *Allen v. Hickey*, 153 Ill. 362, 41 N. E. 1084. In a case of this character, where the issue is tried by the chancellor before a jury, and where the verdict of the jury is only advisory and may be set aside by the chancellor, the rule should be just as strong that clear and palpable error should appear before the decree should be reversed."

It appears from this record that Mary Tindall was very aged and quite infirm at the time the transfers sought to be impeached were made; that the appellant Elizabeth T. Milner lived with her and cared for her, and that Orlando L. Tindall and his wife frequently visited her; that they, as well as Mary Tindall, were followers of Dowie and believed in his teachings. It is apparent, from the situation of the parties, that the relation of the appellants to Mary Tindall

was such that great confidence was reposed in them by her, and that the transfer of her property to Dowie and the execution of said trust agreement were greatly to the advantage of the appellants and to the disadvantage of Mary Tindall. Prior to the execution thereof she owned and controlled said property absolutely. After the execution thereof, if the same were valid, she only had a life interest in the income thereof; the residuum thereof having been transferred to appellant Dowie, and the immediate control thereof, by said transfers and trust agreement, having passed from her and become subject to that of said Dowie and Orlando L. Tindall. The law is well settled that where it appears that relations of trust and confidence exist between parties to a transaction like this, and the parties receiving the transfer are benefited by such transfer, the court will indulge in the presumption that the party making the transfer was unduly influenced to make the transfer until such presumption is rebutted by the party benefited by the transfer. In 2 *Pomeroy's Equity Jurisprudence* (2d Ed.) § 951, it is said: "Where there is no coercion amounting to duress, but a transaction is the result of a moral, social, or domestic force exerted upon a party, controlling the free action of his will and preventing any true consent, equity may relieve against the transaction on the ground of undue influence, even though there may be no invalidity at law. In the vast majority of instances undue influence naturally has a field to work upon in the condition or circumstances of the person influenced, which render him peculiarly susceptible and yielding—his dependent or fiduciary relation toward the one exerting the influence, his mental or physical weakness, his pecuniary necessities, his ignorance, lack of advice, and the like. All these circumstances, however, are incidental, and not essential. Where an antecedent fiduciary relation exists, a court of equity will presume confidence placed and influence exerted. * * * The doctrine of equity concerning undue influence is very broad, and is based upon principles of the highest morality. It reaches every case, and grants relief 'where influence is acquired and abused, or where confidence is reposed and betrayed.' It is specially active and searching in dealing with gifts, but is applied, when necessary, to conveyances, contracts, executory and executed, and wills."

In 27 *American and English Encyclopedia of Law* (1st Ed.) p. 456, the author says: "Certain transactions are presumed, on grounds of public policy, to be the result of undue influence. Such transactions are generally those occurring between persons in some relation of confidence, one toward the other. The presence of such relationship creates a presumption of influence, which can generally be rebutted by proof that the parties dealt as strangers, at arm's length, that no unfairness was used, and that

facts in the knowledge of the one in the position of influence affecting the matter were communicated to the other." And in *Marshall v. Coleman*, 187 Ill. 556, 58 N. E. 628, on page 582, 187 Ill., and page 637, 58 N. E., this court said: "Where two persons stand in such relation to each other that confidence is necessarily reposed by one in the other, and the one has over the other an influence which naturally grows out of that confidence, the abuse of such confidence or influence to obtain an advantage at the expense of the confiding party will not be permitted to prevail, even though the transaction could not have been impeached if no such confidential relations had existed. *Tait v. Williamson*, L. R. 2 Ch. 55; 10 Am. & Eng. Ency. of Law, p. 327; 1 Am. & Eng. Ency. of Law, p. 375; *Purvines v. Harrison*, 151 Ill. 219, 37 N. E. 705; *Sayles v. Christie*, 187 Ill. 420, 58 N. E. 480; *White v. Ross*, 160 Ill. 56, 48 N. E. 336."

The doctrine repeatedly announced by this court is that courts of equity "will scrutinize with the most jealous vigilance" transactions between parties occupying fiduciary relations toward each other (*Casey v. Casey*, 14 Ill. 112), and that the burden of proof is on the beneficiary, in such cases, to establish the fairness of the transaction, and that it did not proceed from undue influence (*Jennings v. McConnel*, 17 Ill. 148; *Zeigler v. Hughes*, 55 Ill. 288; *Ward v. Armstrong*, 84 Ill. 151; *Wickiser v. Cook*, 85 Ill. 68). In *Sands v. Sands*, 112 Ill. 225, on page 232, it was said: "The rule is, where a person, enfeebled in mind by disease or old age, is so placed as to be likely to be subjected to the influence of another, and makes a voluntary disposition of property in favor of that person, the courts require proof of the fact that the donor understood the nature of the act, and that it was not done through the influence of the donee." In *Jones v. Lloyd*, 117 Ill. 597, 7 N. E. 119, it was held the burden of proof is upon the person obtaining the advantage, in cases of fiduciary relations, "to vindicate the bargain or gift from any shadow of suspicion, and to show that it was perfectly fair and reasonable in every respect, and courts will scrutinize the transaction with great severity." And in *Thomas v. Whitney*, 186 Ill. 225, 57 N. E. 808, on page 231, 186 Ill., and page 810, 57 N. E., that "transactions between a party and one bearing a fiduciary relation to him are upon his motion *prima facie* voidable upon grounds of public policy, and the burden of proof, the fiduciary relation being established, is upon the one receiving the benefit to show an absence of undue influence." It is not necessary that actual and intentional fraud be established (*McParland v. Larkin*, 155 Ill. 84, 39 N. E. 609), and "it is immaterial by whom the undue influence is exercised, whether by a beneficiary or an outsider" (*Smith v. Henline*, 174 Ill. 184, 51 N. E. 227).

We have examined this record with care,

and in view of the fact that the burden was upon the appellants to show that the transfers made to Dowle by Mary Tindall were not brought about by reason of undue influence exerted by them over her, growing out of the fiduciary relations which they sustained to her, and as the evidence was conflicting, and the chancellor had, by reason of seeing and hearing most of the witnesses while testifying, a much better opportunity than we to judge of the weight to be given to their testimony, we are unable to say that the decree is manifestly unsupported by the evidence. *Kinnah v. Kinnah*, *supra*. The decree of the circuit court will be affirmed.

Decree affirmed.

(124 Mass. 184)

CLARK v. HULL.

(Supreme Judicial Court of Massachusetts. Essex. Sept. 4, 1903.)

TRESPASS—HIGHWAYS—EVIDENCE—COAST SURVEY CHART.

1. Evidence in an action for trespass held sufficient to go to the jury on the question of the locus being part of a public way by prescription or by dedication before St. 1846, p. 137, c. 203, providing for a public layout.

2. A coast survey chart made under St. U. S. Feb. 10, 1807, § 1 (2 Stat. 413), providing for a coast survey, showing the roads within 20 leagues of the shore, is admissible to show the existence of a way; and, if the other party desires to limit its use, he should request an instruction that it does not show the way to be a public one.

3. Records being offered merely to show a transfer of title, and there being no question about title, they are properly excluded.

Exception from Superior Court, Essex County.

Action by Clark against Hull. Verdict for defendant. Plaintiff brings exceptions. Exceptions overruled.

C. A. Sayward and H. P. Moulton, for plaintiff. A. P. White and G. H. W. Hayes, for defendant.

LATHROP, J. This is an action of tort for breaking and entering the plaintiff's close. The answer contained a general denial, and further set up that the close was crossed by a public way, and at the time of the alleged trespass the defendant was on the way in the rightful use thereof. At the trial in the superior court it appeared that the close described in the declaration was Eagle Hill, so called, which is a portion of a tract of land of about 500 acres called "Jeffries Neck," or "Ipswich Great Neck," situated in the easterly part of the town of Ipswich, bordering on Plum Island river and the sea, and bounded on the north by the Ipswich river and Little Neck. It also appeared that there had been for a long time in Ipswich a road called "East Street," which extended from Ipswich in the direction of Jeffries Neck for a distance of about a mile and a half; that this road extended down to the marsh, over which is a causeway leading to the upland

of Jeffries Neck pasture. At the close of all the evidence the plaintiff requested the presiding judge to rule that the evidence introduced by the defendant was insufficient in law to prove the establishment of a public way, or to make out a justification for the trespass, and requested the judge to direct a verdict for the plaintiff for nominal damages. The judge refused so to rule, and submitted the case to the jury upon full instructions not objected to. The jury returned a verdict for the defendant, and the case is before us on the plaintiff's exceptions.

The principal exception is to the refusal to give the ruling above referred to. The defendant produced ancient records of the town of Ipswich referring to the "highway" or "way" to Jeffries Neck, which made provision for the repair of the way, establishing a fence and gate in the way, "the charges of it to be put on the owners of the cattle that go in the neck." These records bear date from 1635 to 1652. He also put in evidence certain ancient deeds referring to the "road" and to the "great road leading to Jeffries Neck"; also certain ancient plans tending to show the existence of a way beyond the gate to one or another different points beyond the gate across the causeway; also certain charts of the coast survey, the latest of these being made in 1857, indicating a way leading from Ipswich to the southern bank of Green river. These were identified by a witness as the way in question, and as terminating at Eagle Hill landing. The defendant also introduced the testimony of old men tending to show a well-defined and well-traveled way from Ipswich to Jeffries Neck over the premises described in the declaration, at least to the upland inside the gate, and a more or less defined way from this point to the landing; that this road was by reputation an ancient road, and was used by the inhabitants of the town engaged in the clamming industry at Eagle Hill landing, and by the inhabitants of Plum Island, and that cattle had been pastured within the gate from time immemorial; that the place where the cattle were pastured was surrounded by water, except where the causeway crossed a certain creek, where from time immemorial a gate had been maintained during the pasturage season, and removed at other times. The defendant also put in evidence of user of the road from time immemorial by many persons under a claim of right and of repairs made by them and by the surveyor of the district. The plaintiff, who claimed title through the proprietors of Jeffries Neck, put in evidence the record of said proprietors, dating from 1751, which tended to show ownership of the way in question, and of non-acquiescence in any adverse user of the way, as well as steps taken to prevent trespassing.

Strictly speaking, the only question before us is as to the defendant's evidence, as the plaintiff did not ask for a ruling on all the evidence. We are of opinion that on the defendant's evidence it was a question of fact

for the jury, under proper instructions, whether the way was a public way; and certainly it was a question for the jury on all the evidence. The ancient records put in evidence by the defendant show that there was at that time a way or highway leading to Jeffries Neck. The word "highway," in a popular sense, includes all public traveled ways, whether county or town ways. *Jones v. Andover*, 6 Pick. 59; *Commonwealth v. Hubbard*, 24 Pick. 98. So, of the word "road." *Stedman v. Southbridge*, 17 Pick. 162, 164. The records also showed that the gate across the causeway was put up to keep the cattle in, and the jury might well draw the inference that from time immemorial it had been used for that purpose only. The fact that there was no evidence of a public layout of this way is not conclusive. Before the Statute of 1846, p. 137, c. 203, a way might become a public way by dedication or prescription, and the statute does not apply to ways of the latter class. *Commonwealth v. Coupe*, 128 Mass. 63, and cases cited; *White v. Foxborough*, 151 Mass. 28, 44, 23 N. E. 652. We can have no doubt that the evidence in this case was sufficient to show a public way by prescription or by dedication before the Statute of 1846. There was also much evidence to show that the way in controversy was identical with the ancient road.

The cases principally relied on by the plaintiff are cases where the ways were private in their inception, and there was no evidence of dedication, or of acts adverse to and acquiesced in by the owner. *Durgin v. Lowell*, 3 Allen, 398; *Sprow v. Boston & Albany R. R.*, 163 Mass. 330, 39 N. E. 1024. In the present case the acts of user were grounded upon evidence that the way was a public way in ancient times. The case of *Slater v. Gunn*, 170 Mass. 509, 49 N. E. 1017, 41 L. R. A. 268, upon which the plaintiff also relies, came to this court on exceptions to a master's report, which had been overruled by a judge of the superior court. The master stated that he did not find that the travel had been of a nature, or an extent, or under a claim of right, which would give the public an easement by prescription over the way as a public way. This was regarded as, in effect, a finding that the public had not acquired a right of way. It is said by the court: "There was nothing in the nature of the use described, which, as matter of law, required the master to find that it was adverse, and under a claim of right, or that the roadway had become a public way by dedication." The evidence did not come before this court, and the questions arose simply on the master's report, which was in favor of the plaintiff. The only question was whether the master was bound, as matter of law, to find otherwise than he did. In the present case, the tribunal of fact having found for the defendant, the only question is whether there was anything to go to the jury. There are also other differences in the evidence which distinguish the two cases.

There are several other exceptions which remain to be considered. The plaintiff, at the argument, contended that certain deeds put in evidence were not ancient deeds, and clearly they were not. They were introduced in connection with ancient deeds, and apparently for the purpose of identifying the land as part of the same conveyed by the ancient deeds. Whatever was the purpose of their introduction, there is nothing in the bill of exceptions to show that any objection or exception was taken to their admission. The plaintiff excepted to the admission of the coast survey charts before mentioned. No ground of objection to their admission was made at the trial. On the plaintiff's brief the objection is made that they had no tendency to prove a public way, and because the surveyor who drew the plans was not endeavoring to determine what were public or private ways, and had no authority to do so. We have no doubt that these charts were admissible to show the existence of a way on Jeffries Neck, and, if the plaintiff wished to limit their use in evidence, he should have asked for an instruction to this effect. There is nothing in the bill of exceptions to show that they were admitted for the purpose of enabling the jury to decide whether the way was public or private. The United States statute of February 10, 1807, § 1, authorizes the President of the United States "to cause a survey to be taken of the coast of the United States, in which shall be designated the islands and shoals, with the roads or places of anchorage, within twenty leagues of any part of the shores of the United States; and also the respective courses and distances between the principal capes, or headlands, together with such other matters as he may deem proper for completing an accurate chart of every part of the coasts within the extent aforesaid." 2 U. S. Stat. 413. See, also, Rev. St. U. S. § 4681 [U. S. Comp. St. 1901, p. 3149]. It is an essential part of a coast survey chart that it should show a strip of the coast with more or less of the natural and artificial features delineated upon it as to render it serviceable. It would be of no value if the coast line were not shown. These charts were official acts of the government of the United States, to say nothing of their being ancient charts. See *Whitman v. Shaw*, 166 Mass. 451, 44 N. E. 333, and cases cited.

The plaintiff contended that the road over the marsh and across the locus was open by the commoners of Ipswich for their own convenience, and offered the records of the commoners to show the transfer of the title of Jeffries Neck from the commoners to the proprietors of Jeffries Neck pasture in 1708-1709. Upon the offer of the records the presiding judge asked the defendant's counsel, "Is there any question that the former ownership of the land was in the commoners?" The counsel said, "No." The judge then said to the plaintiff's counsel: "Any record that you have in reference to this way you may

put in. I exclude the rest." The plaintiff excepted. He now contends that the records tend to show that the ancient records of Ipswich put in by the defendant were in part records of the commoners, and that the causeway and the road inside the gate were opened by the commoners for their own use. But the excluded records were offered merely to show a transfer of title, and there was no question about the title. The evidence was properly excluded under the offer of proof made. See *Holt v. Sargent*, 15 Gray, 97.

Some other exceptions were taken by the plaintiff, but, as they were not argued, we treat them as waived.

Exceptions overruled.

(184 Mass. 177)

HEWINS et al. v. LONDON ASSUR. CORP.
et al. (twelve cases).

(Supreme Judicial Court of Massachusetts.
Suffolk. Sept. 16, 1903.)

FIRE INSURANCE—LOSS—BUILDING LAWS—ILLEGAL POLICY—CONSTRUCTION.

1. An insurance policy covering a building and also machinery, insuring against loss or damage by fire, and in case of loss allowing the company to pay in cash, replace the property with other of the same kind and goodness, or make the repairs, does not, as to the building, in case of partial destruction, exclude the consideration of the increased cost of repairing by reason of building laws existing when the policy was issued, so that this may be recovered. The company not electing to repair.

2. Recovery on account of the increased cost of repairing, by reason of the building laws, of a building partially destroyed, is excluded by a policy providing that loss or damage shall in no event exceed what it would cost insured to repair or replace the same with material of like kind and quality, and that insurer shall not be liable beyond the actual value destroyed by fire for loss occasioned by law regulating construction or repair of buildings.

3. Under St. 1894, pp. 708, 735, c. 522, §§ 60, 105, providing a standard form for an insurance policy, declaring that no company should issue a different policy, and that, if it did, it should be subject to a fine, but also declaring that the policy should be binding on it, the illegal policy is to be construed as it reads.

Report from Superior Court, Suffolk County; James B. Richardson, Judge.

Actions on insurance policies by Hewins and others against the London Assurance Corporation, the Williamsburg City Fire Insurance Company, the Continental Insurance Company, the Sun Insurance Company, the Queen Insurance Company of America, the Hartford Fire Insurance Company, the Fire Association of Philadelphia, the Holyoke Mutual Fire Insurance Company, the Dorchester Mutual Fire Insurance Company, the Pawtucket Mutual Fire Insurance Company, the Merchants' & Farmers' Mutual Fire Insurance Company, and the Traders' & Mechanics' Mutual Insurance Company. Cases reported to Supreme Judicial Court. Judgment for plaintiffs, except as to defendant Pawtucket Mutual Fire Insurance Company.

Alfred Hemenway and Arthur M. Alger, for plaintiffs. Saml. J. Elder, Robt. F. Herrick, and Alfred B. White, for defendants.

HAMMOND, J. In these 12 cases the question is whether the referees, in determining the amount of damages to which the plaintiffs were entitled, "had the right to take into consideration the increased cost of repairing the building by reason of the building laws." In each case the question calls for the construction of the contract of insurance. It is plain, to begin with, that the contract does not cover all the loss suffered by the insured by reason of the fire, such as interruption of business, loss of profits, or even loss of rents. Nor is the insurer bound to repair, although for obvious reasons it has the option to do so. The contract simply insures the plaintiffs "against loss or damage by fire" to the building with its appurtenances and fixtures. It is a contract of indemnity. Ordinarily, the loss or damage by fire is the difference between the value of the building before the fire and the value of what remains after the fire, and that difference is to be regarded as the true loss covered by the policy, unless there be in the policy some language by which some element of that difference is excluded. Where the building is only partially destroyed, and the proper course is to repair, as in the cases before us, it is manifest that in estimating the value of the part remaining the cost of the necessary repairs is a very material matter; and, if the repairs must conform to certain legal requirements, the nature of those requirements is also to be considered. In considering the cost of repairs it would not be profitable to think of repairs which the law forbids, but only of those which the law does not forbid. This rule of estimating the damage to real estate by reason of some injurious change is of very general application. A familiar illustration of its application is to be found in suits for damages for land injured by the exercise of the right of eminent domain. It may happen that, after being repaired, a building is of greater value than before the fire, and in marine insurance there is a rule of quite general application by which an allowance is made to the insurer on that account; but in the present cases we have no occasion to inquire whether any such allowance should be made, because the only question raised upon the report and submitted to us is whether "the referees had the right, in determining the amount of damages to which the plaintiffs were entitled, to take into consideration the increased cost of repairing by reason of the building laws." If they had that right, the sum is agreed upon. It therefore becomes necessary to look into the policies, and see whether they contain anything which is inconsistent with this method of estimating the loss. With the exception of the policy issued by the Pawtucket Mutual Fire Insurance Company, which is reserved for separate consideration, they are all of the form known as the "Massachusetts Standard," and each contains the following provision:

"In case of any loss or damage, the company * * * shall either pay the amount for which it shall be liable, which amount, if not agreed upon, shall be ascertained by award of referees as hereinafter provided, or replace the property with other of the same kind and goodness, or it may * * * notify the insured of its intention to rebuild or repair the premises." Three courses are open to the company. It may pay in cash, may replace the property with other of the same kind and goodness, or may make the repairs. Neither defendant has chosen to repair. It is to be noted that there has been no change in the building laws since these policies were issued, and that fact must be borne in mind in construing them. They cover not only the building, but also the "additions, including plate glass, fresco work, piping of all kinds, engines and boilers and all appurtenances to the same," machinery, fixtures, and "the sidewalks adjacent." It is obvious that there were many ways in which the insured property might have been damaged by fire where there could have been lawful replacement or repair with property of the same kind and goodness. It is not to be presumed that the parties intended to contract for the doing of that which could not lawfully be done. Inasmuch as at the time the contracts were made two kinds of loss by fire might have been reasonably apprehended—one where the law would permit such repair or replacement, and the other where it would not—the clause must be regarded as intended to apply only to the first class of cases. It can have no application to the class where its application would be legally impossible. Hence it can have no bearing even as to the method in which the amount to be paid in cash should be ascertained so far as respects the second class. We find nothing else in the policies which needs to be considered on this point. The result is that there is nothing in the policies to change the general rule that, where a building is partially destroyed by fire, the loss is the difference between the value of the building before the fire and the value of the remaining part afterwards. The referees, however, have reported that, if the buildings laws were not to be considered, \$30,610 would be full indemnity to the assured, but, if they are to be considered, then the sum should be \$45,792; and it is strenuously contended by the defendants that the difference between these two sums is a loss attributable not to the fire, but to the building laws; that it is not covered by the policy; and that the cost of restoring the building to its original condition is the true measure of the risk assumed by them. This position seems to us untenable. The building laws were the same at the time of the fire as at the time the policies were issued. The only change in the situation was in the physical condition of the building, and that change was caused wholly by the fire. The building laws simply constituted one of the

conditions of the situation. While it is true that by reason of their existence the loss caused by the ravages of the fire was greater than it otherwise would have been, it is none the less true that the sole operating cause of the change in the building was the fire, and, as above stated, in the absence of any provision in the policy expressly excluding from the damages the part arising out of that condition, that part is not to be excluded, but is to be regarded as primarily the result of the fire, or as "loss or damage by fire." In *Brady v. Ins. Co.*, 11 Mich. 425, it was held that, where an ordinance prevented the repair of a building which had been practically destroyed by fire, the loss was total, although the cost of restoring the building to its original condition would have been much less than the amount of insurance. The case seems to have been elaborately argued, and the reasoning of the court by which the decision was supported seems to us to be sound. The same principle has been recognized in other jurisdictions. *Monteleone v. Royal Ins. Co.*, 47 La. Ann. 1563, 18 South. 472, 56 L. R. A. 784; *Hamburg & Bremen Ins. Co. v. Garlington*, 66 Tex. 103, 18 S. W. 337, 59 Am. Rep. 613; *Larkin v. Glens Falls Ins. Co.*, 80 Minn. 527, 83 N. W. 409, 81 Am. St. Rep. 286. These cases support the general proposition that, where the law prohibits the repair of a building which has been partially destroyed by fire, in the absence of any express provision in the policy to the contrary the loss is not measured by the sum required to restore the building to its condition before the fire, but it is total, less the value of the remaining materials for removal. Since the change in the building is caused solely by the fire, the difference in its value caused by that change is loss or damage by fire within the meaning of the policy, in the absence of anything therein to the contrary. The principle is the same whether its application results in a total loss or in an increase of a partial loss, as in *Pennsylvania Co. for Insurance v. Philadelphia Contributorship*, 201 Pa. 497, 51 Atl. 351, 57 L. R. A. 510. It follows that in each of the cases except that against the Pawtucket Mutual Fire Insurance Company judgment is to be entered for the plaintiffs in accordance with the terms of the report.

The policy issued by the Pawtucket Mutual Fire Insurance Company is materially different from the other policies. It provides that in case of loss the loss or damage "shall in no event exceed what it would cost the insured to repair or replace the same with material of like kind and quality." There is also a provision that the insurer shall not be liable "beyond the actual value destroyed by fire for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise." The first is a specific clause expressly declaring that

in no event shall the sum to be paid in cash exceed the cost of restoring the property to its original condition. The second clause specifically names the building laws. We think that these two clauses mutually strengthen each other, and that, when construed together, they modify the general rule as to the measure of the loss by fire in such a case as this, and that the fair construction of these two clauses taken together is that such portion of the damage caused by the change in the condition of the building as arises from the existence of the building laws, whether regarded as a condition or a cause, is not to be considered as a loss or damage by fire, but is to be excluded from consideration, and the loss is to be estimated as if there were no building laws affecting the situation. It is urged by the plaintiffs that, this policy being different from the standard prescribed by our statutes, and the difference not being indicated thereon as required by law, the differences are null and void, and the policy is to be construed as though it were conformable to the standard; and in support of that proposition they have cited cases like *Queen Ins. Co. v. Leslie*, 47 Ohio St. 409, 24 N. E. 1072, 9 L. R. A. 45, where it is held that, where a statute provides a certain rule for the interpretation of a policy, the statute must be regarded as incorporated in the policy issued when the law is in force, and, being so incorporated, must prevail over such other provisions as are inconsistent with it. But such cases are not applicable here. The statute in force when this policy was issued did not provide how the policy should be interpreted. It provided, it is true, a standard form, stated in what way and to what extent the form might be modified, declared that no company should issue a different policy, and that, if it did, it should be subject to a fine, but also declared that the policy should be binding upon the company. St. 1894, pp. 708, 733, c. 522, §§ 60, 105. It does not provide any rule of interpretation of a policy issued contrary to law, nor does it say that the policy shall be void. On the contrary, it fines the company for issuing the policy, and declares it to be binding upon the company. Its legal effect is not changed. The illegal policy is not changed by law so as to conform to the legal standard. The insured may sue upon it, but it must be construed as it reads. No statute is incorporated in it. The penalty suffered by the company is a fine, and not a liability to be held on a contract different from that made by it.

It follows, therefore, that as to this one policy the amount recovered cannot exceed its part of the sum equal to an amount needed to restore the building to its original condition, and in this case judgment should be entered for the defendant. As to the other cases, judgment should be entered for the plaintiff in accordance with the report, and it is so ordered.

(176 N. Y. 9)

PEOPLE v. WADHAMS.

(Court of Appeals of New York. Oct. 6, 1908.)

PUBLIC OFFICER—REMOVAL—USE OF RAILROAD PASS.

1. Where a notary public accepts a free pass from a sleeping car company, and uses the same on the cars of said company, he is subject to removal for violation of Const. art. 13, § 5, prohibiting the use of free transportation by a public official.

Appeal from Supreme Court, General Term.

Action by the people of the state of New York against Frederick E. Wadhams to remove him from his office as notary public for having accepted and used a free pass from the Wagner Palace Car Company, in violation of Const. art. 13, § 5. From a judgment of the Appellate Term affirming the judgment for plaintiff, defendant appeals. Affirmed.

Frederick E. Wadhams, in pro. per. John Cunneen, for the People.

PARKER, C. J. We held in *People v. Rathbone*, 145 N. Y. 434, 40 N. E. 395, 28 L. R. A. 384, that a notary public is a public officer within the meaning of the provision of Const. art. 13, § 5, prohibiting a public officer or a person elected or appointed to public office under the laws of this state from receiving from any person or corporation, or making use of, "any free pass, free transportation," etc.; and necessarily, therefore, the conclusion was reached in that case that, the defendant having received and made use of a free pass over a railroad, the people could maintain an action against him to have his office adjudged to be forfeited. The difference between that case and this one is that the pass received by Rathbone entitled him to ride upon the lines of the corporation issuing the pass, while in this case the defendant paid his fare, but occupied a seat in a palace car belonging to another corporation, and did not pay for it, but instead presented to the conductor a pass issued by the Wagner Palace Car Company in the name of defendant, entitling him, without charge, to accommodations in the palace or sleeping cars of that company running over any railroad in New York state. Accommodations of this kind have come to be regarded as a necessity by a considerable portion of the travelling public, and, rather than not have the benefit of such accommodations, a substantial percentage of the travelling population pay for the privilege of enjoying them. We hold—and we think argument is not needed in support of the proposition—that a public officer who accepts the privilege of riding in a palace or sleeping car accorded to him by a pass such as was issued in this case accepts a free pass and free transportation, within the meaning of that portion of section 5 of article 13 of the Constitution which reads

as follows: "No public officer, or person elected or appointed to a public office, under the laws of this state, shall directly or indirectly ask, demand, accept, receive or consent to receive, for his own use or benefit, or for the use or benefit of another any free pass, free transportation, franking privilege or discrimination in passenger, telegraph or telephone rates, from any person or corporation, or make use of the same himself or in conjunction with another."

It follows that the judgment ousting defendant from his office as notary public should be affirmed, without costs.

GRAY, O'BRIEN, BARTLETT, HAIGHT, CULLEN, and WERNER, JJ., concur.

Judgment affirmed.

(176 N. Y. 37)

BARRETT CHEMICAL CO. v. STERN.

(Court of Appeals of New York. Oct. 6, 1908.)

TRADE-MARK—USE OF ENGLISH WORD.

1. A manufacturer has no such exclusive proprietary right to the use of a common English word or combination of such words as entitles him to debar all others from use of the same as a trade-mark, in the absence of fraud or intent to deceive.

Appeal from Supreme Court, Appellate Division, First Department.

Action by the Barrett Chemical Company against Julius Stern. From a judgment of Appellate Division (76 N. Y. Supp. 1009) affirming a judgment for plaintiff, defendant appeals. Reversed.

Adolph L. Pincoffs and Arthur Furber, for appellant. Charles B. Meyer, for respondent.

O'BRIEN, J. The plaintiff is the assignee of what is claimed to be a trade-mark or business label, which had been adopted by another company some time before the assignment, and used to advertise a preparation known as "Roachsalt," for destroying roaches and other insects. The defendant manufactures and sells an article to be used for the same purpose with what is alleged to be a trade-mark and label which describes the article as "Roach Salt." The plaintiff has condensed into one word the description of the article, with a peculiar spelling of salt, while the defendant uses two words with the ordinary and correct spelling. The plaintiff contends that the use by the defendant of the words and label amounts to a trespass or infringement of his trade-mark, and in this contention he has been sustained by the courts below, and the defendant has been enjoined by the judgment from using the word in his business. The complaint avers the use by the defendant of a label sought to be enjoined in which the most prominent feature displayed is that of a large roach or insect, with the words "Stern's Insectago" upon the body of the

§ 1. See *Notaries*, vol. 37, Cent. Dig. § 1; *Officers*, vol. 37, Cent. Dig. § 121.

insect, with other words descriptive of the article and what it does in the way of destroying insect life. The most prominent words upon the label are, "Warranted Chemical Roach Salt," and the last word contains the only possible similarity between the two labels. In all other respects they are entirely different. The defendant's label differs in size, color, workmanship, and descriptive words from that of the plaintiff, and any one intending to purchase the plaintiff's goods could not be misled by the defendant's label. It is not claimed or averred in the complaint that the public have been deceived by the use of the word by the defendant, or that there was any such intent or purpose on his part to deceive.

The question, therefore, is whether the plaintiff has such an exclusive proprietary right to the use of a common English word, or a combination of such words, as to entitle him to debar all others from the use of the same in the absence of fraud or intent to deceive. The word "roach" can be used as descriptive of the common insect whose life is sought to be destroyed by the use of the article, and so the word "salt" may be used, since it is a word in common use to describe chemical preparations and an article for the preparation of food. The two words may be united and used as one word to describe a salt to be used for the purpose of destroying roaches. Where a common word is adopted or placed upon a commercial article for the purpose of identifying its class, grade, style, or quality, or for any purpose other than a reference to or indication of its ownership, it cannot be sustained as a valid trade-mark. Words of this character correctly describing the purpose to which the article is to be put cannot be exclusively used as trade-marks. *Columbia Mill Co. v. Alcorn*, 150 U. S. 460, 14 Sup. Ct. 151, 37 L. Ed. 1144; *Cooke & Cobb Co. v. Miller*, 169 N. Y. 475, 62 N. E. 582. The office of a trade-mark is to point out distinctively the origin or ownership of the article to which it is affixed, and no sign or form of words can be appropriated as a valid trade-mark, which, from the fact conveyed by its primary meaning, others may employ with equal truth, and with equal right, for the same purpose. *Elgin National Watch Company v. Illinois Watch Case Company*, 179 U. S. 665, 21 Sup. Ct. 270, 45 L. Ed. 365. The sole question in the case is whether the plaintiff has a technical trade-mark that has been invaded by the act of the defendant. Both parties are engaged in the same business, and both have made use of a common word to describe the character, quality, and use of an article for destroying insect life. The fact that the plaintiff made use of the word before the defendant did not give him the exclusive right to it, since it was merely descriptive of the article. There is no allegation or finding that any fraud was intended or committed, or that

the defendant, by the use of the word, palmed off his goods to the public as the goods of the plaintiff. The case, in its legal aspect, is practically the same as if each party had labeled his goods "Roach Poison," instead of "Roach Salt." They are all common descriptive words, indicating to the purchaser of the article that it was a powder or preparation for destroying roaches or other insects; and when the two labels are compared with respect to size, color, character, and advertising caption, descriptive of the thing to which it is attached, they are so dissimilar that it is scarcely possible that any observer possessing reasonable intelligence who wanted to procure the plaintiff's goods would be likely to be deceived, or mistake the defendant's article for that of the plaintiff.

The judgment should be reversed, and a new trial granted; costs to abide the event.

PARKER, C. J., and BARTLETT, VANN, CULLEN, and WERNER, JJ., concur. MARTIN, J., absent.

Judgment reversed, etc.

(176 N. Y. 1)

HOWARD IRONWORKS v. BUFFALO ELEVATING CO.

(Court of Appeals of New York. Oct. 6, 1903.)
COUNTY COURT—JURISDICTION—COUNTER-CLAIM.

1. Const. art. 6, § 14, and Code Civ. Proc. § 340, limit the jurisdiction of county courts to actions in which the complainant demands judgment for a sum not exceeding \$2,000. Code Civ. Proc. § 340, gives county courts the same jurisdiction, after jurisdiction has once been acquired in and over an action, and in the course of the proceedings therein, which the Supreme Court possesses in a like case, and it may render any judgment or grant any relief which the Supreme Court might have rendered or granted in a like case. *Held*, that where the demand for judgment in the complaint does not exceed \$2,000 the court has jurisdiction of the case, with power to try and render any judgment upon any counterclaim, irrespective of the amount that defendant may plead in his answer.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by Howard Ironworks against the Buffalo Elevating Company. From a judgment of the Appellate Division (81 N. Y. Supp. 452) entered on an order reversing an interlocutory judgment overruling a demurrer to a counterclaim, defendant appeals. Reversed.

Alfred L. Becker and Tracy C. Becker, for appellant. Loran L. Lewis, Jr., and William C. Carroll, for respondent.

O'BRIEN, J. The plaintiff's complaint was filed in the county court, and judgment was demanded for about \$900, alleged to be due from the defendant for work, labor, and ma-

terials performed and furnished by the plaintiff at the defendant's request.

The answer, among other things, states that the work, labor, and materials described in the complaint were furnished and performed under a contract between the parties whereby the plaintiff contracted to manufacture and install at defendant's elevator, in a good, workmanlike manner, certain machinery described, and the plaintiff warranted the work and materials free from all defects, and agreed that the machinery so contracted for should be sufficient and suitable to move, control, and regulate the movements of two movable elevator towers for which the defendant was to pay over \$3,000; that the plaintiff undertook to perform this contract, but the work and materials were so defective and unsuitable that the work was not only worthless, but by reason of the default on the part of the plaintiff to perform the contract the defendant sustained damages in the sum of \$30,000, and this sum was, upon these facts, interposed as a counterclaim in the action. The plaintiff demurred to the counterclaim upon the ground that the court had no jurisdiction of the subject-matter thereof, since the counterclaim demanded a judgment against the plaintiff for more than \$2,000. The county court overruled the demurrer, and gave judgment upon the issue of law in favor of the defendant. The Appellate Division has reversed this judgment by a divided court, and has certified to this court two questions, as follows: First. Is the county court without jurisdiction over defendant's counterclaim herein because the amount demanded in said counterclaim exceeds \$2,000? Second. If the jurisdiction of the county court over counterclaims is limited, as to amount, to counterclaims wherein the amount demanded does not exceed \$2,000, is such objection to defendant's counterclaim herein properly taken by demurrer?

The substantial question presented is whether upon the face of the pleadings the county court has jurisdiction to try the matter involved in the counterclaim and to render judgment thereon. The facts set forth by the defendant in that part of the answer amount to an allegation that the plaintiff did not perform the contract sued upon, and that in itself is matter of defense. But the demurrer deals with the answer only so far as it is a counterclaim and demands an affirmative judgment, and hence the decision below must be deemed to relate only to that phase of the answer.

The provisions of the present Constitution and the Code prescribing the jurisdiction of county courts are as follows: Article 6, § 14, of the Constitution enacts: "The existing county courts are continued. * * * County courts shall have the powers and jurisdiction they now possess, and also original jurisdiction in actions for the recovery of money only, where the defendants reside in the county, and in which the complaint de-

mands judgment for a sum not exceeding two thousand dollars. The Legislature may hereafter enlarge or restrict the jurisdiction of the county courts, provided, however, that their jurisdiction shall not be so extended as to authorize an action therein for the recovery of money only, in which the sum demanded exceeds two thousand dollars, or in which any person not a resident of the county is a defendant." Code Civ. Proc. § 340, follows this provision of the Constitution, and limits the jurisdiction in cases for the recovery of money only by the demand of judgment in the complaint, which must be a sum not exceeding \$2,000.

The view of the case that prevailed in the learned court below would produce some curious results in practice. In this case it is admitted on all sides that the court had complete jurisdiction of the action. The objection is that it has no jurisdiction of the defense by way of counterclaim. It is said that there is ample power to hear, determine, and award judgment on the plaintiff's claim, but no power to try or give judgment on the defendant's counterclaim, although it arises out of the very transaction stated in the complaint, and the only reason for this contention is that it is stated in the pleading at too large a sum. The large claim stated in the answer may fade away to a very small one after the proofs at the trial are all in, but it is argued that this makes no difference, since the court is without jurisdiction to take any proofs on the merits of the claim. An irresponsible party could implead his neighbor in the county court in an action wherein he demands just \$2,000. The defendant sued may have a valid counterclaim which he regards as of no value except for defensive purposes, but if it amounts to more than \$2,000 he cannot make use of it as a counterclaim to defeat the plaintiff's claim. If he has no other defense he must submit to have judgment pass against him. If he attempts to set it up to the extent of \$2,000 he must release the balance, since the general rule is that a party cannot split up his claim into fragments and have a separate action upon each fragment. So that a defendant who has been brought into the county court by the act of the plaintiff in selecting his forum may have a valid and meritorious defense, but his hands are so tied that he is unable to avail himself of it by reason of the very magnitude of his claim. It is quite clear that a party may in this way select a forum for the litigation in which he has a strategic advantage over his adversary.

The mind does not readily accept the reasoning and arguments that lead to such conclusions. The first impression is that the argument must be faulty at some vital point, and I think the error is to be found in the attempt to enlarge by construction and analogy the express restrictions which have been placed upon the jurisdiction of the county

court by the Constitution and the statute. The restriction as to the amount of the claim is based wholly on the demand of the complaint, but the learned court below has determined the question of jurisdiction upon the demand in the answer. The point of the decision is that not only is the jurisdiction limited to cases where the complaint demands judgment for a sum of money not exceeding \$2,000, but to cases where the counterclaim contained in the answer does not exceed the same amount. This conclusion is the result of argument and analogy quite outside the words of the Constitution and the statute.

Conceding all that has been said in the learned court below concerning the analogy between the cause of action stated in the complaint and the cause of action stated in the answer by way of counterclaim, the fact still remains that there is nothing in the Constitution or the statute that forbids a defendant, when sued in the county court, from interposing any defense that he may have to the cause of action stated in the complaint, and if it be a counterclaim exceeding \$2,000 he is not forbidden to plead it, even though an affirmative judgment in his favor would result. The power of the court to render the proper judgment is not limited by the amount of the counterclaim, when jurisdiction of the action is once obtained, but the amount demanded in the prayer of the complaint is the sole test upon that question. In this case when the complaint was served the court acquired jurisdiction of the action, and consequently of any defense to it that grew out of the transaction stated in the cause of action, even though it was a counterclaim stated to amount to more than \$2,000. When the plaintiff elected to bring his action in the county court, the right to try and render judgment upon any counterclaim that the defendant had followed the case as a necessary incident of the jurisdiction, without regard to its amount. The jurisdiction of the county court is a question that generally concerns the defendant, and is usually raised by a defendant sought to be subjected to its jurisdiction. In this case the question is raised by the plaintiff who selected that court as his forum, and now contends that the defendant is barred by reason of the limited jurisdiction from interposing defenses that it clearly could interpose had the plaintiff selected any other court. The contention ought not to be sustained unless it appears to rest firmly upon authority, reason, and argument so clear and satisfactory as to be conclusive, and it seems to me that it does not.

It cannot be doubted that the Legislature has power under the Constitution to enact that when the county court acquires jurisdiction of an action by the service of a proper complaint the court may entertain any defense which the defendant, sued in that court, may have, even though it be a counter-

claim alleged to be more than \$2,000, and that, we think, is the effect, substantially, of section 348 of the Code of Civil Procedure. That section points out with great clearness what the power of the court is, after jurisdiction once acquired: "Where a county court has jurisdiction of an action or special proceeding, it possesses the same jurisdiction, power and authority in and over the same, and in the course of the proceedings therein, which the Supreme Court possesses in a like case; and it may render any judgment or grant either party any relief which the Supreme Court might render or grant in a like case. * * *". If the present action had been brought in the Supreme Court no question could be raised with respect to the power to try and render judgment upon the counterclaim, and the plaintiff having impleaded the defendant in the county court, upon a complaint that conferred full jurisdiction upon that court, it follows that it had power to render any judgment in favor of the defendant or grant it any relief that the Supreme Court could in a like case.

There is no express or implied restriction upon the power of the county court to try issues and render the proper judgment in an action where it has once acquired jurisdiction. It may entertain an action to foreclose a mortgage where the real property mortgaged is situate within the county, and in such cases it may render judgment for a deficiency, whatever the amount may be. *Hawley v. Whalen*, 64 Hun, 550, 19 N. Y. Supp. 521. That of course is one of the incidents that necessarily follows the power to render judgment in foreclosure cases. In so far as it is sought to recover a deficiency judgment in such cases upon the bond the action is one for the recovery of money only, and the defendant may interpose, by way of counterclaim, any common-law cause of action he may have against the plaintiff that would tend to defeat or diminish the claim for a deficiency judgment. *Hunt v. Chapman*, 51 N. Y. 555; *Bathgate v. Haskin*, 59 N. Y. 533. There is no constitutional or statutory provision that in terms authorizes such practice, but it is a necessary conclusion from the general power of the court to entertain foreclosure actions. So the general jurisdiction to entertain common-law actions where the demand for judgment in the complaint does not exceed \$2,000 carries with it the power to try and render judgment upon any counterclaim that the defendant may plead in his answer to the cause of action stated in the complaint. If there can be any reasonable doubt with respect to this proposition, based upon grounds of reason and justice, it is made clear by the section of the Code above cited. That section is broad enough in its language to permit a defendant in the county court to interpose any counterclaim that he may have to the plaintiff's demand, and it is safe to assert as a reasonable inference that it was intended by that provision to en-

able the parties to settle all controversies arising from the transaction stated in the complaint. It could not have been intended that the defendant should be debarred from interposing defenses such as appeared in the answer in this case. These views sufficiently indicate the answer to the questions certified.

We think that the demurrer to the counterclaim was not well taken, and that the judgment of the Appellate Division should be reversed, with costs, and that of the county court affirmed.

PARKER, C. J., and GRAY, BARTLETT, HAIGHT, CULLEN, and WERNER, JJ., concur.

Judgment reversed.

(206 Ill. 511)

CHICAGO JUNCTION RY. CO. v. McGRATH et al.*

(Supreme Court of Illinois. June 16, 1903.)

RAILROADS—INJURIES AT CROSSINGS—FLYING SWITCHES—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTIONS FOR JURY—NEW TRIAL—GROUNDS.

1. Where the evidence tends to prove the cause of action laid in the declaration, it is proper to submit the case to the jury.

2. Three detached cars of defendant railroad were standing on a switch laid on a public street, the locomotive being some distance away on another track. Plaintiffs' intestate, in order to cross the street, started to go around the cars, and was knocked down and fatally injured by reason of two loaded cars, which had been kicked in on this switch from another track, striking the opposite end of the cars around which he was passing, with sufficient force to drive them forward 20 to 25 feet. There was some conflict in the evidence as to whether the bell on the locomotive was rung at the time, but it appeared that the locomotive was at least 100 yards distant on another track, and that there was no brakeman on either the moving or standing cars. *Held* that, even though the bell was ringing, the court could not say, as a matter of law, that defendant was not guilty of negligence.

3. The evidence tended to show that, while deceased was within hearing, the conductor of the switch train whose engine caused the injury held a conversation with the foreman of the coalyards in which deceased was employed, relative to placing certain cars on the switches in said yards. The foreman instructed deceased to feed his horses, which necessitated crossing defendant's tracks. Deceased was detained at the crossing by the train which caused the accident, and there was evidence that he was then warned by defendant's switchman that they were about to do some switching and to look out for himself. He was injured while attempting to recross the track on his return from the barn. *Held*, that the question whether he was guilty of contributory negligence was for the jury.

4. After the judge and counsel had withdrawn to argue a motion, one of plaintiffs' witnesses addressed some remarks to the jury to the effect that he hoped they would do the square thing by the widow and give her a substantial verdict. It did not appear that he had any influence with the jury. It did not appear that plaintiffs were in any way connected with or to

blame for his improper conduct. *Held*, that the court did not err in not granting a new trial on this ground.

Appeal from Appellate Court, First District.

Action by Annie McGrath and others against the Chicago Junction Railway Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

This is an appeal from a judgment of the Appellate Court for the First District (107 Ill. App. 100) affirming a judgment of the superior court of Cook county in favor of appellees, and against appellant, for \$5,000.

The action is trespass on the case. The declaration consists of eight counts, each of which contains the general allegation that on the 14th day of November, 1898, appellant possessed and was using various railway tracks in the city of Chicago, extending along and upon Fortieth street, in said city, and various tracks which extended from its main line through the yards of the Weaver Coal Company, and that appellant was operating, by its servants, a certain locomotive engine, and was switching cars along and upon the tracks in said coalyard. In addition to these general allegations, the first count charged that William McGrath was in the employ of said Weaver Coal Company; that the employees of the said coal company, in the course of their employment, frequently, regularly, and habitually crossed and recrossed the switch tracks in said coalyard, and that this fact was known to appellant; that it thereupon became and was the duty of appellant to use reasonable care in the operation of its engine and cars, but that while the said McGrath, in the exercise of due care, was rightfully crossing one of said tracks, appellant wrongfully, negligently, and recklessly pushed certain cars upon the track over which he was crossing, whereby he was run over and killed. The first count concludes, as do all the other counts, with an enumeration of the heirs of William McGrath, and a recital of the issuing of letters of administration to appellees. The remaining counts allege substantially the same facts, charging different violations of duty. The second count alleges that appellant wrongfully, negligently, willfully, wantonly, and recklessly pushed the said car, etc. The third count charges that appellant wrongfully and negligently failed to give any warning or notice of the movement of said cars. The fourth count alleges the duty of appellant, in switching cars, to have a brakeman or other person upon or near the forward end of the forward car to regulate the speed thereof and to warn persons crossing said tracks, and charges negligent and careless violation of this duty. The fifth count charges that appellant carelessly, wrongfully, and negligently moved the said cars at a high and excessive and dangerous rate of speed. The sixth count sets forth an ordinance of the city of Chicago requiring the bell of each locomotive, while running

*Rehearing denied October 6, 1903.

within said city, to be rung continually in certain portions of said city, and alleges that, while operating a locomotive in a portion of the city included in said ordinance, appellant negligently violated the same. The seventh count sets up an ordinance of the city of Chicago limiting the speed of freight cars within the corporate limits of the said city to six miles per hour, and charges a violation of said ordinance. The eighth count sets forth the statute of the state of Illinois requiring each railroad corporation to station upon the rear or hindmost car of each train a trusty and skillful brakeman, unless the brakes are efficiently operated by power applied from the locomotive, and charges a violation of said statute. To this declaration appellant filed the general issue.

From the evidence it appears that the Weaver Coal Company owned a coal yard extending along the south line of Fortieth street, from Wentworth avenue on the east to Hopkins street on the west—a distance of two blocks—in the city of Chicago; that said yards were divided by Atlantic street, which runs parallel with the two last-named streets; that appellant's main line runs on Fortieth street, and in addition thereto it has a switch leading off from its main line into said coal company's yard, and maintains therein several other switches used for the purpose of delivering cars and freight to the coal company. William McGrath, appellees' intestate, was a teamster in the employ of the coal company. A short time prior to the injury which caused his death he returned from delivering a load of coal, and went to his foreman for further instructions. The evidence tends to show that, while he was present and within hearing, the conductor of the switch train whose engine caused the injury held a conversation with said foreman relative to placing certain cars upon the switches within said yards. The foreman at that time instructed McGrath to feed his horses. This necessitated crossing the tracks of appellant in order to reach the barn of the coal company, its custom being to feed at noon, in the harness, from nosebags. McGrath started for the barn and was detained at the crossing on Atlantic street by the train which caused the accident. There is evidence in the record tending to show that he was then warned by a switchman of appellant that they were about to do some switching, and to look out for himself. He went to the barn, got three nosebags filled with feed, and started back to the place where he had left his team. Atlantic street was again blocked by three detached cars standing on one of the switches, the locomotive being some distance away on another track. McGrath turned off on a path, passed along the side of the north car the distance it projected over the street, turned to go around it, and was then knocked down by reason of two loaded cars, which had been kicked in on this switch from another track,

striking the opposite end of the cars around the north end of which he was passing, with sufficient force to drive them forward 20 to 25 feet. The injuries received caused his death shortly thereafter.

Winston, Babcock, Strawn & Shaw, for appellant. Francis T. Murphy (Edward C. Higgins, of counsel), for appellees.

HAND, C. J. (after stating the facts). Appellant insists that this case should be reversed, because: First, it was not guilty of negligence which in any manner contributed to the injury to the deceased; second, the deceased was guilty of contributory negligence at the time of the accident; and, third, appellant did not receive the fair trial to which it was entitled under the law, by reason of the fact that one McGinnis, a witness for appellees, attempted wrongfully to influence the jury to return a substantial verdict in their behalf.

At the close of the plaintiffs' evidence, and again at the close of all the evidence, the appellant made a motion and offered an instruction peremptorily taking the case from the jury, which motion was overruled and instruction refused by the court. Except for this action, its first and second assignments of error would not be before the court for consideration, as the questions of negligence and contributory negligence are, as a general rule, questions of fact for the jury. The refusal to take the case from the jury, however, requires an examination of the evidence by this court, not for the purpose of determining in whose favor it preponderates, but in order to ascertain whether the evidence can be said to tend to prove the cause of action laid in the declaration. If it does, the court properly submitted the case to the jury.

From a careful examination of this record we are of the opinion that the court properly refused to take the case from the jury. It cannot be said that ordinarily prudent men, under the circumstances disclosed by the evidence in this case, would not be apt to differ in their views as to the negligence of appellant in "kicking" two heavily loaded cars, with the force these cars appear to have been driven, against other cars so standing as to barely cover the width of a public street commonly traveled. This manner of switching has been condemned as dangerous by this court (*Illinois Central Railroad Co. v. Baches*, 55 Ill. 379), and Mr. Thompson, in his work on *Negligence* (volume 2 [2d Ed.] § 1695), says: "The courts have held with practical unanimity, and often with great emphasis, that the practice called making the 'running' or 'flying switch,' which consists of 'kicking' or 'shunting' cars forward, in breaking or making up trains, by moving them forward at a rapid speed detached from the engine or from a portion of the train, and then, by checking or increasing the speed of the engine or of such

portion of the train, allowing them to fly forward over public crossings without the usual warning signals by bell or whistle, or any means of giving such signals, and without any other signals than may be afforded by a brakeman standing on such 'running' or 'flying cars,' constitutes negligence." There was some conflict in the evidence as to whether the bell upon the locomotive was rung at the time of this accident, but as the evidence shows that the locomotive was at least 100 yards distant upon another track, and that there was no brakeman upon either the moving or standing cars, even though the bell was ringing we cannot, as a matter of law, say that appellant, in putting in motion said cars, allowing them to get beyond its control, and by reason thereof causing an accident resulting in death, was not guilty of negligence. Nor can we say McGrath was guilty of negligence contributing to the accident. In *Chicago & Northwestern Railway Co. v. Hansen*, 166 Ill. 623, 46 N. E. 1071, it was said (page 628, 166 Ill., and page 1072, 46 N. E.): "It seems to us impossible that there should be a rule of law as to what particular thing a person is bound to do for his protection in the diversity of cases that constantly arise, and the question what a reasonably prudent person would do for his own safety under like circumstances must be left to the jury as one of fact." And in *Lake Shore & Michigan Southern Railway Co. v. Johnsen*, 135 Ill. 641, 26 N. E. 510, on page 647, 135 Ill., and page 510, 26 N. E., it is said: "Unless the negligence of the plaintiff is proven by such conclusive evidence that there can be no difference of opinion as to its existence upon a mere statement of the facts, the jury must pass upon it. We have repeatedly held that it is a question of fact to be determined by the jury from the evidence, and not a question of law, whether an injured party has exercised ordinary care for his safety and to avoid injury." And in *Chicago & Alton Railroad Co. v. Pearson*, 184 Ill. 386, 56 N. E. 633, on page 391, 184 Ill., and page 635, 56 N. E., that "it is not a rule of law that the omission of the duty to look and listen will bar a recovery, where there are facts excusing the performance of that duty (*Elliott on Railroads*, § 1166); and it is the settled rule of this court that it cannot be said, as a matter of law, that a person is in fault in failing to look and listen, if misled without his fault, or where the surroundings may excuse such failure. *Pennsylvania Co. v. Frana*, 112 Ill. 398; *Chicago & Northwestern Railway Co. v. Dunleavy*, 129 Ill. 132 [22 N. E. 15]; *Terre Haute & Indianapolis Railroad Co. v. Voelker*, 129 Ill. 540 [22 N. E. 20]; *Chicago & Northwestern Railway Co. v. Hansen*, 166 Ill. 623 [46 N. E. 1071]. The jury were to determine, as a question of fact, in view of all the surroundings, whether the

deceased was guilty of negligence in failing to look and listen for the other train. Whether these circumstances relieved him from the duty of looking and listening required the submission of the case to the jury."

As to the third objection, it appears that a witness of appellee, one McGinnis, as he was leaving the courtroom, the judge and counsel having withdrawn to chambers for the purpose of arguing the motion to take the case from the jury, stepped in front of the jury and addressed some remarks to them to the effect that he hoped they would do the square thing by the widow and give her a substantial verdict. Court was in session, and there was a bailiff in the courtroom in charge of the jury. Appellant had a special officer present, whose business it was to prepare its cases for trial, and who saw all that took place, although he swears he heard nothing that was said. This special officer made no complaint to counsel or court, and seems to have made no effort to ascertain what was said to the jury by McGinnis until a verdict was returned against his employer, when, although it was argued he, not being a lawyer, did not realize the effect of what was done in the courtroom, it appears that he at once investigated the matter, and, on ascertaining the facts, they were presented to the court and urged as a ground upon which a new trial should be granted. Had the action of McGinnis been presented to the court upon resuming the trial of the case, an instruction could have been given which would have effaced the effect, if any, of this witness' interference. It does not appear that he had any influence with the jury, although it does appear that some of them were much amused at what he had to say, while others resented his interference. He had been a source of much amusement to the court and jury during the trial, and from reading his testimony it is perfectly apparent, and the jury could not but have been fully aware, that his sympathies were entirely with the widow before he gave expression to them, and it seems to us that his conduct could not but have lessened the effect of his testimony and impaired his credit as a witness. It does not appear that appellees were in any way connected with or to blame for this improper conduct of the witness, and from the affidavit of McGinnis, produced by appellant at the time of making the motion for a new trial, it appears that he did not know that he was doing anything improper in addressing the jury. In our opinion it does not appear from this record that the trial court erred in not granting a new trial upon this ground.

No other error having been assigned or argued, we are of the opinion the judgment of the Appellate Court affirming that of the superior court should be affirmed. Judgment affirmed.

(203 Ill. 518)

ECONOMY LIGHT & POWER CO. et al. v. HILLER.*

(Supreme Court of Illinois. June 16, 1903.)

TORTS—JOINT LIABILITY—ELECTRICITY—TELEPHONE WIRES—PERSONAL INJURIES—NEGLECT—EVIDENCE—INSTRUCTIONS—HARMLESS ERROR.

1. Where the wires of an electric light company charged with a powerful current crossed above the wires of a telephone company, not of themselves dangerous, but left uninsulated, and the poles and supports of the electric light wires were neglected, there was a joint liability for personal injuries received from a telephone wire charged by contact with a sagging electric light wire, and they might be joined in suit therefor.

2. There was evidence tending to show that the telephone company would probably know when its wires were burned out or its system interfered with, and after the wire was burned out in the nighttime, and was hanging in a dangerous condition in a public street, nothing was done to repair the damage or remove the danger at 8:30 o'clock the next morning, when the accident occurred. *Held*, that the court could not say, as matter of law, that proper inspection and diligence on the part of the telephone company did not require it to discover the dangerous condition and remove the danger to those using the street before that time.

3. In an action against a telephone company and an electric light company for personal injuries, an instruction that, if the injury was caused by or through the negligence of the defendants or either of them, then plaintiff was entitled to recover, was not harmful error, though it did not limit recovery to the defendant proved guilty, the court having instructed that the telephone company should be found not guilty if its negligence did not cause the accident, and also having given the jury forms for a verdict in case they should find only one defendant guilty, and there being no doubt that the electric light company was negligent.

4. An instruction that the question of negligence of the defendants and of care on the part of plaintiff were questions of fact for the jury, further explaining that it was their duty and province to determine those questions of fact under the law and evidence in the case, was not erroneous.

Appeal from Appellate Court, Second District.

Action by Charles Hiller, by his next friend, against the Economy Light & Power Company and another. From a judgment of the Appellate Court (106 Ill. App. 306) affirming a judgment for plaintiff, defendants appeal. **Affirmed.**

Garnsey & Knox, for appellants. J. W. D'Arcy, for appellee.

CARTWRIGHT, J. Appellee, a minor, suing by his next friend, recovered a judgment against appellants, the Economy Light & Power Company, a corporation maintaining poles and wires in the streets of the city of Joliet and furnishing electric light and power, and the Chicago Telephone Company, a corporation also maintaining poles and wires in said streets and furnishing telephone service, the recovery being for injuries received by appellee from contact with a broken telephone wire hanging across an electric light wire. The Appellate Court for the Second

District affirmed the judgment, and appellants prosecuted separate appeals from the judgment of the Appellate Court.

At the close of the evidence each defendant asked the court to give a peremptory instruction to the jury to find it not guilty. The court refused to give the instructions. It is contended that both instructions ought to have been given, because the injury to the plaintiff was not the result of the joint negligence of the two defendants. The rule is that all persons who join in the commission of a wrong are jointly and severally liable, and the injured party may sue all or any of them. The joint liability in such a case is not of the same nature as a joint liability for the breach of a contract, but, where two or more are sued, the wrong complained of must be joint in its character. One is never liable for the wrong of another, and if their acts are entirely distinct and separate there cannot be joint liability. *Yeazel v. Alexander*, 58 Ill. 254; *Chicago & Northwestern Railway Co. v. Scates*, 90 Ill. 586; *Chicago City Railway Co. v. Rood*, 163 Ill. 477, 45 N. E. 238, 54 Am. St. Rep. 478. There are some wrongs, like slander, which cannot be joint, but the great majority of torts may be committed jointly, and where different persons owe the same duty, and their acts naturally tend to the same breach of that duty, the wrong may be regarded as joint, and both be held liable. We are of the opinion that the injury in this case was the result of the joint negligence of the two defendants. At the corner of Hickory and Division streets, in the city of Joliet, the wires of the defendant the Economy Light & Power Company cross above the wires of defendant the Chicago Telephone Company. The electric current carried by the telephone wire would not be dangerous, under ordinary conditions, if it was not in contact with any other wire; but if the electric light wire should come in contact with the telephone wire, the result would be to impart to it a current of electricity which would be dangerous. While neither one had any direct control or management of the wires of the other company, it was the duty of each to use proper care to protect the public against the danger of accident from its own wires. Both companies were using electricity, and the current of the Economy Light & Power Company was so powerful as to be dangerous to human life. In case of the use of a highly dangerous agent like electricity, the party using it must exercise such a degree of care as is commensurate with the danger, to prevent injury to the public. *Alton Railway & Illuminating Co. v. Foulds*, 190 Ill. 367, 60 N. E. 537. The wires of the telephone company were so related to the electric light wires that contact between them would produce dangerous results. At the place where the wires crossed at Hickory and Division streets the insulation of the electric light wires was bad, and in many places was entirely off, or

*Rehearing denied October 7, 1903.

¶ 1. See *Electricity*, vol. 12, Cent. Dig. § 2.

ragged, and hanging from the wire. The telephone wires beneath were not protected in any way from receiving the deadly current if the wires came in contact. The pole on which the electric light wires were suspended was unfit, and not braced as it ought to have been. There had been a guy wire to keep it erect, which was gone, and on the morning of the accident the pole was leaning over at an angle of 45 degrees, letting the electric light wire down to within two or three inches of the telephone wire. There had been a heavy rain storm during the night, and the electric light wires had evidently sagged and come in contact with the telephone wires, with the result that the telephone wire was burned off at some distance from the point of contact, and fell across the electric light wires to the ground. The telephone wires passed through the branches of shade trees, and were not insulated, so that the wire was liable to burn out if it touched the trees carrying the current from the electric light wires in wet weather. It is uncertain how long the pole had been leaning, but it had been unfit before the accident, and no safeguard of any kind had been provided at that place, or where the telephone wires passed through the trees, or where they were above the electric light wires at the place where the telephone wires burned off. The evidence showed the common duty owing by both of the defendants to the public, resulting from the situation and proximity of the wires, and the use of the dangerous agent by the Economy Light & Power Company. The evidence tended to show a concurrent neglect of the common duty which rested upon both the defendants, and the negligence was joint in its character.

The telephone company also insists that the peremptory instruction asked by it should have been given on account of the want of negligence on its part. Counsel for that company say that it could not repair the wires of the Economy Light & Power Company nor straighten the leaning pole without becoming a trespasser; that it could not enjoin that company from maintaining its poles and wires in a dangerous condition, or compel it to make them safe, and that all the telephone company could do to obviate danger would be to remove its wires from the street when it found they were in danger of contact with the electric light wires. They so construe the decision in *Chicago Telephone Co. v. Northwestern Telephone Co.*, 199 Ill. 324, 65 N. E. 329. We find nothing in that decision justifying the conclusion that the telephone company would have to remove from the street, and would have no protection from the negligence of the Economy Light & Power Company or the improper construction and maintenance of its wires, under such circumstances as are shown by the evidence. It was held in that case that a company operating a telephone system was entitled to be free from unreasonable or unnecessary in-

terference such as would prevent the practical operation of its telephone system. It might require more care on the part of the telephone company if there were electric light wires in the street which were liable to come in contact with its wires and cause injury, and the duty of increased care and caution would not furnish a good reason for enjoining the putting up of electric light wires; but we have not decided that there could be no protection to the property of the telephone company against negligence or improper construction or maintenance of poles or wires by another company. There was evidence tending to show that the telephone company would probably know when its wires were burned out or its system interfered with, and after the wire was burned out in the nighttime, and was hanging in the dangerous condition in the public street, nothing was done to repair the damage or remove the danger at 8:30 o'clock the next morning, when the accident occurred. The court could not say, as a matter of law, that proper inspection and diligence on the part of the telephone company did not require it to discover the dangerous condition and remove the danger to those using the street before that time. The question whether the company ought to have discovered the condition and made repairs in time to prevent the accident was finally settled by the judgment of the Appellate Court. There was no error in refusing to give the peremptory instructions asked.

The court, at the request of the plaintiff, gave to the jury the following instruction: "If the jury believe, from the evidence, that the plaintiff has proved the allegations contained in one or more counts of his declaration by a preponderance of the evidence, and if the jury believe, from the evidence, that the plaintiff was injured as alleged, and if you believe, from the evidence, that the plaintiff, at the time of such injury, was in the exercise of reasonable care for his safety, and if you further believe, from the evidence, that such injury, if proved, was caused by or through the negligence of the defendants or either of them, as alleged in either count of the declaration, then the plaintiff is entitled to recover such damages as you believe, from the evidence, will compensate him for the injury sustained." This instruction was correct in saying that if plaintiff proved the allegations of either count of his declaration, and was injured by the negligence of the defendants or either of them, he would be entitled to recover his damages, but it was faulty in not limiting the recovery to the defendant proved guilty. It did not directly authorize a recovery against both for the negligence of one, and, so far as the Chicago Telephone Company is concerned, the court gave two instructions to the effect that unless it appeared from the evidence that said company was guilty of the negligence charged in the declaration, or if it appeared that the accident occurred by reason of the act or neg-

lect of some other party or company, they should find it not guilty. The court also gave to the jury certain forms for their verdict in case they should find one of the defendants guilty and the other not guilty, so that we think the jury could not have been misled, and that the other instructions, read with the defective one as one charge, supplemented it and supplied the defect as to the Chicago Telephone Company. So far as the Economy Light & Power Company is concerned, there could have been no other conclusion from the evidence than that which was reached by the jury, and we cannot regard the instruction as harmful to that company in view of the evidence. The pole was not supported, and was in a condition wholly unfit for sustaining the electric light wires before and at the time of the injury. The insulation of the wires was very bad, and was hanging in rags at that place and other places in the immediate vicinity, as well as over the city generally. That the Economy Light & Power Company was guilty of negligence causing the injury is beyond question.

An instruction that the questions of negligence on the part of the defendants and care on the part of the plaintiff were questions of fact for the jury is objected to. The instruction further explained to the jury that it was their duty and province to determine those questions of fact under the law and evidence in the case, and there was no error in giving that instruction.

The judgment of the Appellate Court is affirmed. Judgment affirmed.

(203 Ill. 492)

CHICAGO & E. I. R. CO. v. HEEREY.*

(Supreme Court of Illinois. June 16, 1903.)

SERVANT—INJURIES—ASSUMPTION OF RISK—BURDEN OF PROOF—INSTRUCTIONS—APPEAL.

1. Where no cross-error is assigned by plaintiff (appellee) on the action of the court in instructing that there could be no recovery on certain counts in the petition, the instruction must be regarded as correct.

2. In an action by an employé for personal injuries, the burden of proving that there was not an assumption of risk is on the plaintiff.

3. In an action for the death of a railroad fireman by the parting of tender and engine, the evidence examined, and held that the court did not err in refusing to instruct for defendant, but the question of intestate's knowledge and assumption of risk was for the jury.

4. In an action for the death of a railway fireman by the parting of tender and engine, an instruction that "if the deceased knew, or by the exercise of ordinary care might have known, that the chains were uncoupled, he would be charged with assuming the risk or dangers arising therefrom, if an ordinarily prudent person, acting with ordinary care and prudence for his own safety, would not have continued in the same work; but if an ordinarily careful and prudent servant, acting with ordinary care and prudence for his own safety, would, under similar conditions, have continued the work, the deceased did not necessarily as-

sume the risk"—was erroneous, as eliminating assumption of risk from knowledge of danger, and introducing the test of contributory negligence.

Appeal from Appellate Court, First District.

Action by C. J. Heerey, as administrator, against the Chicago & Eastern Illinois Railroad Company. From a judgment of the Appellate Court (105 Ill. App. 647) affirming a judgment for plaintiff, defendant appeals. Reversed.

Pam, Calhoun & Glennon (W. H. Lyford, of counsel), for appellant. James C. McShane, for appellee.

CARTWRIGHT, J. Joseph Heerey, a fireman on one of appellant's engines, was killed on the evening of October 21, 1898, near Kensington, Ill., by the parting of the engine and tender as he was standing with one foot on each, shoveling coal into the fire. He fell between the engine and tender, and was run over by the latter and killed. Appellee, as administrator of his estate, brought this suit in the superior court of Cook county to recover damages for his death, and obtained a judgment, which was affirmed by the Branch Appellate Court for the First District.

At the conclusion of the evidence the defendant asked the court to direct a verdict in its favor. The court refused to do so, and the refusal is assigned as error.

The engine was used to haul a regular train and to do switching work between Oakdale and Thornton, and was taken to defendant's roundhouse in Chicago once a week. On the Saturday night before the accident it was taken to the roundhouse as usual, and was taken out on Monday morning. It was provided with safety chains, one on each side of the drawbar, to prevent the engine and tender from pulling apart in case the drawbar or coupling pin should break. The engine and tender were coupled together with the drawbar and coupling pin, and the safety chains were permanently attached to the tender, to be hooked to the engine. If the coupling was all right, the chains would be slack, but were provided to draw the tender in case the coupling or drawbar should break. When the engine went out from the roundhouse on Monday morning the safety chains were unfastened and hanging from the tender, and the roundhouse foreman and engineer tried to couple them, but found them a trifle too short. Afterward, during the week, the engineer made various attempts to couple the chains, but was unable to do so. It was in use in that condition until the accident, on Thursday evening; and on the morning of that day the deceased, who had been in the defendant's employ as an extra fireman for about three months, was sent out to fire the engine. On the return trip, hauling a train, the deceased was standing with one foot on the engine and the other upon the tender, when the coupling pin

*Rehearing denied October 6, 1903.

† 2. See Master and Servant, vol. 24, Cent. Dig. § 907.

broke, and, the safety chains being uncoupled, the engine and tender parted, and the accident resulted.

The amended declaration contained six counts, but the court instructed the jury that plaintiff could not recover, upon the evidence, under either the second, fourth, fifth, or sixth count. The issues under the first and third counts were submitted to the jury. The counts withdrawn from the jury charged the defendant with negligence respecting the drawbar or coupling pin, causing the pin to break. There was no verdict upon those counts, and the questions arising upon the record relate only to the first and third counts, upon which the verdict and judgment were wholly based. They charged that the safety chains provided to hold the engine and tender together in case the coupling apparatus should give way were unfastened and disconnected; that defendant was negligent in that respect, and as a result the engine and tender parted, causing the accident. There is no cross-error assigned on the action of the court in instructing the jury that plaintiff could not recover under the second, fourth, fifth, or sixth count of the amended declaration, and the instruction must be regarded as correct, and not subject to review. The question is whether the court ought to have given the peremptory instruction as to the first and third counts.

The ground for insisting that the court ought to have directed a verdict for the defendant is that the evidence proved, as a matter of law, that the deceased assumed the risk of the chains being disconnected. It is contended that the burden of proof was upon the plaintiff to show that deceased was ignorant of the fact that the chains were uncoupled, and that he failed to prove such fact, but, on the contrary, the evidence showed that deceased was well aware of their condition, and entered upon and continued in the employment without objection. It is the settled law that the servant, when he engages in the employment, does so in view of the risks incident to it; that he will be presumed to have contracted with reference to such risks and assumed the same; and that, if he receives an injury resulting from the incidental risks and hazards ordinarily connected with the employment, he cannot hold the master responsible. *Cooley on Torts*, 521; 20 *Am. & Eng. Ency. of Law* (2d Ed.) 109. The rule also applies in any case where the servant during the course of his employment becomes aware of a defect, but voluntarily continues in the employment without objection. Following the universal rule, this court has stated the principle in numerous cases, among which are the following: In *Camp Point Mfg. Co. v. Ballou*, 71 Ill. 417, it was said: "The doctrine upon this subject appears to be that an employé cannot recover for an injury suffered in the course of the business about which he is employed, from defective machinery used therein, after he

had knowledge of the defect and continued his work." Again, it was said in *Simmons v. Chicago & Tomah Railroad Co.*, 110 Ill. 340: "If a servant, knowing the hazards of his employment as the business is conducted, is injured while engaged therein, he cannot maintain an action against the master for the injury merely on the ground that there was a safer mode in which the business might have been conducted, the adoption of which would have prevented the injury." In *Chicago & Eastern Illinois Railroad Co. v. Geary*, 110 Ill. 383, the court said: "The rule is as contended by counsel for appellant, namely, when an employé, after having the opportunity to become acquainted with the risks of his situation, accepts them, he cannot complain if he is subsequently injured by such exposure. One may, if he chooses, contract to take the risks of a known danger. Presumptively, he charges in such cases in proportion to the risk, or, rather, for the risk." In *Herdman-Harrison Milling Co. v. Spehr*, 145 Ill. 329, 83 N. E. 944, it was said: "That, as between employer and employé, the latter assumes all the usual known dangers incident to the employment, and that he also takes upon himself the hazard of the use of defective tools and machinery, if, after his employment, he knows of the defect, but voluntarily continues in the employment without objection, are familiar rules of law, often recognized by the decisions of this and other courts." In *Chicago Drop Forge & Foundry Co. v. Van Dam*, 149 Ill. 337, 36 N. E. 1024, the court said: "As a general rule, the servant will be regarded as voluntarily incurring the risk resulting from the use of defective machinery, if its defects are as well known to him as to the master." In *East St. Louis Ice & Cold Storage Co. v. Crow*, 155 Ill. 74, 39 N. E. 589, it was said: "If the injury was the result of obvious defects in the barge where he was working, or from causes known to him, or which he might have known in the exercise of due care, he cannot recover." In *Pittsburg Bridge Co. v. Walker*, 170 Ill. 550, 48 N. E. 915, it was said: "An employé assumes the risks of known dangers, and such as are so obvious that knowledge of their existence is fairly to be presumed." In *Swift & Co. v. O'Neill*, 187 Ill. 337, 58 N. E. 416, it was again said: "It is well understood that, as between employer and employé, the latter assumes all the usual known dangers incident to the employment, and that he also takes upon himself the hazard of the use of defective tools and machinery, if, after the employment, he knows of the defect, but voluntarily continues in the employment without objection."

It is also the rule that an employé of sufficient age and experience is chargeable with knowledge of the ordinary conditions under which the business is conducted, and its ordinary risks and hazards, and will be presumed to have notice of and to have assumed all such risks and hazards which to

a person of his experience and understanding are, or ought to be, patent and obvious. If a defect is so plain and obvious to the senses that in the exercise of ordinary care the employé would discover it, and he continues in the employment without complaint, and without any assurance by the master that the defect will be repaired or the danger removed, he assumes the risk arising from it. *Indianapolis, Bloomington & Western Railroad Co. v. Flanigan*, 77 Ill. 365; *Swift & Co. v. Rutkowski*, 167 Ill. 156, 47 N. E. 362; *Lake Erie & Western Railroad Co. v. Wilson*, 189 Ill. 89, 59 N. E. 573; *Armour v. Brazeau*, 191 Ill. 117, 60 N. E. 904; *Browne v. Siegel, Cooper & Co.*, 191 Ill. 226, 60 N. E. 815. The employé, however, has no duty of inspection to examine for and discover latent defects and dangers which arise during the course of his employment, rendering it more than ordinarily hazardous. He is charged with notice of such defects in appliances as the exercise of ordinary care would make manifest to him; but he does not assume the risk of defects of which he has no knowledge, and which he cannot discover by the use of ordinary care, and of which the master has, or ought to have, knowledge. He has a right to assume that the master has discharged his duty in using reasonable care to furnish him with reasonably safe machinery and appliances, but he cannot assume such fact against his own knowledge of dangerous or defective machinery. The rule is also subject to the limitation that the employé must understand not only the existence of a defect, but must be chargeable with knowledge that the defect exposes him to danger. *Consolidated Coal Co. v. Haenni*, 146 Ill. 614, 35 N. E. 162; *Union Show Case Co. v. Blindauer*, 175 Ill. 325, 51 N. E. 709. But where the danger arising from the defect would be obvious to a person of ordinary intelligence, the law will charge him with knowledge of the danger.

The question on whom rests the burden of proof as to the knowledge of deceased concerning the uncoupled condition of the safety chains is the subject of argument by counsel. On the one hand, it is urged that the burden of proof was on the plaintiff to show that the deceased did not know that the chains were uncoupled, and that the defendant had knowledge of the defect; and, on the other hand, it is contended that the burden was on the defendant to prove the opposite. There is some conflict of authority concerning the burden of proof in such cases. But it is said in 1 *Thompson on Negligence* (section 368) that in those jurisdictions where the burden rests on the plaintiff to prove his own freedom, or the freedom of the person killed or injured, from contributory negligence, the rule, by analogy, is that the burden will rest upon the employé of proving that he did not assume the risk of the employment, and the want of knowledge of the

danger must be averred and proved. In actions for personal injuries it has always been held in this state that the plaintiff must allege and prove that he was free from contributory negligence causing the injury, and the same rule has been adhered to respecting the assumption of risk. In *Goldie v. Werner*, 151 Ill. 551, 38 N. E. 95, it was held that the burden of proof was upon the servant to establish the three propositions that the appliance was defective; that the master had notice thereof, or knowledge, or ought to have had; and that the servant did not know of the defect, and had not equal means of knowing with the master. The third proposition, of course, relates only to patent defects, and does not embrace the duty of inspection to discover latent dangers and defects. The rule has been followed in *Karr Supply Co. v. Kroenig*, 167 Ill. 560, 47 N. E. 1051; *Chicago & Alton Railroad Co. v. Scanlan*, 170 Ill. 106, 48 N. E. 826; *Hines Lumber Co. v. Ligas*, 172 Ill. 315, 50 N. E. 225, 64 Am. St. Rep. 38; *Howe v. Medaris*, 183 Ill. 288, 55 N. E. 724; and other cases. In 3 *Elliott on Railroads* (section 1311) the author says that he thinks the rule adopted by this court is the correct one, since the employé takes the risk of defects of which he has notice, and, in order to constitute a cause of action, it is necessary to show that the defect is one for which the employer is responsible, while for defects known to the employé he is not responsible. It is true that, where the fact is not susceptible of direct proof, it may be inferred from the circumstances, and the plaintiff may be aided by the presumption that a person does not voluntarily incur danger or the risk of death. But that does not affect the question where the burden of proof rests. In a case where a person is killed, and there are no eyewitnesses to the accident, there is no dispute that the burden of proof rests on the plaintiff to show due care on the part of the deceased; but if there are no eyewitnesses, and no direct proof, he is entitled to the benefit of the presumption. Knowledge or want of knowledge of a defect may be inferred from proof of the circumstances. In this case the engineer gave testimony tending to prove that deceased knew the safety chains were not coupled, and that he assisted the witness in attempting to couple them, but there was evidence tending to show that the engineer made contradictory statements out of court respecting the knowledge of the deceased on that question. The space between the engine and tender was covered by a sheet-iron apron, and the duties of the deceased were performed in the gangway. He was not charged with the duty of inspecting the engine to discover whether there were any defects not obvious, and, under all the evidence, the court could not say, as a matter of law, that the deceased knew, or by the exercise of ordinary care ought to have known, that the chains were disconnected,

and that a person of ordinary prudence would have understood that running the engine without coupling them rendered the employment dangerous. Those were questions proper to be submitted to the jury in the first instance, subject to the judgment of the trial court and Appellate Court as to whether their verdict was against the weight of the evidence. We think there was no error in refusing to give the instruction directing a verdict.

The defendant was entitled, however, to have the question whether the risk was assumed by the plaintiff, either as an incident to his employment generally, or as arising from a defect of which he had knowledge, submitted to the jury upon correct instructions as to the law. The only instruction given to the jury on the question of the assumption of risk was the second given at the request of plaintiff, as follows: "The court instructs the jury that if you believe from the evidence that the safety chains on the engine in question were uncoupled before and at the time of the injury, and that as a result thereof the engine was not ordinarily safe for the deceased to work upon, and that its said condition was unusual, and was the direct result of the defendant's negligence, if any, as charged in the first and third counts, or either of them, in the declaration, then you are instructed that the deceased did not assume the risk or dangers, if any, arising from the chains being uncoupled, unless you believe from the evidence that he knew, or by the exercise of ordinary care might have known, that said chains were uncoupled, in time to have avoided the injury which resulted in his death. But you are further instructed that if you believe from the evidence that he did know, or by the exercise of ordinary care might have known, that the chains were uncoupled, then the rule of law as to the effect of such knowledge or means of knowledge upon his part is that if, under all facts and circumstances shown in evidence, an ordinarily careful or prudent servant, acting with ordinary care and prudence for his own safety, would not, under similar conditions, have continued the same work that the deceased was performing under the same risk or dangers, then the deceased must be charged with assuming said risk or dangers, if any; but, upon the other hand, if, under all the facts and circumstances shown in evidence, an ordinarily careful and prudent servant, acting with ordinary care and prudence for his own safety, would, under similar conditions, have continued the same work under the same risk or dangers, then the deceased did not necessarily assume said risk or dangers, if any. Whether he did or did not assume said risk or dangers, if any, is a question for the jury to determine under all the evidence and the rule of law above stated." The first part of the instruction was correct. As a matter of law, the employé does not assume risks

arising from the negligence of the master, unless he is chargeable with knowledge of the fact of such negligence, and of the defect or risk. The second part of the instruction advised the jury that if the deceased knew, or by the exercise of ordinary care might have known, that the chains were uncoupled, he would be charged with assuming the risk or dangers arising therefrom, if an ordinarily careful and prudent person, acting with ordinary care and prudence for his own safety, would not have continued in the same work; but if an ordinarily careful and prudent servant, acting with ordinary care and prudence for his own safety, would, under similar conditions, have continued the work, the deceased did not necessarily assume the risk. It made the test of plaintiff's right to recover the negligence or want of negligence of the deceased, and told the jury that whether he did or did not assume the risk was to be determined under that rule of law. It took from the jury all questions of the assumption of risk on account of the knowledge of the danger, and continuing in the service without objection. Contributory negligence and assumption of risk are entirely different things, in the law. Although the two questions may both arise under the facts of a case, yet they are wholly separate and distinct. Every person suing for a personal injury must show that he was in the exercise of ordinary care and caution for his own safety, so that the question of contributory negligence may be involved in every case; but an employé may have assumed a risk by virtue of his employment, or by continuing in such employment with knowledge of the defect and danger, and if he is injured thereby, although in the exercise of the highest degree of care and caution, and without any negligence, yet he cannot recover. *Miner v. Connecticut River Railroad Co.*, 153 Mass. 398, 26 N. E. 994; *Mundle v. Hill Mfg. Co.*, 86 Me. 400, 30 Atl. 16; *Louisville & Nashville Railroad Co. v. Orr*, 84 Ind. 50; *Bodie v. Charleston & W. C. Railway Co.*, 61 S. C. 468, 39 S. E. 715; *Cunningham v. Bath Ironworks*, 92 Me. 501, 43 Atl. 106; *Carbine's Adm'r v. Bennington & Rutland Railway Co.*, 61 Vt. 348, 17 Atl. 491; *St. Louis, Iron Mountain & Southern Railway Co. v. Davis*, 54 Ark. 389, 15 S. W. 895, 26 Am. St. Rep. 48; *Texas & Pacific Railway Co. v. Bryant*, 8 Tex. Civ. App. 134, 27 S. W. 825; *Bagley's Master's Liability for Injuries to Servants*, 197; *Bailey's Personal Injuries*, § 938. Some occupations are attended with great danger, and the use of certain instrumentalities is so dangerous that no degree of care will protect the employé in all cases; but if he voluntarily undertakes to do work ordinarily attended with perils, although he uses all the care he is capable of, he assumes the risk. He is defeated, not because of his negligence in such a case, but because by his contract, or by continuing in the service without objection, he has assumed the risk of

injury. 3 Elliott on Railroads, *supra*; Swift & Co. v. Rutkowski, *supra*. In Herdman-Harrison Milling Co. v. Spehr, *supra*, it was held that if the plaintiff had been an adult he would have assumed the risk of the employment, and the court said: "The requirement in the instruction that he must have used reasonable care and prudence, 'considering his age and experience,' has no reference to the risk or hazards of his employment."

There are many limitations of the doctrine of assumed risk, such as the duty of the master to disclose to the employé latent defects and dangers, and to instruct a servant that is ignorant, inexperienced, or incapable, from want of maturity or otherwise, to understand and appreciate the nature and extent of dangers to which he is exposed. So, also, a risk from a defect is not assumed by the servant where he calls the attention of the master to it, and is assured that it will be repaired, and he may remain in the service for a reasonable time under that assurance. There are other cases where, by the order of the master, or one standing in that relation, the servant is directed to encounter a danger, and, his duty being that of obedience, he does not assume the risk. In the case of a promise to repair, or of a command, and perhaps some other cases, the question is one of contributory negligence on the part of the servant, depending upon whether the danger was so great that an ordinarily prudent person would not have encountered it. Chicago Anderson Pressed Brick Co. v. Sobkowiak, 148 Ill. 573, 38 N. E. 572; Illinois Steel Co. v. Schymanowski, 162 Ill. 447, 44 N. E. 876; West Chicago Street Railroad Co. v. Dwyer, 162 Ill. 482, 44 N. E. 815; Chicago Edison Co. v. Moren, 185 Ill. 571, 57 N. E. 773; Slack v. Harris, 200 Ill. 96, 65 N. E. 669. In those cases the question of assumed risk, which is founded in contract, is removed by the promise to repair, the coercion, or other sufficient cause, but the question of contributory negligence involved in every case still remains. The employé must always exercise the degree of care which an ordinarily prudent person would have exercised under the same circumstances, but he does not assume the risk resulting from a direct command. Dallemand v. Saalfeldt, 175 Ill. 310, 51 N. E. 645, 48 L. R. A. 753, 67 Am. St. Rep. 214, Offutt v. World's Columbian Exposition, 175 Ill. 472, 51 N. E. 651, Graver Tank Works v. O'Donnell, 191 Ill. 236, 60 N. E. 831, and Western Stone Co. v. Muscial, 196 Ill. 382, 63 N. E. 664, 89 Am. St. Rep. 325, are cases of that character. In Chicago & Alton Railroad Co. v. House, 172 Ill. 601, 50 N. E. 151, the employé had no knowledge that the switch was open. The defendant was in fault in taking away a light which had been kept on the switch, and the claim that the risk was assumed rested only on the mere possibility that sometime an employé might leave a switch open, and the

fireman might thereby be killed. The decision in that case is not an authority for the proposition that assumption of risk rests upon contributory negligence. All the cases relied upon by counsel for plaintiff come within some well-recognized exceptions to the rules concerning assumed risks. In this case there was no question of immaturity of the employé, promise to repair, assurance of safety, or coercion, and the question of the assumption of the risk was fairly presented by the evidence. We think it apparent that the question was not correctly submitted to the jury by the instruction, and that it confused the doctrine of assumption of risks with contributory negligence. There was no instruction which correctly stated the risk assumed by a servant who remains in the master's employ without complaint, knowing of the existence of defective appliances. The rule on that subject has nothing whatever to do with care, or want of care, either of the servant or of the master.

In answer to the objections to the instruction, it is claimed that the instruction is not inconsistent with the assumption of risk being treated as a matter of contract, that the instruction did not negative that proposition, and that the inference to be drawn from it is that remaining at work, under the circumstances, almost charged the deceased with assuming the risk, but not necessarily so. We do not think the jury would understand the instruction in that way, and the objection would not be obviated if they should.

The judgments of the Appellate Court and superior court are reversed, and the cause is remanded to the superior court. Reversed and remanded.

(203 Ill. 551.)

PEOPLE ex rel. CITY OF CHICAGO v.
WEST CHICAGO ST. R. CO.*

(Supreme Court of Illinois. June 16, 1903.)

SUPREME COURT—APPELLATE JURISDICTION—
DIRECT APPEALS—QUESTION OF FREEHOLD
—FRANCHISES—CONSTITUTIONAL QUESTIONS.

1. In mandamus by a city against a street railway to compel it to lower a tunnel authorizedly constructed by it, under a navigable river, so as to permit a deepening of the channel for purposes of navigation, where it is admitted that the company is the riparian owner on both sides of the river and of the bed where the tunnel is constructed, a question of the company's freehold is not involved so as to confer direct appellate jurisdiction on the Supreme Court.

2. The case does not involve the freehold of the public in its easement of navigation.

3. The right of the railroad to construct its tunnel, and the fact that it was rightly constructed in the first instance, being admitted, its franchises are not involved.

4. The franchise of the city is not involved.

5. Where a street railway acquired its rights and constructed its tunnel under a navigable river upon condition that navigation should not be interrupted, mandamus to compel it to lower its tunnel, so as to permit a deepening of the

*Rehearing denied October 8, 1903.

channel, would not involve the determination of a constitutional question as to taking the railway's property without compensation and without due process of law.

Appeal from Appellate Court, First District; Chas. G. Neeley, Judge.

Mandamus by the people, on the relation of the city of Chicago, against the West Chicago Street Railway Company. From a judgment of the appellate court dismissing plaintiff's writ of error to the circuit court (see 105 Ill. App. 439), relator appeals. Reversed.

Granville W. Browning (Charles M. Walker, Corp. Counsel, of counsel), for appellant. W. W. Gurley, John P. Wilson, and Chas. S. Babcock, for appellee.

CARTWRIGHT, J. The city of Chicago filed in the circuit court of Cook county its petition for a writ of mandamus directed to the West Chicago Street Railroad Company, commanding said company, at its own cost and expense, to lower its tunnel under the South Branch of the Chicago river at or near Van Buren street, so as to provide for a clear depth of at least 21 feet of water above said tunnel at all times between the existing dock walls, or to remove said tunnel, so that the same should cease to be an obstruction to the free navigation of said river. The defendant answered the petition, and replications were filed raising issues of fact. A jury having been waived, the issues were submitted to the court for trial. The court found the issues for the defendant, denied the writ, and entered judgment against the relator for costs. The city of Chicago sued out a writ of error from the Appellate Court for the First District to review the judgment of the circuit court. The case was assigned to the branch of that court, which dismissed the writ of error for want of jurisdiction, and entered judgment for costs against the city of Chicago. This appeal is from the judgment of the Branch Appellate Court dismissing the writ.

The error assigned is that the Appellate Court erred in dismissing the writ of error for want of jurisdiction. The only question, therefore, is whether the Appellate Court had jurisdiction to hear and determine the errors assigned in that court. Whether the circuit court committed any error for which its judgment should be reversed is not involved.

It is first contended that the case involves a freehold, and that therefore the Appellate Court was without jurisdiction to review the judgment. The petition sets out that the city of Chicago is a municipal corporation organized under the general act for the incorporation of cities and villages; that within its territorial limits is the Chicago river, a navigable stream having its natural outlet in Lake Michigan; that the West Chicago Street Railroad Company is a corporation organized under the laws of this state, oper-

ating lines of street railroad in said city; that on April 2, 1888, the city council adopted a resolution permitting said company to construct, at its own expense, the tunnel under the Chicago river for the use of its street railroad; that the tunnel was completed by said company in March, 1894; that the water over the tunnel varied in depth from 17 to 18³/₁₀ feet; that since the building of the tunnel there has been an increase in the size of the vessels used in lake transportation; so that it has become necessary, for the proper use and navigation of the river, to deepen the channel; that the Congress of the United States, on March 3, 1899 (30 Stat. c. 425, § 22, p. 1156), passed an act for deepening the same to a depth of 21 feet, provided that the work of removing and reconstructing bridges and piers, and lowering tunnels to permit a practical channel with such depth, should be done or caused to be done by the city of Chicago without expense to the United States; that said city has passed an ordinance ordering and directing said company, at its sole cost and expense, to lower the tunnel as prayed for in the petition, and upon demand said company has refused to do so. The fifth paragraph of the answer alleges that the defendant is the owner of the land under the river in which the tunnel is situated, and that the approaches to said tunnel on each side lie wholly on land owned by the defendant. The averments of said paragraph are not denied by replication, and are therefore admitted. *Mayor of Roodhouse v. Briggs*, 194 Ill. 435, 62 N. E. 778. It is admitted on the record that the street railroad company is the riparian owner of both sides of the river at the place where the tunnel was constructed, and therefore owns the soil under the river, and that the tunnel was wholly constructed in its land under the bed of the river. A freehold is only involved where the result of the litigation must be that one party will gain and another lose a freehold estate, or where the title is so put in issue by the pleadings that a decision of the case necessarily involves a decision as to the title. The title to the freehold is not put in issue by the pleadings in this case, in which the title of the railroad company is admitted, and the city cannot gain a freehold estate nor the railroad company lose such an estate as a result of the litigation.

The fact that the title is in the railroad company, and that the tunnel was rightfully constructed in the first instance by that company under its charter and in pursuance of a license from the city, is admitted. It seems to be claimed, however, that the purpose of the suit is to deprive the railroad company of the full, absolute, and exclusive enjoyment of the soil under the bed of the river as it now exists, and that, therefore, the freehold is involved. It is said that if the freehold is not involved in requiring the company to lower its tunnel four feet, and deprive it of the use of four feet of soil under the river,

it would not be involved in requiring it to lower the tunnel to a much greater depth. That is undoubtedly true, and upon this question the depth to which it is sought to have the tunnel lowered is not material. The question, however, is whether the railroad company is obstructing an easement to which its freehold is subject, by interrupting navigation. It does not dispute the proposition that its freehold is subject to the public right of navigation of the river, and its freehold is not involved in the question whether it is obstructing the paramount right of navigation. It is a street railroad corporation, claiming the right to build the tunnel by virtue of section 1 of the act in relation to street railroads, under which it was organized. That section provides that a street railroad company "may, subject to the provisions contained in this act, locate and construct its road upon and over any street, alley, road or highway, or across or over any waters in this state, in such manner as not to unnecessarily obstruct the public use of such street, alley, road or highway, or interrupt the navigation of such waters." Hurd's Rev. St. 1899, p. 1683, c. 131a. It was by virtue of that act and a license from the city of Chicago that the tunnel was constructed. The company could only acquire and hold the lands on each side of the river for the purposes of its incorporation, and it acquired such lands, carrying with them the soil under the river, subject to the easement of the public for the purposes of navigation. It could only exercise its chartered power to build the tunnel and carry its street railroad under the river upon the express condition contained in its charter that it should not interrupt navigation. The city claims no right to require the tunnel to be lowered unless it is an obstruction to the paramount public right of navigation, to which the company concedes, as it must concede, that the freehold in the soil is subject. It is true that, as against a private individual, material taken from the bed of the river belongs to the riparian owner, and he may maintain replevin from a trespasser or wrongdoer. *Braxton v. Bressler*, 64 Ill. 488. But the question whether the railroad company would own the soil taken from the bottom of the river in deepening it is not involved in this case. The public have a right to enjoy the free and uninterrupted navigation of the river, unobstructed by anything which will materially impair such use. The ownership of the soil under the river is subject to the public easement and the necessary incidental right to keep the channel fit for navigation. The question whether the public authorities, in dredging the river, would have a right to appropriate the soil removed from the bed of the river to their own uses, is not to be decided in this suit.

It is next argued that the suit involves a freehold because the public easement of navigation is involved. Counsel say that, while

the land under the river is subject to the easement of navigation, such easement stops at the regular bed of the stream as it now exists. The decision of that question would not result in one party gaining and the other losing the easement of navigation. The case is not like one where the existence of a perpetual easement is asserted on the one hand and denied on the other, but it is admitted that the easement exists, and the only question is whether the tunnel is an unlawful obstruction to the easement, which the city of Chicago may require the railroad company to lower. No freehold is involved in the litigation.

It is next insisted that the case involves franchises. In the first place, it is said that it involves a franchise of the street railroad company to build a tunnel under the river under the charter, with the consent of the city through its license. The right of the railroad company to construct the tunnel is not questioned, nor the fact that the tunnel was rightfully constructed in the first instance. The right given by the charter is a limited right to construct a tunnel in such a way that it will not be an interruption of navigation, and that right is not in controversy. The authority given by the state is only a right to construct a tunnel upon the condition provided in the act. There is no attempt to oust the defendant from the exercise of any franchise, and, whatever may be the result of this suit, the franchise of the corporation will not be lost. If the railroad company should be compelled to lower its tunnel merely because it is an obstruction to navigation, its right to build tunnels in the city of Chicago as authorized by its charter would not be taken away, or its exercise in a lawful manner prohibited. The question involved in *Chicago & Western Indiana Railroad Co. v. Dunbar*, 95 Ill. 571, is not of the same nature as the question in this case.

In the second place, it is urged that a franchise of the city is involved. The city is attempting to compel the lowering of the tunnel on the ground that it is not such a tunnel as the statute authorizes the company to maintain. There is no attempt to oust the city of any franchise, and the franchise of a city is not involved in every attempt to enforce an ordinance. No judgment could be given in this case whereby the city would be deprived of a franchise. Neither the question whether the tunnel is an obstruction to the public easement nor the question whether the ordinance is a reasonable or lawful exercise of the powers conferred by its charter over water courses or tunnels within its limits involves a franchise of the city. All that is required to decide the questions involved is a construction and application of the law to the facts of the case.

Finally, it is claimed that a constitutional question is involved, on the ground that the city is attempting to take the property of the street railroad company without just compen-

sation and without due process of law. We are of the opinion that the issues in the case do not involve any constitutional question. The street railroad company acquired its rights and built its tunnel upon the condition that navigation should not be interrupted. If the tunnel is one which it has a right to maintain in its present location, the city cannot require it to be lowered. If it has no right to maintain it in that location because it is an obstruction to navigation and exists in violation of the condition upon which the railroad company was authorized to construct it, its property will not be taken by requiring it to be lowered. It would scarcely be asserted that the public authorities could not remove an obstruction from the bottom of the river without first instituting a condemnation suit to ascertain the damage to the owner of the soil under the river. To maintain the navigable character of the stream in a lawful way is not taking any property or property right of the owner of the soil under the river, which is subject to the right of free and unobstructed navigation.

The Appellate Court erred in dismissing the writ of error. The judgment of the Appellate Court is reversed, and the cause is remanded to that court, with directions to consider and decide the case upon the errors assigned.

Reversed and remanded.

(203 Ill. 592)

POTTER et al. v. CLAPP.*

(Supreme Court of Illinois. June 16, 1903.)

MARRIAGE—PRESUMPTION OF VALIDITY—EVIDENCE—SUFFICIENCY—PROBATE COURTS—JUDGMENT—CONCLUSIVENESS—RESULTING TRUSTS—EXPRESS TRUSTS—STATUTE OF FRAUDS—DOWER—DIVORCED WIFE—SUPERIORITY OF CLAIM—DEMAND—NECESSITY—DECEDENT'S ESTATE—ADJUSTMENT.

1. Complainant and deceased entered into a meretricious relation in 1876, each having a lawful spouse living, but so far as appeared neither knew of the marital relations of the other. In 1885, complainant's husband having in the meantime died, she and deceased were married by a justice; deceased's wife being still living. *Held* that, the marriage between complainant and deceased having been shown, the burden was on defendants, contesting the marriage, to show that deceased had not, previous thereto, procured a divorce from his first wife.

2. On the issue of validity of a ceremonial marriage between parties, one of whom had a former spouse living, evidence examined, and *held* insufficient to rebut the presumption that such one had procured a divorce from his former spouse.

3. A judgment of the probate court, allowing a party an award as widow of a decedent, is conclusive, in a proceeding by her for assignment of dower and homestead, on the issue of the validity of her marriage to decedent, as against his heirs; they having appeared before the probate court and contested the award on the ground of the alleged invalidity of the marriage.

4. A resulting trust arises by implication of law, and not from contract.

5. An express agreement by a husband to hold property conveyed by his wife to him in trust for her is within the statute of frauds.

6. A widow, occupying one floor of a two-story flat which had belonged to her husband, the portion occupied by her being of greater value than \$1,000, should account to the heirs for the rent received by her from the other floor, especially in view of an understanding with one of the heirs that she should rent the premises, and that their respective rights should be subsequently adjudicated.

7. In proceedings for the assignment of dower and homestead by a second wife, a divorced wife being still living, the decree should first set apart a homestead for the second wife of the value of \$1,000 in that portion of the estate occupied by the husband at his death as a homestead; the first wife should then be assigned dower, subject to the homestead right of the second wife; and the second wife then be assigned dower in the real estate remaining, and, in case she survived the first wife, dower in one-third of the portion assigned to her.

8. Rents received by the second wife for premises which had belonged to her husband and were not occupied by her as a homestead should be divided by giving the first wife one-third from the time she intervened in the suit; the second wife receiving one-third of the balance from the death of her husband.

9. The second wife having entered into an agreement with one of the heirs, whereby she was to remain in possession and collect rents, a demand for dower on her part was unnecessary.

10. Where deceased's only estate was real property, and his widow was his only creditor, and she and defendants, joined in a suit by her for assignment of dower, were the only parties interested in the estate, a court of equity could adjust in that suit all claims or matters in difference between the parties relative to the estate, and proceed to a full determination of their interest in the real estate, including the adjustment of rents received by the widow from the property and improvements made thereon.

Appeal from Circuit Court, Cook County; Joseph P. Roberts, Judge.

Bill by Mary Ann Clapp against Georgianna Potter and others. From a decree for complainant, defendants appeal. Reversed in part.

This was a bill in chancery, filed by Mary Ann Clapp in the circuit court of Cook county as widow of James H. Clapp, deceased, against Georgianna Potter, Annie L. Wilcox, and Albert G. Clapp, his children by a former marriage, for the assignment of dower and homestead in the real estate of which he died seised, the establishment of a resulting trust in said real estate to the extent her money had paid therefor, and for an accounting. Mary M. Clapp, the divorced wife of the said James H. Clapp, intervened, by leave of court, as a claimant for dower. Answers, a cross-bill, and replications having been filed, the case was referred to a master, and, his report having been filed, a decree was entered in accordance with the recommendations thereof, and the children of James H. Clapp have prosecuted an appeal.

It appears from the pleadings, evidence, and master's report that James H. Clapp, on May 12, 1856, was married to Mary M. Dean at Taunton, Mass., by a ceremonial marriage; that said James H. and Mary M. thereafter

*Rehearing denied October 8, 1903.

¶ 1. See *Marriage*, vol. 24, Cent. Dig. §§ 64, 68.

lived together as husband and wife at Providence, R. I., and other places in that vicinity, for the period of about 19 years; that there was born to them during that period three children, viz., Georgianna, Annie L., and Albert G., who are defendants to this bill; that in September, 1875, said James H. Clapp and Mary M. separated, and soon thereafter Clapp located in Chicago. It further appears that the complainant, Mary Ann, in the year 1862 (her maiden name being Mary Ann Hartnett), married one William S. Seamans, and lived with him at Smithfield, R. I., for four or five years, when they separated, and for a number of years she resided with her sister, Margaret Coombs, at Providence, R. I.; that in August, 1875, she drew from the Providence Institution for Savings her entire deposit, amounting to \$1,437.31, and some time thereafter went to Chicago; that about the year 1876 James H. Clapp and Mary Ann Seamans were living together as husband and wife in the city of Chicago; where they continued to reside as husband and wife until the death of James H. Clapp, on December 1, 1897; that William S. Seamans died in an insane asylum in the state of Rhode Island, October 30, 1883, and on July 21, 1885, the complainant (under the name of Mary A. Seamans) and James H. Clapp were married at Portland, Me., by Melville A. Floyd, a justice of the peace; that Mary M. Clapp, at the October term, 1887, of the Supreme Court of Rhode Island, was divorced from James H. Clapp on the ground of desertion, on service by copy of bill in Chicago upon James H. Clapp. The complainant has no children, and was about 58 years of age at the time of the death of James H. Clapp. There is no direct evidence in the record which shows that the complainant knew that James H. Clapp had a wife living while she was living with him as his wife, or that James H. Clapp knew that the complainant had a husband living during any part of that period. Neither does it appear from any direct evidence that William S. Seamans was ever divorced from the complainant, or she from him, or that James H. Clapp was divorced from his wife Mary M. prior to July 21, 1885. James H. Clapp seems to have had no communication with any of his family from about 1876 to 1887, when his son, Albert G., receiving information which led him to believe his father was living in Chicago, wrote him, and after that James H. Clapp corresponded quite regularly with his children up to the time of his death. He visited them and they visited him, and his son, Albert G., attended his funeral. The complainant, from the time she commenced living with James H. Clapp, bore his name, was called by him his wife, and was so recognized by his neighbors and acquaintances, and in his letters to his children he referred to her as his wife, and when they visited at his house in Chicago he spoke of her as his wife, and she was recognized and treated by

all as his wife. This relation was continued after the death of Seamans, in 1883, after the ceremonial marriage in 1885, and the divorce of Mary M. Clapp, in 1887.

In 1883 the real estate in controversy, which consists of two 25-foot lots located in the city of Chicago, which is now worth, with the improvements thereon, from \$12,000 to \$15,000, and produces a rental of about \$85 per month, was purchased for \$4,000, and title taken in the name of Mary Ann Clapp. About two-thirds of the purchase price was paid in cash, and a deed taken for the premises, subject to a mortgage for the balance of the purchase price, which was subsequently paid. In 1885 Mary Ann Clapp and James H. Clapp conveyed said real estate to Henry D. Nichols, and he immediately conveyed the same to James H. Clapp, and the legal title remained in Clapp at the time of his death. After the purchase of the property a three-story brick flat building and a story-and-a-half frame cottage were erected, and the two-story frame building standing upon the premises at the time of the purchase, the lower story of which was used by Clapp as a residence and the upper story of which was rented, was repaired. The cottage was not completed at the time of Clapp's death, and was afterwards completed by complainant. At the time Albert G. Clapp was in Chicago, in attendance upon his father's funeral, complainant stated to him that the cottage was not completed, that there were debts unpaid, and advised with him as to what had best be done toward a settlement of the estate of James H. Clapp. After talking with an attorney he stated to the complainant, in substance, that she was entitled, as widow, to administer upon the estate, and that she, being in Chicago and the heirs all nonresidents, could better than they rent the real estate, and also advised that the cottage then commenced be completed, and that her rights and the rights of the heirs could be subsequently adjusted. The complainant took out letters of administration in the probate court of Cook county, as widow, upon the estate of James H. Clapp, and filed an inventory, appraisement, and appraisers' estimate for widow's award. Afterwards the heirs appeared in the probate court and filed objections to the approval of the inventory and appraisement and to the allowance of the widow's award, one ground of objection to the allowance of the widow's award being that the complainant was not the lawful wife of said James H. Clapp at the time of his death. The court overruled said objection, approved the inventory and appraisement, and allowed the widow's award to complainant, which order remains in full force and unappealed from. In the title papers to the real estate in which the complainant claims dower and homestead, and through which the defendants claim title, the complainant is designated as the wife of James H. Clapp. Only one, however, a release of a mortgage, bears date

subsequent to 1887, the date of the divorce of Mary M. Clapp.

F. P. Read, for appellants. A. N. Tagert, for appellee Mary Ann Clapp.

HAND, C. J. (after stating the facts). The first question which is presented for consideration upon this record is, was the complainant, Mary Ann Clapp, the lawful wife of James H. Clapp at the time of his death? It clearly appears that at the time James H. Clapp and Mary Ann commenced living together in the city of Chicago, ostensibly as husband and wife, James H. Clapp had a lawful wife then living, and that Mary Ann had a lawful husband then living. Their cohabitation was therefore meretricious in its inception, and the presumption of law is that it so continued so long as they continued to live and cohabit together, unless the proof shows that the evil purpose of the parties subsequently changed, and that the cohabitation lost its unlawful character and became matrimonial in its intent and character, which intent and character may be shown by direct or circumstantial proof, and would be evidenced by a lawful marriage between the parties subsequent to the removal of the disability of each to enter into a lawful marriage contract. *Cartwright v. McGown*, 121 Ill. 388, 12 N. E. 737, 2 Am. St. Rep. 105; *Robinson v. Ruprecht*, 191 Ill. 424, 61 N. E. 631; *Manning v. Spurck*, 199 Ill. 447, 65 N. E. 342. At the time of the ceremonial marriage between James H. Clapp and Mary Ann, on the 21st day of July, 1885, William S. Seamans, the former husband of Mary Ann, had died, and the impediment to her marriage had been removed. The wife of James H. Clapp, however, was then living, and she did not become divorced from him until more than two years after that date, and was still his lawful wife, unless he had before the date of said ceremonial marriage been divorced from her, as the rule universally recognized by the courts is that a marriage between parties, where either the man or the woman has a lawful wife or husband living at the time of the marriage, is absolutely void. *Schmisseur v. Beatrice*, 147 Ill. 210, 35 N. E. 525. True it is, at the time of the marriage of the parties in the state of Maine, the proof does not show that Mary Ann then knew that James H. Clapp had a lawful wife living; but Clapp knew that fact, unless he had been divorced from her, and his knowledge made the continuation of the relation between the parties meretricious, and the ceremonial marriage on the 21st of July, 1885, between the parties, was void, unless James H. Clapp had been before that time divorced from Mary M. Clapp. Mary M. Clapp did not obtain a divorce from Clapp at her suit until in October, 1887; but the record is silent as to the fact whether or not James H. Clapp, prior to the time of the ceremonial marriage

with Mary Ann, had been divorced from Mary M. In *Cartwright v. McGown*, 121 Ill. 396, 12 N. E. 738, 2 Am. St. Rep. 105, it was said: "When the celebration of a marriage is once shown, the contract of marriage, the capacity of the parties, and, in fact, everything necessary to the validity of the marriage, in the absence of proof to the contrary, will be presumed." As Mary M. was living in 1885, the presumption is that James H. Clapp had been divorced from her prior to the celebration of his marriage to Mary Ann on the 21st day of July, 1885. The effect of this presumption was to cast the burden upon the defendants, who are attacking said marriage in this suit, to rebut such presumption. In *Coal Run Coal Co. v. Jones*, 127 Ill. 379, 386, 8 N. E. 865, 869, it was said: "The second marriage being shown in fact, the law raises a strong presumption in favor of its legality, which we do not regard as overcome by mere proof of a prior marriage and that the first wife had not obtained a divorce. See *Johnson v. Johnson*, 114 Ill. 611, 3 N. E. 232, 55 Am. Rep. 883. The husband might have obtained such divorce and left him free to contract the second marriage." And in *Schmisseur v. Beatrice*, 147 Ill. 215, 35 N. E. 526, the court said: "The two marriages of Nicholas Beatrice, Jr., and the existence of the first wife at the time of the second marriage, being established by proof, the presumption would arise in favor of a divorce from his first wife, in order to sustain the second marriage. In view of this presumption, the burden of proof rested upon the appellants, as the objecting parties, to show that there had been no divorce. The law is so positive in requiring a party who asserts the illegality of a marriage to take the burden of proving it that such requirement is enforced, even though it involves the proving of a negative."

It is said, however, if it be conceded that the burden of proof was upon the defendants to rebut the presumption that James H. Clapp had been divorced from Mary M. prior to the celebration of his marriage with Mary Ann, in 1885, as the proof shows that James H. Clapp abandoned his wife Mary M., and that he had no grounds for divorce and could not have legally obtained a divorce from her, such presumption is rebutted—citing *Cole v. Cole*, 153 Ill. 585, 38 N. E. 703, and other cases. The only evidence in the record in support of such contention is that of the defendants Annie L. Wilcox and Albert G. Clapp. Mrs. Wilcox testified: "I did not know what had become of my father for a period of 12 years. The trouble at the time my father deserted my mother and his children was between my sister's intended husband—nothing that I know of on my mother's account. He didn't tell me or any other member of his family where he was going when he left on September 20, 1875." Albert testified: "He ceased to live with my mother upon general dissatisfaction with

business and relatives in Providence—through any fault in my mother." It must be remembered that said defendants were young at the time their mother and father separated, and that they naturally sympathized with the mother. They are parties to and directly interested in the result of this suit, and their testimony, in the nature of things, would be adverse to the complainant. James H. Clapp and Mary M. had been living apart for ten years prior to his marriage to Mary Ann, in 1885. He was a business man, and necessarily had some experience in the ways of the world, and knew something of the law; and it would hardly be presumed that he would enter blindly into a marriage with the complainant at a time when he knew he had a lawful wife, the effect of which would be to subject him to a prosecution for bigamy. The parties lived together openly as husband and wife for two years after the marriage in 1885 and prior to the divorce of Mary M. in 1887, and thereafter continued to live together until his death, in 1897; the complainant during all that time, so far as the evidence shows, resting secure in the belief that she was the lawful wife of James H. Clapp. After the death of Seamans there was no legal impediment to the marriage of James H. Clapp and Mary Ann Clapp so far as she knew, and subsequent to the marriage in 1885 they lived together as husband and wife for a period of 12 years and until the death of Clapp. They held themselves out to the world as husband and wife and were recognized as such by their friends and relatives. Clapp wrote and spoke to his children of the complainant as his wife. The defendant Albert G. visited at his father's home with his bride upon his wedding trip in 1888. Mrs. Wilcox visited the World's Fair in 1893 and she and her husband stopped at her father's house for some length of time. At the time of the death of James H. Clapp, Albert G. attended the funeral, recognized the right of the complainant, as widow, to administer upon his father's estate, and the probate court, without objection on the part of the defendants, appointed her administratrix thereof. In the title deeds under which the father held the property which the defendants inherit from him, the complainant is designated as the wife of James H. Clapp.

In view of all these facts and circumstances, we think the master and the chancellor were justified in holding that the evidence of Mrs. Wilcox and Albert G. Clapp, given after the death of James H. Clapp, was not sufficient to overcome the presumption that James H. Clapp had been divorced from Mary M. Clapp prior to his marriage to Mary Ann Clapp in July, 1885. Furthermore, while the proceeding in the probate court of Cook county for the allowance of an award to the complainant was pending, the defendants, as heirs of James H. Clapp, appeared by attorney and contested her right to an

award upon the ground that she was not lawfully married to James H. Clapp, and was therefore not his widow. The court held against them upon that proposition, and allowed to the complainant, as widow of James H. Clapp, a widow's award out of his estate. The precise question presented here was presented there. The heirs of James H. Clapp had the right to appeal from that order, and, having failed to do so, we think they are bound by the adjudication there made, and cannot now attack that finding and judgment collaterally. The proceeding was, in effect, between Mary Ann Clapp and the heirs of James H. Clapp, deceased, and affected their interests only. The probate court had jurisdiction of the parties and the subject-matter of the suit, and the court, in allowing to the widow an award, necessarily held that she was the lawful widow of James H. Clapp, deceased; and that judgment is binding upon the heirs until reversed in a direct proceeding. In *Hanna v. Read*, 102 Ill. 596, 602, 40 Am. Rep. 608, the court said: "Where some specific fact or question has been adjudicated and determined in a former suit, and the same fact or question is again put in issue in a subsequent suit between the same parties, its determination in the former suit, if properly presented and relied on, will be held conclusive upon the parties in the latter suit, without regard to whether the cause of action is the same in both suits or not. This species of estoppel is known to the law as an 'estoppel by verdict,' and is equally available to a plaintiff in support of his action, when the circumstances warrant it, as when offered by a defendant as matter of defense. * * *

Whether the adjudication relied on as an estoppel goes to a single question or all the questions involved in a cause, the fundamental principle upon which it is allowed in either case is that justice and public policy alike demand that a matter, whether consisting of one or many questions, which has been solemnly adjudicated by a court of competent jurisdiction, shall be deemed finally and conclusively settled in any subsequent litigation between the same parties, where the same question or questions arise, except where the litigation is a direct proceeding for the purpose of reversing or setting aside such adjudication."

The evidence shows that at about the time complainant left Rhode Island she had in cash \$1,437.31. What she did with it does not appear. At the time the real estate was purchased, in 1883, a cash payment of \$2,666.66 was made thereon and an incumbrance of \$1,333.34 was assumed. The title thereto was taken in the name of Mary A. Clapp. In 1885 she conveyed said premises to James H. Clapp through Henry D. Nichols, and the title rested in him at the time of his death. As we understand the contention of complainant, it is claimed that James H. Clapp held said premises in trust for Mary Ann

Clapp to the extent that her funds entered into the payment of the purchase money therefor, which, it is said, was to the extent of \$2,000. A number of witnesses testified that James H. Clapp had stated to them he was indebted to his wife, Mary Ann Clapp, in various sums, ranging in amounts from \$2,000 to \$4,000. There is, however, no evidence in the record which tends to support a resulting trust in her favor in said real estate. A resulting trust arises by implication of law, and does not grow out of a contract. The title to the real estate was taken in the name of Mary Ann Clapp at the time of the purchase, and in 1885 she conveyed the title to James H. Clapp; and even though it were conceded at that time he agreed to hold it for her benefit or to reconvey it to her, as the bill alleges, such contract or agreement, unless evidenced in writing, would be within the statute of frauds, and not enforceable, where the statute, as here, is pleaded. Express trusts do not rest in parol, but must be evidenced in writing. The chancellor allowed the complainant, in the statement of the account between the parties, the sum of \$800 as due her for money loaned to James H. Clapp. We think this amount, as a claim for money loaned, fairly sustained by the evidence, and would not be disposed to disturb such finding were it for a larger amount, as we are impressed the money of Mary Ann Clapp went into said real estate, and James H. Clapp recognized the same as an existing obligation as late as a year prior to his death.

The evidence further shows that lot 30 is improved with a three-story brick flat building, and that lot 31 is improved with a two-story frame building, consisting of two flats, the lower of which was occupied by James H. Clapp and family, and is now occupied by complainant as a homestead, and the upper of which was rented by him, and has been occupied, at least a part of the time, by tenants since his death, as also by a frame cottage upon the rear portion thereof, which is also occupied by a tenant. The complainant remained in possession of all of said premises and collected rents therefor until about September 1, 1900, when the heirs of James H. Clapp recovered possession thereof through an action of forcible detainer, with the exception of the two-story frame building, and have collected the rents therefor since that time. The court held, in stating the account between the parties, that the complainant was entitled to the possession of both flats in said frame building as her homestead, after the death of James H. Clapp, and refused to require her to account for the rent collected by her for the upper flat—the one not occupied by her as a homestead. The portion of the building occupied by her was of much greater value than \$1,000, and we are of the opinion, especially in view of her understanding with Albert G. Clapp that she would rent the premises and that her rights and the rights of the heirs would be

subsequently adjudicated, that there was error in refusing to require her to account for the rent of said flat. In case a householder occupies a flat in a flat building, or an apartment in an apartment building, as a homestead, his residence is as much disconnected from the other flats or apartments located in said building as though the portion thereof occupied by him was located upon a different lot or under a different roof; and while in a case like this it might work no great harm to hold the widow, after the death of the householder, might rightfully retain the possession of the entire building until her homestead was assigned, if the principle were applied to a building containing, as is often the case in large cities, many flats or apartments, it would lead to absurd results. Especially would that be true where the widow remained in the apartment with the understanding that she would rent the balance of the premises and account to the heirs for the rent; and it seems clear to us that the complainant should have been required to account for the rents which she collected upon the upper flat in the frame building subsequent to James H. Clapp's death. In *Tiernan v. Creditors*, 62 Cal. 286, it was held that in the case of a double house on a city lot intended for two families, one part of which was leased to a tenant and the other occupied by the owner, the owner could not claim as a homestead that portion of the building not occupied by him; and in *Dyson v. Sheley*, 11 Mich. 527, it was held that, in order that premises may be exempted as a homestead, they must be set apart as a homestead for the purposes of the owner and his family, and, where the owner of a city lot built a double house upon it in such a way as to show that he designed it for the use of two families, and not for one, and leased one part of it and occupied the other himself, that he could not claim the latter as exempt from execution sale as a homestead, and that the fact that the yard of the part leased was used by the owner in common with the tenant would not vary the case. To the same effect are *Rhodes, Pegram & Co. v. McCormack*, 4 Iowa, 368, 68 Am. Dec. 663, and *Mayfield v. Maasden*, 59 Iowa, 517, 13 N. W. 652.

We are also of the opinion that the court erred in decreeing that the complainant, Mary Ann Clapp, was entitled to dower in said real estate absolutely, and not subject to the right of dower therein of Mary M. Clapp. The court held Mary M. Clapp was entitled to dower in said real estate, and that part of the decree has not been questioned. The decree should have first provided that Mary Ann Clapp recover an estate of the value of \$1,000 in the portion of the real estate occupied by James H. Clapp at the time of his death as a homestead, that Mary M. Clapp recover dower in said real estate subject to the homestead therein of Mary Ann Clapp, and that Mary Ann Clapp recover dower therein subject to her homestead estate and

the dower estate of Mary M. Clapp (*Stahl v. Stahl*, 114 Ill. 375, 2 N. E. 160); that is, first, a homestead of the value of \$1,000 should have been set off to Mary Ann Clapp; second, one-third in value of the real estate remaining should have been assigned to Mary M. Clapp as her dower; and, third, one-third of the real estate remaining should have been assigned to Mary Ann Clapp as her dower, and, in case she survived Mary M. Clapp, she would be endowable of one-third of the portion assigned to Mary M. Clapp as dower in addition to the amount already assigned to her. In the division of rents, after deducting the homestead, Mary M. Clapp should receive the one-third part thereof from the time she intervened, and Mary Ann Clapp should receive one-third of two-thirds of the rent from the date of the death of James H. Clapp. The agreement with Albert G. Clapp, one of the heirs, whereby she was to remain in possession of the property and collect the rents, made a demand for dower on her part unnecessary. *Strawn v. Strawn's Heirs*, 50 Ill. 250.

The only estate of which James H. Clapp died seised is the real estate described in this bill, and whatever debts and claims, including the widow's award and the expenses of administration, that are legally provable against his estate, must be paid from the income thereof or a sale of the whole or a part of the said real estate; and as the complainant is the only creditor, and she and the defendants are the only persons interested in said estate, we see no objection to a full settlement and adjustment in this suit of all claims or matters in difference between them relative to said estate, and to a full determination of their interest in said real estate, including the adjustment of rents arising therefrom and improvements made thereon. While equity will not ordinarily take upon itself the settlement of the estate of deceased persons, in a proper case it may assume such jurisdiction, and this case seems to fall within the class of cases where such jurisdiction may be assumed. Upon the case being reinstated below, it should be re-referred to the master to state an account between the parties as to the rents and profits which have accrued from said real estate since the death of said James H. Clapp, and each party should be charged with the rents collected by them, respectively, and credited with the amounts they have rightfully paid out in improving or preserving said real estate, including the expenses incurred by the complainant in completing said cottage, and the complainant should be credited with the several amounts allowed her for money loaned, widow's award, expenses of administration, and the balance found to be due her decreed to be a lien upon said real estate, and a decree entered fully settling the rights of the parties in said real estate.

The decree will therefore be affirmed in part and reversed in part, and remanded to

the circuit court, with directions to proceed to a final determination of the case in accordance with the views herein expressed; and the complainant will pay one-third and the defendants two-thirds of the costs occasioned by this appeal.

Decree reversed in part, and remanded.

(203 Ill. 530)

ACKLEY v. CROUCHER.*

(Supreme Court of Illinois. June 16, 1903.)

EQUITY—PARTIES—CROSS-BILL—WAIVER OF OBJECTION—AMENDMENT—ESTOPPEL—CONSTRUCTIVE TRUST—STATUTE OF FRAUDS—LIMITATIONS.

1. One who claims to own an interest in the property is entitled to become a party defendant to a suit by one claiming to be the owner in fee, to have a deed which she had executed declared void as a cloud on her title.

2. A cross-bill not being objected to by complainants, but treated as a proper pleading by answering it, is properly made the basis of a decree.

3. That one's first cross-bill is sworn to does not estop him to make an amendment, the verification not being required by law.

4. C. provided A. and her family a home, living with them, paying the expenses, and intrusting his earnings to her, whom he trusted implicitly. She, on taking title to property bought with his money, without his knowledge took it in her name. *Held*, that a trust by construction, to which the statute of frauds does not apply, was raised in his favor.

5. A suit to enforce a constructive trust to land is not stale and barred by limitations, where both parties continue to live on the premises together.

Error to Circuit Court, Cook County; Ellridge Hanecey, Judge.

Suit by Maggie Ackley against Ida Moore and another. Alfred Croucher became a defendant and filed a cross-bill, on which he had a decree. Complainant brings error. Affirmed.

This is a writ of error to the circuit court of Cook county by plaintiff in error, seeking to reverse a decree wherein the defendant in error was held to be the owner in fee simple of certain real estate.

The plaintiff in error, Maggie Ackley, filed a bill on February 8, 1899, to which Ida Moore and William Moore were made parties defendant, praying to have a certain deed from her to them declared void as a cloud upon her title to certain lots in Cook county, and to enjoin them from incumbering the same until the further order of the court. By an amendment to the bill, Alfred Croucher, who claimed some interest in the property and petitioned the court to be heard, was made a party defendant thereto. Ida Moore and William Moore answered the bill, denying the allegations thereof, denying all equity as alleged, and averring that the property was purchased with the joint funds of complainant and Alfred Croucher. Croucher also answered, alleging that he and complainant, in 1885, began business togeth-

*Rehearing denied October 8, 1903.

¶ 2. See *Equity*, vol. 12, Cent. Dig. § 557.

er, as partners, for the purpose of buying property for their own common profit, and continued the same until July, 1898, and as such partners purchased and paid for the lots in question, placing valuable improvements thereon out of their joint moneys; that he had paid more than one-half of the purchase money and expense of improvements; that by agreement the title was taken in the name of Maggie Ackley, to be held for their joint benefit.

On May 27, 1899, Croucher filed a cross-bill, alleging the formation of the said partnership, and the purchase of the property in question, also certain other lots in Tolleston, Ind., and alleging also that the property was improved with their common labor and means; that she, since July 1, 1898, has collected the rents and refuses to account to him; that one of the foregoing pieces of property, known as the Langley avenue premises, was paid for with purchase money furnished by him; that after the purchase of said premises they together took possession of the last-mentioned premises, and occupied, managed, and controlled the same in common as a home until July 1, 1898, when she dispossessed him; that she then conveyed the premises to her daughter Narthana, and afterwards to her daughter Ida Moore, and that Ida Moore and her husband knew of the partnership relation and that Croucher had an interest therein. The cross-bill then alleges that Maggie Ackley is committing waste and squandering the rents, and concludes with a prayer for an accounting, and for a decree declaring the copartnership void, and that the premises be declared to be held by Maggie Ackley in trust for cross-complainant to the extent of one-half thereof, and that partition be made. Ida Moore and husband answered this cross-bill, admitting, among other things, that Maggie Ackley conveyed to her daughters Narthana and Ida to defeat Croucher's interest therein. The answer claims one half of the premises in fee in Ida Moore by virtue of the deed, and concedes that Croucher is the owner of the other half thereof. Maggie Ackley then filed an answer to the cross-bill of Croucher, denying its allegations, and averring that she bought and paid for said property independently, and without cross-complainant's aid, and is now the absolute owner thereof. Ida Moore and her husband then filed a cross-bill, in substance setting up the facts contained in their answer, praying for partition.

After answers to this latter cross-bill were filed, the cause was referred to the master, who took the testimony, and made a report on March 6, 1900. Croucher thereupon, by leave of the court and pursuant to an order thereof, on March 6, 1900, amended his cross-bill so as to conform to the decree as reported by the master, striking out from the cross-bill all allegations about joint interests, partnership dealings, and joint purchases by Mrs. Ackley, with an agreement to hold the

title for the benefit of herself and cross-complainant, and substituting in place thereof the allegation that in 1885 he brought Maggie Ackley and family to Chicago; that they resided with him, and he provided them with their support continuously, until 1898; that he furnished the money with which she purchased and took title in her own name to the Langley avenue property and the other lots in question; that she had no means of her own; that he specifically furnished the sum of \$960, the purchase money with which the Langley property was purchased, took possession thereof, and erected valuable improvements, paying for said improvements with his own money, and that he thereby acquired an equitable interest equal to the whole value of the premises, the said Maggie Ackley receiving the title in trust for him. Maggie Ackley filed an answer to this amended cross-bill, denying its allegations, and setting up the statute of frauds as a defense to the amended cross-bill, on the ground that the trust therein alleged is not manifested and proved by any writing; also setting up the statute of limitations in bar to his right to an accounting for rents.

On stipulation, the court ordered the original bill dismissed as to Ida and William Moore, and also ordered their cross-bill dismissed. Upon re-reference to the master no other testimony was taken, but a new report was made upon the issues as made by the amended cross-bill of Croucher and the answer of Maggie Ackley thereto, who found that the allegations of the amended cross-bill were sustained; that the statute of frauds was not a bar to Croucher's claim, upon the theory that he took the title by way of a resulting trust, which, under the statute, need not be in writing; and that the statute of limitations was of no avail to Mrs. Ackley, because both of the parties lived upon the premises from the beginning of their transactions until 1898.

J. Kent Green, for plaintiff in error. James E. White and F. A. Denison (Edward H. Morris, of counsel), for defendant in error.

WILKIN, J. (after stating the facts). It is first contended that the court below erred in granting leave to the defendant in error to be made a party defendant to the original bill of Mrs. Ackley, and also that the court committed error in permitting him to file his cross-bills, because they were not germane to the subject-matter of the original bill.

The original bill was filed by Mrs. Ackley, claiming to be the owner in fee, to remove as a cloud upon her title a deed which she had executed to Ida Moore, conveying property in which Croucher himself claimed an interest. He was clearly interested in the outcome of that litigation, and the court, upon a proper showing, permitted him to become a party thereto. He was in no sense a mere intermeddler, as counsel for plaintiff

in error infers, having no substantial interest in the proceeding. According to his theory he owned at least a one-half interest, if not the whole, of the property which was the subject-matter of the original bill, and was therefore entitled to become a party. *Marsh v. Green*, 79 Ill. 385.

The cross-bill was not only germane to the issue made by the original bill and answer, but the complainant, Mrs. Ackley, made no objection to filing it, and treated it as a proper pleading in the cause by answering it, and the circuit court properly made it the basis of its decree. *Prichard v. Littlejohn*, 128 Ill. 123, 21 N. E. 10.

Nor was the defendant in error estopped to make his second amendment by the fact that his first cross-bill was sworn to. The verification of the cross-bill was not required by law, and the fact of its being sworn to performs no office, and therefore the court, in the exercise of its discretion, had a right to permit the amendment. *Campbell v. Powers*, 139 Ill. 128, 28 N. E. 1062.

It is said the chancellor erred in holding that Croucher took the equitable title to the Langley avenue premises by way of a resulting trust, the contention of counsel being that such a trust, if one existed, was an express trust, and contrary to the statute of frauds, because not evidenced by any writing. The evidence shows that Croucher, an old man about 60 years of age, came to Chicago in 1885, and brought Mrs. Ackley and her daughters, with whom he lived from that time until 1898, apparently as one family, he providing them with a comfortable home, paying all doctor bills and common living expenses. He first engaged in the express business, and later in the business of night scavenger and of removing dead animals from the city of Chicago. His earnings aggregated about \$250 a month, which he intrusted to the custody of Mrs. Ackley, as custodian, to pay the family debts, living expenses, etc. With the money thus provided by him the property in question and the four lots in Tolleston, Ind., were purchased, and the improvements thereon were paid for out of the same funds. The evidence shows that Mrs. Ackley had no means after she came to Chicago, of consequence, of her own, at any time. The Langley avenue premises were purchased in 1888. The owner of the premises refused to sell direct to Croucher or to Mrs. Ackley because they were colored people, and by an arrangement with one Mary Drake, a white person, she became the purchaser, \$400 being paid in cash and a note and mortgage given for \$560, the purchase price being \$960. Croucher furnished the \$400, and the funds with which to pay off the mortgage. Mrs. Ackley, when the mortgage was paid off, attended to the business, and took the title to the property in herself. The evidence shows that defendant in error trusted to her

implicitly, but as to why she took the title in her own name rather than in his is not explained. An inference can reasonably be drawn from the testimony that the title was thus taken in Mrs. Ackley without his knowledge. He simply provided the means, while Mrs. Ackley attended to the business. Under the facts, although the evidence is somewhat contradictory, we think the master in chancery was justified in finding, as a matter of law, that a trust was raised in favor of Croucher. Where one obtains title to property by virtue of a confidential relation and influence, courts of equity, in order to administer complete justice between the parties, will raise a trust, by construction, out of such circumstances or relation, and this trust they will fasten upon the conscience of the offending party, and will convert him into a trustee of the legal title. To such cases the statute of frauds does not apply. *Allen v. Jackson*, 122 Ill. 567, 13 N. E. 840; *Pope v. Dapray*, 176 Ill. 478, 52 N. E. 58.

The contention that the claim of defendant in error is stale and barred by the statute of limitations avails plaintiff in error nothing. Defendant in error, until 1898, was as much in possession of the Langley avenue property as was plaintiff in error.

From a careful reading of the whole record we think the equities of this cause are with the defendant in error, and that the decree of the circuit court is right. The decree gives to defendant in error the Langley avenue property, and makes no finding as to the other property mentioned in the original bill. Whatever benefit plaintiff in error has obtained in the way of rents and profits and the retention or sale of other property bought with money furnished by defendant in error, she is permitted to keep, and to which the defendant in error makes no objection.

The decree of the circuit court will be affirmed. Decree affirmed.

(203 Ill. 608)

NORTH CHICAGO ST. R. CO. v. COSSAR.*

(Supreme Court of Illinois. June 16, 1903.)

HIGHWAYS—LAW OF THE ROAD—BICYCLES—COLLISIONS—PASSING VEHICLES—DUTIES OF PARTIES—INJURIES—PROXIMATE CAUSE—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.

1. In an action for injuries, where the damages sought to be recovered are speculative and not susceptible of direct proof, and the judgment appealed from is for \$1,000 or more, an appeal lies from the judgment of the Appellate Court to the Supreme Court without a certificate of importance.

2. In an action for injuries to plaintiff while riding a bicycle along a city street, evidence reviewed, and held, that plaintiff's failure to turn out a sufficient distance from a street car to permit her to pass the conductor in safety was the proximate cause of the injury, and that she was, therefore, not entitled to recover.

*Rehearing denied October 2, 1903.

3. In an action for injuries, an instruction that by ordinary care is meant such a degree of care under the circumstances and in the situation in which the plaintiff was placed, so far as they may be shown by the evidence, as an ordinarily prudent and cautious man would exercise under like circumstances and in the same situation for his own safety to avoid apparent danger, was objectionable as authorizing the jury to infer therefrom that, if plaintiff was in the exercise of due care at the instant the accident occurred, she might recover, though she was guilty of negligence in having placed herself in the position she was at the time of the collision.

4. A bicycle is a vehicle subject to the rules of law governing other vehicles, and its rider is required to use the same degree of care to avoid injury as the driver of a team.

5. Where a bicycle rider attempted to pass the conductor of a standing street car, who had alighted to assist a passenger to the ground, such bicycle rider was bound at her peril to turn out a sufficient distance to avoid a collision with the conductor.

Magruder, J., dissenting.

Appeal from Appellate Court, First District.

Action by Frances L. Cossar against the North Chicago Street Railway Company. From a judgment in favor of plaintiff, affirmed by the Appellate Court, defendant appeals. Reversed.

John A. Rose and Louis Bolsot (W. W. Gurley, of counsel), for appellant. James Smith, for appellee.

HAND, C. J. This was an action on the case to recover damages for a personal injury. The declaration contained one count, which averred, in substance, that on the 17th day of August, 1897, the defendant was possessed of and operating a street car, going west, in Fullerton avenue, in the city of Chicago; that while the plaintiff was riding a bicycle in the same direction on said avenue, at a point near Oakley avenue, in the exercise of due care for her own safety, the conductor who was then and there in charge of said car, and who knew of the approach of the plaintiff, or by the exercise of reasonable care might have known of her approach, negligently and without warning suddenly jumped off the car immediately in front of the plaintiff, so that the bicycle upon which she was riding struck him, whereby she was thrown to the ground and injured. The general issue was filed, and upon the trial the jury returned a verdict in favor of the plaintiff for \$1,000, which, on appeal, was affirmed by the Appellate Court for the First District, and a further appeal has been prosecuted to this court.

A motion has been made to dismiss the appeal on the ground of want of jurisdiction in this: that no more than \$1,000 is involved and no certificate of importance has been granted by the Appellate Court. This is an action in which the damages sought to be recovered are speculative and not susceptible of direct proof, and the judgment appealed from is for \$1,000. The question raised here

has been before this court repeatedly, and the rule announced by the decided cases is that in actions *ex contractu* or *ex delicto*, if the damages sought to be recovered are speculative in character and not susceptible of direct proof, and the damages are \$1,000 or more, as shown by the judgment, an appeal lies from the judgment of the Appellate Court to this court without a certificate of importance. *Baber v. Pittsburg, Cincinnati & St. Louis Railroad Co.*, 93 Ill. 342; *Hankins v. Chicago & Northwestern Railway Co.*, 100 Ill. 466; *Umlauf v. Umlauf*, 103 Ill. 651; *Bank of Commerce v. Miller*, 66 N. E. 1039. This appeal falls within the rule above announced, and this court has jurisdiction thereof without a certificate of importance. The motion to dismiss will be denied.

There was but little conflict in the evidence, from which it appeared the plaintiff, a young woman about 20 years of age, on August 17, 1897, started with her mother and aunt to go from their home on the north side, in the city of Chicago, to Maywood, a suburb of said city. Her mother and aunt were upon the street car, and she rode a bicycle. When upon Fullerton avenue, which runs east and west, the plaintiff at times was in front and again in the rear of the car upon which her mother and aunt were passengers. When the car stopped at Oakley avenue, which runs north and south, the conductor was upon the front platform. At that point he left the car to assist a lady passenger in alighting, and just as he stepped upon the ground the plaintiff, who was riding near the car and a few feet to the rear of the platform, upon the same side upon which he alighted, ran against him with her bicycle. He was knocked down, and she was thrown from the bicycle and her arm broken. The car stopped at a usual stopping place to receive and discharge passengers, the conductor left the car in his usual manner, the plaintiff was accustomed to riding a bicycle upon the streets of the city, the accident occurred about 11 o'clock in the forenoon, the street was free from teams, her view was unobstructed, the pavement was in good repair, the plaintiff was riding at the rate of five or six miles per hour, and the car was standing still at the time of the collision.

At the close of all the evidence the defendant moved the court to take the case from the jury, which the court declined to do. We are of the opinion the motion should have been allowed, and the jury instructed to find for the defendant. The plaintiff knew the car was accustomed to stop at the further side of cross streets for the purpose of receiving and discharging passengers, and that the conductor usually left the car at such stops. While the plaintiff had the right to ride a bicycle upon the streets, the defendant had the right to stop its car at that place, and the conductor had a right to be

upon the street; and it was the duty of plaintiff, she knowing the car was apt to stop, to watch for and guard against striking passengers who were entering or leaving the car, or the servants of the defendant who had alighted for the purpose of assisting persons to leave or enter the car. The evidence shows the conductor was standing from two to five feet from the car at the time he was struck. He had the right to be in the street near his car at that place while it was standing still. The plaintiff was aware of that fact. The street was of sufficient width to have permitted the plaintiff to pass in safety, and, if she desired to go ahead of the car while it was standing still, it was her duty to keep far enough away from the car to avoid striking persons getting off or on the car in the usual way, or the servants of defendant while performing their duties of assisting passengers to enter or leave the car. This she failed to do, but kept on her course at so high a rate of speed and so close to the car that she was unable to stop her wheel in time to avoid a collision when the conductor alighted, the result of which was her bicycle struck him with so much force as to knock him down and to throw her off upon the ground and inflict upon her the injuries complained of. It is plain from the undisputed evidence that her failure to turn out a sufficient distance from the car to permit her to pass in safety was the proximate cause of the injury. It was not the duty of the conductor to warn the plaintiff that the car would stop at the further side of Oakley avenue, at its intersection with Fullerton avenue, to receive and discharge passengers, and that he would alight from the car at that point. She was aware of such facts. It is clear from the evidence that the conductor was looking west at the time he alighted, and did not see the plaintiff until he was struck by the bicycle and thrown down.

Complaint is also made that the court erred in giving to the jury, upon behalf of the plaintiff, the following instruction: "The court instructs the jury that by ordinary care the law means such a degree of care, under the circumstances and in the situation in which the plaintiff was placed, so far as they may be shown by the evidence, as an ordinarily prudent and cautious person would exercise, under like circumstances and in the same situation, for his own safety, to avoid apparent danger." The criticism made upon this instruction is that it assumes that an ordinarily prudent and cautious person might find himself in the situation that plaintiff was in at the time of the accident, and assumes that she was not guilty of contributory negligence in being in the position in which she found herself at the time of the injury. In personal injury cases it has been repeatedly held by this court that it is improper to give an instruction which limits the question of due care to the conduct of the

plaintiff at the time of the injury, regardless of his conduct in placing himself in a place of danger. The claim of defendant was that plaintiff was guilty of contributory negligence in riding her bicycle, at the rate of speed at which she was going, so close to the car that when it stopped to let off a passenger an accident would be likely to occur in case a passenger or the conductor should step from the car. We think this instruction subject to the criticism made, and that the jury might well have inferred therefrom that, if the plaintiff was in the exercise of due care at the instant when the accident occurred, then she might recover, although the evidence showed she was guilty of negligence in having placed herself in the position in which she found herself at the time of the collision. In *Chicago, Milwaukee & St. Paul Railway Co. v. Halsey*, 133 Ill. 248, 254, 23 N. E. 1028, 1030, in discussing the question now under consideration, the court said: "Nor should the inquiry in regard to contributory negligence by the deceased have been directed only to the evidence of what the deceased did at the time of receiving the injury. The claim of appellant is, not that he then failed to do what a man of ordinary caution would have done to avoid injury, but that he failed to do what a man of ordinary caution, under like circumstances, would have done to avoid placing himself in a position from which he could not escape without being injured. One who, failing to observe due care, blindly walks into a danger that the observance of due care would have enabled him to avoid, is no less guilty of contributory negligence than he who by the observance of due care could extricate himself from danger fails to make any effort for his personal safety, and because thereof is injured."

The authorities agree that a bicycle is a vehicle, subject to the rules of law governing other vehicles (*State v. Collins*, 16 R. I. 371, 12 Atl. 121; *Holland v. Bartch*, 120 Ind. 46, 22 N. E. 83, 16 Am. St. Rep. 307; *Swift v. Topeka*, 43 Kan. 671, 23 Pac. 1075, 8 L. R. A. 772; *Thompson v. Dodge*, 58 Minn. 555, 60 N. W. 545, 28 L. R. A. 608, 49 Am. St. Rep. 533; *Elliott on Roads and Streets* [2d Ed.] § 852); and it has been held that the rider of a bicycle is required to use the same degree of care as the driver of a team of horses hitched to a wagon (*Peltier v. Bradley*, 67 Conn. 42, 34 Atl. 712, 32 L. R. A. 651); and that the driver of a vehicle who attempts to pass another vehicle on a public road does so at his peril (*Avegno v. Hart*, 25 La. Ann. 235, 13 Am. Rep. 133); and it was ruled by the New York Court of Appeals, in *Adolph v. Central Park, North & East River Railroad Co.*, 76 N. Y. 530, 533, that "one person may choose to go at a slow pace along the way, and has a right so to go; another may choose to go at a faster pace, and has a right so to go; yet each must exercise his right so as not unnecessarily to abridge the use by the oth-

er of his right. The one choosing to go fast may turn out and go past the one choosing to go slow, but must keep clear of him in doing it;" and by the Supreme Court of Tennessee in *Young v. Cowden*, 98 Tenn. 577, 40 S. W. 1088, that it is the duty of the driver of a vehicle following another to give warning to the vehicle in front before attempting to pass, where it is dangerous to pass, and then not to attempt to pass unless he can do so safely.

We think the contributory negligence of the plaintiff in this case was such as to bar a recovery. In *Beidler v. Branshaw*, 200 Ill. 425, 430, 65 N. E. 1086, 1088, we said: "Although it is true that the question of contributory negligence is ordinarily a question for the jury, yet when there is no conflict in the evidence, and the court can clearly see that the injury was the result of the negligence of the party injured, it should not hesitate to instruct the jury to return a verdict for the defendant. In *Lovenguth v. City of Bloomington*, 71 Ill. 238, it is said (page 241): 'A party has no right to knowingly expose himself to danger and then recover damages for an injury which he might have avoided by the use of reasonable precaution.' In *Werk v. Illinois Steel Co.*, 154 Ill. 427, 432, 40 N. E. 442, 444, the court say: 'While questions of negligence or of contributory negligence are ordinarily questions of fact, to be passed upon by a jury, yet, when the undisputed evidence is so conclusive that the court would be compelled to set aside a verdict in opposition to it, the court may withdraw the case from the consideration of the jury and direct a verdict.'"

The judgments of the superior and appellate courts will be reversed.

Judgment reversed.

MAGRUDER, J. (dissenting). I cannot concur in this decision. The car was traveling west upon Fullerton avenue, and the accident occurred when the car reached the crossing of Fullerton avenue by Oakley avenue; the latter running north and south. The plaintiff, who was injured, was riding her bicycle at the time of the accident, going west in the same direction in which the car was going. At the time the accident occurred, she was on the north side of the car, between the car and the sidewalk, upon Fullerton avenue, which was a public street. There are circumstances going to show that the conductor was guilty of gross negligence, which resulted in the injury to the appellee. But, if he was not guilty of gross negligence, the evidence tends to show that he was guilty of negligence, and that appellee was in the exercise of due care for her own safety. This being so, the judgment of the superior court of Cook county in her favor, awarding her \$1,000 damages and the judgment of the Appellate Court affirming the judgment of the superior court, are a final determination of the facts, so far as this court is concerned.

When the car, going west, reached Oakley avenue, the conductor, who was upon the front platform of the car, jumped off the car into the street at a distance of from two to five feet from the car. There is as much evidence tending to show that the distance to which he jumped from the car into the street was four or five feet, as that it was a less number of feet. The car at the time was full of passengers. His object in jumping from the car to the street was to catch the rear platform of the car, as it should come up to him while he was standing in the street. It makes no difference whether, when the car should come up to him, he was going to help a passenger alight or not. His real object in jumping into the street was to jump upon the car at the rear, when the rear should come up to where he was. The conductor himself says in his testimony: "Every conductor has a different way of working his car. If I am on the front end of the car, in order to save time, I will always jump back, and catch the back as it comes up." One of the witnesses says that the conductor was collecting fares, and that she saw him get off the car many times, "because there were many passengers." Is it correct to say that the conductor had a right to be upon the street under the circumstances here stated? The street car company appropriates to its use the middle of the street between the rails of its track, and, in addition, such portion of the street as is under the sides of its cars, where they project over the rails. The streets belong to the people. They are public highways, upon which every citizen has a right to travel. The street car companies have no right to use any more of the public street than is thus occupied by their tracks and the projecting sides of their cars. If the doctrine of the majority opinion is to prevail, then the street car companies have a right to occupy, in addition to the portion of the street thus named, an additional portion for the transaction of their business. When the conductor jumps from the platform of a car four or five feet into the street, on the side of the car, for the purpose of standing there and getting on the car when the rear of the car reaches him, then he is using the street to that extent for the business of the company. He has no right to do that. If it is necessary for him to go from the front to the rear of the car, he should go upon the car, either through the car, or by way of the aisle in the middle of the car, or on the footboard on the side of the car, whether he goes there for the purpose of seeing that a passenger alights properly or not. He has no right thus to appropriate a part of the public street, outside of that occupied by the car tracks and the cars themselves.

But, if it should be conceded that he has such right, it would be his duty so to dismount from the car as not to injure persons passing along the public street. The testi-

mony tends to show that this young lady was riding upon her bicycle about half way between the side of the car and the sidewalk; that is to say, about in the center between the north side of the car and the north side of the street running west. The evidence tends to show that the conductor knew that she was following the car, or riding near the side of the car, as she had been doing for some time; her mother and aunt being upon the car, while she was riding upon her bicycle. The testimony shows that she passed the car several times. The motorman saw her riding upon her bicycle, and several of the passengers testified that they saw her riding there. When he jumped from the car, his back was turned toward her while she was riding her bicycle. His face was directed to the west. In addition to this, the testimony shows that he was engaged in conversation with the motorman just before he jumped from the car. His conduct in thus jumping from the car into the public street to a distance of four or five feet, knowing that the appellee was riding upon her bicycle, and without directing his look in the direction in which she was riding, shows a great degree of negligence. At almost the instant at which he thus jumped from the car, she ran into him, and was thrown down, and suffered the injury for which this suit is brought. If he had any right thus to jump from his car into the street, it was his duty to look and see that the public street was not occupied by travelers, and that he would not collide with any of such passing travelers; but the evidence tends to show that he took no pains, nor exercised any care, to look to see what there was in the street, or what was passing along the street. As a result, the collision with the bicycle was inevitable. The evidence leaves it doubtful whether the car had actually stopped when he jumped off or not. He himself is unable to say in his testimony whether the car had actually stopped, or not. Thus there is evidence tending to show that the conductor, the servant of the appellant company, was guilty of negligence in causing the injury. The evidence also tends to show that appellee was in the exercise of due care. She was on the public street. She had a right to ride upon the street on her bicycle. She had a right to ride in the space between the moving car and the north side of the street. When the accident occurred, she was in the exercise of her rights. She could not know whether the car was going to stop at the crossing or not. It is true that these cars stop at the further side of the crossing to let passengers on and off. But they do not so stop unless some passenger is going to alight or board the car. The conductor knows, or is supposed to know, whether any one is going to alight or board the car. A person traveling on the street upon the right side of the car, or in the rear of the car, is not bound to take notice that

the car will actually stop at the crossing, even though such person knows that there is a rule or ordinance requiring the car to stop at the further side of the crossing. Therefore it cannot be said that it was the duty of the plaintiff, she knowing that the car was about to stop, to wait for and guard against striking passengers, who were entering or leaving the car, or the conductor, who alighted for the purpose of assisting persons to leave or enter the car. Here there was no question of striking a passenger. The person with whom the bicycle collided was the conductor of the car, and not a passenger. It is the conductor's duty to stop the car, in order that every person who desires to alight or board the car may do so. The question whether appellee was in the exercise of due care or not was, under all the circumstances, a question to be determined by the jury; and is it not invading the province of the jury to say that "the evidence showed she was guilty of negligence in having placed herself in the position in which she found herself at the time of the collision"?

The instruction, given for the appellee, which is criticised in the opinion of the majority, cannot be said to contain serious error. The doctrine, announced in *Chicago, Milwaukee & St. Paul Railway Co. v. Halsey*, 133 Ill. 248, 23 N. E. 1028, has no application here, as there was no evidence tending to show that appellee walked into a danger which the observance of due care would have enabled her to avoid. Moreover, the appellant asked, and the court gave, several instructions, which were the same, in effect, as the instruction so given for the appellee. By the ninth instruction, given for the appellant, the jury were told that they must find by a preponderance of the evidence "that the plaintiff was not at the time of the accident guilty of any failure to exercise ordinary care for her own safety proximately contributing to her own injury." By instruction 10, given for the appellant, the jury were instructed as follows: "If the jury believe from the evidence that the plaintiff failed to exercise ordinary care for her own safety, which failure, if any, proximately helped in any way to bring about the accident which resulted in the injuries herein complained of, then they should return a verdict of not guilty." By instruction 15, given for the appellant, the jury were told that "if, after such consideration of all the evidence," etc., "you are unable to say that the plaintiff has proved by a preponderance of the evidence that the defendant was guilty of the negligence alleged in the plaintiff's declaration, and that the plaintiff was exercising ordinary care for her own safety, then the jury should find the defendant not guilty." The jury were also told by the fifth instruction given for the appellee that if they believed, from all the evidence, "that the injuries complained of were caused by the negligence or carelessness of

the servant of the defendant, then the North Chicago Street Railway Company, in the course of his employment as such servant, as charged in the declaration, and without any fault on the part of the plaintiff, which contributed to the injury complained of, then the defendant is liable in this action." In view of these instructions, it cannot be said that the appellant was in any way injured by the giving of the instruction which is said to be erroneous.

A careful examination of the testimony will show that it was conflicting as to the distance of the conductor from the car when the collision occurred, as to the distance from the car the appellee was riding on the street, as to the fact whether or not any passenger alighted from the rear of the car, as to whether the car had actually stopped when the collision occurred, and as to whether the conductor jumped from the car while it was moving. The evidence shows that appellee's arm was broken, and that her injuries are permanent and serious. She was studying music at the time of her injury, and the proof is that thereafter she was unable to use her arm so as to play the piano. The damages awarded her were moderate.

(203 Ill. 543)

BARBER v. PEOPLE.

(Supreme Court of Illinois. Oct. 8, 1903.)

BIGAMY — MARRIAGE — VALIDITY — INTOXICATION — TRIAL — EVIDENCE — WITNESSES — COMPETENCY — HARMLESS ERROR.

1. When the celebration of a marriage is shown, the contract of marriage, the capacity of the parties, and every other fact necessary to the validity of the marriage, will be presumed, but such presumption is not conclusive.

2. Intoxication at the time of entering into the marriage contract will not render the marriage void, but only voidable.

3. A voidable marriage will support an indictment for bigamy.

4. In a prosecution for bigamy, the lawful wife of defendant is not a competent witness against him.

5. In a prosecution for bigamy, the incompetency of defendant's lawful wife as a witness against him cannot be waived.

6. In a prosecution for bigamy, where evidence had been given establishing the first marriage, the woman with whom the second ceremony was performed was a competent witness to testify to the second marriage.

7. She was, however, incompetent to testify to the first marriage.

8. Where, in a prosecution for bigamy, no objection was made to the competency of the woman with whom the second ceremony was performed as a witness to the fact of the first marriage, such objection could not be first raised on appeal.

9. In a prosecution for bigamy, evidence that defendant had delirium tremens during the week in which the first marriage was contracted was inadmissible.

10. In a prosecution for bigamy, the court excluded the woman with whom the second ceremony was performed when she was first offered as a witness, and later stated that, in view of evidence having been submitted tending to

show the first marriage, he would hold that the witness was competent. *Held*, that the remarks of the court were not prejudicial to defendant.

11. In a prosecution for bigamy, the court erroneously permitted the defendant's lawful wife to testify against him as to the fact of the first marriage, but this fact was established by other testimony, and the second marriage was admitted; the only defense being voluntary intoxication at the time of the first marriage. *Held*, that the error in admitting the testimony of defendant's wife was not cause for reversal.

Error to Criminal Court, Cook County; O. H. Horton, Judge.

Adelbert O. Barber was convicted of bigamy, and brings error. Affirmed.

Adelbert O. Barber was tried for the crime of bigamy at the October term, 1902, of the criminal court of Cook county, upon an indictment charging that on the 18th day of February, 1896, at and within said county, he was lawfully married to Annie Zahora, and that afterwards, on the 2d day of October, 1900, at and within said county, he unlawfully and feloniously married one Katherine H. Hurley, while his said wife was yet alive. He was found guilty by the jury, and sentenced by the court to the penitentiary for an indeterminate period, and he has sued out this writ of error, and urges the following grounds for a reversal: First, that the court refused to allow him to show that he was intoxicated at the time of his alleged marriage to Annie Zahora; second, that the court erred in permitting Annie Zahora to testify against him upon the trial as a witness for the state; third, that the court erred in permitting Katherine H. Hurley to testify against him upon the trial as a witness for the state; fourth, that the judge erred in making remarks prejudicial to him in the presence of the jury during the trial; fifth, that the court erred in refusing to instruct the jury on his behalf that if, at the time the alleged marriage ceremony between him and Annie Zahora was performed, by reason of his intoxication he did not have sufficient mental capacity to understand what he was doing, and that he was then assuming the duties and obligations of the marital relation, such marriage was void, and the jury should find him not guilty.

John F. Geeting and Robert E. Cantwell, for plaintiff in error. H. J. Hamlin, Atty. Gen., Geo. B. Gillespie, Asst. Atty. Gen., and Chas. S. Deneen, State's Atty., for the People.

HAND, C. J. (after stating the facts). At the trial the state introduced in evidence a certified copy of a marriage certificate issued by the county clerk of Cook county authorizing a marriage to be celebrated between the plaintiff in error and Annie Zahora, with the return thereon of M. A. La Buy, one of the justices of the peace of said county, that the marriage of the plaintiff in error and Annie Zahora had been celebrated before him; also called Thomas Barrett, who

¶ 2. See Bigamy, vol. 4, Cent. Dig. § 1.

testified that he was present at the office of said justice of the peace at the request of the parties, and witnessed the celebration of the marriage of the plaintiff in error and Annie Zahora by said justice of the peace. When the celebration of a marriage is once shown, the contract of marriage, the capacity of the parties, and every other fact necessary to the validity of the marriage, will be presumed; but such presumption is not conclusive. *Cartwright v. McGown*, 121 Ill. 388, 12 N. E. 737, 2 Am. St. Rep. 105. Intoxication at the time of entering into the marriage contract will not render the marriage void, but only voidable. 19 Am. & Eng. Ency. of Law (2d Ed.) p. 1164, and note. A voidable marriage will support an indictment for bigamy. 4 Am. & Eng. Ency. of Law (2d Ed.) p. 38, and note. "A void marriage is a mere nullity, and its validity may be impeached in any court, whether the question arise directly or collaterally and whether the parties be living or dead; but a voidable marriage is valid, for all civil purposes, until a competent tribunal has pronounced the sentence of nullity, upon direct proceedings instituted for the purpose of setting the marriage aside." *Schouler on Domestic Relations* (2d Ed.) p. 24. The marriage between the plaintiff in error and Annie Zahora was not void, and, if voidable, it was binding upon the parties thereto until it was set aside in a direct proceeding instituted for that purpose in a court of competent jurisdiction, and could not be attacked on the trial in the court below.

The plaintiff in error insisted upon the trial that Annie Zahora was not his lawful wife, on the ground that he was intoxicated at the time he married her. When she was called as a witness, the state's attorney stated to the court that the state claimed the witness was the lawful wife of the plaintiff in error, and, if there was objection to her testimony upon the ground that she was an incompetent witness, he would not use her as a witness. No objection was made to her testifying, and the court permitted her to give evidence to the fact of her marriage to the plaintiff in error. She was not a competent witness, and her incompetency could not be waived. In *Creed v. People*, 81 Ill. 565, on page 568, it was said: "The exclusion of husband and wife from being witnesses for or against each other is not solely on the ground of interest. 'This exclusion is founded partly on the identity of their legal rights and interests, and partly on principles of public policy, which lie at the basis of civil society.'" And in *Kent's Commentaries*, vol. 2 (12th Ed.), p. 179, it is said: "The husband and wife cannot be witnesses for or against each other in a civil suit. * * * Nor can either of them be permitted to give any testimony, either in a civil or criminal case, which goes to criminate the other; and this rule is so inviolable that no consent will authorize the breach of it."

After testimony was introduced showing a lawful marriage between the plaintiff in error and Annie Zahora, the court, over his objection, permitted the state to call Katherine H. Hurley as a witness, and allowed her to testify to facts tending to show the marriage of the plaintiff to Annie Zahora, as well as the second marriage. The plaintiff in error having a lawful wife at the time of his marriage to Katherine H. Hurley, his marriage to her was void, and after the first marriage was established by the introduction of the record evidence thereof, and the testimony of the witness who was present at the time the marriage ceremony was performed, it was competent to permit her to testify to the second marriage; but she was not a competent witness by whom to establish the first marriage. In *Lowery v. People*, 172 Ill. 466, on page 471, 50 N. E. 166, 64 Am. St. Rep. 50, the court say: "In *Miles v. United States*, 103 U. S. 304 [26 L. Ed. 481], it is said that it is only in cases where the first marriage is not controverted, or has been duly established by other evidence, that the second wife is allowed to testify; that she is never competent to prove the first marriage, for she cannot be admitted to prove a fact to the jury which must be established before she can testify at all; and that in cases where she can testify she may be a witness to the second marriage, but not to the first." When she was offered as a witness, objection was made that she was incompetent. As has been said, she was competent to establish the second marriage, the first marriage having been proven, and the objection to her competency was properly overruled. If objection had been made to her testifying to facts which tended to prove the first marriage, such objection should have been sustained; but as no such objection was made, the admission of her testimony cannot now successfully be assigned as error.

Complaint is also made that the court refused to admit evidence tending to show the plaintiff in error was affected with delirium tremens at the time of his marriage to Annie Zahora. No such testimony was offered. While Emily Barber, a sister of the plaintiff in error, was upon the witness stand, she was asked if she knew whether or not the plaintiff in error was affected with delirium tremens during the week of his marriage to Annie Zahora, which question the court declined to permit her to answer. The question was not limited to the time of the marriage, but extended over the entire week in which the marriage occurred. To have been a proper one in any view, it should have been limited to the condition of the plaintiff in error at the time of the marriage, as, if he was rational at the time of the marriage, it would be a valid marriage, even though a few days prior or subsequent thereto, and during the week of his marriage, he was affected with delirium tremens.

When Katherine H. Hurley was first called as a witness, the court declined to permit her to testify. Subsequently, and after the first marriage had been established, she was recalled, when it was ruled that, there having been evidence submitted to the jury which tended to prove a marriage to Annie Zahora, the holding would be that Katherine H. Hurley was a competent witness. No bias was shown against the plaintiff in error in announcing this ruling, and no opinion was expressed by the judge as to whether or not the first marriage had been established. The marriage to Annie Zahora having been established by competent evidence, Katherine H. Hurley was a competent witness to testify upon the subject of her marriage to the plaintiff in error; and the remarks of the court made at that time were not of such a character as to require a reversal of the case. We are also of the opinion the remarks made by the court disapproving of the verdict of a jury rendered in another case, in the presence of the jury trying this case, did not prejudice the minds of the jury against the plaintiff in error.

The court did not err in declining to instruct the jury that, if the plaintiff in error was so far under the influence of intoxicating liquors at the time the marriage ceremony was performed between him and Annie Zahora that he did not have sufficient mental capacity to understand what he was doing, and that he was assuming the duties and obligations of the marital relation, his marriage to her was void, and they should find him not guilty. Said instructions were based upon testimony which was incompetent, and had been excluded. The law will not permit a party to a marriage contract to stultify himself by proving, when on trial for bigamy, that he was voluntarily intoxicated at the time of his first marriage, as a means of exculpating himself, by rendering void what would otherwise be a valid marriage.

The evidence in this case shows, without contradiction, the plaintiff in error and Annie Zahora went to the office of Justice La Buy, and were married. From the justice's office the parties repaired to a restaurant, and had lunch. From there they went to the home of a sister of the plaintiff in error, where they announced their marriage, and partook of refreshments. Although the court erred in admitting the testimony of Annie Zahora, as the first marriage was proven by evidence other than the evidence of said witness, and the second marriage was admitted by the plaintiff in error's counsel in open court upon the trial, and the only defense interposed was that of voluntary intoxication of the plaintiff in error at the time of his marriage to Annie Zahora, we are fully convinced his conviction was proper, and that the verdict and judgment should be sustained. If the competent testimony clearly justifies the verdict in a criminal case, the fact that incompetent testimony has been admit-

ted will not cause a reversal, if it clearly appears that such incompetent testimony could not have affected the result of the trial. *Jennings v. People*, 189 Ill. 320, 59 N. E. 515.

Finding no reversible error in this record, the judgment of the criminal court of Cook county will be affirmed.

Judgment affirmed.

(203 Ill. 567)

ALDIS et al. v. UNION ELEVATED R. CO.

(Supreme Court of Illinois. April 24, 1903.)

EMINENT DOMAIN—ELEVATED RAILROADS—CONSTRUCTION—CONSENT OF CITY—FEE IN STREETS—DAMAGES TO ABUTTING OWNER—ADDITIONAL SERVITUDE.

1. Under Const. 1870, art. 2, § 13, providing that private property shall not be taken or damaged for public use without just compensation, an abutting owner, whose property has been injured by the construction of an elevated street railway in a street, the fee of which is in the city, is entitled to recover the damages sustained, though the railway was legally constructed in the streets by permission of the mayor and city council, and was not so negligently operated as to constitute a nuisance.

2. In an action by an abutting owner to recover damages to his abutting property by reason of the construction and operation of an elevated railway in a street, the fee of which was in the city, the fact that such a railroad did not constitute an additional servitude on the street was immaterial.

Appeal from Circuit Court, Cook County; Frank Baker, Judge.

Action by Owen L. Aldis and others against the Union Elevated Railroad Company. From a judgment in favor of defendant, plaintiffs appeal. Reversed.

Peckham, Brown & Packard, Pike & Gade, and Wilson, Moore & McIlvaine, for appellants. Knight & Brown and William G. Adams, for appellee.

HAND, J. This was an action on the case, brought by the appellants against the appellee in the circuit court of Cook county to recover damages by reason of the depreciation in value of the premises of appellants, located at the northwest corner of Van Buren and Dearborn streets, in the city of Chicago, upon which is located the Monadnock building, caused by the construction and operation by appellee of its elevated railroad in Van Buren street in front of said premises, and the erection of a station, platform, stairs, etc., at the intersection of said streets. The declaration, as amended, contained two counts, which, after describing the premises and the structure of said elevated road and method of its operation, averred that by means of the construction and operation of said elevated railroad, station, etc., their means of access to the said building and premises had been cut off, and the light, air, and view obstructed, and the enjoyment of their property disturbed by the throwing of smoke, dust, cinders, and filth into and upon said building and premises, by the creating and causing of loud

and ominous noises, and by the causing of the ground and building thereon to shake and vibrate; that the railroad is a permanent structure; and that said building and premises are greatly damaged by the construction and operation of said elevated railroad and its appurtenances in the streets upon which said premises abut. A demurrer was sustained to the declaration, and, the appellants having elected to stand by the same, the cause was dismissed for want of a sufficient declaration, and the appellants have prosecuted an appeal direct to this court on the ground that the construction of the first clause of section 13 of article 2 of the Constitution of 1870, providing that "private property shall not be taken or damaged for public use without just compensation," is involved.

The main contention of appellee is that, its elevated railroad having been constructed in the public streets of the city of Chicago by the permission of the mayor and city council, the appellants, as abutting owners, can recover no damages caused by the location, construction, and operation of said elevated railroad in the streets upon which their property abuts, unless the road is so improperly constructed or negligently operated as to make it a nuisance. We do not agree with such contention. The constitutional provision above referred to provides that private property shall not be damaged for public use without just compensation, and in the case of *Doane v. Lake Street Elevated Railroad Co.*, 165 Ill. 510, 46 N. E. 520, 36 L. R. A. 97, 56 Am. St. Rep. 265, where, at the suit of an abutting owner, it was sought to enjoin the construction of an elevated railroad in one of the public streets in the city of Chicago, the relief was denied upon the express ground that the complainant had an adequate remedy at law to recover all damages which his abutting property might sustain by reason of the construction and operation of the elevated road in the street in front of his property. In that case it was said (page 518, 165 Ill., page 522, 46 N. E., 36 L. R. A. 97, 56 Am. St. Rep. 265): "Where the fee of the street is in the city, such damages as the abutting owner may suffer from the laying of a railroad track in the street are merely consequential, so far, at least, as they affect the property abutting on the street. In such case, as there is no physical taking of the land, injunction will not lie to enjoin the taking; the remedy being an action at law for damages." * * * His injury is a depreciation of the property, which is capable of being estimated in money, and recoverable in an action at law, therefore a court of equity will not interfere by injunction." This case has never been overruled or modified, but is sustained by a long line of Illinois cases, and is a fair statement of the law as it has existed in this state since the adoption of the Constitution of 1870. Under the Constitution of 1848 a

remedy for an injury like this did not exist, but one is given by the Constitution now in force. *Rigney v. City of Chicago*, 102 Ill. 64.

In case it is necessary to take private property for public use, the compensation must be fixed and paid before possession can be taken and the improvement made; but in a case like this, where no property is taken, the improvement may be made before the damages are ascertained and paid, the property owner in such case being driven to his action at law for damages. Such action, however, is in the nature of a condemnation suit, and, when resorted to, the measure of damages and rules of evidence which are to be adopted are the same as though a direct proceeding by condemnation had been brought to determine the amount of damages to be paid prior to the making of the improvement. *Chicago & Eastern Illinois Railroad Co. v. Loeb*, 118 Ill. 203, 8 N. E. 460, 59 Am. Rep. 341; *Illinois Central Railroad Co. v. Turner*, 194 Ill. 575, 62 N. E. 798. The fact that the improvement has been made before the damages are determined and paid will not prejudice the property owner to recover the amount justly due him by reason of damage done his property. While a city may lawfully grant to an elevated railroad company, by ordinance, the right to construct its railroad in its streets, it is powerless to grant to such company the right to damage the property of the abutting owner (*Illinois Central Railroad Co. v. Turner*, supra); and, when the property of an abutting owner is damaged, his right, under the Constitution, to compensation, is not confined to a recovery for the tortious acts of the railroad company, but he may recover for an injury to his property which is the result of an act which is perfectly legal. *Calumet & Chicago Canal & Dock Co. v. Morawetz*, 195 Ill. 398, 63 N. E. 165.

While it seems to be conceded by the appellee that the rules of law hereinbefore announced apply to railroad companies in general whose tracks are laid in the streets of a municipality, it is contended they do not apply to appellee's road, as, it is said, it is a street railroad, and the construction thereof in the streets of the city of Chicago is not an additional servitude upon said streets. It has been held in a number of cases, notably in the *Doane Case*, that the construction of an elevated railroad in a street where the fee to the street is in the city is not an additional servitude upon the street; that is, that its construction therein with the consent of the municipality is not unlawful, as being a diversion of the street from the public use for which it was originally dedicated or acquired. While the doctrine of that and kindred cases is not questioned as between the abutting owner and a railroad company occupying the street with its railroad, on principle we see no difference as regards his right to recover damages for an injury to his property abutting on the street by rea-

son of the construction and operation of a railroad in the street, whether it is a street or commercial railroad. The effect upon his property is the same, and, under the Constitution, if the same is depreciated in value by reason of the construction and operation thereof, it has been damaged, and he can recover. In *Illinois Central Railroad Co. v. Turner*, supra, and in *Calumet & Chicago Canal & Dock Co. v. Morawetz*, supra, interferences with the property of an abutting owner by reason of the construction and operation of a railroad in the public streets of a city, although by the consent of the city, similar to those averred in this declaration, were held to give a cause of action to the abutting property owner.

The circuit court erred in sustaining the demurrer to the declaration. Its judgment will therefore be reversed, and the cause remanded to that court, with directions to overrule the demurrer.

Reversed and remanded.

On Rehearing.

(Oct. 7, 1903.)

PER CURIAM. The appellee has filed a petition for rehearing on the ground that its road is not an additional servitude upon the streets upon which appellants' property abuts, and it is said if damages are allowed the appellants for loss of air, light, view, access and the comfortable and safe enjoyment of their property, caused by the proper and reasonable operation of appellee's road, they will be paid for what they have waived, or be twice compensated. As held in the original opinion, this contention is not sound. At the time said streets were dedicated or condemned, appellants or their grantors did not part with, but retained as appurtenant to said property, the right of access to said streets, the right to enjoy the air and light which pass over said streets, the view, and the comfortable and safe enjoyment of their property (*Field v. Barling*, 149 Ill. 556, 37 N. E. 850, 24 L. R. A. 406, 41 Am. St. Rep. 311; *Doane v. Chicago City Railway Company*, 160 Ill. 22, 45 N. E. 507, 35 L. R. A. 588; *Kotz v. Illinois Central Railroad Co.*, 188 Ill. 578, 59 N. E. 240); and if the appellee has constructed and is engaged in operating an elevated railroad in said streets in front of appellants' property, the effect of which is to destroy these rights and thereby depreciate the value of appellants' property, it would seem too clear for argument that the property of appellants had been damaged, and, if damaged, that the appellants have not waived or been paid such damages.

In *Aldrich v. Metropolitan West Side Elevated Railroad Co.*, 195 Ill. 456, 63 N. E. 155, 57 L. R. A. 237, the road was constructed upon the company's own right of way, and the court expressly declined to consider the rights of an abutter where the road was constructed in the street in front

of his property, the effect of which was to destroy his rights of access, air, light and view and the comfortable and safe enjoyment of his property. That case is therefore not an authority, as is contended by appellee, conclusive of the question that the appellants cannot recover in this case.

The declaration averred and the demurrer admits the road of appellee to be an improvement of a permanent character. In *Chicago & Eastern Illinois Railroad Co. v. Loeb*, 118 Ill. 203, 8 N. E. 460, 59 Am. St. Rep. 341, which was an action on the case to recover damages for depreciation in the value of property from the operation of a railroad in a public street upon which the property abutted, it was stated such "action for damages may be regarded as in the nature of one kind of condemnation proceedings," and that all damages, past and future, caused by the operation of the road might be assessed in one suit.

After a re-examination of the original briefs in connection with the petition for a rehearing filed in this case, we have reached the same conclusion as we reached when the case was first considered. The petition for rehearing will therefore be denied.

Rehearing denied.

(203 Ill. 525)

ROULET v. HOGAN et al.*

(Supreme Court of Illinois. June 16, 1903.)

MECHANICS' LIENS — TIME OF PAYMENT — SPECIFICATION—VACATION OF DECREE — CONTRADICTORY PETITIONS.

1. Where, on error from the denial of a petition to vacate a decree, two petitions for vacation appear in the record, stating contradictory grounds, one of which conforms to the facts as disclosed in the remainder of the record, while the other does not, it will be presumed that the trial court in ruling on the petition acted upon the one which correctly stated the facts.

2. Two contracts for the furnishing of steam-heating plants were made, neither of which specified any time for completion of the work. A third contract provided for the application of certain payments, and that the contractor should have one plant in condition to operate by a certain time, and that he should not be required to do any more work after that date until the payment of the sum of \$1,000 and the giving of satisfactory security for the balance. Held, that under the mechanic's lien law (Laws 1895, p. 228, § 6), providing that no lien shall be had under a written contract if the time stipulated for the completion of the work is beyond three years from the date of the contract, or the time of payment more than one year from the time of completion, the third contract, in connection with the other two, sufficiently fixed the time of payment to entitle the contractor to a lien.

Error to Appellate Court, First District.

Action by J. M. Hogan and others against William Roulet and others, in which judgment was rendered by default against defendant Roulet, and he petitioned for vacation of the judgment. From a judgment of

*Rehearing denied October 8, 1903.

the Appellate Court (107 Ill. App. 164) affirming an order overruling the petition, petitioner brings error. Affirmed.

This is a proceeding begun in the superior court of Cook county by J. M. Hogan and others to establish a mechanic's lien.

Frank Buchanan, in March, 1897, was the owner of four flat buildings on Adams street, in the city of Chicago, then in process of erection. On that date he accepted the proposition of J. M. Hogan to furnish a portion of a steam-heating plant, exclusive of the boiler, according to certain specifications, for \$1,250, \$650 of which was to be paid "as work progresses, and the balance of \$600 to be paid in ninety days from time the above work finished." In September following, a second contract was entered into, providing for a boiler, but no time was specified when the work in either of the contracts was to be commenced or completed. On the 21st of October a third or supplemental agreement was entered into, to wit:

"This memorandum of agreement made this 21st day of October, 1897, by and between Frank Buchanan and J. M. Hogan, both of the city of Chicago:

"Witnesseth, that whereas said J. M. Hogan is engaged in putting in two steam heating plants, one in the premises known as Nos. 12-20 Stanley Terrace, and the other in the premises known as Nos. 1120-1126 Adams street, both in the city of Chicago; and whereas, the sum of eight hundred and eighty-seven dollars (\$887) is now due on said Stanley Terrace job and the sum of eighteen hundred and fifty-five dollars (\$1855) will be due on completion of the Adams street job; and whereas, the sum of nine hundred and eighty-four dollars (\$984) has been paid to J. M. Hogan by said Frank Buchanan, the owner of said premises:

"Now, therefore, it is agreed and understood that the sum of eight hundred and eighty-seven dollars (\$887) was paid and is to be applied on said Stanley Terrace job in full satisfaction of the claim of J. M. Hogan against said premises, said work on said premises being hereby accepted by said Frank Buchanan. And it is further agreed that the balance remaining out of said nine hundred and eighty-four dollars (\$984), to-wit, the sum of ninety-seven dollars (\$97), shall be applied as part payment on said Adams street job, the receipt of which sum, to-wit, the sum of ninety-seven dollars (\$97), is hereby acknowledged by said J. M. Hogan.

"It is expressly understood that this instrument is in no way to affect the contract on the Adams street job, except in this: that said Hogan agrees to put in two radiators in each flat in said Adams street building, and to put said job in condition to fire up on or before the 25th day of October, 1897, and shall not be required to do any more work after that date, on said job, until payment of the sum of one thousand dollars (\$1000) in addition to the payment herein

stated shall be made and payment of balance over and above said sums on said contract shall be satisfactorily secured.

"Given under our hands and seals the day and year first above written.

"Frank Buchanan. [Seal.]

"J. M. Hogan. [Seal.]"

On November 29th following, Buchanan conveyed the premises by warranty deed to plaintiff in error, William Roulet. The \$1,000 not having been paid on the 25th day of October, specified in the last clause of the contract of October 21st, work was suspended, and on December 28th the petition for mechanic's lien was filed. William Roulet, the new owner, was made a party defendant, and duly served with summons. He did not appear, and was defaulted. The cause was referred to a master, who took the evidence and reported his conclusions, finding the total amount due, including solicitor's fees, etc., to be \$1,926.29, and the chancellor awarded a lien for that sum, the decree setting forth the evidence upon which it was based. The decree was rendered on the 13th day of January, 1902. On the 24th of that month, as shown by the abstract of the plaintiff in error, a petition was filed by William Roulet, representing, in effect, that he had not been served with process in the cause, and, after averring several irregularities in the proceedings, prays that the decree may be vacated, and that he may be allowed to present to the court his objections. The additional abstract filed by the defendants in error sets forth another petition by Roulet, filed on the same day, which appears to be a part of the record, though not abstracted by the plaintiff in error, and which, although conceding petitioner to have been personally served with summons, prays that the decree be set aside, and he "be given an opportunity to be heard upon the single questions sought to be raised by him." From a reading of the petition itself we find that the questions sought to be raised by him were, "namely, that the contract set up in the bill of complaint and offered in evidence before the master was a contract in writing, and failed to specify the time within which work to be done under said contract should be completed or payment therefor was to be made; that no issues of fact were raised, and petitioner was entitled to be heard on such questions of law notwithstanding the fact that his default had already been entered." To reverse that decree William Roulet prosecuted a writ of error to the Appellate Court for the First District, where the decree below was held to be erroneous as to the excess allowed over the sum of \$1,000 and interest thereon, that court allowing the lien as to that amount upon the theory that it was the only sum the time of payment of which was specified in the contract, while as to the excess no time was specified. Roulet prosecutes this further writ of error to reverse the judgment of the Appellate Court.

James R. Ward, for plaintiff in error.
Dunn & Hayes, for defendants in error.

WILKIN, J. (after stating the facts). Why two petitions of the same date and so nearly alike find their way into the record is not explained, but, inasmuch as the petition not abstracted by plaintiff in error conforms to the facts as disclosed by the remainder of the record, we agree with the Appellate Court in its conclusion, and resolve all doubts in relation to these contradictory petitions against the abstracted one, for which no counsel appears willing to assume any responsibility. It will be presumed, in the absence of anything to the contrary, that the trial court, in overruling the prayer of the petition, acted upon the one which correctly stated the facts. Upon this state of the record we will only consider such questions raised by plaintiff in error as can be made by one who has been defaulted in the proceeding below, and who seeks only to question the decision of the Appellate Court in its construction of the three instruments constituting the contract.

It is first contended that the three instruments upon which the petition for mechanic's lien is based contain no provision as to the time of the completion of the work or making payment therefor, and that no part of the amount found by the master as due to defendants in error can be made a lien upon the premises under section 6 of the mechanic's lien act, Laws 1895, p. 228. As to the first two instruments set forth in the petition, it is true they contain no such provision, and, standing alone, could not properly form the basis for a mechanic's lien. *Freeman v. Rinaker*, 185 Ill. 172, 56 N. E. 1055. But the contract of October 21, 1897, expressly provides that defendant in error Hogan "agrees to put in two radiators in each flat in said Adams street building, and to put said job in condition to fire up on or before the 25th day of October, 1897, and shall not be required to do any more work after that date, on said job, until payment of the sum of \$1000," etc., and stipulating for satisfactory security as to the remainder of the contract price. This is clearly an agreement signed by both of the parties for specified work and for the payment of a sum certain at a fixed time. If the \$1,000 could not be paid and security given for further work, nothing more was to be done by the contractor. When nothing was paid at the time stipulated, the work ceased, and the right to a lien became complete. It would seem that all three of the instruments should be taken together and considered as constituting but a single contract. But it is of no importance whether they be considered one or three instruments. The concluding clause of the last instrument is in itself a complete contract, complying with the conditions of section 6 of the mechanic's lien act of 1895.

Other questions are raised by the plaintiff in error as grounds for reversal of the judgment of the Appellate Court, but we cannot consider them, inasmuch as we have already held that the plaintiff in error is confined to only such questions as may be raised by one who has been regularly defaulted below.

From a careful reading of the whole record we are satisfied that the judgment of the Appellate Court is right, and that the scope of that judgment is fully justified by the averments in the petition. *Monarch Brewing Co. v. Wolford*, 179 Ill. 252, 53 N. E. 583. Its judgment will therefore be affirmed.

Judgment affirmed.

(203 Ill. 576)

CHICAGO TERMINAL TRANSFER R. CO.
v. CITY OF CHICAGO et al.*

(Supreme Court of Illinois. Feb. 18, 1903.)

MUNICIPAL CORPORATIONS—FRANCHISES—ORDINANCES—CONSTRUCTION—EFFECT OF ADOPTION OF PLAT OF STREET—APPEAL—EQUITY—RIGHT OF CO-DEFENDANT.

1. On appeal in a suit in equity the brief of a codefendant will not be stricken from the files as in aid of plaintiff, each defendant in equity being entitled to pursue the course in the litigation which he deems for his best interest.

2. A municipal ordinance, passed in 1879, granted permission to an individual and assigns to construct and operate a single-track dummy railway in certain streets, but expressly limited the right to April 1, 1898. An ordinance passed in 1881 confirmed the privileges in a company as assignee of such individual, and expressly limited the right to July 1, 1901. An ordinance passed in 1887 vested the rights in another company, and ordained "that, in addition to the rights * * * heretofore conferred" on the former company by the ordinance of 1881, it should have "the further right" to operate a suburban passenger railway along the prescribed route, etc., but solely on the terms set forth in the ordinance, and provided that trains should run within a certain time "over the route herein and in other ordinances described." *Held*, that rights conferred by the ordinance of 1887 were subject to the limitation as to time fixed in the ordinance of 1881.

3. The mere fact that the ordinance of 1881 granted permission to operate a dummy railway to a company with limited powers, while the ordinance of 1887 granted permission to operate a suburban passenger railway to a company with general railroad powers, did not manifest an intention on the part of the municipality that the latter ordinance should not be subject to the time limit fixed by the former.

4. A railway company, with general railroad powers laying tracks in a street under municipal authority granting it the right to operate a suburban passenger railway, but expressly limiting the privileges for a designated period, does not acquire a perpetual easement in the street.

5. The doubt, if any, as to the time for which rights were granted by a municipal ordinance arising from the fact that the ordinance purported to grant rights additional to those granted by a prior ordinance, which expressly limited the time for which the rights were granted, must be resolved in favor of the public.

6. A railroad company, pursuant to municipal authority, built its tracks in a street. Thereafter the street was widened, and a plat thereof

*Rehearing denied October 15, 1903.

was made, which marked a 28-foot strip in the center of the street as the company's right of way. The certificate of the platters stated that they had caused to be surveyed and platted a widening of the street so that it should be of a designated width. The plat was adopted by the municipality. *Held*, that there was no implied vacation of the 28-foot strip, nor a dedication thereof to the company.

Error to Circuit Court, Cook County; M. F. Tuley, Judge.

Suit by the Chicago Terminal Transfer Railroad Company against the city of Chicago and another. From a decree dismissing the bill, plaintiff brings error. Affirmed.

This was a bill for an injunction, filed in the circuit court of Cook county by the plaintiff in error, the Chicago Terminal Transfer Railroad Company, to restrain the defendant in error the city of Chicago from tearing up certain railroad tracks of the plaintiff in error. April 26, 1879, the town of Cicero, in Cook county, passed an ordinance giving permission to Charles R. Vandercook, his heirs and assigns, to lay down, maintain, and operate a single-track railway, with necessary turnouts, etc., over and along a certain route, beginning at the intersection of West Fortieth and Madison streets, thence on the west half of West Fortieth street to Randolph street, thence west on Randolph street to Robinson avenue (now known as South Fifty-Second avenue), and thence on certain other streets in the town of Cicero; the engines used thereon to be dummy engines. The right to operate this railway was to extend to April 1, 1898, at which time the rights and privileges granted were to cease, unless further extended. Vandercook having sold and transferred his rights under the ordinance to the Chicago & Western Dummy Railway Company, on August 20, 1881, the town of Cicero passed another ordinance confirming the powers and privileges given and granted to Vandercook, to his assignee, except as therein specified. Section 2 gives permission to operate a single-track railway, and modifies the route somewhat from the former ordinance. Section 3 fixes the standard gauge and the motive power—dummy engines—as before. Section 4 provides how the tracks shall be laid, and that the parts of streets so occupied shall be kept in as good repair and condition as are the other portions of the streets, and that the street crossings and sidewalks shall be planked. Section 5 provides that the company shall save and keep the town harmless for all loss, damage, and expenses on account of said road or the misconduct of its agents, etc. Section 6 fixes the fare at 10 cents to all points within the limits of the town of Cicero. Section 7 provides that the right to operate said railroad shall extend to July 1, 1901, at which time the rights and privileges herein and hereby granted shall cease, unless the same are further extended. Section 8 reserves the right to regulate the speed, time, and manner of run-

ning cars, and also the right to determine in what portions of the streets the tracks, etc., shall be laid, and to regulate and change the same. Section 9 provides that the rights and privileges granted shall at all times be subject to the police regulations, powers, and ordinances of the town. Section 10 makes it the duty of the company to keep all culverts under its tracks free from obstructions, and to build such culverts as the town may direct. On October 5, 1887, the town of Cicero passed another ordinance in reference to this railroad. Section 1 provides that, in addition to the rights, privileges, and franchises heretofore conferred upon the Chicago & Western Dummy Railway Company by the ordinance of August 20, 1881, which rights, privileges, and franchises are hereby vested in and confirmed to the Chicago, Harlem & Batavia Railway Company, the further right is hereby given to the last-named company to maintain and operate a suburban passenger railway along the route prescribed in the aforesaid ordinance, and the right to connect its tracks with the tracks of the Chicago & Great Western Railroad Company at some convenient point between Fortieth and Forty-Sixth streets, in the town of Cicero, and the right, for that purpose, to cross all necessary streets, alleys, and public places, together with the right to straighten all existing curves, solely and only upon the terms, conditions, duties, and other obligations hereinafter in this ordinance set forth, and not upon any other terms, conditions, duties, or obligations. The company is further given the right to construct, maintain, and operate a railroad with one or two tracks, with the necessary switches or turnouts. Section 2 provides that locomotives shall use hard coal, and makes it the duty of the company to put in and keep and maintain in good order and repair all traveled street crossings now existing or hereafter to be made, said crossings to be the full width of the street, including sidewalks; to fill up ditches in the streets used by it, widen the roadway, and to gravel the streets; to maintain safety gates or station flagmen at street crossings; to construct and keep in good order necessary ditches and drains along the right of way; to put in and keep in repair all culverts ordered upon street crossings; to honor commutation tickets for any guests or members of the family of the purchaser. The town reserves the right to open new streets across the railroad right of way, and to cross the same to put in new drains for a general drainage system. Whenever the company neglects or refuses to discharge any duties or obligations imposed upon it by the ordinance, a specific notice shall be served upon the company, calling upon it to discharge its duty, and, if in default for 30 days, the town shall have the right to do the necessary acts, and charge the costs to the company. Section 3 provides that the rights and privileges herein

granted are upon the express condition that the company will comply with all the terms, conditions, and stipulations of this ordinance imposing terms, duties, and obligations upon it, and upon its failure to do so after such default shall be determined by a court of competent jurisdiction then the town may enter and oust the company of all rights herein granted, reinvesting itself with all the rights it had before this ordinance was passed, and relegating the company to the condition that existed before rights hereunder were acquired. Section 4 provides that the rights and privileges herein conveyed shall cease, and this ordinance is to become void and of no effect, unless the company shall within one year after its passage (unavoidable delays excepted) run passenger trains regularly between the western limits of the town of Cicero and the general passenger depot of the Chicago & Great Western Railroad Company in the city of Chicago, over the route herein and in other ordinances described. This last ordinance was amended November 5, 1887, by giving the company the additional permission and authority to operate a railroad, with one or two tracks, in Fortieth street, from Randolph street to the south limits of the town. Randolph street had theretofore been 100 feet wide. September 28, 1888, a plat was filed for record in the office of the recorder of Cook county, indorsed "Approved" by the town board of Cicero, certified to by the owners of the frontage on Randolph street, widening the street from West Fortieth street to Hyman avenue from 30 to 80 feet at different portions by dedication by the property owners of the additional strip. A strip 28 feet wide, running the entire length of the street, and in the middle of the old street, was marked "C. H. & B. Right of Way." Prior to 1889 the center line of West Fortieth street was the east line of the town of Cicero, and the entire line of railroad was within the limits of the town of Cicero. Portions of this territory have at different times been annexed to the city of Chicago, so that the part of the line in controversy is now within the limits of the city of Chicago.

A double track was laid in Randolph street, and connected by a curve over private property with a single track in West Fortieth street (now called South Fortieth avenue), and connecting with the Chicago & Great Western tracks at about Taylor street. After the tracks had been laid, the Chicago, Harlem & Batavia Railway Company conveyed its property to the Chicago & Northern Pacific Railroad Company, which company also owned the tracks of the Chicago & Great Western Railroad Company. The Pacific Railroad Company mortgaged all of its property to the Farmers' Loan & Trust Company. The trust company filed a bill in the federal Circuit Court to foreclose its mortgage, and thereunder A. L. Hopkins was appointed receiver by the court in 1895. On May 19, 1896,

the receiver, by order of the court, leased to the Suburban Railroad Company, one of the defendants in error, the railroad known as the Chicago, Harlem & Batavia Railway for a period of 50 years, subject to the performance of all the obligations of the owner of the said railroad to the municipalities through which it extended. The lessee, the Suburban Railroad Company, mortgaged all the properties then owned or thereafter to be acquired by it to the Chicago Title & Trust Company by deed of trust dated March 2, 1896, recorded December 14, 1896, to secure payment of \$3,000,000 in bonds to be issued. June 20, 1896, a decree foreclosing the mortgage of the Pacific Company was entered, ordering the sale of all its properties, subject to all leases made by the receiver under order of court. The railroad was thereupon sold, and became the property of the Chicago Terminal Transfer Railroad Company, plaintiff in error, and possession was delivered July 1, 1897, which acts were approved by the court.

Before 1895 only a single track had been laid on the west half of South Fortieth avenue, but that year the receiver laid a second track west of the original track, and the city of Chicago threatened to tear up the track. The receiver then filed his intervening petition in the foreclosure suit in the federal court, praying that the city be enjoined from interfering with the track laid. The city answered, denying the validity of the conveyance to the Pacific Company, and setting up alleged violations of the ordinances granting the rights to the railroad companies, and that the construction of two tracks in the west half of the street would be an appropriation of the entire street, to the exclusion of the public. The federal court entered a decree June 17, 1897, in which it declared the ordinances of the town of Cicero legal and valid, and that they conferred the right to lay down and operate one or two tracks on the west half of Fortieth street, and perpetually enjoined the city from tearing up or interfering with the tracks or their operation "for and during the time and period of the said ordinances." It also ordered the receiver to pave the street. This not having been done, another order was entered in 1899, ordering the street paved and the west railroad track constructed, as provided in the former order, on or before June 1, 1899.

May 22, 1899, the defendant in error the Suburban Company filed its intervening petition in the foreclosure suit, making the Terminal Company and the city of Chicago parties, alleging all the matters of record hereinbefore set out in regard to the laying of tracks on South Fortieth avenue; that the city, in 1895, had authorized the Ogden Street Railway Company to lay down and operate a double track in the east half of the same street, thus making four tracks in the street; that the Suburban Company had entered into an arrangement with the Chicago Consolidated Traction Company, the successor of the Ogden Company, by which each company sur-

rendered its right to lay down a double track in said street, and they agreed to operate a double track jointly; and that this compromise agreement was conditioned upon its approval by the court and the passage of an ordinance authorizing it. The defendants answered the same, admitting all the allegations of the petitioner, and an order was entered providing for the removal of the west track on the west half of Fortieth street and the dissolution of the injunction against the city, provided the city council should pass the required ordinance. No such ordinance was passed.

After the construction of the tracks by the Chicago, Harlem & Batavia Railway Company, passenger trains were run over them and the tracks of the Chicago & Great Western Company to the Grand Central Passenger Station in Chicago, as contemplated by the ordinance, until a short time after the line passed into the possession of the Suburban Company. This company secured the passage of an ordinance March 28, 1898, by the city of Chicago, authorizing it to erect poles on South Fortieth avenue, between Madison street and Randolph street, for the purpose of operating its railway by electricity, conditioned that the company should give its patrons at least hourly service, and that it pave the west half of South Fortieth avenue from Randolph street to Taylor street. The electric trolley line was instituted, since which time cars have run on Fortieth and Randolph streets at hourly intervals, but the running of cars over the Great Western tracks and to the Grand Central Station has been abandoned. On December 19, 1898, the town of Cicero passed an ordinance repealing section 4 of the ordinance of October 5, 1887, requiring the operation of trains over the Great Western tracks to the Central Station. At this time the streets on which the track in controversy here is located—that is, South Fortieth avenue, and Randolph street between South Fortieth and South Fifty-Second avenues—had become a part of the city of Chicago, and were no longer under the jurisdiction of the town of Cicero.

March 18, 1902, the city of Chicago passed an ordinance reciting in the preamble the passage of the ordinances of the town of Cicero of August 20, 1881, October 5, 1887, and November 5, 1887, and that all the rights and privileges granted thereby expired July 1, 1901; that the railway company had discontinued running passenger trains between the western limits of the town of Cicero and the general passenger station of the Great Western Company; that it had failed to keep the street crossings and streets in good condition, as required by ordinance; and that the tracks had become a public nuisance. Section 1 declared all the rights and privileges granted by the said ordinances forfeited and annulled, and repealed the ordinances in so far as they granted any rights to maintain or operate street railway tracks upon any

portion of any street which is now within the limits of the city of Chicago. Section 2 declared the tracks a public nuisance. Section 3 ordered them removed by the company within 20 days, and, in the event of its failure to comply with the order, the commissioner of public works was ordered to do so. Section 4 directed the corporation counsel to institute such legal proceedings as he might deem proper. Thereupon plaintiff in error filed its bill for an injunction, setting up many of the foregoing facts, and claiming a reversionary interest in the railroad, subject to the lease. The bill further alleged that the complainant had applied to the Suburban Company to perform the conditions required to preserve the franchises and licenses to maintain its railroad in the street, but that the Suburban Company claimed that it had done all things necessary; that the Suburban Company was insolvent, and liable to be placed in the hands of a receiver at any time, and that the complainant was in danger of having the lease canceled, and thrown back on its hands. The bill made the Suburban Company a party, and prayed for an injunction to restrain the city from tearing up the tracks. The Suburban Company answered, and claimed that the Chicago, Harlem & Batavia Railway Company, its successors and assigns, were not, by the ordinance of October 5, 1887, obliged to operate passenger trains between the town of Cicero and the general passenger station of the Great Western Company, but that the true construction of the ordinance only required it to have passenger trains regularly in operation between those points within one year from the passage of the ordinance, and that there was now no public necessity or demand for the running of trains between those points. The answer further alleged that by virtue of the decree of the federal court authorizing the making of the lease to it, the Chicago, Harlem & Batavia line was separated from the rest of the lines of the Pacific Railroad Company, and the Suburban Company had no right and was not legally bound to operate its trains eastward beyond Fortieth street, and that the decree was a full protection to it, and release of any obligation, if there had been any, to so operate its trains. The answer also alleged the performance of all things required by the ordinances. The city of Chicago answered the bill, alleging that no trains or cars were running into the Central Passenger Station, as prescribed by the ordinance, that the complainant had allowed the streets and crossings to become out of repair and impassable, and that the right to operate the road on Fortieth and Randolph streets had expired July 1, 1901. The city also filed its cross-bill setting up the same matters, also the ordinance of 1902, and praying for a forfeiture of the rights granted to the Chicago, Harlem & Batavia Railway Company, and that the tracks in the streets mentioned

be decreed a nuisance and ordered removed. The Suburban Company answered the crossbill, denying all its allegations, and setting up the same matters alleged in its answer to the original bill; alleging that it has kept all street crossings in good repair, and that it has never been served with any notice to repair, as provided by the ordinance. On the hearing the chancellor, July 3, 1902, entered a decree dismissing the original bill for want of equity, and found the equities with the cross-complainant; that the right of the railroad companies to maintain and operate any tracks on the west side of South Fortieth avenue between Taylor street and Randolph street, and upon Randolph street from South Fortieth avenue to South Fifty-Second avenue, in the city of Chicago, had been forfeited, and had ceased and determined, and ordered the tracks removed.

Jesse B. Barton, for plaintiff in error. Charles M. Walker, Corp. Counsel, and Clarence N. Goodwin, Asst. Corp. Counsel, for defendant in error city of Chicago. Clarence A. Knight and William G. Adams, for defendant in error Suburban R. Co.

CARTER, J. (after stating the facts). The city of Chicago, one of the defendants in error, has filed its motion in this court to strike the briefs of its codefendant in error, the Suburban Railroad Company, from the files, on the ground that its briefs are not in defense of the decree, but are in aid of the plaintiff in error, and therefore not proper to be filed at this time. By the general rules of equity pleading all persons who are materially interested in the event of the suit or in the subject-matter should be made parties, either as complainants or as defendants. It is wholly immaterial whether the interests of the several defendants are or are not in conflict with each other. *Parsons v. Lyman*, 4 Blatchf. 432, Fed. Cas. No. 10,779. It follows that each defendant may pursue that course in the litigation which he shall deem for his best interest. The motion is denied.

The real question at issue in this case is the interpretation of the ordinances of the town of Cicero, passed August 20, 1881, and October 5, 1887. The railroad companies contend that the latter ordinance granted a perpetual right to the railroad company to lay, maintain, and operate its railroad in the streets of the town, while the city of Chicago contends that the ordinance did not have this effect. The first ordinance passed by the town of Cicero in 1879 granted the right to construct and operate a dummy railway in certain named streets of the town of Cicero to one Vandercook, and expressly limited the right to operate said railway to April 1, 1898, at which time the right was to cease, unless further extended. The next ordinance, passed August 20, 1881, confirmed the powers and privileges granted to Vandercook to the Chicago & Western Dummy Railway Company, and limited the right to oper-

ate said railroad to July 1, 1901, at which time the right and privileges should cease, unless further extended. This ordinance made several changes from the first ordinance, principally in the route and the fare to be charged. On October 5, 1887, the town again passed an ordinance in relation to this street railway, which ordained "that, in addition to the rights, privileges and franchises heretofore conferred upon the Chicago and Western Dummy Railway Company by an ordinance passed August 20, 1881, entitled * * *, which rights, privileges and franchises are hereby vested in and confirmed to the Chicago, Harlem and Batavia Railway Company, its successors and assigns, the further right is hereby given to said Chicago, Harlem and Batavia Railway Company," etc. If this language means anything, it means that the rights granted in this ordinance are additional and further rights granted to the railway company not granted in the former ordinance, which ordinance is expressly named and identified by its title and date. These additional and further rights are granted "solely and only upon the terms, conditions, duties and obligations hereinafter in this ordinance set forth, and not upon any other terms, conditions, duties or obligations." Section 3 provides that the rights and privileges "herein" granted are upon the express condition that it shall comply with all the terms, conditions, and stipulations of this ordinance imposing terms, duties, or obligations upon it, and provides a method of ouster of the rights and privileges "herein" granted, thereby "relegating said company to the condition that existed before rights hereunder were acquired." In section 4 it is provided that trains shall be running within a certain time "over the route herein and in other ordinances described."

While this ordinance grants a number of additional rights to the railway company—such as the right to operate a suburban passenger railway over the route prescribed in the ordinance of 1881, to lay a double track, to connect its tracks with the tracks of the Chicago & Great Western Railroad, and to use locomotives burning hard coal—it is also more specific and particular in guarding the rights of the town of Cicero, imposing additional burdens on the company, and justifying such additional burdens by the additional rights granted. A large number of the provisions of the former ordinance of 1881 are in no wise modified or altered, such as those relating to the gauge, the method of laying the tracks in the street, the charge for fare, the right reserved by the town to designate in what portion of the street the tracks shall be laid, to regulate the speed and time and manner of running cars, etc. Nothing is expressly repealed in the new ordinance, and it in no place professes to repeal or supersede the prescribed limit of time fixed by the old ordinance, but only to confer additional rights and privileges. It is diffi-

cult to see how language could make it any plainer that the ordinance of 1881 is not superseded, but only amended or added to, by the ordinance of 1887. All the additional rights granted are made subject to the additional burdens imposed, and it is expressly provided that a failure to observe these duties shall relegate the company to the condition that existed before these rights were granted; that is, to its rights under the ordinance of 1881. As there is nothing said about the time for which these additional rights are granted, they must be held to have been granted for the time specified in the original ordinance, unless it clearly appears from the later ordinance that such was not the intention. The mere fact that the first ordinance granted permission to operate a dummy railway to a corporation organized with more limited powers, and the later ordinance permission to operate a suburban passenger railway to a company with general railroad powers, could not manifest such intention. No reason is perceived why a municipality should not limit its grant to a suburban passenger railway to a definite time, if it sees fit to do so. And this is the chief difference between the two grants. The right to lay a double track only enlarged the facilities of the road. The main object of the ordinance seemed to be to secure the connection with the Great Western Railroad and through trains to its passenger station in Chicago, and it granted additional right of way for this purpose. It is conceded that these trains have been abandoned.

Nor can we assent to the doctrine propounded by the learned counsel for the plaintiff in error that a railroad company, by laying tracks in a street under authority from a municipality, acquires a perpetual easement in the street. If the grant were perpetual, this might follow, but to say that a grant for a limited time conferred a perpetual easement would be a contradiction of terms. In *City of Chicago v. Baer*, 41 Ill. 306, this court said (page 312): "The railway company has not become the owner of any portion of these streets in fee, but it has certainly, through its charter from the Legislature and its contract with the city, acquired a property in them of the most valuable character, * * * and capable, like other property, of being sold and conveyed. The city council has made a contract with the company, by which it has granted to the latter what is substantially a leasehold interest in a portion of this street for a term, by the original ordinance, of twenty-five years. * * * It is wholly unnecessary to define, for the purposes of this case, what is the precise extent or nature of its property." It is true, this case was partially overruled in *Parmelee v. City of Chicago*, 60 Ill. 267, but upon another point, and we there said: "To that extent only are the grounds taken in the *Baer Case* affected by the decision of the Supreme Court of the United States, and we adhere to them still in all other respects."

It is conceded by counsel that the doctrine is well established that a grant from the public is to be construed most strictly against the grantee, and in case of ambiguity nothing can be presumed in favor of the grantee. If there is any doubt as to the time for which these rights were granted, it arises from the fact that the ordinance of 1887 expressly purports to grant rights additional to those granted by the ordinance of 1881, and then fails to ordain anything in regard to the time limited in the old ordinance, which contains the express provision that the rights granted shall extend to July 1, 1901, "at which time they shall cease, unless the same are further extended." The doubt, if any there be, must be resolved in favor of the public. The time limited for the exercise of the rights and privileges granted to the predecessor of plaintiff in error having expired, the action of the city council was proper, and the decree of the court was right. In this view of the question it will not be necessary to consider whether the railroad company has violated the provisions of the ordinance, so as to give the city power to declare a forfeiture on those grounds.

A suggestion has been made in the briefs and arguments in this court that a necessary party has been omitted. There is no assignment of error raising the question. The complainant in the bill did not make the alleged mortgagee of the lessee a party, nor did the city do so in its cross-bill. While the question of the lack of necessary parties can be raised on appeal, though not raised in the court below (*Gerard v. Bates*, 124 Ill. 150, 16 N. E. 258, 7 Am. St. Rep. 350), still, as the record is presented, we do not feel called upon to determine whether the omitted mortgagee was a necessary party or not.

At the close of his argument counsel for plaintiff in error claims that the court erred in decreeing a forfeiture of the rights of the railroad company in Randolph street, because, as he says, by virtue of the plat widening Randolph street, the railroad company has secured the same interest in the 28-foot strip in the center of the street, marked "C. H. & B. Right of Way," and extending from Forty-Eighth street to a point near Fortieth street, as though it had condemned it. The certificate of the platting states that they "have caused to be surveyed and platted a widening of Randolph street between the above-named points, so that Randolph street shall be one hundred and sixty feet wide between," etc. The report of the committee of the board of trustees of the town of Cicero reporting on the plat, recommended the approval of the same, and that the land be accepted for purposes named and designated on the plat, which report was adopted. The 28-foot strip in the center of the street was in the original street as laid out years ago. The owners of the abutting property in their certificate state that they have caused to be surveyed and platted a widening of the street, so that it shall be 160 feet wide. There has been no

vacating of any portion of the street by the town authorities. The report that was adopted recommended the acceptance of the land for purposes named and designated on the plat. The only land that there was to be accepted was the additional strip on each side of the old street, and that this additional strip was dedicated solely for the widening of the street. There was no implied vacation of the 28-foot strip, and there could be no dedication of it to the railroad company. The previous rights of the company in this strip were not in any way enlarged by the acceptance of the plat by the town.

Finding no error the decree will be affirmed. Decree affirmed.

(176 N. Y. 81)

LOOMIS v. CITY OF LITTLE FALLS et al.
(Court of Appeals of New York. Oct. 6, 1903.)
CONSTITUTIONAL LAW — LOCAL IMPROVEMENTS—SETTING ASIDE ASSESSMENTS.

1. City Charter, § 83, as amended by Laws 1898, p. 487, c. 199, and Laws 1899, p. 637, c. 289, providing that no action shall be maintained by any person to set aside an assessment for a local improvement in the city of Little Falls unless commenced within 30 days after the delivery of the assessment roll and warrant to the city treasurer, and notice by him in the official newspapers of the receipt thereof, and unless within 30 days an injunction shall have been procured by such person from a court of competent jurisdiction restraining the assessment, is valid, it being within the power of the Legislature to absolutely prohibit such action.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by Watts T. Loomis against the city of Little Falls and others. From an order of the appellate division (72 N. Y. Supp. 774), reversing judgment in favor of plaintiff and granting a new trial, plaintiff appeals. Affirmed.

A. M. Mills, for appellant. George J. O'Connor, for respondents.

PARKER, C. J. The determination of the appellate division must be affirmed because this action was not commenced within the period provided by the city charter. The complaint alleges in detail the omission of the local authorities to comply with certain requirements of the city charter in proceedings taken to build certain sewers and grade a portion of a street, the expense of which was assessed upon property owners benefited, which it was alleged rendered the assessment void, and the relief demanded in the complaint was (1) that all of the said taxes and assessments mentioned and described in the foregoing complaint be vacated and set aside; (2) that the defendants, their officers, agents, subordinates, and employes, be enjoined and restrained from in any manner collecting or attempting to enforce the collection or payment of said taxes and assess-

ments; (3) for such other or further judgment or relief that may be just and proper; (4) for the costs of this action.

Section 83 of the city charter, as amended by chapter 199, p. 487, Laws 1898, and by chapter 289, p. 637, Laws 1899, provides in part as follows: "No action or proceeding to set aside, cancel or annul any assessment made for local improvement under any of the provisions of this act shall be maintained by any person unless such action or proceeding shall have been commenced within thirty days after the delivery of the assessment roll and warrant for such local improvement, to the city treasurer and notice by him in the official newspapers of the city of the receipt thereof, and unless within said thirty days an injunction shall have been procured by such person from a court of competent jurisdiction restraining the common council from issuing the assessment bonds hereinbefore provided to be issued for such assessment."

This action was commenced March 29, 1900, and more than 30 days after the delivery of the assessment roll and warrant for such local improvement to the city treasurer and notice by him in the official newspapers of the receipt thereof for the roll and warrant were delivered to him December 26, 1899, and notice of receipt was given by him as required by the charter January 4, 1900.

It is true, as the learned counsel for the plaintiff contends, that it is an acknowledged branch of equity jurisdiction to remove clouds from the title to real property, but the Legislature has the power to deprive parties of that particular remedy. It may not deprive them of every remedy, but so long as an adequate remedy is afforded to a party injured the Legislature acts within its authority when it deprives the courts of power to give relief in certain forms of actions.

In *Lennon v. Mayor, etc.*, of N. Y., 55 N. Y. 361, the original assessment was invalid, but the court held that the assessment could not be vacated or canceled because section 7 of the act of 1872 (Laws 1872, p. 1416, c. 580) provided that no assessment for local improvements "shall be vacated or set aside for omission," etc., including the omission which the court said invalidated the original assessment. The court said, Judge Rapallo writing: "It was competent for the Legislature to deprive the courts of the power to give this relief, and the parties of the benefit of this form of remedy. * * * If the assessment in question has not been effectually validated, the plaintiffs may resist its collection, or the title of any purchaser who may claim by virtue of a sale had under it. Their constitutional rights will then come directly in question. But no such right is violated by precluding them from taking the initiative to remove the apparent lien upon their property."

In *Mayer v. Mayor, etc.*, of N. Y., 101 N. Y. 285, 4 N. E. 336, the court considered sec-

¶ 1. See *Municipal Corporations*, vol. 36, Cent. Dig. § 1202.

tion 897 of the consolidation act (Laws 1882, p. 246, c. 410), which forbade a suit in equity to vacate any assessment in the city, or remove a cloud on title, and it was held that the plaintiff could not have the specific relief which he sought, because denied to him by the statute.

To the same effect is *Matter of Bridgford*, 65 Hun, 227, 20 N. Y. Supp. 281, where the court in its opinion cites and comments upon a number of cases.

It is therefore settled by authority that it was within the power of the Legislature to have provided by section 83 that no action should be brought to cancel, annul, or set aside any assessments made for land improvements. But it did not go so far, and instead limited the bringing of such an action to a period of 30 days after the delivery of the assessment roll and warrant to the city treasurer, and notice by him in the official newspapers of the city of receipt thereof, and conditioned, further, that within such 30 days he procure an injunction restraining the common council from issuing the assessment bonds.

The reason for requiring the commencement of the action and the granting of an injunction is apparent. The fact that no action has been brought when such a statute exists assures the would-be purchaser of the bonds that he is not in danger of being subjected to litigation in the event of purchase, and hence the bonds are likely to sell at a higher price than when there is some uncertainty about it.

But whether the reasons be adequate or not, the power of the Legislature to absolutely prohibit the bringing of such an action—which, as we have seen, is established—necessarily includes the power to prohibit the commencement of such an action unless specified conditions be complied with.

The order should be affirmed, and judgment absolute for defendant rendered on the stipulation, with costs.

O'BRIEN, BARTLETT, VANN, CULLEN, and WERNER, JJ., concur. MARTIN, J., absent.

Order affirmed, etc.

(176 N. Y. 11)

GUNNISON v. BOARD OF EDUCATION OF CITY OF NEW YORK.

(Court of Appeals of New York. Oct. 6, 1903.)

MUNICIPALITIES—TEACHERS' WAGES—ACTION TO RECOVER—PARTY DEFENDANT—BOARD OF EDUCATION.

1. Greater New York Charter, § 1062 (Laws 1897, p. 381, c. 378), created the board of education of the city, and provided that it should have the management of the public schools and the public school system of the city. By section 1063 (page 381) the board was declared to possess the powers and privileges of a corporation. Though section 1055 (page 377) vested the city with title to school property, the care

and control thereof were preserved in the board of education, and it was declared that suits in relation to such property should be brought in the name of the board. Section 1060 (page 379) provided for the raising of a special school fund, which section 1065 (page 382) required to be administered by the board, and section 1060 declared that the board should receive all moneys appropriated for educational purposes. *Held*, that an action to recover teachers' salaries was properly brought against the board of education, and not against the city.

2. The fact that the Legislature made the board of education a member of one of the administrative departments of the city of New York did not devolve on the city itself the functions formerly imposed on the board as a separate public corporation, nor does the fact that Laws 1897, p. 377, c. 378, § 1055, authorizes the board to sue as to school property, exclude the idea that it may also defend actions.

3. As the board of education of the city of New York was created as a new and distinct corporation by the Greater New York Charter, and was not a public corporation consolidated in the city of New York by such charter, section 1614 (Laws 1897, p. 557, c. 378) thereof, providing that all suits against the city of New York or against any corporations united therewith should be brought in the corporate name, did not prevent a suit for teachers' salaries against the board of education of the city.

Appeal from Supreme Court, Appellate Division, Second Department.

Action by Walter B. Gunnison against the board of education of the city of New York. From an interlocutory judgment of the Appellate Division (81 N. Y. Supp. 181, 1127), reversing an order of Special Term sustaining a demurrer to the complaint and overruling such demurrer, defendant appeals by permission. Affirmed.

The following questions were certified: "(1) Ought the demurrer to the complaint in this action be sustained? (2) In an action predicated upon a claim for salary alleged to be due teachers under the charter of the Greater New York, is the board of education the proper party defendant? (3) In an action to recover teachers' wages or salaries, should not the action be brought against the city of New York?"

George L. Rives, Corp. Counsel (James McKeen, of counsel), for appellant. Ira Leo Bamberger, for respondent.

O'BRIEN, J. The question in this case is presented by the demurrer to the complaint. The action was to recover an alleged balance of wages or salary of the plaintiff and other teachers in the public schools of Brooklyn. The defendant demurred to the complaint upon the ground that upon its face it did not state a cause of action, and that the city of New York, and not the board of education, was the proper party defendant. The only question argued is whether the defendant is liable to be sued on account of the matters and things stated in the complaint.

The complaint contains several causes of action separately stated, but all of the same nature and character. One of the causes of action is to recover a sum of money stated

to be due to the plaintiff from the defendant as salary or wages, or a balance thereof, as a teacher in one of the public schools of Brooklyn. The other causes of action are to recover a balance of salary or wages alleged to be due from the defendant to the other teachers named in the complaint, the claims for the same having been assigned to the plaintiff. The plaintiff on all the claims demanded judgment for \$1,465.20, with the interest thereon from May 1, 1899.

The complaint avers and the demurrer admits the following facts: (1) That the defendant is a public municipal corporation. (2) That prior to the month of April, 1899, the plaintiff, being a duly licensed and qualified teacher, was duly appointed by the board a teacher in the public schools, and rendered services in that capacity, performing all the duties of the position. (3) That the salary of the position had been duly fixed by the board at \$500 per month for the month of April, 1899, and but \$400 has been paid. (4) That sufficient funds were appropriated to the defendant and apportioned to the Brooklyn schools to pay the plaintiff's salary. (5) That more than ten days before the commencement of the action the plaintiff presented the claim to the defendant, and its financial officer having power to audit and pay the same, and payment or audit was refused. (6) Precisely the same facts with respect to the employment of the other teachers named, with the amount of salary of each per month, and the balance remaining unpaid, and the assignment of each of these claims to the plaintiff. (7) That all the claims were, at least 30 days before the commencement of the action, presented to the comptroller of the city of New York for payment, but that he neglected and still neglects to adjust or pay the same.

On the face of the pleadings the facts are therefore admitted that the defendant, a public municipal corporation, employed the plaintiff and the other teachers named in the complaint to teach in the public schools at the agreed salary or compensation alleged, and as to each teacher that it has refused to pay a part of the compensation, and that the sum specified in the complaint remains unpaid, although the services were fully rendered. It remains to inquire what reasons, if any, exist or can be urged why the defendant cannot be sued on account of the matters and things alleged in the complaint, and why the plaintiff must resort to the city for the recovery of his claims, since that is the contention and the only argument in support of this appeal.

It is admitted on the record that the defendant is a public municipal corporation. It is admitted that it employed the plaintiff and the other teachers at a fixed compensation, and that a part of this compensation still remains unpaid. This appeal cannot be sustained unless it is shown that these facts do not constitute a cause of action against

the defendant and do constitute a cause of action against the city of New York.

The city charter provides that the defendant, the board of education, shall administer all moneys available for educational purposes, and, on the facts stated in the complaint and admitted in the demurrer, it is clear that the plaintiff cannot maintain any action against the city. The mere fact that the public money for the support and conduct of the schools is deposited in the city treasury does not affect the liability of the board of education to be sued, nor does it, upon the facts stated, create any liability against the city. The city has the custody of the money, but the board must administer and expend all school funds as the representative of the school system, and the financial officer of the city cannot pay out any part of these funds except upon the order and audit of the board. In most of the other counties of the state the county treasurer or some county or town officer has the custody of the school funds, but it cannot be paid out or disbursed except upon the order or audit of the trustees of the proper school district, and these districts are declared to be corporate bodies thus giving them the power of independent action. Laws 1894, p. 1226, tit. 7, c. 556, art. 6, §§ 42-44. So, in the city of New York, the city, of its own motion, has no power to expend or pay out any part of the school funds for the payments of teachers. The plaintiff can make no valid claim against the city until the board of education has audited it through its own proper officer, and when so audited the city has no discretion with respect to payment except in cases of fraud. City Charter, § 149, c. 378, p. 41, Laws 1897. It is important, therefore, to bear in mind that the plaintiff has no claim against the city until the salary alleged to be due to him and the other teachers has been audited or directed to be paid by the board, and it is admitted by the demurrer that the board has refused to audit the claim or in any manner direct its payment. Hence it is a disputed claim.

It was always the law, and is the law still, that an action will lie against the board of education to recover a judgment upon a disputed claim which it has refused to audit or allow. *Dannat v. Mayor, etc.*, of N. Y., 66 N. Y. 585-588. A suit at law against the board is the proper proceeding to compel the adjustment or liquidation of the claim. The procedure for the collection of claims such as this was very clearly laid down by this court in the case last cited, in this language: "Under the system that is provided, there was but one way for the board of education to discharge the obligations assumed by its contracts, and that was by a draft drawn upon the city chamberlain, and so long as it was willing to give such a draft its creditors could make no further claim upon it. If it was willing to give a draft, and had done all

the law required of it, it could not be sued. It could not draw the money itself, as the draft is required to be made payable to the person entitled to receive the same, and hence a suit to compel it to pay would be an idle proceeding and in contravention of the statute. But if it refused to give a draft, then the creditor's remedy would be against it. If the claim was undisputed, he might by mandamus compel the giving of the draft. If the claim was disputed, he could sue the board of education in its corporate capacity, and, having thus established his claim, then procure his draft. But he would have no claim against the city until he had in some way obtained such a draft as the law required. When he came with such a draft it would be the duty of the chamberlain to pay. If he refused, having the funds in the treasury, he could be compelled by mandamus to pay, or could probably in an ordinary action be made personally liable for his misfeasance." The liability of the city begins only when it refuses to honor or pay a draft drawn upon it in favor of the creditor by the board of education. There is not, and never was, any law that would permit a school-teacher in any of the schools of the city to bring a suit against the city for salary when the right to the salary was disputed by the board of education, and when that body refused to audit or allow it in any form, as in this case.

It is apparent from the general drift of the argument that the learned counsel for the defendant is of the opinion that the employment of the teachers in the public schools, and the general conduct and management of the schools, is a city function, in the same sense as it is in the case of the care of the streets or the employment of police and the payment of their salaries and compensation; but that view of the relations of the city to public education, if entertained, is an obvious mistake. The city cannot rent, build, or buy a schoolhouse it cannot employ or discharge a teacher, and has no power to contract with teachers with respect to their compensation. There is no contract or official relation, express or implied, between the teachers and the city. All this results from the settled policy of the state from an early date to divorce the business of public education from all other municipal interests or business, and to take charge of it as a peculiar and separate function, through agents of its own selection, and immediately subject and responsive to its own control. To this end it is enacted in the general laws of the state that all school trustees and boards of education shall be corporations, with corporate powers, which, of course, includes the power to sue and be sued in all matters relating to the control and management of the schools. School Law, tit. 8, § 7 (Laws 1894, p. 1243, c. 556); Gen. Corp. Law, § 3, p. 974 (Laws 1892, p. 1801, c. 687). These corporate pow-

ers are expressly conferred upon this defendant by the city charter. Section 1062. It needs no argument to prove that a corporation is liable to be sued upon any obligation that it has incurred or any contract made in the transaction of the business for which it was created or for any breach of duty involved in the exercise of its powers. The only purpose for which the defendant was created a corporate body was to conduct a system of public education in a designated division of the state, and manage and control the schools therein. This obviously includes the employment and payment of teachers, and none of these powers or functions are conferred upon the city as such. The only relation that the city has to the subject of public education is as the custodian and depository of school funds, and its only duty with respect to that fund is to keep it safely and disburse the same according to the instructions of the board of education. The city as trustee has the title to the money, but it is under the care, control, and administration of the board of education, and all suits in relation to it must be brought in the name of the board. Section 1055. A suit to recover teachers' wages is a suit affecting or in relation to the school funds, and hence, under the express words of the statute, must be brought against the board.

The defendant is by the terms of the new charter given all the powers and subjected to all the obligations and duties of all previous boards of education or school boards. Section 1058. It is expressly required to administer all moneys raised for educational purposes (section 1060), and hence the obligation to pay the teachers is not only a matter implied in the duty of administration, but inheres in the contract of employment. The defendant is expressly declared to be the representative of the school system of the city in its entirety, and if the defendant is such representative the city is not. Section 1064. The board is given power to purchase, lease, or condemn all real property required for school purposes, and to sell such real and personal property as may not be required for the conduct and management of the schools. Section 1066. It has power to appoint its own officers, clerks, and assistants, all superintendents, architects, janitors, auditors, and other employes necessary in the care of the school property, or in the conduct and management of the schools, and to fix the salary or compensation to be paid them (sections 1067 and 1068); and, finally, no member of the board of education can hold any office of emolument under the county, state, or city government (section 1061). It will thus be seen how completely, under the scheme of the city charter, the subject of public education is separated from all other municipal functions.

The proposition sought to be established by this appeal is that a corporate body created for

the express purpose of conducting a system of public education, exercising such vast powers and charged with such important duties, is not subject to be sued by a school-teacher to recover wages or salary, when the only object and purpose of such a suit is to establish the validity of a disputed claim and liquidate the amount. It is quite certain that during the last 50 years, and ever since a board of education existed in the city of New York, actions of this character have been brought and maintained against it without any question raised or doubt suggested that it was not the proper party. The board still has every power that it ever possessed, and it is still subject to every duty or obligation that ever was imposed upon it. A brief review of some of the cases in this and other courts will show that there never was and cannot now be any doubt with respect to the liability of the board of education of the city of New York to be sued upon any disputed claim or liability arising out of the exercise of its corporate functions as the sole representative of the school system of the city. In *Donovan v. Board of Education of N. Y.*, 85 N. Y. 117, the purpose of the act of 1851 (Laws 1851, p. 734, c. 386), as amended in 1853 (Laws 1853, p. 635, c. 301), and under which the board was organized, was considered. This court noted the fact that under the original statute the title to all school property was vested in the city, as it is now, but that by the amendment of 1853 "all suits in relation to the same should be brought in the name of said board"—a provision that, as we have seen, has been incorporated into the present charter. The purpose of the amendment is stated in these words: "It was apparently one purpose of the provision to rebut the inference of any power in the city government to control the schools arising from the clause in the original section vesting in the city title to school property." The contention of the learned counsel for the defendant in the case at bar would be a long step in the direction of remanding the schools to the control of the city, since it must logically follow, if the city is the only proper party to be sued for teachers' wages, it must be the party, and not the board, in control of the schools. The management, government, and control of the schools is clearly vested in the defendant as a corporate body, and it has been repeatedly held that it was liable to be sued upon its contracts, including the obligation to pay the wages of teachers. *Steinson v. Board of Education of N. Y.*, 163 N. Y. 431, 59 N. E. 300; *Id.*, 158 N. Y. 125, 52 N. E. 722; *Coulter v. Bd. of Education of N. Y.*, 63 N. Y. 365; *O'Leary v. Bd. of Education of N. Y.*, 93 N. Y. 1, 45 Am. Rep. 156; *Gildersleeve v. Bd. of Education of N. Y.*, 17 Abb. Prac. 201. The case first above cited is a very recent one, and the action for teachers' wages was not only sustained, but it was distinctly held that the legal relation between the board and the

teacher is with the board it is not with the city, and it would seem to be plain that the proper party to be sued is the one that made the contract, and not a party that did not make it and had no power to make it. This court has still more recently entertained and decided controversies between the teachers in the public schools of the city and the board of education concerning the right or power of the board to remove teachers or reduce their grade compensation. *Matter of Cusack v. Board of Education*, 174 N. Y. 136, 66 N. E. 677; *People ex rel. Callahan v. Board of Education*, 174 N. Y. 169, 66 N. E. 674. If it be true, as now contended, that the board is nothing but a mere organ or agency of the city, and that the latter represents the schools, it is plain that the proceedings in these cases were brought against the wrong party, and should have been brought against the city instead of the board. It is quite remarkable, however, that neither of the counsel in the case, nor any member of the several courts through which the cases passed, ever thought of the point now raised. The reason for this is very obvious, since the board, being charged by the charter with the control and management of the schools and the administration of the school funds, and representing the entire school system, it was the proper party, and the proceedings would not lie against the city, as it had no power to restore the teachers to their former positions or to fix their compensation.

Actions and special proceedings of almost every conceivable character have been so often brought and maintained against the defendant, the board of education, that the present contention would seem to be without any support in reason or authority. Suits have been repeatedly maintained against the defendant on contracts for building or repairing schoolhouses (*McGregor v. Board of Education of N. Y.*, 107 N. Y. 511, 14 N. E. 520; *Van Dolsen v. Bd. of Education of N. Y.*, 162 N. Y. 446, 56 N. E. 990; *Dwyer v. Bd. of Education of N. Y.*, 165 N. Y. 613, 59 N. E. 1122); and so mandamus proceedings have been instituted against the board to compel the delivery of papers (*People ex rel. Hoffman v. Board of Education of N. Y.*, 141 N. Y. 86, 35 N. E. 1087); to compel payment of teachers' salaries (*People ex rel. Steinson v. Bd. of Education of N. Y.*, 158 N. Y. 125, 52 N. E. 722); or to compel an increase of salary or reinstatement of teachers (*People ex rel. Murphy v. Board of Education of N. Y.*, 173 N. Y. 607, 66 N. E. 1114; *People ex rel. Christie v. Bd. of Education of N. Y.*, 167 N. Y. 626, 60 N. E. 1118); and certiorari proceedings have been brought to review certain acts of the board (*People ex rel. Hoffman v. Board of Education of N. Y.*, 143 N. Y. 62, 37 N. E. 637; *People ex rel. Fisk v. Board of Education of N. Y.*, 142 N. Y. 627, 37 N. E. 565). It is quite true that

some of the special proceedings referred to above were not successful, but were denied or dismissed. That, however, was not for the reason that the defendant was not the proper party. The decisions in those cases were based upon the merits of the controversy or on some question of practice, but no one suggested that the suit or proceeding should have been brought against the city instead of the board of education, and that is the sole question with which we are now concerned.

It is very plain, therefore, that the contention on the part of the defendant, that it is not the proper party to be sued, cannot be sustained unless it is shown that some change has been made in the statute law on the subject by recent legislation. The contention of the learned counsel for the defendant is that a radical change has been effected in this respect, and that the law of 50 years has been superseded by the enactment of the present charter, and it is upon this contention that this appeal must stand or fall. The following statement, taken from the printed argument in support of the appeal, clearly discloses the counsel's position with respect to the right to bring suits of this character against the board of education under the present charter: "What we urge in this connection is that the Legislature in making the board of education a member of one of the administrative departments of the city of New York have devolved upon the city itself, acting through one of its departments, the state functions which were formerly directly imposed upon the board of education as a separate public corporation. In this respect the board of education is similar to the department of health, the police department, the department of public charities, and the fire department. No more reason exists for holding that a common-law action should be brought against the board of education than for holding that such actions should be brought against the members of the other departments above named."

Surely, if this is a correct statement of the law, a great change has been made, which we would naturally expect to find clearly expressed in the new charter, since it is in that charter that we still find all the statutory provisions quoted above, and notably that provision wherein it is declared that the board of education shall, in its corporate capacity, represent the entire school system. If the state has departed from the settled policy that has prevailed since its organization, of keeping the work of public education and the control and management of its schools separate and distinct from all other municipal interests and business by the selection of its own agents, and clothing them with corporate powers to represent the schools, such as school districts and boards of education, and has devolved these pow-

ers and duties directly upon the city, we would naturally expect to find such a departure and notable change expressed in language so clear that no doubt could arise as to this change of policy. If the board cannot be sued for teachers' wages, and the teacher must resort to a suit against the city, then surely the board must have sunk into a mere city agency, and it no longer has any use for independent corporate powers. Public education then becomes a city function, exposed to the taint of current municipal politics, and to any and every general mismanagement that may prevail in city departments.

But we still have the very plain provisions of the charter declaring that the board is the representative of the entire school system, and has the power to administer all school funds, and is vested with the right to manage and control all school property, followed by the provision that "suits in relation to such property shall be brought in the name of the board of education." But the learned counsel for the defendant explains away all these provisions in his printed brief in the following words: "There is no express legislation as to the relation of the board of education to lawsuits except that, under the provisions of this section, suits affecting school property shall be brought in its name. There is no language anywhere providing that the board of education shall be a defendant in any case. The limit of express legislative sanction is that it can be plaintiff in a particular class of cases, which have relation to school property. This special provision on the subject excludes other cases, and, in connection with the general provision in section 1614 of the charter above quoted, impels the conviction that the Legislature intended that suits other than such as are here expressly mentioned should be brought against the city of New York."

The meaning of this proposition is that under the present charter the board of education may bring suits as plaintiff, but cannot be sued as a defendant, and when applied to this case it means that the board may sue teachers and others for breach of their contracts, but the teachers and others cannot sue the board for salary, wages, or compensation. No argument is necessary to refute this proposition. The bare statement that a corporate body exercising full control and management of the schools, and representing the school system in its entirety, may bring suits in all matters relating to the schools, but cannot be sued upon claims or demands arising out of the management and conduct of the corporate business, is such an extreme and unreasonable view of the legal relations between the board and the teacher that the proposition refutes itself.

We have seen that the policy of this state for more than half a century has been to separate public education from all other municipal functions, and intrust it to independent cor-

porate agencies of its own creation, such as school districts and boards of education, with capacity to sue and be sued in all matters involved in the exercise of their corporate powers. We have seen that during this long period of time this court and all the courts of this state have accepted this rule and acted upon it, and not until now, and in this case, has any question been raised with respect to the right of a teacher to bring suit against the board of education to recover salary or wages. In no part of the state have suits of this character so frequently arisen as in the city of New York, under the charter of that city, and in no instance has any doubt been suggested that the board was not the proper party defendant or that the city was. The learned counsel for the defendant must, therefore, be able to point to some new and plain provision of the present charter that abolishes the long-settled policy of the state, and reduces the board of education to a mere city agency, incapable of being impleaded in the courts as a defendant upon one of the contracts that it made for the employment of teachers in the schools. He has been able to point out but two sections that even in his own view give the slightest support or color of support to his contention, and it will be seen that neither one of these sections, when fairly examined, has any effect whatever upon the powers, duties, and obligations of the defendant as they have always existed in successive charters and have been applied by the courts to actions of this character.

The first provision relied upon as a foundation for the radical change suggested is to be found in section 1614, and reads as follows: "All future suits by or against the city of New York as hereby constituted, or against any of the municipal and public corporations in this act united and consolidated, shall be in the corporate name of the city of New York." This section has not the slightest reference to the board of education, but simply points out how suits against the city of New York must be brought. It has no application whatever to this case, since this is not a suit against the city nor against any of the political divisions united and consolidated with it, but against another and independent corporation, namely, the board of education. The meaning and purpose of this provision is very obvious. Prior to the enactment of the present charter the corporate name and style of the city was "The Mayor, Aldermen and Commonalty of the City of New York," and all suits had to be brought against it in that name. Consol. Act, § 26, Laws 1882, p. 6, c. 410. In the enactment of the new charter this provision of course had to be changed, and by the first section the old city, with certain other cities, towns, counties, and other political divisions united and consolidated with it, are to form a new municipal corporation, to be known as "The City of New York." Having changed the name of the city, and having abolished and taken into it various other mu-

nicipal corporations theretofore existing, capable of bringing suits and being sued in the name by which they had been known before, the Legislature thought it wise and necessary to prescribe how and in what name or form the new city was to sue or be sued. There is nothing new in this provision; it was always the law under every charter that suits by or against the city must be brought in the corporate name, and that is all that this provision was intended to accomplish or does accomplish. It does not contain even the most remote suggestion that suits by or against the board of education, that had always been brought and maintained by or against that corporate body, were thereafter to be brought by or against the city, and does not touch such actions at all, but leaves them just where they were before. It is an erroneous idea to suppose that this provision of the charter operated to make any change with respect to suits against the board of education which had always been maintained since the board was organized and given the management and control of the school system.

The other provision of the present charter, which it is said is new and makes a radical change with respect to the proper party defendant in such actions as this, is to be found in section 96, where the administrative departments of the city, 15 in number, are enumerated. The board of education is there called the "Department of Education," and the head of the department is to be called the board of education, and shall consist of 46 members. Section 108. It is difficult to see how the mere listing of the board of education among the city departments makes any change in its corporate powers, duties, or liabilities. It possesses every power now that it ever had, and much more. The legal capacity to sue or be sued that was always inherent in it as a corporate body, and in terms conferred by express statute, has not been affected or taken away by calling it "The Department of Education." It is still the sole representative of the school system, with exclusive powers to control, manage, and administer all school property and school funds. If enumerating the board as a corporate body among the departments did not make it any greater than before, it certainly could not make it any less. It was not shorn of the capacity to be sued which it always possessed, or of any of its powers or functions, by being promoted to the dignity of a department. Moreover, the provision was not new. The board of education was made a city department by the charter of 1873, and under the charter of Brooklyn, where this case originated, the board of education was always classified as one of the departments of the city, but no one ever before supposed that by conferring that title upon it the Legislature thereby deprived it of the capacity to be sued, which is a common characteristic of all corporate bodies.

But it is said, and this is the reasoning

(176 N. Y. 84)

PEOPLE v. GAIMARI.

(Court of Appeals of New York. Oct. 6, 1903.)
HOMICIDE—EVIDENCE—THREATS—CHARACTER
OF DECEASED—INSTRUCTIONS.

1. Evidence held sufficient to warrant conviction of murder in the first degree.

2. On a trial for murder, where the defense is excusable or justifiable homicide, evidence of threats of defendant to kill the deceased, made at a time before the homicide, are competent.

3. On a trial for murder, where defendant claims self-defense, the general reputation of deceased for violence is admissible, but not evidence of specific acts.

4. Instructions given in accordance with a request of defendant's counsel are no ground for reversal, though they may be too lenient towards defendant.

Appeal from Court of General Sessions, New York County.

Carmine Gaimari was convicted of murder in the first degree and appeals. Affirmed.

Charles E. Le Barbier, for appellant. William Travers Jerome, Dist. Atty. (Robert C. Taylor and Howard S. Gans, of counsel), for the People.

ess in support of the argument, that, an individual head of a department not be sued for his official acts, it must w that the head of a department, being rporate body, is likewise exempt from suits. That argument rests entirely upon non sequitur. The head of a city dement who is a natural person is a mere t of the city. His acts are the acts of city, and the city alone is responsible for ; but the board of education is an inde- lent corporate body created for the par- ar purpose of exercising specific statu- powers as the sole representative of the ol system, and its acts are in no sense acts of the city, and the city is not re- sible for them, as this court has often

The board is the lineal successor of old school districts, with powers much rged, and it might just as well be argued these districts in the rural part of the e could not be sued, but that the action t be brought against the village, the a, or the county. If a great corporate , exercising such vast powers as are con- ed upon this defendant, cannot be sued the wages of teachers that it employs, it ld be difficult to justify such actions nst the school districts in other parts of state. But the argument that the de- ant's capacity to be sued is lost in con- equence of placing it upon the list of city rtments, if it proves anything at all, es too much. If it proves that the de- ant cannot be sued in matters relating he schools, it must prove that it cannot

If it proves that the board cannot be e a defendant, it must prove that it can- be a plaintiff, since the individual head city department has no more capacity e sued than to sue. The reasoning and ment by means of which it is sought to blish the proposition that a corporate r charged with the duties and intrusted powers to conduct a system of public ation in the chief city of the state is ble of bringing suits in all matters relat- to the corporate functions, but incapable elng made a defendant in suits by others matters growing out of the exercise of e functions, is certainly not very power- or persuasive. From whatever point this ention is viewed, it will be found to be out any legal basis. The facts stated in complaint and admitted by the demurrer titute a good cause of action against the ndant, but no cause of action whatever nst the city. The demurrer was not well n, and hence the judgment of the learned t below overruling it is right, and should affirmed, with costs. These views suffi- ly cover the questions certified.

ARKER, C. J., and GRAY, BARTLETT, GHT, CULLEN, and WERNER, JJ., ur.

dgment affirmed.

VANN, J. At the time of the homicide the defendant lived with his wife in a double tenement house known as No. 56 Roosevelt street, in the city of New York, and Josephine Santa Petro, the deceased, lived with her husband in the same building. The defendant worked in Jersey City, and the deceased was janitress of the building where both resided. He was 31 years old, weighed 130 or 135 pounds, and was not quite as tall as the deceased, who was about 40 years of age, 5 feet and 6 inches in height, weighed from 175 to 180 pounds, and was a strong, robust, muscular woman. They were acquaintances, more or less intimate, and there was some evidence of jealousy of the deceased on the part of the defendant's wife and of threats made by the former that she would kill the defendant and his wife, and that these threats had been communicated to him. Maggie Santa Petro, a little daughter of the deceased, 12 years of age, testified that a few days before the homicide the defendant came up to the rooms occupied by her father and his family, and, knocking at the door, said he was the landlord, Mr. Golden, but the door was not opened, whereupon he broke in the window, "pulled out a revolver, and he pointed it in. My mother ran in the front-room door. He said, 'I was going to leave you dead in Roosevelt street.'" Two days before the homicide, a precept issued by a local court, requiring the defendant forthwith to remove from his rooms at No. 56 Roosevelt street, or show cause before the court on the 7th of October, 1902, at 10 a. m., why possession of the premises should not be delivered to Barnard Golden, the landlord, was served upon the defend-

¶ 2. See Homicide, vol. 26, Cent. Dig. §§ 391, 395.

ant, and was found upon his person immediately after the homicide. The homicide took place on the 6th of October, 1902, between 9 and 10 in the morning, at No. 56 Roosevelt street. The witnesses who saw the occurrence, in whole or in part, differ somewhat in their versions, so that a review of the case upon the merits, which is substantially the only duty presented by the record, requires an analysis of the evidence.

William Gibson, a seafaring man, was in front of No. 56 Roosevelt street, on the opposite sidewalk, between half past 9 and 10 o'clock on the morning of Monday, October 6, 1902. He saw three women standing in front of No. 56, when a man came out of the doorway, whom he identified as the defendant. The defendant "made a reach for a woman that was standing in the crowd, and as he did so he drew a revolver out of his hip pocket, and fired two shots at her. She was dodging around the other women, and started to run into the shoe store right next door to No. 56, and as she was going through the door into the place he fired three more. I never heard of the people before. I did not know that they were on earth. After the second three shots were fired at the woman as she went into the door of the cobbler's shop, I went across the street to the sidewalk where she was shot. I seen her lying in there, and I started back—lying in the shoemaker's shop, right by the casing at the windows, the cobbler's bench there. I seen blood on the side of her dress."

Kate Looney, who lived at No. 56 Roosevelt street, was talking to Mrs. Petro as she was cleaning the bells by the front door, when the defendant came downstairs, and said to the deceased, "You did this," and she said, "I didn't do it, the landlord did it." Thereupon the defendant caught her by the throat, and commenced to shove her. The witness thought he was fooling until she saw him pull a revolver out of his pocket and fire three shots, when she ran into the shoemaker's shop, followed by the deceased, who in turn was followed by the defendant. When the defendant went in, he fired another shot, and the witness observed nothing more except that she saw him throw away the revolver. "He was in the store when he chucked it away. He chucked it in the back of the store." The night before, this witness heard the defendant say to the deceased, as he passed by her at the front door, "This is your last night of living." She further testified that when the defendant "fired those shots at the housekeeper he was right up at her side; he had his hand on her when he fired them at her in the store." When sworn before the coroner she did not say that she saw the defendant throw away the revolver.

Angelina Granero lived at No. 56 Roosevelt street, and, going downstairs to pay her rent to Mrs. Petro, saw her cleaning the knobs of the bells by the front door. While she was engaged in paying her rent, the de-

fendant came downstairs, and said to Mrs. Petro, "Give us the money." She replied: "No, I wasn't going to give you no money. If I've got to give you any money, call me to the court, and don't talk to me. Don't speak to me. Talk to my husband. I don't want you to be talking to me." He asked her for the money again, and she said: "Don't be doing me anything. If you do me anything I will call a policeman, and make you arrested." In the language of the witness: "From these words they started to be fighting," and, alarmed, she turned to go, when Mrs. Petro caught hold of her dress. She next heard three shots from behind her, the hold on her dress was relaxed, and she ran away, but, looking back, saw the defendant shoot again. By "fighting" the witness may have meant quarreling, for, when asked if the parties were striking at each other, she answered, "No, sir; fighting, talking."

Louis Cairia testified that he was a shoemaker, and was at work in his shop in the front part of No. 56 Roosevelt street, at about 8 or 9 o'clock on the morning of the homicide. He heard a shot, and raising his head, saw the defendant pursuing the deceased, about three feet from her, and shooting at her "in front and in the back, anywhere she turned." He heard three shots fired outside, when he ran out of his shop and the deceased ran in, followed by the defendant with a pistol in his hand. After that the witness heard one or two shots inside. The defendant was close to Mrs. Petro as the witness looked up and saw the second and third shots. At this time he saw the defendant shoot at her in front, and when she turned he saw him shoot at her back.

Daniel A. Walsh, a collector, was walking down Roosevelt street on the morning in question shortly after half past 9 o'clock. When about opposite No. 56 he heard the report of a revolver, and, turning, saw a woman running from the hallway, followed by a man, whom he identified as the defendant. She was running from him, and he had his left hand on her right shoulder. He next heard two shots in quick succession, when she turned and went into the cobbler's shop, followed by the defendant, and after that he heard two more shots; making five in all. He went into the shop, and saw the woman with blood coming from her back and a wound in her abdomen. Her apron was burned with powder. He saw a man put his hand on defendant and hold him until he was turned over to the police. A few minutes later the witness picked up a revolver in the air shaft at the back part of the store. Each of the five chambers contained an empty shell, and the revolver was hot when he picked it up. It was identified by several witnesses as the one with which the shooting was done.

Three of these witnesses and two others testified that when the defendant was ar-

rested right after the shooting he was taken before Mrs. Petro, who was still living. She was asked if he was the man who shot her. She could not speak, but nodded her head. In broken English the defendant denied that he did the shooting. The defendant was seized as he was "trying to get out" of the shoe shop, and held until the arresting officer came and took him in custody. A watch, \$15 or \$16 in money, and the precept to dispossess, returnable the next day, were found upon his person. The officer asked him why he did it, and he said he did not do it. After the revolver was found, he was asked if it was his, and he said it was not.

The interne in charge of the ambulance found Mrs. Petro, at about 10 o'clock, lying on the floor of the cobbler's shop, still conscious, but suffering from shock. Her clothes were saturated with blood and burned in two places—one in the back, just behind the right shoulder, and the other in front, over the right groin. Beneath each burned spot there was a pistol shot wound in the body. She was taken to the hospital, and died in about 30 minutes.

The physician who made the autopsy found two pistol shot wounds—one in the back, about two inches to the right of the median line, above the right shoulder blade. The bullet which made that wound lodged in the muscles of the back. The other wound was in front, on the right side of the body, and the bullet, after penetrating the abdominal cavity, passed through the bladder, and was found in the muscles on the left side. It was of the same caliber as the revolver that was found right after the shooting, both being No. 32. The wound in the abdomen, with the internal hemorrhage resulting, was, in the opinion of the physician, the cause of death.

The defendant, when sworn in his own behalf, denied the occurrence testified to by the little girl Maggie in relation to his breaking into the room of the deceased with a revolver in his hand, and said that he never had a revolver in his possession. He also denied that he ever threatened to kill Mrs. Petro. He testified that on the morning in question he went downstairs to see the owner of the building, and found the deceased and another woman. He said, "Good morning," and as he was passing by Mrs. Petro she said, "Come here." As he was going toward her "she drew the revolver, and I, with a jump, grabbed hold of her hand. When so doing, two shots fired in the air, and while I was wrenching the revolver from her hand the revolver went off. In that moment I lost my hat, and while I was picking up my hat from the ground she ran away, and I myself tried to get away, and entered the shoe store where I saw her—I met her. She grabbed hold of me, and I put my arms around her, and, seeing that she was fainting, I put her in a chair. I never supposed in that moment that she was wounded. Then the policeman came up, and I was arrested, without any resistance."

He did not intend to shoot her. He had heard that Mrs. Petro had made a threat against his life, and believed he was in danger of his life. He gave her his salary every week, "because from the first day that she got affectionate with me, she didn't want me to give the money to my wife." He did not go to work that day, because he wanted to know from his landlord "what for he dispossessed me, when I had paid up everything." He further testified that when Mrs. Petro drew the revolver she pointed it at him, being about 3½ feet away. He grabbed her right hand, and held it up, when two shots went off in the air, and while he was wrenching her hand to get the revolver away "three shots went off." The record then continues as follows: "By the Court: Ask him if he wrenched the revolver from her, and if he succeeded in getting it away from her. A. Yes, I succeeded. Q. What did he do with the revolver afterward? A. She was holding me around my body, and I fired the revolver. I shot the revolver. Q. Now, when did you fire the revolver? A. After the shots went off, and she had clasped her hands around my body, and did not want to leave the revolver go. * * * I fired it at nobody. I wanted to unload it, in order to prevent her from doing harm to me. * * * The revolver dropped on the sidewalk, and since that time I didn't see it any more. * * * I didn't see her enter the shoe store. Q. Well, you went into the cobbler shop yourself, didn't you? A. Yes, for fear she had some other weapon, because she always had a knife with her. * * * By the Fifth Juror: Q. I would like to know in what direction you fired these shots—how you held the revolver when you fired these two or three shots? A. I could not say that, because of the position in which she held it, clasping around her arms. I tried to shoot to the ground. I didn't want to shoot at her."

Julia Osnato testified that about 8 o'clock on the morning of the homicide she told the deceased that the defendant and his wife were going away. She replied that, if they were going away, she would kill them both. The witness did not tell the defendant this, but told his wife.

The defendant's wife testified that he never carried a revolver. At about half past 9 on the morning of the homicide "my boy commenced to cry for his father, and I opened the window, and allowed him to see his father, and then I saw the housekeeper and my husband was talking both together, * * * near the door of the house. I noticed that they were quarreling together, and I from the window hollered to my husband, saying that he had better leave her alone. Then I saw that the woman drew a revolver, and pointed it, and that my husband went against her to stop her." She started to run downstairs, and on the way heard shots ring out. She was agitated and trembling, and when she reached the sidewalk the police had arrived. She also said that the deceased had

threatened "all the time" to destroy both her husband and herself, and that she told him so. She lived on the fifth floor of the building, and whatever she saw was from a window at that elevation.

Gulseppe Alzerana testified that on the morning of the homicide he was out selling bread, and when near No. 56 Roosevelt street saw a man and woman quarrelling. She took a revolver from her dress, the man came against her, and the witness ran away, but heard the shooting immediately.

Several witnesses—one a brother-in-law of the defendant—testified that his reputation for peace and quietude was good. Evidence was given by his employer in Jersey City that the defendant worked every day and all day during the latter part of September and the fore part of October, which covered the period when the daughter of the deceased said that he came to their family rooms with a revolver.

In rebuttal, another daughter of the deceased, 15 years of age, testified that she did not know of her mother having a pistol. The husband of the deceased said he had lived with her 19 years, and never knew her to have a revolver.

These are the salient facts sworn to by the various witnesses. According to the theory of the defendant, he made no threats, had no revolver, and used no violence until the deceased wantonly attacked him. He claims that she had threatened his life, and was the aggressor; that she was superior to him in size and strength; that as he was passing by her on his own business, she called him to her, drew a revolver from her bosom, and was about to shoot him, when, apprehending that his life was in danger, he wrenched the weapon from her, and as he did so it went off, accidentally, so far as he was concerned; that after that, with his arms still around her, he fired the revolver so as to unload it; that he did not intend to shoot her, but tried to shoot toward the ground, and that all he did was in lawful self-defense. His theory finds some corroboration in the testimony of other witnesses.

On the other hand, the people claim that the defendant had twice threatened to take the life of Mrs. Petro; that, while she was peacefully engaged in attending to her ordinary duties, the defendant either accused her of doing something which she denied, or he asked her for money; that both of these statements may have been made, as the evidence does not exclude either; that without provocation or warning he drew a revolver from his pocket, and fired at her five times as she was fleeing from him; that, after three shots had been fired, she ran into the shoe shop, and he followed her, although he might then have run away if he was afraid of his life; that, according to his own statement, when trying to escape from danger, he tried to pick up his hat; that, if in fear of his life, he could have sought protection

in the police station, but 150 feet away, but instead he followed her into the shoe shop, and shot at her twice there, where she was soon found in a dying condition, with one wound in her back and another in her abdomen. It is argued that the defendant shot Mrs. Petro, for no one else was seen to shoot her, and she could not have shot herself in the back. The people claim that he shot her with a deliberate and premeditated design to take her life, and that all the circumstances tend to show that he was the aggressor from the outset, and executed the threats which he had repeatedly made. While the defendant claims that the homicide was accidental, and hence excusable, or in self-defense, and hence justifiable, the people insist that these defenses are inconsistent. He clearly had the right to rely on inconsistent defenses, but it is significant that only one could rest on truth. Either defense makes motive important, and, while no motive to murder can be adequate, still it may be obvious. Service of the precept to dispossess, and the statement of the defendant to Mrs. Petro that she caused it, as sworn to by Mrs. Looney, are relied upon by the people to establish a motive; while threats made by the defendant to kill Mrs. Petro and by her to kill him and his wife are relied upon by both parties. The defendant and his wife testified that he never had a revolver, and several of his witnesses said that Mrs. Petro drew the revolver in question from her bosom. On the other hand, the husband and the daughter of the deceased say that she never had a revolver. Another daughter said that a few days before the homicide the defendant had a revolver, and threatened to use it upon her mother; while two witnesses for the people testified that they saw the defendant draw the revolver from his pocket, and shoot five times at Mrs. Petro. The defendant swore that he wrenched the revolver from the deceased, dropped it on the sidewalk, and that he did not see it afterward. A witness for the people testified that she saw him throw away the revolver, after the shooting, in the back part of the shoe shop, and several witnesses swore to the finding of the revolver in the air shaft at the rear of the shop, and one that it was then hot, with five empty shells in it. The people further claim that the statement of the defendant's wife that she saw what she testified to while holding her little boy out of the fifth story window, so that he could see his father on the sidewalk, is too improbable for belief.

It is unnecessary to review the case upon the merits at greater length, for enough has been said to show that the question as to the defendant's guilt, as to the grade of his offense if he was guilty, as to his claim that he acted in self-defense, or that the homicide was the result of accident, were for the jury. They could look into the faces of the various witnesses as they gave their versions of the transaction, and decide, so far as human

judgment can tell, not only who intended to speak the truth, but who in fact spoke the truth. Representing the average judgment of mankind, they could separate the true from the false with a degree of accuracy which, according to the theory of our law founded on the experience of many generations, cannot be attained by reviewing judges. The memory, motive, mental capacity, accuracy of observation and statement, truthfulness, and other tests of the reliability of witnesses can be passed upon with greater safety by those who see and hear than by those who simply read the printed narrative. Clearly, the case was for the jury to decide, and we cannot say that their verdict was against the weight of evidence, or against law, or that justice requires a new trial.

The exceptions are few and unimportant. The defendant moved to strike out the testimony of Kate Looney and Maggie Santa Petro in relation to the threats of the defendant to kill the deceased, made a short time before the homicide, on the ground that it was immaterial and incompetent; but the motion was denied, and an exception was taken. For time out of mind recent threats have been held competent to show the state of the defendant's mind toward the deceased. *La Beau v. People*, 34 N. Y. 222, 229, 232; *Archibald's C. P.* 283; *Wharton's Crim. Ev.* (9th Ed.) § 756. They are of special importance when the accused claims that the homicide was excusable or justifiable. Although clearly competent, they should be considered with caution, for many an idle threat is made, and words spoken under excitement are liable to be misunderstood.

The defendant was not allowed to show specific acts of violence alleged to have been committed by the deceased upon his wife, no offer having been made to prove that he knew of them. We find no error in this ruling. When the accused claims that he acted in self-defense, it is competent to show the general reputation of the deceased for violence; but evidence of specific acts toward a third person, especially when it does not appear that the defendant had heard of it, is inadmissible. *People v. Druse*, 103 N. Y. 655, 656, 8 N. E. 733; *Thomas v. People*, 87 N. Y. 218; *Eggler v. People*, 56 N. Y. 643; *People v. Lamb*, 41 N. Y. 360-371. As was said by Judge Earl in *Thomas v. People*, supra: "There is no authority for holding that proof of specific acts of violence upon other persons, no part of the *res gestæ*, and in no way connected with the prisoner, is competent."

We have considered the other exceptions, but find none which merit the expression of reasons for holding that they raise no error. No exception was taken to the charge. The court charged each of the 14 requests presented by the learned counsel for the defendant, including the following: "That use of force or violence upon or toward the person of another is not unlawful when committed by the party about to be injured, if

the force or violence used is not more than sufficient to prevent such offense." In the body of his charge the learned trial judge said to the jury: "On the main defense offered in behalf of the defendant—justifiable homicide—I will read you the law, and you will see whether it properly applies. In the Penal Code it is enacted that 'to use, or attempt or offer to use, force or violence upon or toward the person of another is not unlawful when committed by a party about to be injured, or by another person in his aid or defense, in preventing or attempting to prevent an offense against his person, if the force or violence is not more than sufficient to prevent such offense.'" The learned trial judge thus inadvertently read from section 223 of the Penal Code, which relates to the use of force or violence to prevent an assault. Pen. Code, § 223, par. 3. He doubtless intended to read section 205, which relates to justifiable homicide, and lays down a more stringent rule in relation to the use of violence resulting in homicide by limiting it to an occasion "when there is reasonable ground to apprehend a design on the part of the person slain to commit a felony, or to do some great personal injury to the slayer, * * * and there is imminent danger of such design being accomplished." Thus the charge was more favorable to the defendant than he was entitled to. The effect of the charge was that, if the defendant thought he was about to be injured by Mrs. Petro, he had a right to take her life, which was erroneous; but the error injured the people and benefited the defendant. The learned judge, however, further instructed the jury that they were "to determine from the testimony whether this defendant had good and reasonable grounds to believe that he was in danger of his life, or of grievous bodily injury, and whether what occurred after he had wrested this pistol from the hands of the deceased and had it in his possession was more than sufficient force to avert the danger that he apprehended. From the plain wording of the statute you will see that it applies only where a party is about to be injured." This was a nearer approach to the correct rule, and it is obvious that there is nothing in the charge upon the subject of justifiable homicide of which the defendant has a right to complain, for it was not only too lenient toward him, but it was in accordance with the request of his own counsel.

After carefully considering this case, and every error alleged, whether raised by an exception or not, we find nothing that should disturb the verdict, and the judgment pronounced against the defendant must be affirmed.

The judgment and orders should be affirmed.

PARKER, C. J., and GRAY, HAIGHT, CUILLEN, and WERNER, JJ., concur. MARTIN, J., absent.

Judgment of conviction affirmed.

(176 N. Y. 36)

ROCHESTER & L. O. WATER CO. v. CITY OF ROCHESTER.

(Court of Appeals of New York. Oct. 6, 1903.)

WATER COMPANIES—INCORPORATION—WATER MAINS—USE OF CITY STREETS—INJUNCTION.

1. The transportation corporations act (Laws 1890, p. 1151, c. 566, § 82, subd. 2, as amended by chapter 617, p. 1171, Laws 1892) confers on water companies power to lay their pipes in any street of an adjoining city to the city, town, or village where permission has been obtained to lay its distributing mains. *Held* that, where a city was between the source of the water supply of a water company organized under such statute and a town where the right to lay pipes and furnish water had been obtained, the corporation had the right to lay its pipes in the street of the city without its consent, notwithstanding the various acts and ordinances of the common council forbidding the use of the streets except under the direction of the common council.

2. The ordinances adopted by the common council of a city after the passage of the transportation corporations law (Laws 1890, p. 1136, c. 566, as amended by Laws 1892, p. 1170, c. 617), regulating the opening of streets for the laying of water pipes, though authorized by the charter of the city, cannot regulate the laying of water pipes through the city by a water company organized under the transportation corporations act to supply water to adjacent towns and villages.

3. Though a water company organized under the transportation corporations act could have located its line around a city by going through a town not named in its certificate of incorporation, it is not required to do so where such town does not lie between its water supply and the towns to be supplied with water, nor furnish the most feasible route between the same.

4. That a water company organized under the transportation corporations act, laying its water mains through a city between its water supply and the towns which it proposed to furnish with water, may become a competitor of such city in supplying water to consumers therein, is no ground for preventing the laying of such pipes, though the city may own and operate a municipal water plant supplying water to its inhabitants, and though such city has supplied water to a railroad company upon whose right of way the water company has located its route through the city, and with which it has contracted to furnish water at a lower rate than furnished by the city.

Bartlett, Martin, and Vann, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by the Rochester & Lake Ontario Water Company against the city of Rochester. From a judgment of the Appellate Division (82 N. Y. Supp. 455) affirming a judgment for plaintiff, defendant appeals. Affirmed.

William A. Sutherland and John Van Voorhis, for appellant. Albert H. Harris, for respondent.

HAIGHT, J. This action was brought to restrain the city of Rochester, its officers, agents, and servants, from interfering with or preventing the plaintiff from laying its water pipes or mains across certain streets of the city. The plaintiff is a domestic corporation organized under the transportation corporations law (chapter 566, p. 1136, Laws

1890, as amended by chapter 617, p. 1170, Laws 1892) for the purpose of supplying water to the villages of Brighton and Fairport and the towns of Greece, Gates, and Brighton, in the county of Monroe. The trustees of the villages and the officers of the towns have, under due form of law, executed in writing permits authorizing the formation of the plaintiff as a corporation for the purpose of supplying their respective villages and towns with water, which were duly acknowledged, and annexed to the certificate of incorporation and filed therewith. The plaintiff, after perfecting its organization and paying the charge therefor imposed by the statute, determined to take its supply of water from Lake Ontario at a point near Rigney's Bluff westerly from the point at which the Genesee river empties into the lake, and to lay its pipes therefrom southerly through the towns of Greece and Gates to the city of Rochester, and thence through the city to the town of Brighton, and so on easterly to the village of Fairport. It caused a map to be made of the lands intended to be taken or entered upon in the route which it had adopted, duly signed by the officers of the company, and filed in the office of the clerk of the county, as required by section 83 of the transportation corporations law. It then procured its right of way through the towns of Greece and Gates to the city of Rochester, and entered into a contract with the New York Central & Hudson River Railroad Company by which it was given the right to lay its mains upon the company's right of way through the city of Rochester and the town of Brighton to the village of Fairport. It entered into a contract with another corporation to construct its plant and lay its pipes, and has made agreements to supply water to a number of manufacturing establishments, including railroad repair shops, in the towns outside of the city of Rochester, and to supply the New York Central & Hudson River Railroad Company with the water that it required in the city of Rochester and at its stations east between the city and Fairport; after which it commenced the laying of its pipes and undertook to dig trenches therefor across one or more of the streets of the city upon the right of way of the railroad company, and was prevented from so doing by the officers of the city, acting through its police department, and thereupon this action was brought to restrain such interference.

The trial court has found as a fact that there was a legitimate demand for water in the towns and villages specified; and that it was necessary for the plaintiff, in order to carry out the purposes of its incorporation and to fulfill the contracts which it had made and assumed, to lay its water mains along the route which it had adopted through the city of Rochester; and that it had acquired an easement to cross the intersecting streets. At the request of the defendant the court found "that it is a physical possibility to car-

ry water from Lake Ontario to the towns of Greece and Gates on the south and west of Rochester, and to the town of Brighton and the villages of Brighton and Fairport on the east of Rochester, without laying any pipes within any portion of the territory of the city of Rochester, but that to supply the said territory east of Rochester would require pipes to be laid through the town of Irondequoit, in which the plaintiff has neither sought nor obtained any permit from the local authorities, and has acquired no right of way, and the cost of such construction would be materially greater." The town of Greece lies between the lake and the city of Rochester. The town of Gates is west of the city, and that of Brighton is east of the city. It therefore is necessary, in laying a main from the town of Gates to the town of Brighton and to the villages on the east of the city, to pass through the city of Rochester, or to go around the city through the town of Irondequoit, which would involve the laying of the pipes for a much greater distance, and consequently cause a considerable increase in the cost of the construction.

Section 82 of the statute under which the plaintiff was incorporated provides as follows: "Every such corporation shall have the following additional powers: (1) To lay and maintain their pipes and hydrants for delivering and distributing water in any street, highway or public place of any city, town or village in which it has obtained the permit required by section eighty of this article. (2) To lay their water pipes in any streets or avenues or public places of an adjoining city, town or village, to the city, town or village where such permit has been obtained. (3) To cause such examinations and surveys for its proposed water works to be made as may be necessary to determine the proper location thereof, and for such purpose by its officers, agents or servants to enter upon any lands or waters in the city, town or village where organized, or, in any adjoining city, town or village for the purpose of making such examinations or surveys, subject to liability for all damages done." The first subdivision of this statute gives to water companies the right to lay and maintain their pipes and hydrants in any street, highway, or public place of the city, town, or village in which it has obtained a permit to supply its inhabitants with water. The second subdivision gives a like power to the company as to its pipes in an adjoining city, town, or village. It is upon this latter subdivision of the statute that the plaintiff bases its claim of right to run its pipes through the city of Rochester. The city, as we have seen, adjoins the town of Gates on the west and the town of Brighton on the east. It owns and operates a municipal water plant, by which it supplies itself and its inhabitants with water. It also has for many years supplied the New York Central & Hudson River Railroad Company with water within the city at an annual rental of

from \$18,000 to \$20,000 per year. The city, therefore, does not require water from the plaintiff corporation, and objects to its occupying any portion of the streets with its pipes. The purpose of this provision of the statute is manifest. The Legislature did not propose that one municipality, which happened to be more favorably situated, should have the power to prevent another and adjoining municipality from obtaining water, where it becomes necessary to pass through the territory of such adjoining municipality to reach the source of supply. This was settled in the case of *Village of Pelham Manor v. New Rochelle Water Company*, 143 N. Y. 532, 38 N. E. 711, in which case the court went to the extent of holding that a water company had the right to lay its water pipes in the streets of an adjoining town or village whenever it was necessary to effectually and properly execute the purpose for which it was created, even though the point in the adjoining town where the pipes were laid did not intervene between the source of supply and the place of distribution. A vigorous assault has been made by the counsel for the appellant upon the wisdom of this statute. While we have no power to review the legislative discretion, it may not be out of place to here make some suggestion with reference to this particular provision. We fully recognize the justice of the provision which permits the laying of water pipes through an adjoining municipality, and thus preventing such municipality from depriving its neighbors from receiving a supply of water, where such municipality happens to intervene between the source of supply and the place of distribution. This power, as it was originally granted, was limited to towns and villages, but under the provision of chapter 617, p. 1170, of the Laws of 1892, the right to lay pipes through the streets, avenues, and public places was extended to cities. This provision was adopted doubtless for the reason that it was found that the compelling of a water company to lay its mains around the territory of a city many miles in extent might involve such expense as to operate as a practical prohibition to the supplying of water to villages which happen to be situated so that the city intervenes between them and the source of water supply. We think, however, that the Legislature might properly have placed some restriction upon the use of the streets in cities, and possibly in villages, that should be made by water companies; that the city or village authorities should be given some voice as to the streets that should be used, and the place and manner in which the pipes should be laid therein; and that it should not be left entirely to the judgment and discretion of the officers of the water company to place its pipes wherever they please, without regard to the wishes or reasons of the officers of the city, who may desire to have them placed elsewhere. There is, however, no complaint with reference to the location of the company's

line in this case, provided it has the right to lay its pipes through the city. The line selected upon the right of way of the New York Central & Hudson River Railroad Company relieves the city from having the pipes laid lengthwise through its streets, for it only crosses the streets that are crossed by the railroad tracks.

The trial court has awarded judgment to the effect that the plaintiff has acquired the right to lay and maintain its water mains through the city of Rochester upon the strip of land owned by the New York Central & Hudson River Railroad Company; and that the city, its officers, agents, and servants, be enjoined from interfering with the plaintiff in laying its water mains across the streets of the city. In awarding such judgment the court has very properly imposed certain conditions upon the plaintiff, regulating the manner in which it should do its work, providing for the guarding of trenches, the restoring of pavements and streets in which trenches have been dug, to save the city harmless from liability, and to give the commissioner of public works of the city 24 hours' notice before commencing the work of excavating in any of the streets. The representatives of the city have not suggested that further restrictions should be imposed, and, indeed, we do not understand them as complaining of the judgment, except in so far as it holds that the plaintiff has acquired the right to lay its pipes into or through the territory of the city.

We are thus brought to a consideration of the defenses interposed by the defendant. The city, in its answer, has set out section 40 of its charter, as finally amended by chapter 28, p. 78, of the Laws of 1894, which gives the common council of the city the power to enact ordinances for the following purposes: "To regulate and prevent the use and encumbering of streets; * * * to regulate the opening of street surfaces and connections with sewers, and the laying of gas, water pipes and mains and sewer connections." It further alleges that on or about the 11th day of May, 1897, the common council of the city duly enacted an ordinance relating to streets, which contained the following: "Section 1. No person shall injure any pavement, sidewalk, crosswalk or sewer, nor dig any area, sewer, lateral sewer or other excavation in any public street, nor remove any earth or stone therefrom, within the city of Rochester, without permission in writing from the executive board, and under such conditions as said board may impose, and the executive board may order any sewer or excavation constructed contrary to the provisions of this section to be filled up or altered at the expense of the owner." Further provisions of the ordinances make a violation punishable by a fine not exceeding \$150, or to imprisonment not exceeding 150 days, or to both such fine and imprisonment. The answer further alleges that the city of

Rochester is a city of the second class, and that under section 483, p. 443, c. 182, of the Laws of 1898, entitled "An act for the government of cities of the second class," it is provided that "nothing contained in this act should be construed to repeal any statute of the state or ordinance of the city, * * * not inconsistent with the provisions of this act." It is also alleged that by section 109 of the latter act the commissioner of public works "has cognizance, direction and control of the construction, alteration, repair, care, paving, flagging, lighting and improving streets, ways and sidewalks"; that under section 142 of the act the commissioner of public works has the jurisdiction of commissioners of highways in towns; and under section 110 he is required to appoint a superintendent of waterworks, to see that the city has an abundant supply of wholesome water for public and private use.

To our minds, the provision of the charter of the city of Rochester giving to the common council the power to enact ordinances upon various subjects does not affect the questions involved in this case. The common council has enacted an ordinance to regulate and prevent the use and encumbering of streets. This undoubtedly has reference to the use and encumbering of streets upon the surface, and not especially to the use made of the soil underneath the street. That was doubtless left to the other provision which regulates the opening of street surfaces for the laying of gas and water pipes and the making of sewer connections. This ordinance was doubtless framed to regulate the laying of the water mains of the city's plant and the connections to be made therewith by the abutting owners on the streets. It is claimed that it had reference to the water mains of water companies organized under the statute to which we have called attention; but the ordinance was adopted May 11, 1897, after the passage of the transportation corporations law. To give it the force claimed would necessitate the holding that it was the intention of the Legislature to vest in the common council of the city of Rochester the power by ordinance to repeal or amend a general statute of the state. This certainly could not have been intended, for the power delegated to enact ordinances has always been limited to such as were not in conflict with existing laws; so that, if the ordinance is to be construed as a prohibition against making any excavations in a public street for the purpose of laying water pipes by the plaintiff herein, then it is in conflict with the provisions of the general statute to which we have referred, which expressly gives such power in adjoining municipalities. As to the provisions of the charter of cities of the second class which continue in force statutes and ordinances which are not inconsistent with its provisions, they relate to those ordinances which are valid, and are not in conflict with existing statutes.

While the commissioner of public works is given the power of commissioners of highways and the power to appoint a superintendent of waterworks, whose duty it is to see that the city is supplied with wholesome water for public and private use, we do not understand that it gives him any power to prohibit the laying of pipes under general laws, or control over the water of the plaintiff corporation so long as it is only passing through the city in the mains of the company for use elsewhere. If an attempt is made to distribute the water within the city, then the superintendent may become interested in ascertaining whether it is pure and wholesome or is contaminated.

The defendant has further alleged in its answer that by chapter 59, p. 197, of the Laws of 1903, section 157 of the city charter was amended so as to substitute the commissioner of public works for the executive board, and then by adding the following: "No other person or corporation shall enter upon or excavate any road, street, highway or public place in the city of Rochester, for the purpose of laying down pipes for the conveyance of water, without the permission of the common council." And this section has been again amended since the decision in this case was made by chapter 553, p. 1226, of the Laws of 1903, in which there was added the following:

"Section 1. Which Body May Deny Any Such Application in Its Discretion. No person or corporation shall furnish or distribute water within said city of Rochester from pipes, mains or conduits except under a franchise granted by an ordinance passed by a three-fourths vote of all of the members of the common council, approved by the board of estimate and apportionment and providing for a disposition of such franchise for an adequate consideration for a period not exceeding twenty-five years and upon such terms and conditions as said common council may impose.

"Sec. 2. Any right, license or permission to any person or corporation, other than the city of Rochester, to enter upon and lay pipes for the conveyance of water in the public streets and highways of the city of Rochester, or to furnish and distribute water within said city, accruing, accrued or acquired under and pursuant to any previous act of the Legislature, or part of such act, as hereby repealed and revoked.

"Sec. 3. All acts and parts of acts inconsistent with this act are hereby repealed."

Section 157 of the city charter had reference to the power of the executive board over the extension of the water mains of the city, their repair and maintenance. The duties of the executive board were transferred to that of the commissioner of public works, and he was, therefore, given the power which the board had previously possessed over the streets and the extension of the water mains therein. The first amendment prevents any

other person or corporation from entering upon, excavating, or laying down pipes in the streets without the permission of the common council. It may be that manufacturing corporations and abutting owners upon streets who desire to have connections made with the water mains of the city in the future must obtain the permission of the common council to open the streets and make connections with its city water system; and that the provisions of the amendment should be construed as applying to the waterworks plant of the city, and therefore not in conflict with the general law. But as to the last amendment, made after the trial and decision of this case, we think no such construction is permissible. It was evidently intended to meet the circumstances of this case, and to prevent the plaintiff from laying its pipes within the territory of the city. It remains, therefore, to be determined whether this legislation can be given force and effect. As we have seen, the plaintiff corporation had been perfected, and it had paid the state the taxes imposed therefor. It had caused surveys to be made, and a map filed, locating its route, and had entered into a contract for the construction of its plant, including the laying of its pipes. It had acquired its right of way, and had entered into contracts for the supplying of water, in accordance with its charter. It had expended money and incurred obligations. All this had taken place before the legislation of 1903. The plaintiff, in incurring these obligations and in making these expenditures, had the right to rely upon the faith of the franchise which it had acquired, under which it had the right to supply the localities with water. We think these rights had become vested, and were property within the meaning of the Constitution, which prohibits the deprivation of a person of property without due process of law. *People v. O'Brien*, 111 N. Y. 1, 18 N. E. 692, 2 L. R. A. 255, 7 Am. St. Rep. 684.

As we have seen, under the general statute the right was given to the water company to lay its pipes in the highway of an adjoining city, town, or village. No consent of the municipal authority was required. While we have made suggestions with reference to this legislation, we think that the whole matter is subject to legislative control. The care, control, and management of the highways at common law were vested in the sovereign. In this state the sovereign power is with the people as represented in their Legislature. The sovereign power over highways may be delegated to municipalities to such an extent as the Legislature may deem advisable; and when the grant by the government is made to a municipality of a portion of its sovereign power it is to be deemed a sufficient consideration for an implied contract on the part of the municipality to perform the duties which the charter imposes, and the contract so made with the

sovereign power inures to the benefit of every individual interested in its performance. *Conrad v. Trustees of the Village of Ithaca*, 16 N. Y. 158. The management and control of highways, given by the state to cities and villages, is still subject to such statutes as the Legislature shall adopt with reference thereto. And when, therefore, the Legislature sees fit to sanction their use for the transportation of water for the benefit of the people of a municipality, it is a public use, which the Legislature has the power to authorize without the consent of the municipality.

It is suggested that it was not necessary that the plaintiff should run its line of pipe through the city of Rochester; that it could have located its line through and around the city through the town of Irondequoit. We have not been favored with a finding as to the amount of additional expense that would be involved in the making of this circuit of the city, and we consequently cannot determine as to whether it would be so great as to render the undertaking financially impossible, and thus operate to deprive the villages named of an opportunity to procure water. We think a sufficient answer to this suggestion lies in the fact that the town of Irondequoit does not directly intervene between the towns named in the certificate of incorporation which seek the supply of water, or furnish the direct, natural, and feasible route between the same.

The remaining suggestion coming from the city is to the effect that the plaintiff corporation may become a competitor of the city. This grows out of the fact appearing in the record that the city of Rochester owns and operates a municipal water plant which supplies water to its inhabitants for domestic and manufacturing purposes; that the plant cost \$11,000,000, and that there are \$3,000,000 in municipal bonds outstanding; that for many years the New York Central & Hudson River Railroad Company has been supplied with water within the city from the municipal plant, it paying therefor from \$18,000 to \$20,000 per annum; that the rate charged the company by the city has been 14 cents per 1,000 gallons; and that the company has entered into a contract with the plaintiff corporation to supply it with water at about one-half of that rate. This fact doubtless furnishes the chief reason on the part of the city for opposing the laying of the company's lines through the city on the right of way it has obtained. We do not at this time deem it necessary to engage in any discussion of the merits of municipal ownership, or to determine whether the establishing of a municipal plant operates to give the city an exclusive right to supply its inhabitants with water. Under the statute, as we have seen, the company has the right to run its mains through the city, in order to comply with the purposes of its grant. When it attempts to supply water to the inhabitants of the city within its ter-

ritorial limits, its power to do so may then be questioned by the municipality, and the courts may then be called upon to determine the extent of its powers in that regard.

The New York Central & Hudson River Railroad Company is not here opposing this judgment. The city of Rochester is not interested in the question as to whether the plaintiff has obtained from the railroad company a valid right of way along the company's lands. It therefore is not in a position to call upon the courts to determine the validity of such title.

The judgment should be affirmed, with costs.

BARTLETT, J. (dissenting). In this action the plaintiff seeks a permanent injunction against the defendant, and is consequently bound to show an entry into court with clean hands and a clear right to the relief demanded. The validity of plaintiff's contracts with other corporations is involved, but only for the purposes of this action, and the judgment which may be entered will necessarily be limited in its operation to the rights of parties before the court.

The plaintiff, having set the court in motion, cannot be heard to complain if the issues involve a wider range than it originally contemplated. The plaintiff is a waterworks corporation, organized under the transportation corporations law in December, 1902, naming in its certificate two villages and three towns in the county of Monroe which it proposed to supply with water. A portion of the territory named adjoins the defendant, the city of Rochester, on the east, and a portion adjoins it on the west. The plaintiff intends, according to its certificate, to obtain its supply of water from Lake Ontario, some distance west of the Genesee river, and to lay its mains southerly parallel to the river to the west line of the city of Rochester, thence through the city to the territory on the east. The trial court found that the plaintiff, before the commencement of this action, obtained from the state of New York a franchise giving to it the right to lay and maintain its water mains through the city of Rochester upon the route adopted by it, to the exercise and enjoyment of which the consent of the city of Rochester is not required; that thereafter the plaintiff undertook to lay its mains on the line of its proposed route at two certain streets, but was prevented by defendant exercising force to that end. The court further finds that the New York Central & Hudson River Railroad passes through the city of Rochester, and that the company owns and occupies a continuous strip of land through the city in an easterly and westerly direction, upon which its tracks are laid; that this strip of land is intersected by several streets, some of which cross at grade and some above or below grade; that the land at all of the street crossings is owned by the railroad company, subject to the public user for street purposes.

It is further found that plaintiff acquired an easement in the north six feet of said continuous strip of land for the purpose of laying and maintaining thereon its water mains, by virtue of two written contracts with the New York Central & Hudson River Railroad Company, by which it agreed to furnish water to the railroad company in large quantities in the city of Rochester and elsewhere on its right of way for a term of years; that a like contract to furnish water was made by plaintiff with the Buffalo, Rochester & Pittsburg Railway Company. It is found that the city of Rochester owns and operates a municipal water plant, which supplies water to its inhabitants for domestic and municipal purposes in large quantities; that the cost of this plant was about \$11,000,000, of which \$3,000,000 are represented by outstanding bonds. The New York Central & Hudson River Railroad Company has been supplied with water by the city of Rochester, paying therefor from \$18,000 to \$20,000 per annum. The Buffalo, Rochester & Pittsburg Railway Company has also paid the city of Rochester a very considerable sum per annum for water. The plaintiff contends that on the facts found it is, by virtue of the statute and under its contracts with the Central & Hudson, possessed of a legal franchise and route through the city of Rochester on which to lay and maintain its mains. The plaintiff admits that whenever the question is presented it will insist that it can legally furnish water, in the city of Rochester, to the railroad companies with which it has contracted, and to such adjoining owners as can be reached without laying its pipes along the streets. The plaintiff and the courts below have sought to confine the case to the one question of the legality of the route claimed by plaintiff. It will presently appear that other questions are necessarily involved in passing upon the alleged legality of the route.

1. The first point arises under the provisions of plaintiff's charter. It is authorized to furnish water to two villages and three towns. Its charter does not extend to the city of Rochester, and it has no more right to sell or furnish water within the corporate limits of that city than it has in the city of New York. This point goes to the foundation of the action, for the plaintiff cannot sell or furnish water even to the New York Central & Hudson River Railroad Company within the boundaries of the city of Rochester, and hence its contracts with the said company are *ultra vires*, and give it no franchise or vested rights. The plaintiff's right to lay and maintain its mains on the strip of land in question, as between it and the Central & Hudson, rests on its covenant to supply the railroad company with water.

2. While the Central & Hudson could lay water pipes on its right of way to supply itself with water, for that would be a purpose incidental to its charter, it could not sell water to others, for that would be foreign to its

charter. Not having that right itself, it could not confer it upon the plaintiff. It could not, by contract, enable the plaintiff to do something which the railroad company had no right to do itself. It is true that a railroad company, needing water for its uses and purposes, may resort to condemnation proceedings to obtain it (Railroad Law, § 7, subd. 4); but this power does not affect the present situation. In so far as plaintiff rests its claim for equitable relief on its contracts, it asks the protection of a right by injunction that does not exist in law. The contracts relied upon are two in number. One Mingle entered into a contract with the Central & Hudson to furnish it for a term of years with water, which was assigned to plaintiff by Mingle, with the consent of the Central & Hudson, the plaintiff assuming performance. Later the plaintiff entered into a contract with the Central & Hudson for its right of way, which was granted, subject to the express condition that plaintiff should fully perform the contract to furnish water so assigned to it by Mingle.

3. The plaintiff further insists that its selected route through the city of Rochester rests not only on its contracts with the Central & Hudson, but on the provisions of the transportation corporations law. It therefore becomes necessary to consider this contention in view of the provisions of various statutes, viz., the transportation corporations law, as amended (Laws 1896, p. 705, c. 678); the charter of the city of Rochester and its amendments (Laws 1890, p. 1012, c. 561); the act for the government of cities of the second class, sometimes called the "White Charter" (Laws 1898, p. 371, c. 182). The plaintiff contends that, notwithstanding its route is 6 miles long and crosses 29 streets in the city of Rochester, it can lay its mains thereon and cross said streets without interference from the local authorities. This contention is based on section 82, subd. 2, of the transportation corporations law (3 Birdseye's Rev. St. [3d Ed.] p. 3764), which authorizes waterworks corporations "to lay their water pipes in any streets or avenues or public places of an adjoining city, town or village where such permit has been obtained." That is to say, where a corporation has received a permit from a municipality to furnish it with water, it may, in order to reach such municipality, lay its pipes in the streets of an adjoining city, town, or village which lies between the water supply and the place to be furnished with water. As the city of Rochester occupies this position as to certain of the municipalities to be supplied with water by the plaintiff, it is argued that the latter can proceed to locate its route and lay its mains without the permission or interference of the local authorities of the city of Rochester. While the statute does not declare in terms that the local authorities are powerless to regulate or control the route selected in such intervening municipality, the respondent, in support of such a construction, places great

reliance on the case of *Village of Pelham Manor v. New Rochelle Water Company*, 143 N. Y. 532, 38 N. E. 711 (decided in November, 1894). Pelham and New Rochelle are adjoining villages. The claim of the plaintiff was that the defendant had no power to lay pipes in one of its highways without permission of the municipal authorities. Judge O'Brien, writing for the court, said: "What the defendant did was to use the road for about five hundred feet in order to connect two of its mains, which terminated in 'dead ends' near the boundary lines of the two towns. * * * So long as the defendant was without power to add to its revenues by furnishing water to the plaintiff or any of its inhabitants, no great mischief is to be apprehended from any extensive use of the streets by the defendant. But the Legislature evidently anticipated that a water company, in performance of its functions of supplying the town and every part of it which granted the permit with water, might, for some reason, find it necessary to cross the boundary line of an adjoining town and use its highways, not for the purpose of supplying that town, but for the purpose of properly and effectively executing the purpose of its creation. Such necessity has been found in this case as matter of fact by the trial court, and hence the permission of the municipal authorities who had charge and control of the highways was not necessary." This case was properly decided on its peculiar facts, as the law stood in 1894, but since then section 81 has been amended, and we have existing, by virtue of this amendment, the very situation the absence of which controlled the foregoing decision, to wit, where the company claiming the right to lay its pipes in the streets of an intervening town has the power to add to its revenues by supplying it with water. In 1896 (Laws 1896, p. 705, c. 678) section 81 of the transportation corporations law was amended so as to read: "Sec. 81. Every such corporation shall supply the authorities or any of the inhabitants of any city, town or village through which the conduits or mains of such corporation may pass * * * with pure and wholesome water at reasonable rates and cost," etc. It would be an unreasonable construction of this statute, so amended as to compel the corporation passing through an intervening municipality with its pipes to furnish pure water to its authorities and inhabitants, to hold that it could select its route through such municipality without consulting the officers having charge of the streets. While the right to pass through the streets of the intervening municipality is conferred by this statute, a fair construction leads to the conclusion that the Legislature intended that its exercise is subject to the reasonable regulations and control of the local authorities, both as to route and manner of conducting the work. The court would not be justified in assuming that the Legislature intended to allow a water company, in passing through an intervening town, where

it is compelled to supply water, if required, to select its route as to streets in defiance of the duly constituted authorities, but in the adjoining town, where by permit it is to erect a water system, it is subject to such restrictions as to route and interference with the public streets as the local authorities may deem it proper to impose. It follows that the provisions of the transportation corporations law, as amended in 1896, do not authorize the plaintiff, even if lawfully within the city limits, to cross the 29 streets in the city of Rochester without submitting to the reasonable supervision and control of the local authorities.

The finding of the trial court that the land at all of these street crossings is owned by the railroad company, subject only to the public use for the purposes of a street, does not help plaintiff, as the local authorities have the power to protect and regulate this public use.

Furthermore, it is a question whether the Central & Hudson could grant an easement to the plaintiff to lay its pipes over the entire strip of six miles, including the land involved in street crossings. In *Albany Northern Railroad Co. v. Brownell*, 24 N. Y. 345, 349, the court said: "Upon this my opinion is that the railroad companies, under the general act, do not acquire the same unqualified title and right of disposition to the real estate taken for the road, and paid for according to the act, which individuals have in their lands. The statute declares the effect of the proceedings which it authorizes to be that the company shall be entitled to enter upon, take possession of, and use the said land for the purposes of its incorporation, during the continuance of its 'corporate existence'; and it further declares that the land it thus appropriates shall be deemed to be acquired for public use." It is not contended that the laying of plaintiff's mains over the entire strip was necessary to furnish the railroad company with water. It is admitted a further object was to reach municipalities on the east of defendant. A conveyance by the railroad company with the latter object in view is clearly *ultra vires*.

I have deemed it proper to construe the transportation corporations law as claimed to be applicable to this case, although of the opinion that the charter of the city of Rochester and its amendments, read in connection with the White charter, already cited, bar the entrance of plaintiff to the city of Rochester. We have here one of the large cities of the second class, which has, at an expenditure of \$11,000,000, created a water system adequate to supplying the municipality and its inhabitants with pure and wholesome water for many years to come. The question is whether the statutes under which the city is exercising its governmental functions permit it to found and maintain a municipal water system in the interests of the public safety and health free from outside competition or interference. This court has

decided that this system of waterworks was erected for the public benefit and is held for public purposes. *City of Rochester v. Town of Rush*, 80 N. Y. 302. This system of waterworks was authorized by Laws 1872, p. 937, c. 387, under which were created the original water commissioners of Rochester. The consolidated charter of Rochester, as amended, transferred the control of the water system to the executive board. The amendments of 1890 (chapter 561, p. 1024, § 150) declare: "The executive board shall have control of the water works of said city, and of the construction of all extensions and additions, improvements and repairs of the same, and of furnishing the water to citizens, and the care and repair of said works, * * * and they may make such rules and regulations and establish such rates for the use of water as they may deem proper." The act for the government of cities of the second class (*White charter*, Laws 1898, p. 371, c. 182) devolves the construction, maintenance, extension, and repair of the city waterworks upon the commissioner of public works (section 109), and it is also made his duty (section 110), "when a vacancy shall occur, to appoint a superintendent of waterworks, and to see that the city has an abundant supply of wholesome water for public and private use; to devise the plans and sources of water supply; to plan and supervise the distribution of water through the city; to protect it against contamination; to prescribe rules and regulations for its use, which, when ratified and approved by the common council, shall have the same force and effect as an ordinance by the common council enacted." The section goes on to give to the commissioner most ample powers in detail. We have here the legislative intention, clearly expressed, that the city of Rochester is to have full and complete control of its system of waterworks even to devising the plans and sources of supply, which may be necessary in every city where the increase of population renders the existing supply insufficient. There is but one fair and workable construction to be given these charters, and that is they make the municipal water system exclusive and free from all outside competition or interference.

If it should be held that these charters, when inconsistent with, are subject to the provisions of, the transportation corporations law, and if the judgment appealed from is affirmed, the right and obligation of plaintiff to furnish water to the authorities and inhabitants of Rochester instantly spring into existence. It thus becomes evident that the real question is not solely whether, under section 82 of the transportation corporations law, plaintiff has the right to pass through the intervening municipality of Rochester, but is the much broader question whether, under the amendment of section 81 of the above law, as already pointed out, the plaintiff can gain a foothold in the city of Rochester which will enable it to become

a competitor of the municipal water system, notwithstanding the charter provisions already quoted, and other stringent enactments contained therein and in the ordinances as to the control of the water system and the public streets, which cannot, for lack of space, be quoted here in full. The question, briefly stated, that dominates this case is, can the plaintiff, under any circumstances, furnish water to the authorities or inhabitants of the city of Rochester? I answer, "No, unless the city of Rochester permits it." The charter of the city of Rochester and its amendments constitute a special act, and are not repealed by the transportation corporations law, in the absence of an express or necessarily implied statement to that effect. The White charter is special in nature as to the transportation corporations law, for it is confined to four cities. Independent of that, however, it is subsequent in date to the transportation corporations law, and hence is superior to the provisions of the latter when there is a necessary conflict.

4. There is a reason, independent of statutory enactments, why the city of Rochester should have exclusive and absolute control of its water system. It is necessarily vested with the police power as a part of its governmental functions. The law of paramount necessity is involved, and the maintenance of the municipal water system, untrammelled by competition or interference, is essential for sanitary purposes, the extinguishment of fires, and the conservation of the public health by furnishing an abundant supply of pure and wholesome water for general consumption. Chief Justice Redfield said: "The police power of the state extends to the protection of the lives, limbs, health, comfort, and quiet of all persons and the protection of all property within the state." *Thorpe v. Rutland & B. R. R. Co.*, 27 Vt. 149, 62 Am. Dec. 625. A city or other political division of the state acts in a dual capacity. In business matters it is treated as a private person in suing and being sued, but when exercising the delegated sovereign power of the state it is judged by the same legal standard as the state itself. *Maxmillian v. Mayor, etc.*, of New York, 62 N. Y. 160, 20 Am. Rep. 468; *Hughes v. County of Monroe*, 147 N. Y. 49, 41 N. E. 407, 39 L. R. A. 33; *Missano v. Mayor, etc.*, of New York, 160 N. Y. 123, 54 N. E. 744. In *People ex rel. N. Y. Electric Lines Co. v. Squire*, 107 N. Y. 593, 606, 14 N. E. 820, 1 Am. St. Rep. 893, *Ruger, C. J.*, in discussing the police power, said: "The right to exercise this power cannot be alienated, surrendered, or abridged by the Legislature by any grant, contract, or delegation whatsoever, because it constitutes the exercise of a governmental function, without which it would become powerless to protect the rights which it was specially designed to accomplish." The police power is as broad and plenary as the taxing power. *Kidd v. Pearson*, 128 U. S. 1, 9 Sup. Ct. 6, 32 L. Ed. 346,

This court has held, as already pointed out, that the Rochester waterworks system is to be regarded as created for the public benefit, held for public purposes, and not subject to taxation. *City of Rochester v. Town of Rush*, 80 N. Y. 302. To subject this system to competition or interference would be to weaken, and possibly destroy, it.

5. In arriving at the conclusion that the plaintiff cannot lawfully extend its route through the city of Rochester, I have not adverted to the charter amendments of 1903, as I am of opinion they are not absolutely essential in reaching that result. The Legislature of 1903 twice amended the charter of the city of Rochester, section 157. Laws 1903, p. 197, c. 59; p. 1226, c. 553. This section is headed: "Power Over Streets, et cetera, to Extend Water Works." The first amendment added these words to the section: "No other person or corporation shall enter upon or excavate any road, street, highway or public place in the city of Rochester, for the purpose of laying down pipes for the conveyance of water, without the permission of the common council." This provision limited the exercise of power to the commissioner of public works. The amendment became operative March 19, 1903. The motion for a preliminary injunction herein was granted March 18, 1903, but the order was not entered until two days later. The appellant claims the legislation precedes the injunction. The order entered related back to the day the motion was granted in writing, with a direction that the order be settled on two days' notice. *Robinson v. Govers*, 138 N. Y. 425, 34 N. E. 209. We do not regard this point as material. The trial of this action, which resulted in the judgment making the preliminary injunction permanent, did not take place until the following April. This judgment was entered notwithstanding the declaration of the Legislature that no other person than the commissioner of public works could lay pipes in the streets for conveying water without the permission of the common council. The force of this legislation was sought to be limited by the trial court in its opinion, but the application of a familiar canon of construction disposes of the matter, to the effect that in construing a statute resort may be had to the circumstances under which and the purposes for which a statute is passed. *People ex rel. Onondaga County Savings Bank v. Butler*, 147 N. Y. 164, 41 N. E. 416; *Smith v. People*, 47 N. Y. 330. It was shown that the object of this legislation was to prevent the plaintiff extending its route through the city of Rochester, and the Governor discloses the fact in his memorandum handed down when signing the bill. The plaintiff was possessed of no franchise or vested rights authorizing it to extend its route through the city of Rochester, and the trial court should have heeded this latest expression of the legislative will.

The second amendment (Laws 1903, p. 1226, c. 553) did not become operative until

May 12, 1903, and need not be considered at this time, although it is a more emphatic announcement of the legislative intention to make the waterworks system of the defendant exclusive.

6. Our attention is called to the fact that the trial court sought, in its judgment, to protect the defendant by stringent provisions as to the manner in which plaintiff should proceed with its work. The plaintiff's contention was that it is authorized by law to lay out its route through the city of Rochester, and the local officials had no authority to interfere in any way. The defendant's position was that the plaintiff had acquired no franchise or vested rights in the premises, and could not enter the city of Rochester without its permission. There is no middle ground lying between these two positions. The plaintiff could extend its route through the city of Rochester undisturbed, or it was powerless to do so unless the defendant gave its permission. The provisions in the judgment to which reference has been made were unauthorized, as the rights of the parties rest upon legislative enactment.

7. The trial court found (finding 12) that it was necessary for plaintiff to pass through the city of Rochester "in order to carry out the purposes of its incorporation and fulfill the contracts which it has made and assumed," etc. This finding must be read, however, with another (finding 20), to the effect that it is a physical possibility to reach the territory on the east of the city of Rochester without laying any pipes within its territory, but the cost of construction would be materially greater.

8. It would seem quite impossible to read this record without reaching the conclusion that the real object of this plaintiff is to accomplish by indirection that which it could not secure otherwise, to wit, an entrance into the city of Rochester for the purpose of ultimately serving that city and its inhabitants with water as a competitor of the existing municipal waterworks system. I have previously pointed out that the plaintiff admits that whenever the question is presented (and we hold that it is presented now) it will insist that it can legally furnish water in the city of Rochester to the railroad companies, with which it has contracted, and to such adjoining owners as can be reached without laying its pipes along the streets. I have also called attention to the fact that, if this route can be extended through the city of Rochester under the provisions of the transportation corporations law, as contended, then the amendment of section 81 in 1896 would enable the plaintiff to furnish water to the defendant and its inhabitants, subject only to the reasonable regulations and control of the local authorities. The learned Appellate Division in its opinion says: "It is obvious, however, that the incidental privileges of supplying water to the Central Railroad Company and contiguous property owners within the city of Rochester was one of

the chief inducements to the organization of the plaintiff, although that intention was not embodied in its certificate of incorporation filed with the Secretary of State, and upon which its organization tax was accepted by the state." The learned court, notwithstanding its expressed conviction that plaintiff was impelled by ulterior motives, failed to apprehend the full legal results of affirming the judgment of the Trial Term.

It may be further stated that a corporation having a capital stock of \$2,500,000, and the power to issue bonds for a large sum, would not be justified in marketing such an amount of securities if its real object was only to furnish water to the rural localities named in the certificate, with their small aggregate population. The fact that the plaintiff has selected the corporate name of the Rochester & Lake Ontario Water Company is not without significance as bearing upon plaintiff's ulterior designs.

9. I have to say, in conclusion, that, while there are many objections to the judgment below, the primary and controlling one is that the plaintiff sought an injunction to promote an illegal purpose, and hence its prayer for relief should have been denied.

The judgment of the Appellate Division and the Special Term should be reversed, with costs.

PARKER, C. J., and GRAY and O'BRIEN, JJ., concur with HAIGHT, J. MARTIN and VANN, JJ., concur with BARTLETT, J.

Judgment affirmed.

(176 N. Y. 106)

ADAMS et al. v. ELWOOD.

(Court of Appeals of New York. Oct. 6, 1903.)

APPEAL—HARMLESS ERROR—OBJECTIONS TO EVIDENCE—JUDICIAL NOTICE.

1. A judgment will not be reversed for immaterial errors.

2. Where a ruling is reserved to an objection to evidence, but never made, an exception cannot be taken as if the objection had been made.

3. Where, in an action for an accounting, the alleged incorrectness of the inventory was a material fact, a question whether the witness had explained the mistakes therein to one of the plaintiffs was properly excluded, where it was not claimed that the plaintiff to whom the explanation was made admitted anything in connection therewith; and, in the absence of any such admission, the explanation of defendant was immaterial.

4. The court cannot take judicial notice of the fact that a county contains more than 120,000 inhabitants, where the last public record showed the population to be less than that in number, though in point of fact it may have been more at the time of the trial, as the court must be governed by the facts shown by the public records.

Appeal from Supreme Court, Appellate Division, Second Department.

Action by Mary Ann Adams and others, as executors of Walter Adams, against George Elwood. From a judgment of the Appellate Division (76 N. Y. Supp. 1008) affirming a

judgment for plaintiff, and also from an order of the Appellate Division (70 N. Y. Supp. 1134) affirming an order denying a motion to vacate an order of reference, defendant appeals. Affirmed.

William L. Mathot, for appellant. R. J. Shadbolt and James M. Seaman, for respondents.

WERNER, J. This action was brought to compel a surviving partner to render an accounting. Plaintiffs' testator and the defendant had for many years been partners in a botanical drug business in the city of New York, when the firm was dissolved on the 1st day of March, 1895, by the death of Walter Adams, one of the partners. The action was tried before a referee. The complaint alleges, and the referee has found, that after the death of Adams the defendant Elwood continued the business down to the time of the commencement of this action in December, 1899, and refused to wind up the partnership affairs or to render an account, although he was asked to do so by the plaintiffs.

Defendant's answer sets forth an alleged agreement between the plaintiffs and the defendant, under which the latter claimed the right to continue the business for the benefit of all concerned, he to receive a compensation of \$1,000 per year for his services, after which the plaintiffs were to have the right to withdraw the proportionate interest in the profits to which their testator's estate should be entitled, besides such portions of the capital as should from time to time be agreed upon. The plaintiffs denied the existence of the alleged agreement, and the referee has found that the defendant has failed to establish it. The referee has further found that the interest in said firm of plaintiffs' testator at the time of his death was \$7,927.03, upon which the defendant has paid \$5,588.55, leaving a balance due of \$2,338.48, which, with interest amounting to \$1,325.75, entitles the plaintiffs to judgment against the defendant for \$3,664.23.

The judgment entered upon the referee's report having been unanimously affirmed at the Appellate Division, the case is now before this court subject to the constitutional and statutory limitations under which every question of fact is conclusively deemed to have been resolved in favor of the plaintiffs in the courts below. This leaves for review nothing but the exceptions to the rulings of the referee, and the appeal from the order denying defendant's motion to vacate the order of reference, which is brought up with the main appeal under the provisions of section 1316 of the Code of Civil Procedure.

Only three exceptions to the rulings of the referee are discussed by the learned counsel for the appellant. Two of them relate to the question of value of fixtures and merchandise, and the third refers to alleged errors in an inventory made by the defendant,

¶ 4. See Evidence, vol. 20, Cent. Dig. § 17.

and which he claimed to have explained to one of the plaintiffs. The rulings upon questions of value referred to were clearly right, but, even if it were conceded that they were erroneous, they are not of sufficient importance to justify a reversal of the judgment. When the defendant was asked if he had explained to the plaintiffs the alleged errors in the inventory, the question was objected to as incompetent, irrelevant, and immaterial; that the defendant was incompetent to testify to the value of the fixtures, and he was bound by the inventory as it was made by himself January, 1895, and approved by his partner, Mr. Adams, during his lifetime. The referee reserved his decision upon this objection, and no ruling thereon was subsequently made, so that it must now be treated as though it had been sustained and an exception taken. *Lathrop v. Bramhall*, 64 N. Y. 365.

This view of the matter does not help the appellant, however, for we think the ruling was right. The question was irrelevant and immaterial. The alleged incorrectness of the inventory may have been a competent and material fact for the consideration of the referee, but the excluded question simply called upon the witness to state whether he had explained the mistakes therein to one of the plaintiffs. It was not claimed or suggested that the plaintiff to whom the explanation is said to have been made admitted anything in the light of, or in connection with, defendant's explanation; and, in the absence of some statement or admission on the part of the plaintiffs that would be binding upon them, the naked explanation of the defendant, even if admitted in evidence, would have contained nothing material to the issue.

The referee in the case was the county judge of Queens county, having been elected to that office in November, 1897. He was appointed referee by an order entered April 10, 1900. His report was dated October 31, 1900. On the 21st day of March, 1901, the defendant made a motion at Special Term to vacate the order of reference, the referee's report, the judgment entered thereon, and all other proceedings in the action subsequent to the order of reference, on the ground that the court had no jurisdiction to appoint as referee any person holding the office of county judge in a county having more than 120,000 inhabitants. Article 6, § 20, Const. This motion was denied, and the order entered upon that decision was affirmed at the Appellate Division. The appeal from that order is now before this court by virtue of the specification in the defendant's notice of appeal that he will seek to have the order reviewed on the main appeal. This branch of the case can also be very briefly disposed of. If the contention of the defendant as to the population of Queens county rests upon a question of fact, the adverse decision of the courts below is conclusive upon him in this court. If, on the other hand, the inquiry involves

facts of judicial cognizance, then we must refer to the data in existence at the time when the referee herein was appointed. The order of reference is dated April 10, 1900. The federal census of that year was not taken until June, and the figures relating thereto were not obtainable until later. The last enumeration of the inhabitants of the state prior to April, 1900, was that of 1892, which fixed the population of Queens county at 141,807. From these figures must be deducted the population of the towns of Hempstead, North Hempstead, and Oyster Bay, which in 1899 were erected into the present county of Nassau, and which in 1892 had a population of 47,604. Deducting the population of these three towns in 1892 from the total population of Queens county in the same year leaves to the latter county in 1892 a population of 94,203. It is probably true that there was a steady increase in the population of Queens county in all the years from 1892 to 1900, but it may be equally true that the growth of population may have been principally in the towns now forming Nassau county. There may be a moral certainty that the population of Queens county in 1900 exceeded 120,000, but in this matter we can take judicial notice of nothing but facts authenticated by public records. The last public record preceding the appointment of the referee herein is that of 1892. According to that record the population of Queens county was less than 120,000, and the contention of the appellant as to the disqualification of the referee cannot be sustained.

The judgment herein should be affirmed, with costs.

PARKER, C. J., and O'BRIEN, BARTLETT, VANN, and CULLEN, JJ., concur. MARTIN, J., absent.

Judgment affirmed.

(176 N. Y. 111)

HICKS v. MONARCH CYCLE MFG. CO.
(Court of Appeals of New York. Oct. 6, 1903.)

BAILMENT—LOSS OF PROPERTY—EVIDENCE OF VALUE.

1. Plaintiff sued to recover damages for the loss of a bicycle and models of a patented improvement thereon received by defendant for examination, at his risk, and at an alleged agreed valuation. *Held*, that evidence of an expert as to the cost to reproduce a model fashioned after the patents of the lost model was admissible on the issue whether the sum agreed upon was to be regarded as liquidated damages or a penalty, and as tending to show whether the sum demanded was an unreasonable price for the property.

2. Where plaintiff sues to recover for the loss of property consisting of a bicycle and models of a patented improvement thereon, evidence as to the value of the models is not inadmissible on the ground that it related only to the models, and not to all of the articles in question.

Parker, C. J., and Bartlett and Haight, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, First Department.

Action by John B. Hicks against the Mon-

arch Cycle Manufacturing Company. From a judgment of the Appellate Division (74 N. Y. Supp. 180) affirming a judgment for plaintiff entered on a verdict and an order denying a new trial, defendant appeals. Reversed.

Charles A. Wendell and Alfred W. Kiddle, for appellant. E. F. Hills and L. A. Wray, for respondent.

WERNER, J. In this action the plaintiff seeks to recover from the defendant \$1,000 as damages for the failure of the defendant to return a bicycle and two models delivered to it under the following circumstances: The plaintiff was part owner of a patent upon an improved bicycle gear. During the month of February, 1898, he delivered to defendant's agents, at its salesroom in New York City, a bicycle to which was attached the patented device referred to, and also two models thereof, and left them there for the purpose of having defendant's agents examine the same with a view to inducing the defendant to adopt it upon the bicycles manufactured by it.

The plaintiff's testimony tended to show, and the jury had the right to find, that certain authorized agents of the defendant examined plaintiff's bicycle with its attachments and the accompanying models, and expressed a desire to send it to defendant's factory in Chicago for the purpose of having it there examined by experts, and that this arrangement was agreed to, with the proviso that said property should be received at defendant's risk, at an agreed valuation of \$1,000. The defendant admits the receipt of the property, the shipment thereof to its factory at Chicago, and its failure to return the same to the plaintiff, but denies that any valuation was ever agreed upon.

As part of the plaintiff's case he introduced in evidence a receipt signed by one Strout, an agent of the defendant, which was in the following form: "Recd. one bicycle from J. B. Hicks for examination and return. Value 1000.00." This receipt was signed by Strout individually, but was written on the back of a business card of the defendant, indicating that Strout was the manager of defendant's New York sales department. Defendant's witnesses gave evidence tending to show that the statement as to value was not in the receipt when it was signed, and that this statement had been written into the receipt after its delivery to the plaintiff.

The case was submitted to a jury, and plaintiff had a verdict for \$1,000. The judgment entered upon that verdict was affirmed by a divided court. As there was some evidence to support the verdict, the present review must be confined to questions arising upon the rulings of the trial court in the reception and exclusion of evidence. We shall limit our discussion to a single exception, which we think is fatal to the judgment appealed from.

Upon the question of damages defendant called an expert in the manufacture of bicycles, and he was asked by defendant's counsel if he could tell as an expert what it would cost to reproduce by hand a model fashioned after the patent referred to. He answered in the affirmative, and was then asked what it would cost. This question was objected to by plaintiff's counsel as immaterial and incompetent, "and also upon the ground that it appears that the wheel was received and the models on the valuation of \$1,000.00 by the company." The objection was sustained, and the defendant took an exception.

This evidence was clearly admissible. Whether the sum of \$1,000, which the plaintiff claimed had been agreed upon as the value of the articles delivered by him to the defendant, was to be regarded as liquidated damages, or merely as a penalty, was a question of intent to be deduced from the circumstances. If the sum named was an unreasonable price for the articles, evidence tending to show that fact would have had a very material bearing upon the question of damages. The rule is that "when the stipulated sum is disproportionate to presumable or probable damage, or to a readily ascertainable loss, the courts will treat it as a penalty, and will rely on the principle that the precise sum was not the essence of the agreement, but was in the nature of security for performance." *Ward v. Hudson River Bldg. Co.*, 125 N. Y. 230, 26 N. E. 752; *Curtis v. Van Bergh*, 161 N. Y. 47, 55 N. E. 398; 3 *Parsons on Contracts* (8th Ed.) 157.

The learned Appellate Division sought to uphold this ruling upon the ground that, since the question asked related only to the models and not to all of the articles in question, it was improper and immaterial. We do not concur in that view. The defendant had the right to give the value of the different articles separately, and in that way to establish their total value. There is nothing in the form of the excluded question to indicate that defendant's counsel did not intend to adopt this method. No specific objection was taken to the form of the question in this particular, and it is only fair to assume that if such an objection had been taken the defendant's counsel would have changed the form of his question, although we do not think that was necessary. Considering the nature of the case, the question of damages was obviously an important one, and the erroneous ruling pointed out must have injuriously affected defendant's rights.

For the reasons stated the judgment should be reversed, and a new trial granted, with costs to abide the event.

MARTIN, VANN, and CULLEN, JJ., concur. PARKER, C. J., and BARTLETT and HAIGHT, JJ., dissent.

Judgment reversed, etc.

(176 N. Y. 97)

BAER v. McCULLOUGH et al.

(Court of Appeals of New York. Oct. 6, 1903.)

FEDERAL RECEIVER—ACTION AGAINST—DISCHARGE OF RECEIVER—CONTINUANCE OF ACTION—SUBSTITUTION OF PARTIES—TAX DEED.

1. Plaintiff sued the receivers appointed by a federal court in the Supreme Court of the state under the provisions of the Revised Statutes of the United States authorizing actions without leave of court against a receiver appointed by a federal court in respect to any act of his in carrying on the business. Before the trial the property was sold under a decree of foreclosure providing that the purchaser should discharge any obligations incurred by the receivers before the delivery of the property sold. *Held*, that the action was not terminated by the discharge of the receivers and the transfer of the property, so as to require the plaintiff to substitute the purchaser thereunder as defendant, under Code Civ. Proc. § 756, requiring that, on transfer of interest or devolution of liability, the action may be continued by or against the original party.

2. Though the Revised Statutes of the United States authorizing the bringing of actions against a receiver appointed by a federal court provide that the suit shall be subject to the general jurisdiction of the court in which such receiver was appointed, they do not require the discontinuance of an action against a receiver after his discharge on the ground that the decree of the federal court provided a method for establishing claims against the fund in the hands of the receiver.

3. Under Laws 1896, p. 841, c. 908, § 132, providing that a tax deed which has been recorded for two years with the clerk of the county shall be conclusive evidence as to the validity of the sale and the prior proceedings, a tax deed is admissible in evidence without proof of the regularity of the proceedings upon which it was based.

Appeal from Supreme Court, Appellate Division, Third Department.

Action by Elias Baer, executor of George Baer, against John G. McCullough and others, receivers of the New York, Lake Erie & Western Railroad Company. From a judgment of the Appellate Division (76 N. Y. Supp. 1008) affirming a judgment in favor of plaintiff, defendants appeal. Affirmed.

Henry Bacon and Joseph Merritt, for appellants. Frank S. Anderson and John F. Anderson, for respondent.

PARKER, C. J. While defendants were receivers of the property of the New York, Lake Erie & Western Railroad Company they allowed an accumulation of inflammable material upon its property and near its tracks, which was set fire by sparks from a locomotive. The fire spread to the adjoining property of plaintiff, occasioning him substantial damage. The accumulation of combustible material was in violation of statute, and the jury found defendants guilty of negligence, and fixed the damages at a sum for which judgment was entered, with costs, and subsequently affirmed by the Appellate Division.

It is urged in this court, as it was in the courts below, that, inasmuch as there is no personal liability on the part of the receivers, it was error to deny defendants' motion,

upon the opening of the trial, that the court proceed no further with the action because defendants were no longer receivers, having discharged the duties of their trust, and been discharged by the court after a sale of the property pursuant to decree. As the learned counsel for defendants now states it, the receivers having terminated their receivership, any action or legal proceeding against them was necessarily terminated, and it was not competent for the Supreme Court of the state of New York to continue or permit the continuance of any action against defendants as receivers appointed by the Circuit Court of the United States after that court had terminated the receivership and discharged them. The action was brought against defendants while they were receivers, and in full possession of the property, and it was properly brought under that provision of the Revised Statutes of the United States which authorizes the bringing of actions, without previous leave of the court, against a receiver appointed by a federal court, in respect to any act or transaction of his in carrying on the business connected with such property.

After the action was at issue, but before trial, the railroad property was sold pursuant to a decree of foreclosure and sale. But such decree expressly provided that: "The purchaser or purchasers shall, as part consideration and purchase price of the property purchased, and in addition to the sum bid, take the same and receive the deed therefor upon the express condition that he or they or his or their successors or assigns shall pay, satisfy, and discharge any unpaid compensation which shall be allowed by the court to the receivers, and any indebtedness and obligations or liabilities which shall have been contracted or incurred by the receivers, or which may be contracted or incurred by the receivers before the delivery of the possession of the property sold, whether or not represented by certificates hereinafter issued, and also any indebtedness or liabilities contracted or incurred by said defendant railroad company in the operation of its railroad prior to the appointment of the receivers. * * *"

In pursuance of such sale the property was conveyed to the Erie Railroad on November 14, 1895, and necessarily came to it burdened with the obligation imposed by the decree to pay any judgment finally rendered in the action in favor of plaintiff. The Supreme Court would undoubtedly have substituted it in the place of the receivers had it made a motion to that end, and it may well be that, had the receivers moved for a substitution of the Erie Railroad, it would have been granted; but the Erie Railroad did not demand a substitution to the end that it might the better protect its rights, nor did the receivers seek to relieve themselves of the burden of making a contest, which, if successful, would result in a benefit to the Erie Railroad, and, if unsuccessful, in an addition to its financial responsibilities.

One question, therefore, is, was plaintiff bound to bring about a substitution before he could proceed to judgment? The answer to that question is furnished by section 756 of the Code of Civil Procedure, which provides that: "In case of a transfer of interest, or devolution of liability, the action may be continued by or against the original party; unless the court directs the person, to whom the interest is transferred, or upon whom the liability is devolved, to be substituted in the action, or joined with the original party, as the case requires." In this case the taking title to the railroad property by the Erie Railroad under the decree of foreclosure operated as "a devolution of liability" upon the railroad for all valid claims against the receivers, whether growing out of contract obligations or negligence in the operation of the railroad. Hence it was proper, under that section, for plaintiff to proceed to judgment against the receivers, in view of the fact that the court did not cause the Erie Railroad to be substituted in the action. This judgment, while in form one against the receivers, establishes such a liability as the Erie Railroad has agreed to pay, and its agreement may be enforced by the federal court, if need be, for that court not only provided in its decree that the purchaser of the property should take title subject to all the obligations or liabilities of the receivers, but by the same decree reserved the right to enforce the payment of all such obligations in the event of the purchasers refusing to make payment after demand.

The cases cited as tending to establish a different practice (*Herring v. N. Y., L. E. & W. R. R. Co.*, 105 N. Y. 340, 12 N. E. 763; *N. Y. & W. U. Tel. Co. v. Jewett*, 115 N. Y. 166, 21 N. E. 1036) were commenced after the discharge of the receivers, and hence do not present the point. The same is true of *Thompson v. Northern Pac. Ry. Co.*, 93 Fed. 384, 35 C. C. A. 357, in which it is held that under a decree like the one in the case at bar a purchaser is a proper party defendant to an action on such a claim, being entitled to defend, and that in an action commenced after the property has been conveyed to it and the receivers have been discharged it might properly be made sole defendant. In that case defendant, the purchaser of the road at foreclosure sale, objected to being made defendant, although the action was commenced after the receivers had been discharged. The trial court was of the opinion that its objection was well made, and dismissed the complaint, but on the review it was held that, under the peculiar circumstances of that case, the receivers having passed out of existence officially before the action was begun, it was proper to commence it against the party upon which liability had devolved by reason of the terms of the decree of foreclosure and its purchase thereunder. But it is unnecessary to examine, for the purpose of distinguishing,

cases in the federal courts, for this cause of action did not abate upon the discharge of the receivers, but continued; and the practice to be followed by the courts of this state having jurisdiction of the original parties and of the cause of action is provided by the legislation of this state, which, as we have seen, is to the effect that the action may continue against the receivers unless the court directs the person upon whom the liability has devolved to be substituted. The court did not so direct, as it probably would have done had the Erie Railroad asked it, and so the plaintiff had the authority of our statute to proceed to judgment against the receivers.

The defendants make the further point that, assuming that the practice followed in this case would have been proper had the decree of foreclosure been made by the Supreme Court of this state, it furnishes no precedent for the conduct of that court in this case, inasmuch as the decree was made by a federal court, and in such case our courts should refuse to lend aid to establish a claim against the fund after the discharge of the receivers, although the action brought for that purpose was pending at the time of such discharge. As we understand the claim of the learned counsel for defendants, our court should have said to plaintiff, "True, the statutes of the United States in terms authorized you to commence the action in this court without the consent of the federal court, but, notwithstanding that authorization, your action must fail, because the federal court has seen fit since its commencement to discharge the receivers, and has provided a method for establishing claims against the fund that was in the hands of the receivers." This contention is mainly founded upon a clause in the provision of the statute already referred to authorizing the commencement of a suit without leave of the federal court, which reads, "But such suit shall be subject to the general equity jurisdiction of the court in which such receiver was appointed." It would be unfortunate, indeed, if two jurisdictions, both within the same territory, should work so inharmoniously, burdening the citizen with two litigations where one should suffice, and producing that multiplicity of actions which is abhorrent to the law—a result which the judges of each jurisdiction charged with the responsibility of administering the law so that its burdens shall rest as lightly as possible upon litigants will find a way to avoid unless prevented by the commands of a statute. We find no decision construing the provisions of the statute last quoted in the light of a situation such as this, and are therefore unrestrained by authority from giving to it such a construction as, in our judgment, it requires. Clearly, the statute indicates that it was a part of the congressional scheme that the appointment of receivers of great corporations—in the case of rail-

roads, covering hundreds, and sometimes thousands, of miles, with property extending through many different counties and states—should not operate to prevent parties having claims against such corporations, or against the receivers thereof, from proceeding in the courts of the neighborhood precisely as they could have done when the corporation was managing the property. And to save the citizen unnecessary expense, and the more surely to protect him in his rights, it provided, in effect, that the right to bring the action should not depend upon the will of the court appointing the receivers, and so could be brought without the consent of such court. But while Congress intended to permit the establishment of claims against the fund in the hands of the receivers to take place through the ordinary local judicial machinery, it could not, of course, tolerate an attempt on the part of such courts to take possession of so much of the fund or property in the hands of the receivers as would be necessary to the satisfaction of the claims. Only one court could be permitted to operate the property, marshal the assets, decree a sale, and provide for the distribution of the assets among those entitled thereto, and hence it was deemed necessary to establish the boundary line beyond which state courts could not go. Such a construction is in harmony with the decree made by the federal court in this case. True, it provided for a method by which claims against the fund could be ascertained, but it did not provide that such method was exclusive, nor do we think it could have so provided in view of the language of the statute authorizing the commencement of suits without its consent; for, if it could take to itself exclusive jurisdiction to establish claims against the fund by decree made at the close of the litigation, it could also do it at the outset of the litigation, and in such case the authority conferred by statute upon other courts to take jurisdiction of actions brought against the receivers would be without effect, and, of course, the statute cannot thus be brushed aside. The decree of the federal court in this case was made on broader lines; lines more convenient for the litigant, and in harmony with the statute. It assured the creditor that his claim, whether established or not at the time of the sale of the property, should be paid; and it did not attempt to take from him the right, plainly given him by the statute, to select the court most convenient to him; and it reserved to the federal court, in the interest of all the creditors, the right to proceed at the foot of the decree to make such further order as might be necessary to carve out of the property or take from the fund such sum as should be necessary to satisfy all claims established through the proper legal machinery provided either by the state or the federal government in the event that the purchaser of the property, the Erie Railroad Company, should fail to pay such claims.

Exception was also taken to the admission in evidence of a tax deed upon which plaintiff relies to establish his title. The objection made was that the deed, executed by the county treasurer of Sullivan county in his official capacity, was not admissible or competent to prove title without proof of such proceedings as authorized him to make the sale and make the conveyance; and defendants invoke the rule of law that where a deed is made by a public officer, or by any person under a naked power uncoupled with an interest, it is not admissible in evidence without proof of the facts which show the power and the right to exercise it, citing in support thereof *Sinclair v. Jackson*, 8 Cow. 543, *Beekman v. Bigham*, 5 N. Y. 366, and *Thompson v. Burhans*, 61 N. Y. 52. They concede that by chapter 194, p. 239, of the Laws of 1878, it was provided that every conveyance made by the county treasurer under such act should be presumptive evidence that the sale was regular, and that all the previous proceedings were regular, according to the provisions of this act; and also that by chapter 594, p. 851, of the Laws of 1886, amending said section 8, it was further provided that such a deed should be conclusive evidence that the sale and all proceedings subsequent and prior thereto, including the assessment of the land, were regular and valid; but urges that both of those acts were repealed by chapter 218, p. 384, of the Laws of 1888, and hence it was necessary for the plaintiff to establish the facts authorizing the execution of the deed so as to bring the case within the rule of the authorities cited. This argument overlooks section 132 of the tax law (chapter 908, p. 841, Laws 1896), which provides that: "Every such conveyance heretofore executed by the comptroller, county treasurer or county judge and all conveyances of the same lands by his grantee or grantees therein named, which have for two years been recorded in the office of the clerk of the county in which the lands conveyed thereby are located, * * * shall be conclusive evidence that the sale and proceedings prior thereto, from and including the assessment of the lands, and all notices required by law to be given previous to the expiration of the time allowed for redemption, were regular and were regularly given, published and served according to the provisions of all laws directing and requiring the same or in any manner relating thereto. * * *" Before this court in *People v. Turner*, 117 N. Y. 227, 22 N. E. 1022, 15 Am. St. Rep. 498, it was argued that a similar statute was unconstitutional, but it was held that the effect of the statute was to change the rule of evidence as it existed at common law, and also to vary the existing rules relating to the limitation of time for the commencement of legal proceedings, which is within the power of the Legislature, and therefore the act was valid.

This provision of the tax law, the validity of which is sustained by *People v. Turner*, fully justifies the ruling of the trial court in admitting the deed in evidence without proof of the regularity of the proceedings upon which it was based.

The judgment should be affirmed, with costs.

O'BRIEN, BARTLETT, VANN, CULLEN, and WERNER, JJ., concur. MARTIN, J., absent.

Judgment affirmed.

(176 N. Y. 65)

TRENTON POTTERIES CO. v. TITLE GUARANTEE & TRUST CO.

(Court of Appeals of New York. Oct. 6, 1903.)

TITLE INSURANCE—CONSTRUCTION OF POLICY—TIME OF TAKING EFFECT—EVIDENCE.

1. A title insurance policy agreeing to insure the holder against all damage, not exceeding a certain sum, which he may sustain from any defects in title, or by reason of the unmarketability of the title, or against any liens or incumbrances on the property at the date of the policy, insures against any loss through defects or incumbrances existing at the time when the insured takes his title, and bears the same date as the deed under which the insured holds.

2. A policy of title insurance covered five separate tracts, but its issuance was postponed until title to the fifth parcel was perfected by a proceeding at law. There was no intent of either of the parties to have the property insured beyond the date when it became the property of the insured. A single policy was issued on agreement after all the titles were perfected as a matter of convenience with no intent to in any way affect the liabilities of the parties under the policy. In executing the policy the date was by mistake fixed as that of the date on which the deed to the last lot was obtained. *Held*, that the policy as to the other four lots would be reformed so as to make it bear the same date as the deeds to such lots.

3. Where a title insurance policy was issued on certain property, but not until seven months after the date of the deeds of the property to the insured, the insurer was not liable for an assessment for a street opening which became a lien on one of the parcels three months after the insured had taken title thereto, it being the intent of the parties that the policy should only cover incumbrances existing at the time of the taking of the title.

4. In an action on a title insurance policy, testimony of experts in such insurance as to what ought to have been done in the issuance of the policy in question is inadmissible to support the legal conclusion that the policy should have been different in form.

Appeal from Supreme Court, Appellate Division, First Department.

Action by the Trenton Potteries Company against the Title Guarantee & Trust Company. From a judgment of the Appellate Division (74 N. Y. Supp. 170) affirming a judgment in favor of defendant, plaintiff appeals. Affirmed.

Howard R. Bayne, for appellant. George Coggill and John L. Cadwalader, for respondent.

WERNER, J. This action is brought to recover upon a policy of title insurance the amount of an assessment which became a lien upon the property of the plaintiff after it had taken title thereto and gone into possession thereof, but before the date of the policy. It appears that the plaintiff, a New Jersey corporation, was formed for the purpose of taking over the property and business of five pottery plants in Trenton, N. J., known as the "Empire," "Crescent," "Equitable," "Delaware," and "Enterprise," and it employed the defendant to search the titles and to insure them. Early in July, 1892, the titles to four of these plants were ready for transfer, but the title to the Empire plant was incumbered by certain infants' interests that could not be conveyed without judicial sanction in proceedings instituted for that purpose. This complication led to an interview between a representative of the plaintiff and another of the defendant, in which it was decided to have a single policy to cover all of the properties, and to defer the issuance thereof until the Empire title could be perfected. At this interview the deeds conveying to the plaintiff the Crescent, Equitable, Delaware, and Enterprise potteries were delivered to defendant's representative, and by him recorded, and thereupon the plaintiff went into possession of these four plants. The defects in the Empire title were removed and the conveyance of that property was made on April 19, 1893, the deed being recorded April 24, 1893, on which date the policy in suit was issued. On the 12th of October, 1892, an assessment for a street opening became a lien on the Crescent property. This was three months after the plaintiff had taken title thereto, and seven months before the defendant issued its policy. The plaintiff, having paid the assessment, called upon the defendant for reimbursement, which was refused, and this action was brought.

There have been two trials. Upon the first trial it was held that the plaintiff could not recover, because it was the owner of the property upon which the assessment was made at the time it became a lien. The judgment entered upon that decision was reversed at the Appellate Division upon the ground that it could not be held as matter of law that a policy dated subsequent to the assessment, and which in terms purported to insure against liens and incumbrances charging the property at the date of the policy, was intended to cover only such liens and incumbrances as existed when the plaintiff took title. Upon the second trial the defendant was permitted to introduce oral evidence in support of its allegation that by inadvertence and mistake the policy was dated April 24, 1893, when in fact it should have been dated July 1, 1892, as to the four properties conveyed on the latter date. The learned trial court held that the allegation of mistake was abundantly supported by the evidence, and the judgment in favor of de-

fendant, entered upon that decision, has been unanimously affirmed by the learned Appellate Division. The learned counsel for the appellant, realizing the limitations imposed upon him by the unanimous affirmance, takes the position that, if the incompetent evidence received over his objections was expunged from the record, it would be barren of proof tending to show inadvertence or mistake in the framing of the contract of insurance. This contention is amply justified so far as it relates to the evidence of so-called "experts" in title insurance who were permitted to give their opinions as to what they would have done or what ought to have been done in the issuance of such a policy under the conditions above described. There is so much of that kind of incompetent evidence received under the objections and exceptions of plaintiff's counsel that we cannot attempt to reproduce it here, and we shall only give two or three specimen questions and answers to illustrate how far afield the defense was permitted to go in its attempt to secure a reformation of the contract on the ground of inadvertence and mistake. One Van Buskirk, a lawyer, and a director of the defendant, was asked: "If you had issued a policy of insurance at or about that time on the closing of these titles, upon the four titles which were pronounced to be good, what would have been the date of that policy of insurance?" The witness answered, "The date of the recording of the deeds." Another witness for the defendant, named Green, who was manager of a New York title insurance company, was asked: "In a case where several pieces of property were transferred, but on different dates, and the record date of the different deeds bore, of course, different dates, what, under such circumstances, does the policy, if it bears a single date and is a single policy, show in the custom of your business?" The answer of the witness was: "As a matter of form, it would bear the date of the face of the last deed, but as to its application it would only have the application of the record dates of the several deeds." And, again, a witness (Bailey) was asked, "In what respect does this policy fail to conform to the usual form of title insurance policy under these circumstances?" His answer was: "It insures against liens subsequent to the date of the acquiring of the title of a number of the properties set forth in the policy." In these three instances, which, as we have said, are merely illustrative of numerous others, defendant's witnesses testified to what they would have done under similar circumstances, to the custom of other title insurance companies in such cases, and to the legal conclusion that the policy should have been different in form. This unique and summary disposition of the whole case would excite no less surprise than criticism were it not for the embarrassments by which the learned trial court and the counsel for the defendant were surrounded.

A former trial court had held, in substance, that the mistake in the policy was obvious on its face, or that it should at least be so construed as to cover no liens or incumbrances accruing after the several titles had vested in the plaintiff. The appellate court had disagreed with this view, and ordered a new trial on the ground that the policy, as written, covered the assessment, which became a lien upon the Crescent property prior to the date of the policy, although after defendant took title thereto, and that the policy would have to be reformed before the defendant could be relieved from liability. These embarrassments were accentuated by the fact that this was not the usual case of mistake caused by a misunderstanding of terms expressed in conversation, and inaccurately or erroneously transcribed into the written instrument; on the contrary, the mistake was the result of inadvertence in the failure of the parties to notice that the date of the policy, unqualified and unexplained, had the effect of creating a contract that was not intended to be made by either party. As the Appellate Division had laid down no rule of procedure for the second trial, it was obvious there was but scant room for competent oral evidence, unless the opinions of experts in title insurance could be received; and this probably accounts for the freedom with which incompetent testimony was offered and admitted when once the forbidden field had been entered.

We hold that the opinions of the experts were not competent, and when that testimony is expunged from the case it becomes apparent that the unanimous affirmance in the Appellate Division will not support the judgment herein unless the nature and purpose of the contract, coupled with the facts and circumstances surrounding the transaction, are such as to justify or require a reformation of the policy. In determining that question it becomes necessary to scrutinize somewhat more closely the contract as written, its nature and purpose, the conditions under which it was made, and the legitimate oral evidence, if any, bearing upon the transaction.

First. As to the written contract. In the body of the policy the defendant undertakes to insure the plaintiff "against all loss or damage, not exceeding four hundred thousand dollars, which the insured shall sustain by reason of any defect or defects of title affecting the premises described in Schedule A, hereto annexed, affecting the interest of the insured therein as described in said schedule, or by reason of unmarketability of the title of the insured to or in said premises, or by reason of liens or incumbrances charging the same at the date of this policy." The policy is dated April 24, 1893. The premises described in Schedule A are the five pottery plants above referred to. The assessment which occasions this suit became a lien in October, 1892, or seven months prior to

the date of the policy. Upon these facts, considered alone, there could hardly be any controversy as to the meaning of the contract. But Schedule A enumerates the several deeds by which the five pottery plants were conveyed to the plaintiff, and shows that four of them, including the one affected by the assessment, are dated June 16, 1892, and were recorded July 8, 1892, which was three months before the assessment became a lien. The plaintiff went into possession of these four plants immediately upon taking title thereto, although the deeds thereof were left with the defendant pending the perfecting of the title to the fifth plant and the issuance of the policy.

Second. As to the nature and purpose of the contract. The contract is one of insurance against defects in title, unmarketability, liens, and incumbrances. The risks of title insurance end where the risks of other kinds begin. Title insurance, instead of protecting the insured against matters that may arise during a stated period after the issuance of the policy, is designed to save him harmless from any loss through defects, liens, or incumbrances that may affect or burden his title when he takes it. It must follow, as a general rule, therefore, that when the insured gets a good title the covenant of the insurer has been fulfilled, and there is no liability. It is also apparent from the very nature of the contract that it usually bears the same date as the deed of the title which it purports to insure, and that if, in a given case, there is a discrepancy between these dates, it must be due to some exceptional circumstance, which should be noted in the contract. In the contract before us the absence of any special note as to the date negatives any intention to take this case out of the general rule.

Third. As to the facts and circumstances under which the contract was made. The plaintiff, as a part of its plan of organization, was to take over the title to the five potteries above named. Four of these titles were perfected July 8, 1892. Had the fifth title been ready at the same time, the policy of insurance upon the five titles would, of course, have been issued at that time. The fifth title being imperfect, the question arose whether the defendant should then issue separate policies upon each of the four perfected titles, and issue a fifth one when the outstanding title was made good; or whether the plaintiff desired to cover the four perfected titles with one policy then to be issued, and the other title, when perfected, with a second policy; or whether a single policy covering all the titles would be issued when all were perfected. It was finally decided to pursue the latter course, and the testimony of Halsey, the defendant's representative, as to the conversation between him and Mr. Ledyard, of counsel for the plaintiff, clearly shows how it came about. He says: "After the titles to the four pieces

of property were closed, Mr. Ledyard asked me for our policy of title insurance. I explained to him that it was impossible for us to prepare the policy insuring the titles of this kind before the matter was closed, and I offered to deliver the policy to him by the next day if he wished it. He then suggested that we could not guaranty the title of the fifth piece anyway, and I asked him whether he would prefer to wait for his policy until the Trenton Potteries Company had taken title to the fifth piece, and then to have a single policy covering all their property, or whether he would have a policy for the four pieces at once, and a separate policy for the fifth piece when his company had taken title. He asked me whether I thought that the title company would be responsible anyway if the title were bad, and laughed when I said I thought they would be. He then consulted with the officers of the company, who, with several members of the new company and former owners of the property mentioned above, were in one of his offices, I being present; and it was decided that the more convenient way would be to take a single policy when they acquired title to the fifth piece, and not to take any policy at that time for the four pieces." In the foregoing combination of elements, which may properly be considered in determining what the contract between the parties was intended to be, we have, as it seems to us, the clearest indication that there was no purpose on the part of either party to have any of the titles insured beyond the moment when they became the property of the plaintiff. This is attested by the nature and purpose of the contract, the absence of any special condition therein taking the case out of the ordinary rule, and by the conversations between Halsey and Ledyard, from which it appears that the issuance of a single policy, after all the titles were perfected, was agreed upon as a matter of convenience, and with no thought or suggestion of changing the liability of the defendant from what it would have been if a policy upon the four titles had been issued when the conveyances thereof were made. The whole transaction tends to show that there was no mistake as to the actual terms of the agreement, but that in reducing it to writing the real date as to a part thereof was inadvertently omitted. That is the sum and substance of the whole matter. Upon these competent facts and circumstances alone the trial court should have reformed the written policy so as to make it conform to the actual agreement of the parties, and in this view of the case the excision of the incompetent evidence referred to does not affect the result. This conclusion seems to be supported by either one of the following two views that may be taken of the transaction: If there was no mistake in the agreement as made and understood between the parties, and the scrivener, in reducing

it to writing, inadvertently omitted an essential element thereof, the court had the right to reform the written contract, under the case of *Born v. Schrenkeisen*, 110 N. Y. 55, 17 N. E. 339. If, on the other hand, this is regarded as an instance of actual mistake in the making of the contract, then the mistake was mutual, and the reformatory power of the court is properly invoked on that ground. The evidence of Halsey as to the conversation between him and Ledyard when the first four titles were passed was competent as bearing upon the date which the subsequently issued policy should have borne in relation to those titles. Oral evidence of mistake in the date of a written instrument is always admissible. *Kincaid v. Archibald*, 73 N. Y. 193.

Counsel for the plaintiff and appellant, in the course of his very able argument, suggested that defendant had been negligent in searching these titles, and for that reason it should not be permitted to escape its liability as an insurer. Whatever the fact may be in regard to defendant's alleged negligence, it is enough to say that this action is not based upon that ground. The contract of insurance is distinct and separate from the contract of searching. This action is brought upon the contract of insurance. Under the contract for searching titles the defendant may be liable for any damages which its negligence may have imposed upon the plaintiff. *Ehmer v. Title Guarantee & Trust Co.*, 156 N. Y. 10, 50 N. E. 420. Under the contract of insurance no question of negligence in searching can arise.

For these reasons the judgment herein should be affirmed, but, in view of the apparent justification of this appeal by reason of the incompetent evidence received at the instance of the respondent, the affirmance should be without costs.

O'BRIEN, BARTLETT, HAIGHT, VANN, and CULLEN, JJ., concur. MARTIN, J., not voting.

Judgment affirmed.

(176 N. Y. 75)

WANAMAKER v. WEAVER.

(Court of Appeals of New York. Oct. 6, 1903.)

LIABILITY OF HUSBAND—NECESSARIES FURNISHED WIFE.

1. Where a husband furnishes his wife with necessaries suitable to her position, and money with which to pay cash therefor, he is not liable for the price of other goods sold to her, in the absence of proof of prior authority or subsequent ratification.

Parker, C. J., dissents.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by John Wanamaker against Simon J. Weaver. From an order of the Appellate

Division reversing a judgment for defendant and granting a new trial (76 N. Y. Supp. 390), defendant appeals. Reversed.

Charles Van Voorhis, for appellant. Harry Otis Poole, for respondent.

HAIGHT, J. This action was brought to recover the purchase price of goods sold by the plaintiff to the defendant's wife, in the city of Philadelphia, without the defendant's knowledge or consent. The defendant and his wife resided in the city of Rochester, and at the time the goods were purchased lived together as husband and wife. It was claimed on behalf of the defendant that, while the goods might ordinarily be deemed necessities, they were not in fact such, for the reason that the defendant lived on a salary of \$2,000 per year, out of which he delivered to his wife \$1,500 in monthly installments of \$125 with which to supply his table and purchase her necessary wearing apparel; and at the time she purchased the goods in Philadelphia she was amply supplied with articles of a similar character, and was not in need of the articles purchased. Upon the trial the defendant sought to show the character and the amount of clothing possessed by the defendant's wife at the time she made the purchase of the plaintiff in Philadelphia. This was objected to. The objection was overruled, and an exception was taken. The court, in discussing the question, stated the law to be as follows: "That if a married woman goes to a merchant, and within reasonable limitations buys articles suitable for the family use and for her own wardrobe, the presumption is, in the absence of evidence to the contrary, that the husband is liable. But if it appears affirmatively that the lady was abundantly supplied with similar articles, purchased elsewhere, and that there was not, in fact, any reasonable necessity for such expenditure, the husband cannot be held responsible, unless there is some affirmative proof of actual authority outside of the authority the law infers from their marital relations." This view was substantially repeated by the trial judge in his charge to the jury, and an exception was taken thereto. The trial court also submitted to the jury the question as to whether the plaintiff gave credit to the defendant or to his wife. The verdict was in favor of the defendant.

The only question which we deem it necessary to consider is that raised by the exception to the charge as made submitting to the jury the question as to whether the defendant's wife was abundantly supplied with similar articles to those purchased at the time of the purchase, and therefore the articles were not necessary for her support and maintenance. The majority of the judges of the Appellate Division appear to have entertained the view that, if the articles purchased by the wife were of the character ordinarily deemed necessities, such as clothing,

¶ 1. See *Husband and Wife*, vol. 26, Cent. Dig. §§ 121, 122.

table linen, towels, and napkins, the merchant was at liberty to furnish her therewith, and charge her husband therefor, without regard to the amount purchased or the necessity therefor. In commenting upon the charge of the trial court, they say in their opinion: "We have, therefore, this principle enunciated: That if a wife, living with her husband, seeks to purchase goods of a merchant, the latter must make inquisitorial examination, and ascertain whether the family possess an adequate supply of the articles which the wife desires to purchase." It will readily be observed that while the amount involved in this case is trivial, the principle is of considerable importance. While the question seems to have been considered in the lower courts, it does not appear to have been squarely decided in this court. In the case of *Keller v. Phillips*, 39 N. Y. 351, the husband had given the merchant notice not to give the wife further credit, and in the case of *Hatch v. Leonard*, 165 N. Y. 435, 59 N. E. 270, the husband and wife lived separate and apart; so that neither of these cases afford us much help in determining the question presented in this case. In the case of *Cromwell v. Benjamin*, 41 Barb. 558, the General Term sustained the right of a merchant to recover of the defendant for the necessities furnished to his wife. *J. C. Smith, J.*, in delivering the opinion, states the law, as he understood it, as follows: "But the husband may be liable for necessities furnished to the wife in certain cases, though the existence of an agency or assent, express or implied in fact, is wholly disproved by the evidence; and this upon the ground of an agency implied in law, though there can be none presumed in fact. It is a settled principle in the law of husband and wife that by virtue of the marital relation, and in consequence of the obligations assumed by him upon marriage, the husband is legally bound for the supply of necessities to the wife so long as she does not violate her duty as wife; that is to say, so long as she is not guilty of adultery or elopement. The husband may discharge this obligation by supplying her with necessities himself or by his agents, or giving her an adequate allowance in money, and then he is not liable to a tradesman who, without his authority, furnishes her with necessities." In *Bloomington v. Brinckerhoff*, 2 Misc. Rep. 49, 20 N. Y. Supp. 858, it was held that, in order to entitle the tradesman to recover from the husband, it was incumbent upon him to show that "the articles supplied to the wife were not only of the kind usually denominated necessities, because their need is common to all persons, but that, in consequence of the inadequacy of the husband's provision, they were actually required for the wife's proper support, commensurate with his means, her wonted living as his spouse, and her station in the community."

There are numerous other cases reported in this and other states bearing upon the liability of the husband for necessities, but attention has been called to those most nearly in point upon the question involved in this case. There are, however, some cases in England where the question appears to have been more thoroughly considered in the higher courts. In the case of *Debenham v. Mellon*, 5 Q. B. Div. 394, *Bramwell, L. J.*, in stating the question involved, says: "The goods were necessities in the sense that they consisted of articles of dress suitable to the wife's station in life; but they were not necessities in the sense that she stood in need of them, for she had either a sufficient supply of articles of a similar kind, or at least sufficient means from her husband or otherwise to acquire them without running him into debt for them." He then proceeds to state the cases in which the husband would be liable; as, for instance, where he turns his wife out of doors, or conducts himself in such manner as to oblige her to leave him, she may provide herself at his expense, and pledge his credit for necessities, such as food, apparel, lodging, and medicine. In case they are living and cohabiting together, and there has been a custom of contracting short credit as to a class of articles, such as grocery and meat bills, her authority to order the same may be inferred, not for the reason that it springs out of the contract of marriage, but because of her existing relation as the head of his household; that the same authority would be inferred in favor of a sister, or a housekeeper, or other person who presided over the management of his house. The judge concluded by holding that the husband was not liable. The same case was subsequently brought up for review in the House of Lords. 6 Appeal Cases, 24. Lord Chancellor Selborne then considered two questions. The first was whether the mere fact of marriage implies a mandate by law, making the wife the agent in law of her husband, to bind him by her contract, and to pledge his credit. Upon this point he says that: "According to all the authorities, there is no such mandate in law from the fact of marriage only, except in the particular case of necessity—a necessity which may arise when the husband has deserted the wife, or has by his conduct compelled her to live apart from him, without properly providing for her; but not when the husband and wife are living together, and when the wife is properly maintained, because there is, in that state of circumstances, no prima facie evidence that the husband is neglecting to discharge his necessary duty, or that there is any necessary occasion for the wife to run him into debt for the purpose of keeping herself alive or supplying herself with lodging or clothing." The second question considered by the Lord Chancellor was whether the law implied such a mandate from the fact of co-

habitation. Upon this point he says: "If, therefore, the law did imply any such mandate from cohabitation, it must be an implication of fact, and not as a conclusion of law. There are, no doubt, various authorities which show that the ordinary state of cohabitation between husband and wife does carry with it some presumption—some *prima facie* evidence—of an authority to do those things, which, in such ordinary circumstances of cohabitation, it is usual for a wife to do, * * * because in that state of circumstances the husband may truly be said to do acts, or habitually to consent to acts, which hold the wife out as his agent for certain purposes. * * * But where there has been nothing done—nothing consented to by the husband—to justify the proposition that he has ever held out the wife as his agent, I apprehend that the question whether, as a matter of fact, he has given the wife authority, must be examined upon the whole circumstances of the case. No doubt, though not intending to hold her out as his agent, and though she may not actually have had authority, the husband may have so conducted himself as to entitle a tradesman dealing with her to rely upon some appearance of authority for which the husband ought to be held responsible. If he has so acted, he may be bound; but the question must be examined as one of fact, and all the authorities, as I understand them, practically treat it so when they speak of this as a presumption *prima facie*, and not absolute; not a presumption of law, but one capable of being rebutted." The Chancellor then proceeds to consider the facts in the case, and concludes by holding the husband not liable, stating that: "It was argued that, because these articles were found to be in some sense necessities in their nature, the husband ought, therefore, to be bound. But, even if the husband and wife had been living apart, the husband would not be bound by reason of such things being necessities if he made a reasonable allowance to his wife, and duly paid it; much less can he be bound in a case like this, where they were not living apart, and when he made her an allowance sufficient to cover all proper expenditure for her own and her children's clothing." In the still more recent case of *Morel Brothers and Company, Ltd., v. The Earl of Westmoreland*, 1 K. B. (1903) 64, it was held that the presumption which arises that the husband has given the wife authority to pledge his credit for necessities may be rebutted by proof of an arrangement under which a substantial allowance has been made by the husband to the wife for household expenses. In this case Mathew, L. J., concludes his opinion by stating: "There is no real hardship to tradesmen involved in such cases as this. They should understand that the question is always one of agency, and it is incumbent on them to prove the wife's agency. They can easily protect them-

selves from any great risk in such cases, but, if they think it answers their purpose better to go on giving credit for goods ordered by the wife without taking any steps to ascertain whether she has authority to pledge her husband's credit, they must run the risk of its ultimately turning out that she has no such authority."

Schouler on Husband and Wife, § 107, sums up the authorities upon the subject as follows: "Not only is the husband permitted to show that articles in controversy are not such as can be considered necessities, but he may show that he supplied his wife himself, or by other agents, or that he gave her ready money to make the purchase. This is on the principle that the husband has the right to decide from whom and from what place the necessities shall come, and that, so long as he has provided necessities in some way, his marital obligation is discharged, whatever may be the method he chooses to adopt. Accordingly, in the class of cases which we are now considering, namely, where the spouses dwell together, so long as the husband is willing to provide necessities at his own home he is not liable to provide them elsewhere. In general, while the spouses live together, a husband who supplies his wife with necessities suitable to her position and his own, is not liable to others for debts contracted by her on such an account without his previous authority or subsequent sanction." For further authorities and discussions upon the subject, see 10 Cent. Law J. 341; 54 Cent. Law J. 472; 18 Am. Law Reg. (N. S.) 412-416 (Judge Bennett's note); 20 Am. Law Reg. (N. S.) 324 (Judge Bennett's note); *Clark v. Cox*, 32 Mich. 204.

The discussion of the English cases, to which attention has been called, covers the points involved in this case. They, in effect, hold, in accordance with the charge made by the judge in this case, that the husband, in defense, may show that the wife was amply supplied with articles of the same character as those purchased, or that she had been furnished with ready money with which to pay cash therefor; that the question of her agency is one of fact, and is not a conclusion of law to be drawn alone from the marital relation. The conclusions reached in these cases are in accord with the rule as stated by Schouler and some of the decisions alluded to in this state, and we incline to the view that the rule recognized by them is the safer and better rule to follow. It compels the husband to pay in a proper case, and at the same time affords him some financial protection against the seductive wiles exerted by tradesmen to induce extravagant wives to purchase that which they really do not need. We do not participate in the alarm which appears to have possessed the learned justices of the Appellate Division on account of the possible inquisitorial examination to which the wives may be subjected. The anxiety of tradesmen to sell will be sufficient to protect them from

any improper "inquisitorial examination." If a wife is going to a merchant to trade, with whom she is acquainted, and with whom she has been accustomed to trade upon the credit of her husband, she may still continue to do so until the husband gives notice prohibiting the merchant from longer giving credit to her. But when she goes to a stranger, with whom she has never traded before, and where, consequently, there is no implied authority on the part of the husband to give her credit, and seeks to purchase upon her husband's credit, it is but reasonable and proper that she disclose to the merchant her authority therefor, or for the merchant to request such disclosure.

We have discovered no errors in the rulings of the trial court. The judgment of the Appellate Division should, therefore, be reversed, and that entered upon the verdict affirmed, with costs.

GRAY, VANN, CULLEN, and WERNER, JJ., concur. PARKER, C. J., dissents. MARTIN, J., absent.

Judgment reversed, etc.

(176 N. Y. 138)

In re BROOKFIELD, Commissioner of Public Works, et al.

(Court of Appeals of New York. Oct. 6, 1903.)

DEED—CONSTRUCTION—INTEREST CONVEYED—EMINENT DOMAIN—DAMAGES.

1. An owner of a pond, or a portion thereof, and of certain lands surrounding it, executed to the owner of a mill site on a river which flowed through the waters of the pond a deed of "all the land that will be overflowed by raising the water level twelve feet only for the purpose of being flowed," and thereafter gave another deed to the same grantee, containing the same description and provisions, except that it gave the right to raise the water 8 instead of 12 feet. Held to convey the land on the sides of the pond for flowage purposes only, leaving the title to the land in the grantor.

2. The conveyance to the grantee was a mere easement to collect the water by a dam and overflow such lands, leaving the fee and the use thereof in connection with the uplands belonging to the grantor in him, subject only to such right of flowage, and another provision in such deeds that, if the grantee should not use the land for such purpose, the grantor could buy them back at a price to be agreed upon, is a mutual agreement of the parties, which could be enforced by either, and did not in any way affect the title conveyed.

3. The city of New York, under Laws 1893, p. 317, c. 189, providing for the protection of the sources of the water supply of the city, acquired the rights of a grantee in a deed, giving permission to flow certain lands by erection of a dam, and acquired from the successor of the grantor in such deeds any title to the land surrounding the pond which was flooded by such dam. The commissioners of appraisal awarded substantial damages to the owner of the dam, but awarded only nominal damages to the owner of the land, which the owner of the dam had a right to flow. Held, that such owner of the land was entitled to substantial damages for his right to use the pond in connection with the upland for domestic purposes, and for his

right under the written agreement in the deed granting the right of flowage, to repurchase his interest in the land surrounding the pond.

Bartlett, Gray, and Cullen, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, Second Department.

Application by William Brookfield, commissioner of public works of the city of New York, to condemn certain real estate. From an order of the Appellate Division (79 N. Y. Supp. 1022) reversing an order of Special Term setting aside a portion of the report of the commissioners of appraisal, De Witt C. Sarles appeals. Reversed.

James Dunne, for appellant. George L. Rives, Corp. Counsel (Theodore Connolly and Henry T. Dykman, of counsel), for respondent.

HAIGHT, J. This proceeding was instituted by the commissioner of public works of the city of New York on behalf of the city, under the provisions of chapter 189, p. 317, of the Laws of 1893, to acquire title to Byram pond, a nonnavigable body of water in the town of North Castle, Westchester county, and to the lands surrounding the same. The commissioners of appraisal appointed in the proceeding made their report, in which they awarded to the claimant, Sarles, substantial damages for his lands surrounding the pond, but only awarded him \$1 nominal damages for the bed of the pond. Objection was filed by him to so much of the report as awarded him only nominal damages for the bed of the pond. The Special Term sustained the objection, and ordered a new appraisal as to the lands embraced within the pond, and in other respects confirmed the report. The Appellate Division reversed so much of the order of the Special Term as granted a new appraisal, and confirmed in full the original report of the commissioners.

In the year 1864 one Josiah Wilcox was the owner of a mill on Byram river, through which flowed the waters from Byram pond, and John N. Lyon was the owner of the pond, or of a portion thereof, and of the lands surrounding the same. Under date of June 28, 1864, John N. Lyon executed and delivered to Josiah Wilcox a deed, which was recorded in the office of the register, Westchester county, in Liber 441 of Deeds, page 298, in which the premises conveyed are described as follows: "All that certain piece or parcel of land situate lying and being in the Town of North Castle, County of Westchester and State of New York bounded and described as follows, viz.: Southerly by lands of Ebenezer G. Platt, westerly by land of the party of the first part, northerly by lands of Samuel Augustus Lyon and easterly by land of the party of the first part being all the land on both sides of the Byram River and Byram Pond that will be overflowed by the waters of Byram River and Byram Pond in

consequence of the erection of a dam across said Byram River, southerly of lands hereby conveyed of sufficient height to raise the waters in Byram Pond eight feet and two-tenths above its present level, and the above-described land is conveyed by the party of the first part to the party of the second part only for the purpose of being flowed by said pond, and in case the party of the second part should not use said land for the purpose above named then the party of the first part his heirs and assigns shall buy back the land thereby conveyed at such price as may be agreed upon between the parties to these presents and in case of a disagreement between the parties, then each shall choose a disinterested person as umpire and the two shall choose a third person and the three persons thus selected shall fix a price on the land which shall be binding between the respective parties to these presents, their heirs and assigns. Together with all and singular, the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof," and so on, following the usual form of the ordinary printed deed, and concludes with a covenant to the effect that the party of the second part may within two years from that date purchase an additional quantity of land surrounding the pond sufficient to raise the dam three feet higher upon paying \$100 per acre therefor. Wilcox apparently availed himself of the provisions of this covenant, for a second deed, bearing date the 12th day of October, 1864, recorded in Liber 549 of Deeds, page 351, was executed by Lyon to Wilcox, which conveys all the land that will be overflowed, being about two acres, by the waters of Byram river and Byram pond, by the erection of a dam of sufficient height to raises the water in Byram pond twelve feet above the present level of the pond. This deed contains substantially the same description and provisions contained in the former deed, with the exception that it gives the right to raise the water of the pond twelve feet instead of eight feet. The city of New York has acquired the rights of Wilcox in the premises, and the claimant, De Witt C. Sarles, has succeeded to the title of John N. Lyon.

It becomes important, in the first place, to determine who is the owner of the pond. If the city of New York is the owner, then these proceedings were unnecessary, and the nominal award of \$1 should not have been made. Both parties claim under John N. Lyon, and it therefore becomes important to determine the construction that should be given to his two deeds to Wilcox. In describing the land conveyed, it is stated in the deeds as "being all the land on both sides of Byram river and Byram pond." It may be conceded that, where a tract of land is conveyed by deed, described by metes and bounds, the title to any lake or pond in-

cluded within the boundary lines passes with the uplands to the purchaser. It may also be conceded that by the conveyance of land along a highway, stream, or pond in which the description runs to the highway, stream, or pond, the title to the center of such highway, stream, or pond will ordinarily be held to have passed under the grant. But when the boundary line is along the side, the edge, the border, or the margin of a highway, stream, or pond, the parties will be held to have intended to limit the lands conveyed to that within such boundary, and not to that which constitutes the body of such highway, stream, or pond. As, for instance, "along a stream" means along the center or thread of the stream, while "along the shore of the stream" means along the edge or margin of the stream. In the case under consideration the deed conveys the land on the sides of the pond, and not that of the pond itself. It is the land bordering upon the waters of the pond which may be overflowed by the raising of the dam, and not the lands under the waters of the pond already overflowed. It appears to us that the fair and reasonable construction of the language used in the deed would exclude from the conveyance all the lands within the pond, leaving the title thereto in the grantor. *Child v. Starr*, 4 Hill, 369; *Starr v. Child*, 5 Denio, 599; *Halsey v. McCormick*, 13 N. Y. 296; *Holloway v. Southmayd*, 139 N. Y. 390-413, 34 N. E. 1047.

It is now contended that, even though the body of the pond was not included in the conveyance to Wilcox, the conveyance did vest in Wilcox in fee a strip of land surrounding the pond, by which Lyon cut off his right of access to and possession of the pond. This brings us to a more minute consideration of the deeds. The formal parts of the deeds are those in ordinary use, containing apt words for the conveyance of the fee to the lands described. They include all the hereditaments and appurtenances thereto belonging, as well as the rents, issues, and profits. But when we find provisions in a deed which are inconsistent, the rule is well settled that those provisions which are written, or are unusual, or those which have received special attention, will be deemed to express the intention of the parties, rather than the printed or formal portions of the instrument. John N. Lyon owned a farm of 200 acres, which he had purchased from Samuel A. Lyon two years before. In his deed to Wilcox he commences by describing his whole farm, giving the boundaries, and then he limits the amount intended to be conveyed with the clause, "being all the land on both sides of Byram river and Byram pond that will be overflowed by the waters of Byram river and Byram pond in consequence of the erection of a dam across said Byram river southerly of lands hereby conveyed of sufficient height to raise the waters in Byram pond eight feet and two-tenths

above its present level, and the above-described land is conveyed by the party of the first part to the party of the second part only for the purpose of being flowed by said pond." It is thus apparent that, but for the provision above quoted, the title of Lyon's whole farm passed to and vested in Wilcox. But the provision limiting the grant to the lands on both sides of the pond overflowed by water is inconsistent with the provision describing the whole farm as conveyed. So, also, is the provision that the lands are conveyed "only for the purpose of being flowed by said pond" inconsistent with the other provisions of the deed, which would ordinarily be construed as passing a fee to the land. These clauses are the prominent and noticeable provisions of the deed. They are its essential features, the real essence of the contract, and evidently they are the result of the deliberate thought and agreement of the parties, and express their intention. We therefore think they should be given force and effect in preference to the usual formal provisions appearing in the deed. The fee is the greatest interest that can be granted in real estate. It includes title, the right of possession, and the right to use for any purpose which may be lawful. The limiting of the use and purpose of the land conveyed to that only of being flowed by the waters of the pond prohibits the purchaser from making any other use of it. It does not even give him the right of possession. He may erect the dam of the height specified, and he may have the waters collected overflow the land; but this is the extent of his rights. This does not constitute a fee. At most it is but a mere easement, leaving the title, possession, and use to the grantor, subject only to the right of flowage created by the deed. The circumstances of this case are not unlike those which may be found on nearly every stream or river throughout the country in which there flows sufficient water to turn a wheel. Mills and milldams are very numerous, and many grants for the right of flowage have been made by upper riparian owners, and yet not a case has been called to our attention in which it was ever held or claimed that such a grant carried the fee. Our construction of the provision of these deeds is not only sustained by, but is strengthened by, the circumstances surrounding the parties at the time they were executed. Wilcox was a millowner upon Byram river, below the pond. He was seeking additional power with which to operate his mill. He first procured the right, by the first deed, to erect a dam 8.2 feet high; then, about three months thereafter—probably before he had completed the construction of the dam—he procured the further right, by the second deed, to erect the dam 12 feet high. There was no reason why he should go to the expense of acquiring the title to the body of the pond, or of the fee of the land surrounding it. His pur-

pose was fully satisfied by acquiring the right to construct the dam of that height, and have the waters collected flow back upon the lands of his grantor. In the case of *Stevens v. Kelley*, 78 Me. 445, 6 Atl. 868, 57 Am. St. Rep. 813, it was held that the owner of a mill dam of an unnavigable stream, who does not own the bed of the stream above the dam, has only a qualified interest in the flow of the water, and the upper riparian owner has the right to possession, use, and occupation, subject to the easement of the millowner's right of flow, and that the riparian owner is the owner of the ice which forms upon the pond and has the exclusive right to harvest the same.

It is contended that the provisions in the deeds to the effect that in case Wilcox should not use the lands for the purposes mentioned, Lyon, or his heirs and assigns, "shall buy back the lands hereby conveyed," creates a condition subsequent, in which a fee may vest. Of course, a condition subsequent embraced in the deed does not prevent a vesting of the fee, but this is upon the assumption that a fee was intended to be conveyed. If no fee was intended, there could be none to vest. But is it a condition subsequent? There is no forfeiture provided for, or any re-entry authorized, upon the happening of such event. It is merely a mutual agreement of the parties—of Wilcox to sell, and of Lyon or his heirs and assigns to buy back, that which had been conveyed to Wilcox, upon a price to be agreed upon or settled by arbitration. Wilcox had the right to demand that Lyon should take the same, as well as Lyon had the right to insist upon his right to purchase. The covenants were mutual, and could be enforced by either. But whether it may be a condition subsequent or not, it does not appear to us to affect the main question, considered as to the interest that the parties intended to convey by the deeds in question.

Upon the argument of this appeal there was an elaborate discussion as to the rule of damages that should be adopted. We do not deem it necessary at this time to enter upon a discussion of that question. The conclusion which we have reached is that the deeds to Wilcox did not convey to him the fee to the lands above the dam, but that it did convey the right to maintain the dam and to flow the waters collected therein upon the land that would be covered thereby; that, subject to this right, Lyon remained the owner of the fee to not only the body of the pond, but to the lands covered by the flowage, with the right to the possession and use in connection with his upland, which were not inconsistent with the right of Wilcox to the use of the water as the exigencies of his business might require; and that among the uses retained by Lyon was that of supplying himself and family with water for domestic purposes, the harvesting of ice, etc. The city of New York, as we have seen, has acquired

Wilcox's right to maintain the dam and to use the waters collected and stored therein. For this Lyon has already received a compensation in the consideration given for the deeds. Sarles is not, therefore, entitled to recover damages therefor. But he had the right to use the pond in connection with his upland for the purposes stated, together with the right to repurchase the interest conveyed, as provided for in the deed; and these rights are real, entitling him to substantial damages upon their being taken from him, pursuant to the provisions of the act under which these proceedings were instituted.

We therefore conclude that the order of the Appellate Division should be reversed, that of the Special Term affirmed, and that the costs in this court and in the Appellate Division should be awarded to the appellant, the other costs in the proceeding to abide the final award of costs.

BARTLETT, J. (dissenting). The deeds to Wilcox, in my opinion, conveyed the absolute fee of the premises described, subject to a condition subsequent. No particular form of words is necessary to create a condition subsequent, but the cases hold it must be clearly expressed. *Lyon v. Hersey*, 103 N. Y. 264, 8 N. E. 518; *Uppington v. Corrigan*, 151 N. Y. 143, 45 N. E. 359, 37 L. R. A. 794. The premises in question were to be used for flowage purposes, and the deeds provide, if not so used, then the grantor, his heirs and assigns, "shall buy back the land hereby conveyed at such price as may be agreed upon between the parties to these presents." A clause then follows for umpires to fix price if parties fail to agree. It is a little difficult to comprehend how grantors can "buy back" land unless title passed under their conveyance. I vote for affirmance.

PARKER, C. J., and **O'BRIEN** and **WERNER, J.J.**, concur with **HAIGHT, J.** **GRAY** and **CULLEN, J.J.**, concur with **BARTLETT, J.**

Order reversed, etc.

(176 N. Y. 126)

COHNFELD v. TANENBAUM et al.

(Court of Appeals of New York. Oct. 6, 1903.)
GUARDIAN AND WARD—DEPOSIT OF FUNDS—
CHECK OF GUARDIAN—RIGHTS OF PAYEE.

1. A guardian deposited moneys of a corporation of which he was the manager from time to time with moneys deposited by him to his credit as guardian, and gave checks on such account in payment of debts due from the corporation. Held to give notice to the payee of such checks that the funds drawn on were not those of the corporation or of the drawer personally, and to put him on inquiry to ascertain the authority of the maker to apply such funds to such debts.

2. Where a manager of a corporation draws checks on a fund as guardian, in the absence of affirmative proof that there was money of the corporation in such fund to the credit of the corporation, the ward may recover such amount from the payee of the checks.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Charles M. Cohnfeld against Leon Tanenbaum and another. From an order of the Appellate Division (68 N. Y. Supp. 1023), affirming a judgment for defendant, plaintiff appeals. Reversed.

George W. Weiffenbach, for appellant. Sol. M. Stroock, for respondent.

CULLEN, J. The action was brought by the plaintiff in his own right and as assignee of his brothers and sisters, children and wards of Isidore Cohnfeld, deceased, to recover from the defendant the amount paid to him by said guardian by three checks, aggregating the sum of \$1,200. The case was tried on an agreed statement of facts, which is extremely meager in its details. By such statement it appears that said Isidore was appointed guardian of said children on January 2, 1885. On January 1, 1886, he had in his possession moneys of his wards amounting to \$10,355.79, and in March, 1892, he opened an account in the New York Security & Trust Company in the name of Isidore Cohnfeld, guardian, and deposited therein the sum of \$12,000. At the same time he filed with the trust company a certificate of his appointment as guardian by the surrogate of New York county. Various deposits were made to the credit of that account, and checks drawn against it. No information is given as to the sources from which the moneys deposited were obtained, or the purposes to which the checks drawn on the account were appropriated, except that there were from time to time some moneys of the Cohnfeld Manufacturing & Trading Company, a corporation of which the guardian was manager, deposited in the account. What those sums were, or what checks were drawn against them, is not stated. From the bank account it appears that on the 1st day of January, 1893, all the moneys had been withdrawn except a balance of \$61. In August, September, and December of that year the guardian drew three checks, the subject of this action, and delivered them to the defendant in payment of claims for rent he held against the Cohnfeld Company. The guardian died in April, 1896, without ever having accounted to the wards for their property. The defendant had no knowledge of the rights of the parties to the moneys paid to him, except such as was given to him by the form of the checks, which were signed "Isidore Cohnfeld, Guardian." On these facts the trial court rendered judgment for the defendant, which has been affirmed by the Appellate Division.

We think the courts below erred in their disposition of this case. From the extremely meager character of the evidence, it will be seen on final analysis that the determination of the case must be governed by presumptions. The signature to the check, "Isidore Cohnfeld, Guardian," gave the defendant notice that presumptively the funds being paid

to him were not those either of the Cohnfeld Manufacturing Company or of Isidore Cohnfeld personally, and he was put on inquiry to ascertain the authority of Cohnfeld to apply the money in payment of the company's debt. *Gerard v. McCormick*, 130 N. Y. 261, 29 N. E. 115, 14 L. R. A. 234. This proposition is conceded by both the courts below. Had he made the inquiry, he would have learned the facts which have already been stated. He is, therefore, chargeable with all that those facts import, or which is fairly to be inferred from them. It is to be noted that the parties did not admit, nor did the court find, that at the time at which the checks in suit were drawn there was a dollar of the moneys of the Cohnfeld Company remaining in the accounts, nor are there any facts admitted or found from which such an inference can be drawn. The finding is that moneys of the company were deposited in the account, and payments made from the account on its behalf, but not a word as to the amount of the deposits or the amount of the payments. It is very evident that the first question to be determined is, to whom, on this state of facts, did the moneys of the account *prima facie* belong, and this question is to be decided between the plaintiff and the defendant, the same as it would be between the plaintiff and the company were that company asserting its rights to the moneys on deposit. No evidence was given by the plaintiff to show that any of the moneys of the wards were deposited in the account subsequent to its depletion in January, 1893, and for this reason the courts below were of opinion that the plaintiff had failed to identify the moneys paid to the defendant. But it was not necessary for the plaintiff to give evidence on the subject. The account was that of the wards, or of their property. There is neither finding nor proof that the guardian embezzled the money withdrawn by him prior to January, 1893. The money may have been drawn out for investment, or other legitimate purposes, and when moneys were subsequently received by the guardian from such investments, it was his duty to again deposit them. But if we assume that the guardian had embezzled the money, the obligation existed to make restitution, and his subsequent deposits, from whatever sources received, would be an appropriation of those moneys in satisfaction of his wards' claim against him. From such time they became the infants' moneys as against every one except one who, claiming the moneys, could show they had been wrongfully diverted. *Baker v. New York National Exchange Bank*, 100 N. Y. 31, 2 N. E. 452, 53 Am. St. Rep. 150. In the opinion of the learned Appellate Division it is said: "It is immaterial that in this case the account was opened and continued in Cohnfeld's name as guardian. We have a mixed fund to deal with, in which moneys of different parties were mingled by

one occupying a fiduciary relation to both parties, and the rights of these parties are to be settled upon equitable principles." We entertain a different view. We think the point on which this case turns is the name and character in which the account was opened and kept. In the absence of proof to the contrary, all the moneys in that account were presumptively the property of the wards. For another party to successfully reach any part of the fund, it would be insufficient to show merely that moneys of the party had been improperly placed in the account; it would be necessary to go further, and to prove the amount so deposited; in other words, the burden of proof would rest on the claimant to establish just what portion of the fund belonged to him, and the remainder, as to which he failed to affirmatively show title, would be awarded to the party in whose name the account stood, and to whom it presumptively belonged. As already said, there is no proof in the case that at any time any particular sum on deposit was the property of the Cohnfeld Company.

These views dispose of the objection that the plaintiff failed to comply with the rule that to follow trust funds they must be identified. The funds in this case were identified by their deposit in the trust company to the credit of Cohnfeld, guardian. Nor do we see that the rule adopted in *Clayton's Case* (*Devoyne v. Noble*, 1 Merivale, Ch. Rep. 572) has any application to this case. That rule, that the earliest draft should be charged against the earliest deposits, might apply if it appeared that the moneys on deposit were insufficient to satisfy the claims of both cestuis que trustent—the wards and the Cohnfeld Company; but it has no bearing on the proposition that the burden rested on the Cohnfeld Company or on the defendant, who claims under it, to establish that it had any claim on the trust fund.

The judgment should be reversed, and a new trial granted; costs to abide the event.

PARKER, C. J., and BARTLETT, HAIGHT, MARTIN, VANN, and WERNER, JJ., concur.

Judgment reversed, etc.

(76 N. Y. 119)

NILES v. NEW YORK CENT. & H. R. R. CO. et al.

(Court of Appeals of New York. Oct. 6, 1903.)
CORPORATIONS—CONSPIRACY OF OFFICERS—
—ACTION BY STOCKHOLDER—DAMAGES.

1. An individual stockholder cannot maintain an action to recover damages resulting from a conspiracy entered into by a majority of the stockholders of the corporation to wreck it, by the officers of the company refusing to accept business that would enable it to pay the interest on its funded debt, thereby bringing about a foreclosure sale, as the damages resulting therefrom belong to the corporation, and not to such stockholder.

2. An action to recover for conspiracy among the officers of a corporation to wreck it must be brought by the corporation or its receiver, or by any stockholder after demand on behalf of the corporation.

3. The measure of damages in an action to recover for conspiracy by officers of the corporation to wreck the same would be the value of the property and franchises of the corporation as it existed before the acts of the conspirators producing insolvency, less the amount which the property brought on foreclosure sale.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Robert L. Niles against the New York Central & Hudson River Railroad Company and others. From a judgment of the Appellate Division (74 N. Y. Supp. 617) affirming a judgment (71 N. Y. Supp. 271) sustaining demurrers to and dismissing the complaint, plaintiff appeals. Affirmed.

Louis Marshall and Nathaniel A. Elsbarg, for appellant. Thomas Thacher and Ira A. Place, for respondents.

HAIGHT, J. The demurrers interposed to the plaintiff's complaint were upon the ground that the facts stated therein were not sufficient to constitute a cause of action. The allegations of the complaint are somewhat voluminous, but, so far as they are necessary to present the question to be determined upon this review, they may be summarized and stated in substance, as follows: The plaintiff was a stockholder of the New York & Northern Railroad Company, which owned and operated a railroad from its junction with the Manhattan Railway, near 155th street, in the city of New York, to a point on the New York & Harlem Railroad at or near Brewster, in Putnam county. The company had about 60 miles of railroad, with terminal facilities and other property, in the city of New York and elsewhere, of great value, which competed with the New York Central & Hudson River Railroad, or roads which it controlled. Under these circumstances the defendants wrongfully, unlawfully, fraudulently, and maliciously entered into a combination and conspiracy to procure for the New York Central & Hudson River Railroad Company the possession, control, and virtual ownership of the property and franchises of the New York & Northern Company. Among the overt acts alleged to have taken place in order to accomplish this result are the following: A majority of the stock of the New York & Northern Company was purchased by the defendants, and officers friendly to them were elected. These officers, after obtaining the possession of the company, obstructed and hampered its business by refusing traffic offered to it by other transportation companies and shippers, thus depriving it of the income which it might have received, and diverted its earnings so as to leave it without sufficient funds with which to pay the interest

accruing and accrued upon its bonded indebtedness. That thereupon the defendants purchased or secured the control, by contract, of a majority of the outstanding bonds, and then procured the trustee to institute an action for the foreclosure of the mortgage given to secure the payment of the bonds. This action resulted in a sale of the property of the company to the New York & Putnam Railroad Company, who leased the same to the New York Central & Hudson River Railroad Company for a period of 999 years, who thereupon mortgaged its property to secure the payment of bonds amounting to \$100,000,000, which have passed into the hands of bona fide purchasers, thus rendering the plaintiff's stock of no value. He demanded judgment for the value of his stock before it was injured by the action of the conspirators.

The action is at law for the purpose of recovering the damages which the plaintiff has sustained, and is not brought for or on behalf of the corporation or of its stockholders. The question raised for review is as to whether the damages resulting from the conspiracy belong to the corporation or to the individual stockholder. In determining this question we must bear in mind that the rights of creditors are superior to those of the stockholders, who are only permitted to share in the earnings of the corporation or in the division of its assets after the claims of creditors have been satisfied. We are thus brought to a consideration of the nature of the injury inflicted by the conspirators. Many of the overt acts alleged are lawful and justifiable when done in good faith, and without any intent or purpose to harm others—as, for instance, it was lawful for defendant Morgan and his associates to purchase stock and bonds of the New York & Northern Company, and to hold the same for investment or for profit. Upon the failure of the company to pay the interest accrued upon the bonded indebtedness, they had the right to petition the trustee to foreclose the mortgage; but they had no right to enter into a conspiracy with the officers of the corporation, elected by them after they had acquired a majority of the stock, to refuse to accept traffic from other railroad and transportation companies, from which the corporation could have derived an income sufficient to pay the interest accruing upon the bonded indebtedness, or to otherwise divert the earnings of the company so as to bring it in default, and permit the bringing of the foreclosure action for the purpose of cutting off the interest of the minority stockholders or of the general creditors. The refusing of traffic and the diversion of funds operated to deplete the company's treasury, and was a direct wrong to the corporation. It was an injury for which an action could have been maintained by the corporation, its receiver, if one had been appointed, or by any stockholder, after proper demand, in behalf of the company and for its benefit. In such an ac-

¶ 2. See Corporations, vol. 12, Cent. Dig. §§ 1420, 1429, 1429½, 1430.

tion the creditors are vitally interested. They have the right to have the action prosecuted on behalf of the company, so that their interests may be protected, and their claims paid out of any recovery which may be obtained.

True, the plaintiff has suffered a depreciation in the value of his stock as a result of the wrong, and in this respect the injury was personal to the holders of the stock. But every stockholder has suffered from the same wrong, and, if the plaintiff can maintain an action for the recovery of the damages sustained by him, every stockholder must be accorded the same right. The injury, however, resulting from the wrong, was, as we have seen, to the corporation. The depreciation in the value of the plaintiff's stock and that of the other stockholders was in consequence of the waste and destruction of the property and franchise of the corporation. There are wrongs which, if committed against a stockholder, entitle him to a right of action against the person committing the wrong for the damages sustained—as, for instance, where a person had been induced to purchase stock in a corporation, and pay a higher price than the stock was fairly and reasonably worth, or where the owner of stock had been induced to part with it for a less sum than its true value by reason of false and fraudulent representations of others with reference to its value. *Rothmiller v. Stein*, 143 N. Y. 581, 38 N. E. 718, 26 L. R. A. 148; *Ritchie v. McMullen*, 79 Fed. 522, 25 C. C. A. 50. But these wrongs are distinguishable from those against the corporation. They result in injury to the stockholder upon whom the wrong is practiced, but do not injure the other stockholders or the corporation itself. The injuries, however, in this case, are not of that character. The defendants had obtained control of the affairs of the corporation through the board of directors elected by them. These directors undertook to manage the property of the corporation in good faith, according to their best judgment and skill, in the interests of all of the stockholders. Having assumed the management, they were bound to use their best endeavors to prevent default in the payment of interest, and the consequent sacrifice of the corporate property. Under the allegations of the complaint, the directors of this corporation not only failed to discharge their duties to the stockholders, but they actively participated in the depletion of the company's treasury and in a sacrifice of the company's property, thus depriving the stockholders and the creditors of that which belonged to them.

It is suggested that the corporation is in the hands of a board of directors controlled by the defendants, and that they would work against the interest of the minority stockholders. It is also urged that the remedy of the stockholders, through the corporation, is inadequate, and that, if a recovery should be had, the proceeds might not reach the

plaintiff, thus leaving him with a barren victory. It is doubtless true that the interests of the directors are inimical to those of the plaintiff and other minority stockholders, but the Supreme Court has ample power to protect the minority stockholders, even against the unlawful acts of the company's board of directors. It may appoint a receiver, if it has not already done so; and he may bring the action, or the plaintiff himself, where the officers of the corporation are under the control of the parties to be sued, may bring the action in his own name, but in the right of the corporation, making it a party defendant. *Flynn v. Brooklyn City R. Co.*, 158 N. Y. 493-508, 53 N. E. 520. As to the suggested inadequacy of the remedy, we apprehend there is no trouble. If the defendants conspired with the officers of the company to improperly deplete its treasury, and thus render the corporation insolvent, in order that a sale might be made upon a foreclosure judgment, and the stockholders and creditors thus deprived of their interest in the property, we see no reason why the damages recoverable may not be for the full value of the property and franchises of the corporation as it existed prior to the overt acts complained of, producing insolvency, less than which the property actually brought upon the foreclosure sale. This would afford full protection to all concerned. It would indemnify the creditors, and if the stock of the company was actually worth \$35, or any other sum, per share, it would restore to the stockholders the property of which they have been deprived, or compensation therefor.

While the case of *Flynn v. Brooklyn City R. Co.*, supra, differs widely in its facts from the case under consideration, the principle involved is quite similar. In that case *Vann, J.*, in delivering the opinion of the court, says, with reference to the subject we have under review, that "while courts cannot compel directors or stockholders, proceeding by the vote of a majority, to act wisely, they can compel them to act honestly, or undo their work if they act otherwise. Where a majority of the directors or stockholders, or both, acting in bad faith, carry into effect a scheme which, even if lawful upon its face, is intended to circumvent the minority stockholders and defraud them out of their legal rights, the courts may interfere and remedy the wrong. Action on the part of directors or stockholders, pursuant to a fraudulent scheme designed to injure the other stockholders, will sustain an action by the corporation, or, if it refuses to act, by a stockholder in its stead for the benefit of all the injured stockholders." In the case of *Farmers' Loan & Trust Co. v. New York & Northern Ry. Co.*, 150 N. Y. 410, 44 N. E. 1043, 34 L. R. A. 76, 55 Am. St. Rep. 689, we reversed the judgment of foreclosure referred to in the complaint in this action. In the trial of the foreclosure action in that case the trial court

excluded the evidence offered to the effect that the officers of the company had declined to accept traffic from other roads, and had diverted its money. It was because of the exclusion of this evidence that the judgment was reversed, thus in effect holding that, had the facts appeared as claimed in the offer, they would have established a good defense in equity to the action. It now appears that a sale of the company's property under the foreclosure judgment had taken place before the reversal of the judgment. But it would seem to logically follow that, if the matter excluded constituted a defense which the corporation could avail itself of, the damages resulting would also belong to the corporation. See, also, *Leslie v. Lorillard*, 110 N. Y. 519-585, 18 N. E. 363, 1 L. R. A. 456; *Gamble v. Queens County Water Co.*, 123 N. Y. 91, 25 N. E. 201, 9 L. R. A. 527; *Sage v. Culver*, 147 N. Y. 245, 41 N. E. 513; *Hawes v. Oakland*, 104 U. S. 450, 28 L. Ed. 827.

We think that the damages belong to the corporation, and not to the individual stockholder, and that the judgment should be affirmed, with costs.

PARKER, C. J., and O'BRIEN, BARTLETT, MARTIN, and VANN, JJ., concur. GRAY, J., not sitting.

Judgment affirmed.

(176 N. Y. 122)

BROWN v. SUPREME COURT I. O. F.

(Court of Appeals of New York. Oct. 6, 1903.)

MUTUAL BENEFIT ASSOCIATIONS—BY-LAWS—VALIDITY—APPEAL TO COURTS.

1. A by-law of a mutual benefit association, whereunder members who pay their dues and assessments precisely as provided by the by-laws are deprived of their rights of membership, including a forfeiture of their insurance, if the officers of the company ordered to receive such dues fail to pay over the moneys, is unreasonable, and does not affect the status of members in good standing.

2. Where the obstacles to the prosecution of an appeal in a benevolent association are so great as to amount almost to a denial of justice, and where, if prosecuted, no relief would result therefrom, such by-laws are not a bar to an action by a suspended member, who is denied reinstatement, though they also provide that no member shall be entitled to bring any legal proceedings until he shall have exhausted all his remedies by such appeals.

Appeal from Supreme Court, Appellate Division, Fourth Department.

In the matter of the application of Lesser Brown for writ of mandamus against the Supreme Court of the Independent Order of Foresters. From a judgment of the Appellate Division affirming a judgment in favor of plaintiff (72 N. Y. Supp. 800), defendant appeals. Affirmed.

O. P. Stockwell, for appellant. David Ruslander, for respondent.

O'BRIEN, J. The courts below have adjudged that the plaintiff or relator was entitled to a peremptory writ of mandamus commanding the defendant to reinstate the relator in all his rights and privileges as a member of the order of Foresters in good standing upon payment by him of such dues and assessments as have accrued since the date of his suspension, and, further, that the relator recover his costs of the proceedings. This appeal presents the question whether the relator was entitled to that relief upon the undisputed facts.

The defendant is a foreign corporation, organized under the laws of Canada on the fraternal and mutual benefit plan, doing business in this state. The purposes of the corporation, the rules for its government, and the rights, duties, and obligations of the members are embodied in the constitution and by-laws. The corporation has made a very liberal use of the power to enact by-laws, since it appears from the record that at least 258 sections were in force at the time of the several transactions out of which this controversy arises. These sections constitute an elaborate and somewhat complicated code of laws, many of which are quite drastic in their operation upon the rights of members, as will presently appear. One of the primary and principal purposes of the corporation was to insure the lives of its members, and to afford them assistance in case of physical disability or sickness, as prescribed in the law of its creation. It is admitted that on the last day of September, 1900, the relator was a member in good standing of the organization and of one of its subordinate lodges in this state, and was insured in the defendant in the sum of \$1,000; that all his dues and assessments as a member of the order and as the holder of such insurance, which, by the constitution and by-laws of the defendant, he was required to pay, were fully paid up to that date. In fact, there is no claim made by the defendant that the relator ever was personally in default with respect to any duty or obligation to the defendant concerning the insurance or his status as a member of the organization, but, notwithstanding all this, the defendant's contention is that he has ceased to be a member of the order, and has lost all rights as such member, including a forfeiture of the insurance.

A brief review of the argument in support of this proposition is all that is necessary to the disposition of this appeal. The by-laws provide that the relator's dues and assessments were to be paid to the financial secretary of the subordinate lodge or court, as it is called, and he complied with this requirement, and made the payments accordingly. But the by-laws also provide that its own officer, thus receiving the money, shall be deemed to be the agent of the member making the payment, and any default on the part of that officer to transmit the money to the principal office shall be imputed to the

¶ 2. See *Insurance*, vol. 28, Cent. Dig. § 1987.

member, and not until the money is actually transmitted to the defendant's proper officer at the principal office is the obligation of the paying member discharged. In this case it appears that the financial secretary of the relator's lodge did not transmit the funds, but made default in that respect. The by-laws then provide that any subordinate lodge or court, not transmitting the funds so received on the 1st day of the succeeding month, and so continuing in default until the end of the month, shall ipso facto be deemed to be suspended on the 1st day of the succeeding month. This suspension affects not only the subordinate court as such, but the whole body of its membership, and thus the innocent and the guilty are cut off from all the benefits of the association through the default or misconduct of the defendant's own agent, and without any fault of their own. It is true that the member may be reinstated when the default has ceased, but not unless he is able to present a certificate of good health, or to pass the medical board. The relator attempted to comply with this provision, but was unable to procure the certificate of good health or pass the medical examination, as his physical condition was impaired in consequence of an operation performed after he became a member, and while in good standing, and so his application for reinstatement was rejected.

The constitution and by-laws provide for appeals from decisions of this character to various courts or tribunals within the order, and that no member shall be entitled to bring any civil action or legal proceeding until he shall have exhausted all the remedies by such appeals. The tribunal of last resort of the order is called the "supreme court," but it is found that no session of that body was held after the suspension of the relator and before the 30th day of January, 1901, when this proceeding was commenced, and that none could be held until the second Tuesday in April, 1902, and then in the city of Los Angeles, in the state of California. It is argued that these regulations or laws debar the relator from any remedy or relief in the courts of this state. Conceding that the constitution and by-laws of the defendant are a part of the contract between the parties, and the general rule that the law permits great freedom of action in making contracts, there are some restrictions placed upon that right by legislation by public policy and by the nature of things. As this court has said in a recent case: "Parties cannot make a binding contract in violation of law or of public policy. They cannot in the same instrument agree that a thing exists and that it does not exist, or provide that one is the agent of the other, and at the same time, and in reference to the same subject, that there is no relation of agency between them. They cannot bind themselves by agreeing that a loan, in fact void for usury, is not usurious, or that a copartnership,

which actually exists between them, does not exist. They cannot, by agreement, change the laws of nature or of logic, or create relations physical, legal, or moral, which cannot be created. In other words, they cannot accomplish the impossible by contract." *Sternaman v. Met. Life Ins. Co.*, 170 N. Y. 13, 62 N. E. 763, 57 L. R. A. 318, 88 Am. St. Rep. 625. In so far as the defendant attempted by the enactment of by-laws to make the default or misconduct of its own agent and officer the default and misconduct of the members, who had paid their dues and assessments precisely as the regulations required, its action was nugatory. No corporation can be deemed to possess the power to visit upon its members the consequences of a default in the payment of funds by its agent and officer to the extent of excluding the members from all their rights, and virtually expelling them for such reason from the organization.

The learned courts below have held that the by-laws had no effect upon the status of the relator as a member of the order in good standing, for the reason that, in so far as they deprived him of the rights acquired by his membership, they were unreasonable and void. We fully concur in this view of the case, and in the reasons stated in support of it in the learned opinion below. The defendant had no power, under the circumstances of this case, to deprive the relator of the right to resort to the civil courts for redress, or to compel him to seek his remedies by appeal to the various judicatories erected within the order. The manner in which these courts are organized, the expense and delay involved in procuring a hearing in another and very remote jurisdiction, were obstacles that amounted almost to a denial of justice. But it is plain that such an appeal could result in no relief to the relator, since, under its own laws, the defendant could not reinstate him without the medical certificate, and it was impossible to procure that.

We think that the judgment is right, and must be affirmed, with costs.

PARKER, C. J., and BARTLETT, VANN, CULLEN, and WERNER, JJ., concur. MARTIN, J., absent.

Judgment affirmed.

(176 N. Y. 163)

WALSH v. CENTRAL NEW YORK TELEPHONE & TELEGRAPH CO.

(Court of Appeals of New York. Oct. 6, 1903.)

DEFECTIVE STREET—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.

1. A bicyclist was riding after dark between the rails of a railroad track on a street in which a trench was excavated about three feet from the track, and a manhole constructed with-

¶ 1. See *Municipal Corporations*, vol. 24, Cent. Dig. §§ 1682, 1755.

in a foot of the track. The street had been barricaded on that side, and red lights placed thereon. In order to avoid a car on the other track, coming from the opposite direction, he attempted to ride on a strip between the track and trench, and fell into the manhole. *Held* that, as a matter of law, he was not guilty of contributory negligence.

2. Where a bicyclist was riding in the night on a street in which a trench was being excavated, where red lights and the dirt thrown up by the trench indicated there was danger, an instruction that he was bound to exercise unusual care, and that by "unusual care" was meant a greater degree of care than was necessary in using an unobstructed street, was improperly refused.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by Dennis Walsh against the Central New York Telephone & Telegraph Company. From a judgment of the Appellate Division (77 N. Y. Supp. 798) affirming a judgment for plaintiff, defendant appeals. Reversed.

Edwin Nottingham, for appellant. James Devine, for respondent.

CULLEN, J. The action was brought to recover for damages for personal injuries. At the time of the accident the defendant was engaged in laying a subway or conduit in South Salina street, in the city of Syracuse. The street runs north and south, and in the middle of it is laid a double-track street railroad. For the purpose of laying the conduit the defendant had excavated at a distance of about 3 feet west of the westerly rail a trench 2 feet in width, and varying in depth from $2\frac{1}{4}$ to $3\frac{1}{2}$ feet. At points along the line of the subway, manholes were to be constructed. The one in question, into the excavation for which the plaintiff fell, was about 6 feet wide, east and west, and 9 feet long, north and south. The easterly side or line of the manhole was a little more than a foot from the westerly track. The earth taken from the trench was cast on its westerly side, so as not to obstruct the movement of the street cars, the running boards of which projected from a foot and a half to over 2 feet beyond the rails at a height of 14 inches above the pavement. The part of the carriageway lying to the west of the railroad tracks was closed by barricades. The carriageway to the east of the tracks, in width 18 feet, was wholly unobstructed. On the night on which the accident occurred, red lights were placed at the barricades, and also along the ridge of earth thrown out from the trench. About half-past 8 the plaintiff and his brother were proceeding on bicycles southerly along the street; the plaintiff riding between the two rails of the westerly track, his brother in the space between the two tracks. They encountered another bicycle and a car proceeding north on the easterly track. Thereupon the plaintiff turned out of the south-bound track to the 3-foot strip between the trench and that track, in order, as he testified, to permit the brother to take

his place in that track and avoid the approaching vehicles. They continued on their way at a speed of about 4 miles an hour until they reached the manhole into which the plaintiff fell and was injured. The plaintiff testified that he had noticed the excavation of the trench, but that he had observed there was a strip of 3 feet between the trench and the track, which, in his judgment, was sufficient for him to safely proceed on his bicycle; that he did not see the manhole, or that at that point the excavation approached closely to the track; and that there was no light or barrier at that point to give him warning. At the trial the defendant contended that it could not place any barrier or lights on the easterly side of the trench on account of the projection and overhanging of the running boards of the cars, and also that the plaintiff was guilty of contributory negligence in running his bicycle so close to the trench. The motion for a nonsuit was denied, and the case submitted to the jury, which rendered a verdict for the plaintiff. The Appellate Division, by a divided court, affirmed the judgment entered on that verdict.

Personally, I should incline to the view that the plaintiff, in riding at night so close to the excavation or trench without being driven to assume that position by any special stress of circumstances, was guilty of contributory negligence as a matter of law. Doubtless, in the absence of any information or notice to the contrary, the traveler has a right to assume that all parts of the highway are reasonably safe and secure; but every traveler equally well knows that for very many purposes it is necessary from time to time to tear up and obstruct streets, by which the streets, or portions of them, are rendered unfit for travel. In such cases it is necessary that barriers, lights, and other appropriate warnings should be given, by which the traveler is made aware of the condition of the street. The plaintiff saw the barriers and lights; saw that the westerly portion of the carriageway was closed to travel, and that a trench was being excavated through the street at a distance of three feet from the rail. I do not think he had the right to assume that there would continue to be a space of three feet between the trench and the rail. Every one knows that the side of a trench is not maintained with the regularity that is to be expected in a face of masonry. The earth is apt to cave in to a certain extent, and therefore the width of the trench cannot be expected to be uniform, but necessarily varies. It is also well known that riding or walking close to the edge of a trench tends to make it cave in. It was dark, and the plaintiff could not see the condition of the street any great distance before him. Knowing, therefore, that the street was torn up, and appreciating his inability to see its state at any great distance, it seems to me that ordinary care would have

kept him off that side of the carriageway, unless he was forced on to it by the movement of other vehicles, which was not the case. There was no reason why he and his brother should necessarily have ridden abreast. One could have preceded the other in the space between the rails with entire safety. But a majority of my associates think the question of the plaintiff's negligence was one of fact for the jury, and I bow to their judgment. We all agree, however, that there was error in refusing to charge the defendant's request as to the degree of care which the plaintiff was bound to exercise under the circumstances. The defendant asked the court to charge that the red lights and the dirt thrown up in the excavation of a trench indicated that there was danger, and that the plaintiff was bound to exercise unusual care in passing that locality; that by "unusual care" was meant greater care than would be required in passing over a street without obstacles, and in which excavations did not appear. This the court refused to charge, but left it for the jury to say whether the plaintiff should have exercised a greater degree of care. It is true that the obligation resting on the plaintiff was the exercise of ordinary care, but at the same time the general rule is that care, or, more accurately, precaution, must be commensurate with the danger, and ordinary care will dictate and require a degree of vigilance under one set of circumstances that would be unnecessary under another. *Thompson on Negligence*, § 171; *Griffen v. Mance*, 166 N. Y. 188, 59 N. E. 925, 52 L. R. A. 922, 82 Am. St. Rep. 630. It is on this principle that the rule of law has become settled in this state that, because a railroad crossing is a place of danger, travelers seeking to cross must make vigilant use of their senses to avoid danger. Assuming that I am wrong in the view that the danger here was so manifest that it was negligence for the plaintiff to proceed on the side of the carriageway upon which was the excavation, it was at least sufficiently obvious to require of him to exercise special care. We think that the defendant was entitled to have that proposition specifically charged.

The judgment should be reversed and a new trial granted; costs to abide the event.

PARKER, C. J., and O'BRIEN, BARTLETT, VANN, and WERNER, JJ., concur. MARTIN, J., absent.

Judgment reversed, etc.

(176 N. Y. 150)

BRINK v. STRATTON et al.

(Court of Appeals of New York. Oct. 6, 1903.)

WITNESSES—IMPEACHMENT.

1. Where witnesses are called for the purpose of impeaching a party to an action, his testimony that they are hostile to him is competent as affecting their credibility.

2. For the purpose of affecting the credibility of a witness he cannot be interrogated as to his belief in the existence of a Supreme Being, who would punish him for false swearing.

Appeal from Supreme Court, Appellate Division, Second Department.

Action by Leander Brink against William D. Stratton and others. From the judgment of the Appellate Division (72 N. Y. Supp. 87) affirming a judgment in favor of plaintiff, defendants appeal. Reversed.

Abram F. Servin and Thomas Watts, for appellants. William Vanamee and John F. Bradner, for respondent.

MARTIN, J. This action was to recover upon a joint and several promissory note made by the defendants Stratton, Brown, and the firm of Corey & Co., of which Corey is surviving partner. It was payable to the plaintiff or his order. The defendants Stratton and Brown answered the complaint, and among other defenses alleged that the note in suit had been paid by the defendant Horace W. Corey or the firm of Corey & Co. The defendants' evidence was to the effect that it had been paid by giving another note, made by Corey & Co. alone, which was discounted at a bank, renewed from time to time, and ultimately taken up and paid by the plaintiff. That it was received in payment by the plaintiff was denied by him, and that issue was submitted to the jury, which found a verdict in his favor. The judgment entered upon the verdict was unanimously affirmed by the Appellate Division, so that the only questions which are presented upon this appeal arise either upon rulings rejecting or admitting evidence or upon exceptions to the charge of the trial court.

The first error alleged by the appellants is the refusal of the court to permit the defendant Corey to testify as to the relations between himself and three witnesses—Stivers, Boyd, and Wilbur—who were called on the trial to impeach his character for truth and veracity. As to the witness Stivers, he was asked: "While you were publishing a paper and he was publishing one, were you good friends? (Objected to as improper. Objection sustained. Defendants except.)" As to the witness Boyd, he was asked: "Was Mr. Boyd opposing you and you opposing Mr. Boyd for a number of years in your papers? (Objected to as improper. Objection sustained. Defendants except.)" Q. Each one attacking the other through the paper? (Same objection, ruling and exception.)" As to the witness Wilbur he was asked: "What have been the relations between you and Mr. Wilbur? (Objected to. Objection sustained. Defendants except.)" Q. Was Mr. Arthur (Wilbur) at one time superintendent of schools? A. He was. Q. Did your paper attack him? (Objected to. Objection sustained. Exception.) Q. I will ask you whether or not, by reason of

the position of the Forum against Mr. Wilbur, whether or not he was defeated as superintendent of the schools? (Objected to. Objection sustained. Exception.)" That it was competent to prove the hostility of any or all of these witnesses towards the defendants, or either of them, by their cross-examination, or by other testimony; that it was not necessary that the witness should be first examined as to his hostility before calling other witnesses; and that the examination of other witnesses is not limited to contradicting him in case he denies hostility—is well established by the decisions in this state. *Starks v. People*, 5 Denio, 106; *People v. Brooks*, 131 N. Y. 321, 30 N. E. 189; *Garnsey v. Rhodes*, 138 N. Y. 461, 467, 34 N. E. 199; *People v. Webster*, 139 N. Y. 73, 85, 34 N. E. 730; *Lamb v. Lamb*, 146 N. Y. 317, 41 N. E. 26. In *People v. Brooks* it was held that the hostility of a witness towards a party against whom he is called may be proved by any competent evidence, either by cross-examination of the witness or by the testimony of other witnesses; and that it is not necessary that the witness should first be examined as to his hostility before calling other witnesses, and the examination of other witnesses is not limited to contradicting him in case he denies any hostility. The extent, however, to which an examination may go for the purpose of proving the hostility of a witness must be, to some extent, at least, within the discretion of the trial judge. It should be direct and positive, and not very remote and uncertain, for the reason that the trial of the main issue in the case cannot be properly suspended to make out a case of hostile feeling by mere circumstantial evidence from which such hostility or malice may or may not be inferred. *Schultz v. Third Ave. R. R. Co.*, 89 N. Y. 242. The decision in the *Brooks* Case was followed in *Garnsey v. Rhodes*, *People v. Webster*, and *Lamb v. Lamb*. In the *Garnsey* Case a witness was asked whether there had been any disagreement between him and the plaintiff's architects, between whom and the plaintiff a conspiracy was alleged. The evidence was objected to and excluded. This was held error, and the court there said: "The object of the defense was to charge the plaintiff with the consequences of a conspiracy between him and the architects, and it was therefore quite as material and important for the plaintiff to show that the witness by whom it was sought to establish the unlawful combination was hostile to one of the parties to it as it would have been to have shown hostility on his part towards the plaintiff himself. The admission or rejection of the evidence was not discretionary with the trial court." "It was not there [in *People v. Brooks*] held, as the counsel for the defendant seems to suggest, that it was in the discretion of the court whether such questions should be allowed. All that was said upon the point was that the extent

to which such an examination may go must be in some measure within the discretion of the trial judge. This must be so, or else it might become interminable. But here the whole inquiry was ruled out. Even general questions were disallowed, and as it must be assumed, for the purposes of this appeal, that, if answered, the responses would have shown bias, the plaintiff may have been prejudiced by the exclusion of the evidence." If Corey is to be regarded as a party to this action, then clearly, within the doctrine of that case, the evidence offered by the defendants as to the relations between Corey and the witnesses called was admissible. It will be remembered that the witness was asked as to Stivers whether he and Stivers were good friends while publishing opposition papers, as to Boyd the inquiry was if they were opposing each other for a number of years in their papers, and as to Wilbur he was asked what had been the relations between them. All these questions were objected to as improper, and the objection was sustained. Corey was named as defendant in the summons and complaint, but did not appear either in person or by attorney. He was, however, called as a witness by the defendants, and gave material testimony upon the trial. The three witnesses mentioned were called to impeach his character for truth and veracity, and testified that it was bad. Corey was then recalled, and the proof as to the hostility of those witnesses to him was offered and excluded. Thus the question presented is whether the defendants were entitled to prove the relations between those witnesses and Corey as affecting their evidence as to his general character. We think they were. The question of his character was thus placed in direct issue. To that issue the evidence rejected was plainly directed, and the proof offered was admissible within the principle of the cases already cited, especially the cases of *Starks v. People*, 5 Denio, 106, where it was held that a party has a right to impeach a witness for his adversary, though the testimony of such witness related solely to the general character of another witness, and *Garnsey v. Rhodes*, where the hostility which was sought to be proved was between the architects employed by the plaintiff and the principal witness for the defense. In this case the direct purpose of the evidence was to show that the witnesses who had testified to the bad character of Corey were hostile to him, the party against whom they had testified, and hence their evidence was not entitled to the credit it otherwise would have been, and was, we think, plainly admissible.

The next exception urged by the appellants is to the rulings of the court rejecting the evidence of the defendant Corey as to whether he was financially responsible at the time the note which was put in the bank was delivered to the plaintiff. The issue was whether the note in suit had been paid by

the delivery and acceptance of a note made by Corey & Co. That question in the case depended upon the direct evidence of the parties, and, even if the defendant Corey was financially responsible, it is hardly evidence that the plaintiff would have surrendered a note upon which there were two other makers who were responsible, even if the defendant Corey was. We think this exception is insufficient to justify an interference with the judgment.

The only remaining exceptions that need be considered are whether the court properly overruled the defendants' objection to the plaintiff's question whether the witness Corey believed in the existence of a Supreme Being, who will punish false swearing, and to the charge of the court upon that evidence. The question was objected to as improper, immaterial, and irrelevant. The objection was overruled, and the defendants excepted. The answer was: "I do not know anything about it, I am sure. * * * I will reply that I am an agnostic. I have no belief on that subject at all. I do not know anything about it." The court, in charging the jury, said: "It is for you to say how far you are to attach credibility to his [Corey's] statements, how far his testimony is impeached as to what he has said here in regard to his religious beliefs." This charge was excepted to by the defendants. That question is not an open one in this court. In *People v. Most*, 128 N. Y. 108, 27 N. E. 970, 26 Am. St. Rep. 458, it was directly involved, and distinctly decided. One of the points made by the appellant's counsel in this court was that "the court erred in permitting the district attorney to interrogate each witness for the defense as to his religious belief, and in not stopping the district attorney in his summing up to the jury when he said that the jury should not believe the defendant and his witnesses, because some of them testified that they did not believe in the Supreme Being." At the threshold of his opinion in that case Judge Andrews stated that: "But three of the questions presented on the brief of the appellant's counsel can be considered on this appeal. One of these questions is raised by the exception to the denial by the trial judge of the motion of the counsel for the defendant, made at the conclusion of the evidence on the part of the people, for an instruction to the jury to acquit the defendant on the ground that the evidence was legally insufficient to justify a conviction. An exception was taken to a question put to a witness by the defendant on cross-examination by the prosecuting officer, and which was allowed by the court, as to his belief in a Supreme Being. A third exception was taken to evidence offered by the prosecution, and admitted, that the persons present at the meeting at Kramer's Hall on the evening of November 12, 1887, were anarchists." After discussing the first and third questions, the court held that the evidence was sufficient to

bring the case within the definition of the statute, and that the proof that the persons present at the meeting at Kramer's Hall were anarchists was properly admitted. As to the second exception, which was to the question as to the witness' belief in a Supreme Being, the court said, "The exception to the question put to the witness on cross-examination, as to his belief in a Supreme Being is frivolous." Thus it is perfectly manifest that the question whether it was competent to interrogate a witness as to his belief in a Supreme Being was directly involved and squarely decided by this court in that case. It is also manifest that, if a contrary view had been taken upon that question, which was certainly presented, it would have required a reversal of the judgment, and, as the judgment was unanimously affirmed, it is plain that the question was passed upon in that case. Therefore, unless our decision in that case is to be overruled, the judgment in this case cannot be reversed upon that ground.

We are, however, of the opinion that the court erred in rejecting the evidence of the witness Corey as to the hostility of the impeaching witnesses, and for that error alone the judgment should be reversed.

CULLEN, J. I concur in the opinion of Judge MARTIN that the trial court erred in not permitting the defendant, when examined as a witness on his own behalf, to testify as to the state of the relations existing between himself and several witnesses for the plaintiff. But there was further error committed on the trial. On cross-examination the defendant Corey was asked, against the objection and exception of his counsel, whether he believed in the existence of a Supreme Being, who would punish false swearing, to which he replied that he knew nothing about it; that he was an agnostic, and had no belief on the subject at all. In submitting the case to the jury the learned county court charged: "It is for you to say how far you are to attach credibility to his [Corey's] statements, how far his testimony is impeached as to what he has said here in regard to his religious beliefs;" to which comment and instruction the appellants excepted. I think that these rulings also were erroneous. At common law no one but a Christian was a competent witness, and, as testimony could be given only under the sanction of an oath, even Christians (such as Friends and others) who deemed the taking of an oath unlawful were necessarily excluded from testifying. The common-law rule was relaxed from time to time, either by statute or by judicial decisions, until as the law stood in this state prior to the adoption of the Constitution of 1846: "Every person believing in the existence of a Supreme Being who will punish false swearing, shall be admitted to be sworn, if otherwise competent." 2 Rev. St. 408, § 87. And it was further enacted by the Legislature that "no-

person shall be required to declare his belief in the existence of a Supreme Being, or that he will punish false swearing, or his belief or disbelief of any other matter, as requisite to his admission to be sworn or to testify in any case. But the belief or unbelief of every person offered as a witness may be proved by other and competent testimony." Id. 408, § 88. It was immaterial whether the witness believed that Divine punishment would be inflicted in this world or in the next (1 Greenl. Ev. § 369); though it seems that prior to the legislation referred to the rule was to the contrary, and it was necessary that the witness believe in a future state of rewards and punishments (Jackson v. Gridley, 18 Johns. 98; Butts v. Swartwood, 2 Cow. 431). But by the Constitution of 1846 there was added to the previously existing constitutional declaration of religious liberty the further provision: "And no person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief." This amendment, of course, established the competency of an infidel or an atheist as a witness. As to this there is no dispute. But it is contended that, though the witness may not be excluded from testifying by reason of being an infidel, he may be interrogated as to his belief, and his infidelity be considered by the jury on the question of his credibility. This was so held by the Supreme Court in *Stanbro v. Hopkins*, 28 Barb. 265, though the declaration was obiter, the judgment having been reversed on another point. The same view was taken by this court without discussion in *People v. Most*, 128 N. Y. 108, 27 N. E. 970, 26 Am. St. Rep. 458. The question has arisen in other states. In Iowa the rule in the *Stanbro* Case seems to have been adopted. *Searcy v. Miller*, 57 Iowa, 613, 10 N. W. 912; *State v. Elliott*, 45 Iowa, 486. On the other hand, in Virginia and in Kentucky, under constitutional provisions not as explicit as our own, but enacting liberty and equality of religious belief, it has been held that a witness cannot be interrogated as to his belief in the existence of a Deity or a future state for the purpose of affecting his credibility. *Perry's Case*, 3 Grat. 632; *Bush v. Commonwealth*, 80 Ky. 244. The record of the proceedings of the convention by which this constitutional provision was formulated shows that the view taken by the Virginia and Kentucky courts is the correct one. The provision was the subject of discussion and debate, and was not adopted without opposition. The member who introduced the provision (Mr. Taggart, of Genesee) said that he had known the question of a witness' belief in a Supreme Being being raised but once, and trusted that he should never see it raised again. But, he said, if there was anything in this, "let it go to the jury; let it go to his credit, and not to his competency." Acting on this suggestion, another member moved an amendment: "But evi-

dence may be given as to the belief or disbelief of the witness in the obligation of an oath and of the grounds of such belief or disbelief, in order to enable the jury to judge of his credibility." This amendment was rejected by a vote of 92 to 12. Crosswell & Sutton Debates, pp. 808, 809. It may be worthy of notice that the convention at the same time struck out the provision of the then existing Constitution which disqualified ministers from holding office, thus making the divorce between the state and religious creeds complete. Therefore, upon the adoption of the Constitution of 1846 by the people, a witness could not be excluded by reason of his religious belief or unbelief, nor, under the statute, could he be interrogated on that subject. The learned court in the *Stanbro* Case said with entire truth that, though a witness may be competent, his credibility may be impaired. It then argued that in analogy to the case of a party to an action who is now a competent witness, but whose interest in the cause goes to his credibility, so the religious belief of a witness, while not rendering him incompetent, might be considered on the question of the credit to be accorded him. I think the learned court was misled by a false analogy. Interest in the subject-matter and relationship to the parties are temporal and mundane influences which common experience teaches us tend to bias consciously or unconsciously the testimony of witnesses. But such is not naturally the result of abstract religious belief. I think that the decision of this court in *Gibson v. Am. Mutual Life Ins. Co.*, 37 N. Y. 580, is controlling on that question. That was an action on a life insurance policy, one of the defenses being suicide. Evidence offered by the defendant to show that the insured was an atheist was excluded. The ruling of the trial court was upheld on the ground that a man's probable course of action could not be predicated from his religious belief. It was there said by Judge Hunt: "In what way, and how far, do these statements of belief operate upon the conduct of man? Is it certain that he who believes in the eternal punishment of the impenitent in a future world is a better observer of the laws of his country, and more free from actual crime, than he who denies that doctrine? Or is it certain that he who believes in the final salvation of all men would refrain from an offense which he would have committed had he believed that there was no future state? No man can answer with certainty." The truth of this statement is apparent when it is borne in mind that at all times men have been found to unflinchingly meet death, rather than deny their religious faith, who could not be induced to conform their lives to the commands of that religion for a week continuously. All that was written by Judge Hunt in the case cited applies with far more force to the case before us. The light in which

suicide was viewed by Pagan ethics differs widely from the judgment passed on that act by the Christian religion. While there were not wanting philosophers or moralists in the old world to condemn the act, they were the exceptions. But the Christian religion declared that suicide was a "mortal" sin, and there can be no doubt that it is due to belief in that religion that a practice once common has substantially ceased, though sporadic instances still occur. See 1 Lecky, *European Morals*, 233 et seq. Indeed, one of the grounds of attack on Christianity by the great apostle of modern pessimism is what he contends to be its false view of suicide. Schopenhauer's *Essays*. The argument was, therefore, not without force, that an infidel or an atheist would be more likely to commit suicide than a Christian. But I know of no system of religion or code of ethics at any time generally prevalent in the world that has failed to condemn falsehood, or to hold truth as a virtue.

It has been seen that in the condition of the law just prior to 1846 the only religious view that excluded a witness was failure to believe in Divine punishment. Thus fear was deemed the only influence by which veracity in witnesses could be assured. If, despite the constitutional enactment that no such test of competency shall longer prevail, inquiry on the subject is still to be made with reference to the witness' credibility, I think we may be led into great embarrassments. I do not see why a witness who declares merely his ignorance as to whether there is or is not a Deity who will punish false swearing is less amenable to fear than one who believes that his future state, whether of salvation or punishment, has been decreed from all eternity, regardless of faith or good works. Yet the denomination holding this doctrine in its confession of faith has given to American history at least as many great names as any other religious sect. I think that the learned court in the *Stanbro Case* failed to appreciate that when the Constitution abrogated all disqualifications from office or civil rights the consideration of a witness' religious belief on the question of his credibility necessarily fell at the same time. On the trial of a cause, as is pointed out by the Supreme Court of Virginia, the judge may be a skeptic or an infidel and the juror an agnostic or an atheist. Neither can be excluded for that reason from sitting in judgment. Is it possible that we would uphold the submission to a jury of a witness' belief in Christianity as impairing his credibility? It is said by one of the learned judges in the *Stanbro Case* with reference to the practice of interrogating a witness as to his religious belief: "I have no fears that this rule will encourage parties to scandalize truly religious witnesses by imputations that they profess the worst of creeds. For, so long as no religious test shall be required for judges and jurors, parties will be loath to cross-ex-

amine witnesses as to their opinions on matters of religious belief, unless they are well assured the opinions of the witnesses are very obnoxious to the sentiments of citizens who say with Pope:

For modes of faith let graceless zealots fight,
He can't be wrong whose life is in the right.

That which the learned judge considered a safeguard against the abuse of the practice, to me constitutes its danger. Doubtless, no wise advocate will interrogate a witness as to his religious faith unless it is obnoxious and unpopular in the community. But that is the very case in which the exposure of a witness' religious belief would probably lead to injustice. It is somewhat singular that shortly after the adoption of the Constitution of 1846 abolishing all religious tests or disqualifications, religious animosities, it is true, not standing alone, but connected with questions of race and nationality, reached the highest pitch ever known in this country, not only affecting the action of political parties, but leading in many cases to riot and destruction of property. I think that no one who remembers that period will deny that during the prevailing prejudice and passion a witness professing the unpopular faith might have found himself, in some parts of the country, as much discredited by a jury, or some members of it, as an agnostic or atheist would now be. It is true that the feelings then existing have entirely, or almost entirely, subsided. It is also true, as said by Bacon, that a religion of negation only is not apt to draw to itself many or enthusiastic adherents, and it may be added that for this reason it is not likely to excite the most violent antipathies. But the principle involved here is in itself important, and the rule declared by the court, in my judgment, wrong. Unfortunately, religious animosities are easily aroused, and we should not give sanction to a principle that may hereafter work great injustice.

I do not say that no examination into a witness' religion can at any time be had. The religious creed of a person may not deal exclusively with his relations to his Creator, but may enjoin acts forbidden by law, or forbid compliance with the law. The weight of authority seems to be that the Thugs in India committed their crimes under the direct sanction, if not command, of their religion. Of course, a witness may be interrogated as to whether he thinks it wrong to give false testimony, whether his religion requires him to commit a crime. These inquiries relate to temporal matters, not to spiritual or theological ones. So, also, a witness may be asked whether he is a member of the same church as that of one of the parties. This also involves no direct inquiry into his religious belief, but only as to his associations. Experience teaches us that we may be biased in favor of our associates, whether in a church, in a club, or in a business institution. Possibly the most "ob-

noxious" religious faith to-day is that of the Mormons. In a prosecution for polygamy a witness might properly be asked whether he was a Mormon, and whether his religion did not enjoin, or at least approve, that practice. But when a Mormon sues on a bill for groceries, in my judgment it is neither constitutional nor reasonable to interrogate him on the subject of his belief for the purpose of exciting prejudice against him.

The judgment appealed from should be reversed, and a new trial granted; costs to abide the event.

BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur with CULLEN, J., who agrees with MARTIN, J., as to ground for reversal. PARKER, C. J., concurs with MARTIN, J., fully.

Judgment reversed, etc.

(176 N. Y. 115)

WILCOX v. AMERICAN TELEPHONE & TELEGRAPH CO.

(Court of Appeals of New York. Oct. 6, 1903.)

EJECTMENT—EVIDENCE—NEGLIGENCE.

1. In ejectment against a telephone company to recover land occupied by its poles, plaintiff is not precluded from attacking the validity of a paper signed by him, which defendant's agent told him at the time was a receipt for a dollar paid by the agent for trimming one of his trees, while in fact it gave defendant the right to construct its lines over and along its property, though plaintiff, at the time of signing the agreement, failed to read it.

2. Plaintiff in ejectment can show that the grant of the land to defendant was obtained by him by fraud, when it is set up as a defense, and is not required to go into equity for relief against the grant.

Haigh, J., dissents.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by Sylvester Wilcox against the American Telephone & Telegraph Company. From a judgment of the Appellate Division (76 N. Y. Supp. 1037) affirming a judgment for defendant entered on dismissal of the complaint, plaintiff appeals. Reversed.

Jay K. Smith, for appellant. Elbridge L. Adams and Melville Egleston, for respondent.

CULLEN, J. The action was brought in ejectment to recover lands in the highway occupied by the defendant's poles, and for damages. On the trial the plaintiff proved title to the locus in quo, and the entry thereon by the defendant, and the erection of its poles. The defendant then put in evidence an instrument under seal executed by the plaintiff some years after the original entry on the highway, whereby the plaintiff, in consideration of \$1, granted to the defendant the right to construct, operate, and maintain its lines over and along the plaintiff's property. The plaintiff admitted his signature to this instrument, but testified that at the time of

its execution he was told by an agent of the defendant that he had trimmed one of the plaintiff's trees, and wished to pay him a dollar for it; that the agent told him the paper was a receipt for a dollar; that he (the plaintiff) did not read the paper; that he had not his spectacles with him; and that thereupon, relying upon the statement of the agent as to its contents, he signed the paper. On this evidence the court directed a nonsuit, and the judgment entered thereon was affirmed by the Appellate Division by a divided court, Mr. Justice Spring writing for reversal.

The ground on which the learned trial judge disposed of the case, as appears in the opinion rendered by him upon denying the motion for new trial, was that the negligence of the plaintiff in failing to read the paper which he signed precluded him from attacking its validity. We think no such rule of law prevails in this state, though there may be dicta in the text-books and decisions in other jurisdictions to that effect. It was expressly repudiated by this court in *Albany City Savings Institution v. Burdick*, 87 N. Y. 40, where Judge Earl said: "It is certainly not just that one who has perpetrated a fraud should be permitted to say to the party defrauded, when he demands relief, that he ought not to have believed or trusted him. Where one sues another for negligence, his own negligence contributing to the injury will constitute a defense to the action; but where one sues another for a positive, willful wrong or fraud, negligence by which the party injured exposed himself to the wrong or fraud will not bar relief." See, also, *Welles v. Yates*, 44 N. Y. 525; *Smith v. Smith*, 134 N. Y. 62, 31 N. E. 258, 30 Am. St. Rep. 617. It is true that, in the opinion delivered in the *Smith* case, Judge Landon refers to the relations of confidence between the parties, but only as affecting the credibility of the plaintiff's story that she executed the instrument relying on the defendant's statements as to its contents. The decision did not proceed on any ground of trust relations between the parties. On the contrary, the learned judge said: "The learned counsel for the defendant cites numerous cases, mostly from other states, to support his contention that plaintiffs' negligence in not reading the deed defeats their appeal to equity to relieve them from it. The law of this state as stated in *Albany City Savings Institution v. Burdick* is not so harsh as in some of the cases cited. It does not, in cases like this, impute inexcusable negligence to that omission of vigilance and care procured by the fraud of the wrongdoer." In the other cases cited there was no relation of trust between the parties, but merely that of vendor and purchaser. In a case where a third party has parted with value on the faith of the instrument executed by a person, the question of negligence leading to the execution of the instrument might be material (see opinion of

Gray, J., in *Marden v. Dorthy*, 160 N. Y. 60, 54 N. E. 726, 46 L. R. A. 694, but it can have no relevancy in favor of the party who it is alleged committed the fraud. The credibility of the plaintiff's statement was for the jury. If the trial judge deemed it unreliable, he might have set aside a verdict based upon it, but that did not authorize him to withdraw the case from the jury or to direct a verdict or a nonsuit. *McDonald v. Met. Street Ry. Co.*, 167 N. Y. 66, 60 N. E. 282.

The practice adopted by the plaintiff was entirely proper. He was not obliged to appeal to a court of equity for relief against the deed, but when it was set up to defeat his claim he could avoid its effect by proof of the fraud by which it was obtained. *Kirchner v. New Home Sewing Machine Co.*, 135 N. Y. 182, 31 N. E. 1104. Nor was he obliged to return the dollar paid to him on its execution. The plaintiff does not attempt to rescind a contract as induced by fraud. The charge by him relates, not to the contract, but to the instrument which purports to represent the contract. In such a case the return of the consideration is unnecessary. *Oleary v. Municipal Electric Light Co. (Sup.)* 19 N. Y. Supp. 951, affirmed on opinion below in 139 N. Y. 643, 35 N. E. 206.

The judgment should be reversed and a new trial granted, costs to abide the event.

O'BRIEN, BARTLETT, and WERNER, JJ., concur. PARKER, C. J., not sitting. GRAY, J., not voting. HAIGHT, J., dissents.

Judgment reversed, etc.

(203 Ill. 621)

LLOYD v. SANDUSKY et al.*

(Supreme Court of Illinois. June 16, 1903.)

COVENANTS — SEISIN — BREACH — MINERAL — SEVERANCE OF ESTATES — DAMAGES — CONSIDERATION — PAROL EVIDENCE — APPEAL — PLEADING — REVIEW — EXCEPTIONS.

1. A ruling on demurrer to certain pleas filed may be reviewed on appeal, though no exception was taken to the ruling and noted on the record, since the pleadings are part of the record proper.

2. In an action for breach of covenant of seisin, where the consideration was severable as to various tracts or parts of the land, and the title failed as to one of such tracts, the measure of damages was the price paid for such particular tract, with interest.

3. Where, in an action for breach of a covenant of seisin, consisting of an alleged prior conveyance of coal under the land conveyed, it was alleged that prior to the sale to plaintiff he was informed that a severance of the estate had been made by a previous conveyance of the coal, and that the consideration paid by him was for the surface of the land only, and that the deed, by mistake, described the entire land, parol evidence of such facts was not objectionable, as tending to contradict the deed, but was admissible in mitigation of damages.

Hand, C. J., and Wilkin and Cartwright, JJ., dissenting.

*Rehearing denied October 23, 1903.

¶ 2. See *Covenants*, vol. 14, Cent. Dig. §§ 235, 236.

Appeal from Appellate Court, Third District.

Action by Henry Lloyd against William Sandusky and others. From a judgment of the Appellate Court (95 Ill. App. 593) in favor of plaintiff for nominal damages, he appeals. Affirmed.

Lawrence & Lawrence, for appellant. H. M. Steely and E. R. E. Kimbrough, for appellees.

RICKS, J. This is an action of covenant on two deeds, brought by appellant, against the appellees, in the circuit court of Vermillion county. The declaration consisted of one count, in which two breaches were assigned: First, the breach of seisin under both deeds; and, second, breach of warranty and quiet enjoyment. Suit was begun January 5, 1900.

The declaration alleges that on April 26, 1876, appellees made and delivered to appellant a deed of general warranty, purporting to convey the E. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of section 34 (80 acres), and the W. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 35 (82 acres), in township 19, range 12 E. of the third principal meridian, which deed was duly recorded in said Vermillion county on the 27th day of July, 1876. Appellees also made a statutory warranty deed to appellant for the E. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 35, in the same town and range, which latter deed was filed and recorded on the 15th of March, 1880. The consideration for said land was \$8,100. The breach as to seisin was: "The defendants were not seised in fee simple, and did not have good right and lawful authority to sell and convey the whole of the said described real estate, in this: That on the 4th day of May, 1864, one Harvey Sandusky was then the owner in fee simple, and actually possessed with good right and lawful authority to sell and convey the whole of the lands described as aforesaid, and upon that day, for a good and valuable consideration to him paid by one John Faulds, did then sell all coal and mineral beneath the surface of said described lands (excepting the northwest quarter of said southwest quarter of section 35), with the right to dig and remove the same therefrom, and for that purpose to sink pits and shafts thereon, with the right of ingress and egress over the surface to and from said pits and shafts, and to flow the water over the surface from said mines; and on said date the said Harvey Sandusky, by his deed of conveyance with the usual covenants, conveyed to the said Faulds said coal and mineral, with the rights and easements aforesaid, which deed of conveyance was filed for record in the office of the said recorder of deeds on the 14th day of May, 1864, and is of record therein on page 312, Volume 4 of Deeds. And plaintiff avers that he entered into the actual possession of the surface of said described lands, and has so

possessed the same from thence hitherto. And he further avers that said coal and mineral so conveyed to said Faulds was never actually taken possession of until the first day of May, 1897, when the Catlin Coal Company, a corporation, having become the owner in fee, by mesne conveyance from said Faulds, of said coal and mineral, with the rights and easements in his said deed of conveyance mentioned, entered into the actual possession of said coal and mineral by means of a tunnel and entry extending from the coal mine of said company upon adjoining lands, into a vein and stratum of coal so conveyed to Faulds, as aforesaid, which stratum of coal is one hundred and eighty feet beneath the surface of plaintiff's said described land. And plaintiff avers that said company still retains said possession, and has mined and removed therefrom large quantities of coal, to wit, 50,000 tons, to the damage of plaintiff," etc. The declaration lays damages in the sum of \$16,000. The second breach, as to warranty and quiet enjoyment, was demurred to in the trial court, and the demurrer sustained, and in the view we take of the case need not be set out or further considered.

To the first breach a number of pleas were filed, some of which were disposed of, and about which no question is made, and need not be set out or further referred to. Among the pleas was one of the 10-year statute of limitations, which is designated the first plea. The fourth plea was that there was no vein or stratum of coal lying beneath said land, as alleged. The fifth and sixth pleas were in the nature of pleas of confession and avoidance, except as to nominal damages.

To the plea of the 10-year statute of limitations appellant replied that after the entry of the Catlin Coal Company the plaintiff in writing notified the defendants of such entry, and requested them to defend his title and possession thereto, and in response thereto, on May 10, 1897, it was agreed by and between defendants and plaintiff that plaintiff's name should be used as plaintiff in the action of ejectment to be brought in said court to recover the possession of said coal and mineral from said Catlin Coal Company, for the benefit of defendants and to satisfy their covenant, and in consideration thereof the defendants promised to correct the legal title to said E. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 34 before the commencement of said action of ejectment, by procuring, at their expense, quitclaim deeds from certain of the heirs of one Josiah Sandusky, then supposed to have a legal title to the coal and minerals under the surface of said tract; that said action of ejectment was commenced June 1, 1897, and was prosecuted to final judgment, wherein it was adjudged that the said Catlin Coal Company had the paramount legal title to said coal and mineral. Plaintiff further averred that the defendants, pursuant to their said undertaking and promise, did pay and dis-

charge the costs and expenses of said prosecution of said action of ejectment, amounting to the sum of \$500, and by reason thereof, plaintiff says, defendants have acknowledged the said cause of action, and have thereby made payments on the said several covenants, and thereby have removed the bar of the statute of limitations. A demurrer was interposed and sustained to this replication, and plaintiff excepted and abided by his replication. To the fourth plea, that there was no coal under the lands in question, a demurrer was interposed, and the demurrer overruled, and plaintiff excepted and abided the demurrer.

The fifth plea alleges that before and at the time of the execution of said deeds defendants informed plaintiff that they did not own the coal and minerals underlying said lands, and that the same had been severed by said conveyance of Sandusky to Faulds, in 1864, and were then owned by persons claiming under said Faulds; and with said knowledge plaintiff accepted said deeds and purchased from the defendants the surface of the 162 acres in the first deed mentioned, for the sum of \$50 an acre, and the 80 acres named in the second deed, at \$32.50 an acre, and that no part of said price was paid for the coal and minerals underlying said lands, but was paid for the surface only, and that the said plaintiff took, and agreed to take, and accepted, said deeds subject to such prior conveyance of coal and mineral, and therefore plaintiff is not damaged, except nominal damages, and defendants have not broken said covenant of seisin. The sixth plea avers that at and before the execution of said deeds plaintiff was informed by defendants that they derived title to said lands by a deed from one English, the assignee of said Sandusky, who was adjudged a bankrupt January 30, 1872, who had in May, 1864, severed said coal and minerals from the surface by a deed of conveyance thereof to said Faulds, and that the same were then owned by one Bernice Morrison Fuller, and also that said Sandusky and wife were then living, and the wife then had her inchoate right of dower in and to said surface; that plaintiff, for the consideration named in said deeds, purchased said surface only, subject to said prior conveyance to Faulds, with the agreement that defendants should execute to him warranty deeds to protect plaintiff against the dower interest of said wife of Sandusky; that under said agreements defendants aver that they accepted said consideration in the said deeds named, and that by mistake the reservation or exception of such prior conveyance of said coal and minerals was omitted from said deeds; that no part of said consideration was paid by plaintiff, or intended to be paid by him, for said coal and minerals, or any part thereof; that the plaintiff remains in the quiet and peaceable possession of said surface, and the title thereto has not failed; that Sandusky died,

his said widow survived, and defendants, by an outlay of \$1,500, procured her release of right of dower in and to said described lands, wherefore defendants say that they have not broken their covenant of seisin and that plaintiff hath not been damaged, except nominal damages. To these pleas plaintiff demurred, and the demurrers were overruled. To the action of the court in overruling plaintiff's demurrers to the fifth and sixth pleas no exception was taken or preserved in the record. On this point the record states: "And now said plaintiff files a demurrer to the fifth and sixth pleas, as amended, which demurrer to said fifth and sixth pleas is overruled by the court."

By this state of the pleadings the record stood with the appellant abiding his replication to the plea of the statute of limitations, abiding his demurrer to the fourth plea, and with demurrers to the fifth and sixth pleas overruled without exception. The court thereupon entered judgment in favor of appellant for one dollar and costs of suit, and ordered execution. Appellant excepted and prayed an appeal, which was granted and taken to the Appellate Court for the Third District, where the judgment of the circuit court was affirmed. From that judgment of affirmance this appeal is prosecuted.

In the main briefs of appellant and appellees numerous questions are discussed and errors insisted upon, but in appellant's reply brief he says: "The Appellate Court saw fit to consider but one issue, as in its view it disposed of the contention of the parties, and that was whether or not the allegations, in the fifth and sixth pleas, that the parties to the two deeds of land in question intended to reserve from their operation the coal and mineral beneath the surface of the land, but by mistake and inadvertence omitted it from the deeds, constituted a sufficient answer and defense to the causes of action set forth in the declaration. By our demurrer to these pleas we admit the facts only that are well pleaded therein, and deny their sufficiency. The other issues in the case are upon our demurrer to the defendants' fourth plea, which denies that there is any vein of coal underlying the land. The trial court held this plea sufficient and overruled our demurrer, and we stood by it and assigned error upon the ruling in the Appellate Court, which it did not consider, and its failure to do so we assign as error in this court. Also our replication to the second plea of the ten-year statute of limitations was held by the trial court to be insufficient under appellees' demurrer thereto, and we stood by our replication, and in the Appellate Court assigned error upon this action of the trial court, which it declined to consider, and this omission of that court we here assign as error. These are the only questions that arise upon the record in this court. All others have been disposed of in the trial court, and have not been by either party brought into this court."

Appellees contend that the ruling of the court upon the demurrers to the fifth and sixth pleas is not open to review by us, because of the failure of appellant to except thereto and have it noted of record. In this contention appellees are in error. All the questions arising here are upon the record proper, and as they relate to rulings with respect to pleadings, which are a part of the record, and which alleged errors are of law, when such is the case, an appellate tribunal may review and pass upon the errors thus appearing, without a bill of exceptions or without exceptions appearing in the record. The office of a bill of exceptions is to introduce matter into the record; but, where the record shows upon its face all the rulings and decisions, a bill of exceptions is unnecessary. *Randolph v. Emerick*, 13 Ill. 344.

In the view we take of this case, it will not be necessary to consider or discuss anything other than the fifth and sixth pleas, and the demurrers to the same. These pleas, in effect, state that before the purchase of appellant, Harvey Sandusky, the original owner, had in law and in fact divided these same lands into two distinct estates by having, in 1864, conveyed to Faulds the coal and mineral rights under the lands, and had thereby severed such coal and mineral strata as were there from the main body of the land; that when appellant was negotiating for the purchase of the lands he was apprised of this severance, and of the existence of the two estates, and that with such knowledge he purchased only the upper estate, and that the purchase price for the lands so conveyed to him was fixed with that fact in view; and that for the land in one of said deeds he gave \$50 per acre, and for the other \$32.50 per acre, and that as a fact he gave nothing for the coal and mineral rights, which had been previously conveyed. It is also stated in the sixth plea that it was agreed and understood that the reservation and exception of said coal and minerals from the covenants of said deed should be made, but that such was omitted therefrom by mistake. It is further averred in both of the pleas that appellant took possession of the surface of the land, being all that he bought under his deeds, at the time of the purchase, and has ever since remained, and still is, in possession of the same; and each plea concludes with the averment that he has only suffered nominal damages. Appellant contends that these pleas were insufficient, and that his demurrers to them should have been sustained, for the reason that by the matters set up in them it is attempted to vary the terms of the deeds by parol evidence, and that under the law that cannot be done. If such is the effect of the pleas, then we would say that appellant's contention is sound, as the rule, coming down from the hornbooks and the earliest Reports of which we have any account, is expressly declared that the terms of a deed or other written instrument

cannot be varied by parol evidence of any antecedent or concurrent verbal agreement. In other words, the rule is that the law presumes that the parties, having made a written agreement, included in it all that they had in their minds pertaining to it, and that it must stand as the final and solemn declaration of the transaction which it evidenced. Many cases are cited and a number of references are made to text-books laying down this principle, but we deem the question so long established and so well settled that it is not necessary to here refer to them. Appellees, on the contrary, contend that the pleas do not purport or offer to change the terms of the contract, as that expression is commonly understood, but that, inasmuch as this is an action for damages, the matters set up in the pleas go to the question of consideration, which is the foundation for damages, other than nominal damages, in this class of cases.

The rule, as established in most of the states of this Republic, and, in fact, of most civilized countries, is that the measure of damages for a breach of such a covenant is what the party actually lost by such breach; and if the title has wholly failed, then the whole of the purchase price, with interest, is the measure of damages, and if the title has partially failed, and the consideration was paid as a whole, then the measure of damages is the proportion in value that the land to which title failed bore to the whole land; or if the consideration was severable as to the various tracts, and the title failed as to one of these tracts, then the measure of damages was the price paid for the particular tract, with interest. 8 Am. & Eng. Ency. of Law (2d Ed.) 183, 184; *King v. Gilson's Adm'x*, 32 Ill. 348, 83 Am. Dec. 269; *Weber v. Anderson*, 73 Ill. 439; *Frazer v. Peoria County*, 74 Ill. 282; *Tone v. Wilson*, 81 Ill. 529.

The authorities usually agree, and in this state the rule is established, that in estimating the extent of the damages, where there is a partial failure, the value of the property at the time of the conveyance shall form the basis. *Weber v. Anderson*, supra; *Tone v. Wilson*, supra. From an early day it became the established rule in this state that the consideration expressed in the deed, and the acknowledgment of the receipt thereof, were not binding or conclusive upon the parties, but might be explained or contradicted by parol evidence or other evidence allunde the deed. So we have held it may be shown, in an action between the parties upon the covenants of a deed, that the consideration expressed in the deed was more than the consideration that was actually paid. *Howell v. Moores*, 127 Ill. 67, 19 N. E. 863. In that case a deed was made reciting the consideration as \$2,000, and a bond in the sum of \$2,000 was also given to keep the covenant against incumbrances, and the covenant of the deed was broken and the property lost,

and an action was brought, when it was held competent to show that the real consideration paid was \$1,000 paid by note, and certain real estate, and that the real value of the real estate that was taken as a part of the consideration was only \$500, and the recovery was limited to \$1,500. In *Ludeke v. Sutherland*, 87 Ill. 481, 29 Am. Rep. 66, a tract of land was sold and described as 140 acres, and the consideration expressed in the deed was \$3,780. The price of the land was \$27 per acre. There was paid in cash \$500, and a note and trust deed were given for the balance of the purchase money. It was verbally agreed at the time of the sale that the actual number of acres of land was not known to the parties, and that it should be surveyed, and if there were less than 140 acres the grantor should pay for the deficit, and if more than 140 acres the grantee should pay for the excess. It was measured and found to contain 148.74 acres, and a suit was brought by the grantor against the grantee for the excess. In *Koch v. Roth*, 150 Ill. 212, 37 N. E. 317, we held it competent to show that the consideration mentioned in the deed had not in fact been paid, and that a vendor's lien might be enforced. In *Kimball v. Walker*, 30 Ill. 482, both a deed and a written contract acknowledging the payment of the consideration were made, and we held it competent to show that the consideration was not in fact paid. We have also held that a deed in the ordinary form may be shown by parol evidence to have been given as security for a loan of money, and was to operate as a mortgage, thus reading into the deed a condition of defeasance upon the repayment of the money. *Crane v. Chandler*, 190 Ill. 584, 60 N. E. 826. In *Drury v. Holden*, 121 Ill. 130, 13 N. E. 547, a deed was made subject to certain mortgages or trust deeds, and the consideration expressed in the deed was \$40,000. The grantee purchased one of the outstanding incumbrances, and the other was foreclosed by sale by the trustee, under the powers given in the trust deed; the grantee, Drury, purchasing at the sale. In this trust deed that was foreclosed was a certain lot that was not included in the deed to Drury. Holden brought a bill to set aside the sale of his lot that was not included in the deed, but was in the trust deed. We held it competent to show by parol evidence that Drury assumed the payment of these outstanding incumbrances as a part of the purchase price of the lands conveyed to him, and that the amount of the incumbrances was deducted from the purchase price mentioned in the deed. Whenever the question has come before this court, it has been uniformly held that the statement of the amount of the consideration and acknowledgment of its receipt in the deed were formal recitals, their only operation in law being to prevent a resulting trust, and that they might be explained, varied, and contradicted by parol evidence.

It then remains for us to consider the ques-

tion whether the facts tendered by the pleas and admitted by the demurrer go to the consideration of the deeds in the case at bar, or whether they go beyond that, and are to affect the terms of the deed in other respects. It must be borne in mind that this was not a real action, and was not to try the title, or, as we conceive, to in any way affect the title. It is a personal action for damages. True, it grows out of a land transaction, and to determine the rights of the parties the deed must be looked to. If the rule of damages is that the plaintiff can only recover what he lost, and if it is also the rule that what he lost is determined by what he paid for the land for which the breach is alleged, then it would seem to necessarily follow that, in order to determine what the extent of his loss was, it was both necessary and proper to determine what he paid for the land, or interest in the land, lost. Relating to this particular land, and to the conveyances of the coal by Harvey Sandusky to Faulds and his grantees, the question was twice before this court in *Catlin Coal Co. v. Lloyd*, 176 Ill. 275, 52 N. E. 144, and *Id.*, 180 Ill. 398, 54 N. E. 214, 72 Am. St. Rep. 216. In those cases we held that by the deed of Harvey Sandusky to Faulds the land was divided into two distinct estates, the surface and the coal, and that the latter, when thus severed, constitutes land; and we further held that said deed was a severance, and that the possession of the surface of the land, after such severance, was not the possession of the coal and minerals in place under such surface. Thus, by the declaration of this court, at the time appellant purchased there were two distinct tracts of land. One, we may say, was lying over the other. Each, in a general way, answered the same legal description, and yet each was so severed from the other that it constituted a distinct and separate body of land.

By their pleas appellees say that at the time of the purchase there was such a severance, and that appellant had notice of it, and that his contract was only with reference to one of said estates or bodies of land, and that, in fact, he only paid for one of these bodies of land; that is, the surface. One of the pleas further says that the failure to place the reservation or exception in the deed relative to the coal was by mistake or oversight; but we do not think that can avail appellees in an action at law, but is the peculiar subject of equity jurisdiction. In the view we take of that averment in the plea, it may be regarded as surplusage, and, so far as our consideration of the case goes, it will be solely upon the question of whether the pleas tendered a sufficient defense to the action, as it relates to the consideration and damages. Mr. Rawle, in his work on *Covenants for Title*, in the discussion of this subject says (4th Ed., 258): "On this side of the Atlantic it may be considered as settled that although (apart from

the question of fraud) evidence to contradict or vary the consideration clause is inadmissible, if offered to defeat the conveyance, as such (as, for example, by showing it void because of want of consideration), yet that for any purpose short of affecting the title this clause is not conclusive, but only *prima facie* evidence of the amount therein named. Hence it is held that in an action on the covenant for seisin, parol evidence is admissible on the part of the plaintiff to show the actual consideration to have been greater than that expressed in the deed, for the purpose of increasing the damages, and, on the other hand, equally admissible on the part of the defendant to show the consideration less, for the purpose of diminishing them. So it has been held admissible for the defendant to show, in reduction of damages, that the part to which there was no title was included in the deed by mistake, and that no consideration was paid for it, though it is clear that such evidence is admissible solely in mitigation of damages, and not for the purpose of negating a breach of the covenant."

In 1840 a case somewhat analogous to the case at bar, and involving the same principle as to the admission of parol evidence, was considered by this court, wherein Kinzie had conveyed to Penrose, by a deed of general warranty, lots 10 and 11, in block 12, Kinzie's addition to Chicago, for the expressed consideration of \$42. At the time there was a verbal agreement that Penrose should buy lot 10 and pay \$42 for it, and that Kinzie would also convey to him lot 11 upon the condition that he should erect and finish a good dwelling upon said lot 11 within a stated time. There was no provision of this sort in the deed. The time having elapsed, and Penrose having failed to build the house, Kinzie brought a bill to set aside the deed. A demurrer was sustained to the bill below, and this court reversed it, saying: "The complainant anticipated an increase to the value of the residue of his property adjacent to the lot conveyed, by the agreement to build, and supposed it would have been observed by the defendant in good faith. The court see no just reason why the latter should be absolved from his engagement, and also retain the lot, without giving any compensation therefor. The admission of the parol evidence shows only that there was an additional consideration for the conveyance, which existed at the time and must naturally be supposed to enter into the inducements for the sale of the ground. Hence we are not satisfied that the parol proof should be excluded, but believe it ought to be admitted." *Kinzie v. Penrose*, 2 Scam. 515. In the above case it will be noticed that there was no allegation in the bill that the parol contract was to be incorporated in the deed, and was omitted by any mistake of the parties, nor was it a proceeding to reform the deed in any respect, but it was to recover

the lot on the ground that the consideration had failed.

In *Sidders v. Riley*, 22 Ill. 110, assumpsit was brought upon a note given by Riley's intestate, Hume, to Sidders, for the purchase of land. Pleas were filed and issue joined, and on the trial the plaintiff offered to prove that at the time he made the deed to Hume he had no title to the north half of the quarter section, and that the note sued on was given for the south half and certain farm stock and other chattels. On objection of defendant this evidence was excluded. On appeal this court reversed the judgment of the trial court, and held that the evidence should have been admitted, and among other things said (page 111): "It has been decided by this court that it is competent for a party to show a different consideration from the one stated in the deed, as between the parties to it, under peculiar circumstances. *Kinzie v. Penrose*, 2 Scam. 515. In that case the party was permitted to show that the consideration expressed in a deed for two lots of ground was in reality the consideration for one only. So it is universally held that a deed absolute on its face may be shown by parol to have been intended as a mortgage. All that the plaintiff proposed to prove was that, when the defendant received the deed, it was with the express knowledge and understanding that the consideration of \$1,500 expressed in it applied only to the south half of the quarter section; the defendant well knowing at the time that the plaintiff had no title to the north half, and did not pretend to sell and convey any title to that half. The defendant accepted the deed with that understanding, and it is competent for the plaintiff to show this by parol."

While it is true that there is a diversity of opinion among the courts of the various states upon this question, and as to whether this evidence should be held to apply to the consideration only, or goes to the terms of the deed, yet, after having examined with much care a large number of cases cited in the briefs of the respective parties, and many other cases and authorities besides, we are satisfied that the greater weight of authority is that such evidence only goes to the consideration, and is admissible. At all events, and whatever might be our view if the question were an original one, we think the cases cited above from this court establish the rule in favor of these pleas, and that rule is of such long standing that we would not feel at liberty to disturb it.

Our view being in harmony with the judgments of the circuit and Appellate Courts, the judgment of the Appellate Court is affirmed.

Judgment affirmed.

HAND, C. J., and WILKIN and OART-WRIGHT, JJ., dissent.

(204 Ill. 25)

In re MAHER'S ESTATE.*

(Supreme Court of Illinois. June 18, 1903.)

COMMON-LAW MARRIAGE—REPUTATION—COHABITATION—PRESUMPTION—EVIDENCE—APPEAL—REVERSAL—RES JUDICATA—RETRIAL—LAW OF THE CASE.

1. Where, in a proceeding for administration on the estate of a deceased person, a judgment finding that petitioner had established that she was the lawful common-law wife of deceased was reversed and remanded, without qualification, the decision on appeal was not res judicata as to the question involved, so as to preclude petitioner from introducing additional evidence on a new trial.

2. Where a judgment is reversed and remanded generally by the Supreme Court, the rules of law announced in the opinion reversing the judgment are conclusive on the second hearing.

3. A common-law marriage cannot be established by evidence of an agreement to present cohabitation and a future marriage, but there must be either a consent by words de presenti, or by words de futuro cum copula.

4. Evidence of cohabitation and reputation held insufficient to establish a common-law marriage.

Appeal from Circuit Court, Cook County; R. W. Hilscher, Judge.

Petitions by A. L. Maher and others for the administration of the estate of Mark H. Maher, deceased. From an order finding petitioner Jessie R. Maher the lawful widow of deceased, A. L. Maher and others appeal. Reversed.

Seth F. Crews and Ralph Crews (Geo. W. Brown, of counsel), for appellant Alzuma L. Maher. M. F. Riggle and James B. Muir (Shope, Mathis, Zane & Weber, of counsel), for appellant Elizabeth B. Maher. Francis W. Walker and Albert G. Welch (A. M. Pence, of counsel), for appellee.

WILKIN, J. The only question involved in this case is whether a common-law marriage was legally contracted between Jessie R. Kean and Mark H. Maher, and whether such marriage existed at the time of his death, on February 1, 1896, whereby she became his lawful widow. A former decree of the circuit court of Cook county deciding that question in her favor was reversed by this court at a former term upon the ground that the evidence failed to sustain the decree. The order of reversal and remandment at that time was general. Subsequently the case was redocketed in said circuit court, and additional evidence heard, whereupon the finding and decree were again in favor of the appellee, Jessie R. Kean, or, as she claims to be, Jessie R. Maher. A statement of the facts of the case will be found in and preceding the opinion rendered upon the former hearing, and reported in 183 Ill. 61, 56 N. E. 124. Elizabeth B. Maher and others again appeal from the latter decree.

It is first insisted on behalf of appellants

*Rehearing denied October 23, 1903.

† 3. See Marriage, vol. 34, Cent. Dig. § 13.

that the chancellor erred in admitting additional evidence upon the second hearing, the position being that the former decision of this court is *res judicata* as to the question involved. That position is not tenable. The remandment being without qualification, the cause stood for hearing precisely as it did originally. *Henderson v. Harness*, 184 Ill. 520, 56 N. E. 786, and cases cited; *Aurora & Geneva Railway Co. v. Harvey*, 178 Ill. 477, 53 N. E. 331. It was therefore proper to admit any and all competent testimony tending to prove or disprove the issue.

It was stipulated upon the last hearing that the evidence of witnesses heard on the former trial, as shown by the transcript of the record and by depositions and documentary evidence then introduced, might be re-introduced by either party upon the latter hearing, subject to objections as to its competency. It was further stipulated that Mark H. Maher died at his domicile, in the city of Chicago, seised of real estate and personal property in the county of Cook, and that he left neither child, children, nor descendants of a child or children, him surviving; that no record of any proceeding for divorce between said deceased and appellee existed in any court "of St. Paul or Minneapolis, Minn., Washington, D. C., Buffalo, N. Y., or Chicago, Ill., or in any court within whose jurisdiction said respective cities are located;" also "that nothing contained in said stipulation shall be construed as an admission that a marriage existed between the petitioner and Mark H. Maher."

While the cause was open for a rehearing generally upon the evidence in the court below, on the remandment from this court the conclusions announced in our former decision as to matters of fact then in the record, and the principles of law applicable to and governing the cause upon those facts as the record then disclosed, were binding upon the chancellor upon his final decision of the cause. The rule is that, upon the remandment of a cause generally, the rules of law applicable to the case announced in the opinion of this court are conclusive upon the second hearing. *Newberry v. Blatchford*, 106 Ill. 584; *Dilworth v. Curtis*, 139 Ill. 508, 29 N. E. 861. The question, then, for our determination, must be, is the new evidence now in the record, together with that which was before us upon the former hearing, construed as we then construed it, sufficient to sustain the present decree? In other words, is it sufficient to establish the relation of husband and wife between Jessie R. and Mark H. Maher, and entitle her to succeed to so much of his estate as by the statute passes to the widow of the deceased husband, leaving no child, children, or descendants of such, him surviving?

After a patient reconsideration of the case, and giving due consideration to all the additional facts adduced upon the second hearing, we are unable to see upon what prin-

ciple or logic the second decree of the circuit court—that is, the one now before us—can be sustained, without overruling our former decision. It was then said, as it is now, that there was at no time a marriage ceremony solemnized between the parties; the sole claim being that the relation of husband and wife was created between Jessie R. Kean and Mark H. Maher by reason of their having lived and cohabited together as husband and wife under such circumstances as to create a valid common-law marriage. We held in the former decision of this case, in conformity with the previous decisions of this and other courts, that, "to constitute a marriage legal at common law, the contract and consent must be *per verba de presenti*, or, if made *per verba de futuro cum copula*, the copula is presumed to have been allowed on the faith of the marriage promise, and that so the parties at the time of the copula accepted of each other as man and wife. *Port v. Port*, 70 Ill. 484; *Hebblethwaite v. Hepworth*, 98 Ill. 126; *Cartwright v. McGown*, 121 Ill. 388 [12 N. E. 737, 2 Am. St. Rep. 105]; *Stoltz v. Doering*, 112 Ill. 234; *Hiler v. People*, 156 Ill. 511 [41 N. E. 181, 47 Am. St. Rep. 221]. It is not sufficient to agree to present cohabitation, and a future marriage when more convenient. *Robertson v. State*, 42 Ala. 509; *Duncan v. Duncan*, 16 Ohio St. 182; *In re Beverson's Estate*, 47 Cal. 621; *Fryer v. Fryer*, Rich. Eq. Cas. 85. Where parties have contracted a common-law marriage, without any solemnization or other formality apart from the agreement itself, it is not requisite that the agreement should be made before witnesses. *Cheney v. Arnold*, 15 N. Y. 345 [69 Am. Dec. 609]. But such a marriage is to be distinguished from cases of seduction or sexual intercourse followed by a promise of marriage, and cases where the intercourse, in its inception is illicit, and is known to be such by both parties. *Cheney v. Arnold*, *supra*; *Duncan v. Duncan*, *supra*."

The additional testimony introduced upon the present hearing, like that previously introduced, wholly fails to show that there was a present agreement between the parties to live together as husband and wife, or that they cohabited together on the faith of a marriage contract, so that they at any time accepted each other as man and wife. Such latter testimony establishes no independent, distinct fact necessary to constitute a common-law marriage not established, or which the evidence did not tend to establish, on the former hearing. In other words, the additional evidence is merely corroborative of that which was previously introduced. The effect of the former decision was to hold that, while cohabitation and reputed marriage relations between the parties at the several places of their residence would raise the presumption that a marriage contract had been entered into between them, we there held that "a presumption of that character may be overcome by other presumptions

which spring from the acts of the parties themselves during the time of cohabitation, as well as from acts and declarations and conduct springing from their acts after cohabitation between them has ceased," and that the facts disclosed by this record did overcome any presumption of a marriage contract honestly and fairly entered into between the parties. The significant fact in reaching that conclusion was the unexplained conduct of appellee at the time and after she left Maher, in June, 1890, and returned to the home of her mother, in Washington, D. C., and at no time thereafter resuming or attempting to resume the relation of, or to be known or recognized as, his wife. He soon after the separation returned to Chicago, where he continued to reside until his death, nearly six years thereafter. He was possessed of a considerable amount of wealth, amply able to provide for her every want, and yet during all that time she remained at the home of her mother, and supported herself by employment in her mother's store or in one of the departments of the government. Also that during that time she made a written application for employment in her maiden name, stating that she was unmarried. She came with her mother in 1893 to Chicago, where Maher was then living with Alzuma L., with whom he had been regularly married in 1892, which fact was at least known to her mother, if not to her; and yet, having completed their visit in that city, they returned to the city of Washington, where she resumed her duties as clerk in the Treasury Department as an unmarried woman, under her maiden name. These facts, with others, were then regarded as conclusively showing that she did not pretend to be the wife of Mark H. Maher, and that the previous relations which had existed between him and her were not matrimonial. The additional testimony in the record in no way tends to explain her conduct during that time, but, at most, merely explains why she left him; that is, because he had contracted a loathsome disease. And even that reason for leaving him was known by her to exist long prior to the separation, as disclosed in our former opinion. Her abandonment of him because of his diseased condition, however, would in no way tend to prove that their relations had been matrimonial rather than adulterous.

It may be conceded that the evidence in the record now and upon the former hearing shows that the parties held themselves out to the world on different occasions and at different places as husband and wife, and that they resorted to devices for the purpose of misleading others into the belief that they were husband and wife, such as the presentation of the ring mentioned by the mother of Jessie R., with the inscription, "From Mark to Jessie—Mizpah," and which she says her daughter wore until the death of Maher; but certainly it will not be seriously claimed that a common-law marriage can be made to

68 N.E.—11

rest upon the misconduct of a man and woman in holding themselves out to the world as being married. Also the evidence tending to show that Mark H. Maher called her by the name of Mrs. Jessie Maher, and that he drew checks to her in that name, is not at all inconsistent with what seems to us, as shown by an overwhelming weight of testimony, to be a living with her in a state of adultery, and not as her husband, which fact was fully understood and appreciated by her. The evidence in this record is voluminous. To attempt a discussion of it in detail would be futile. An impartial reading of it must lead the candid mind to the conclusion that her relation to him from the time they left Washington, and perhaps prior thereto, until she finally separated from him, was nothing more or less than meretricious, and that their living and cohabiting together, as between themselves, was known to be adulterous. His conduct was doubtless the more wicked and reprehensible, but neither the law nor public policy will permit the converting of such relations into the sacred relation of husband and wife.

Under the foregoing rules of law, the decree of the circuit court is, in our opinion, unsupported by the testimony; and it will be reversed, and the cause remanded, with directions to proceed in conformity with the views herein expressed. Reversed and remanded.

(303 Ill. 636)

BICKERDIKE et al. v. CITY OF CHICAGO.

(Supreme Court of Illinois. Oct. 20, 1903.)

LOCAL IMPROVEMENTS — RESOLUTION OF BOARD—ENGINEER'S ESTIMATE—SUFFICIENCY—ORDINANCE—VALIDITY.

1. Laws 1897, p. 104, § 7, provides that the board of local improvements shall adopt a resolution describing the proposed improvement, and cause an estimate of the cost to be made by the engineer, which shall be itemized to the satisfaction of the board. A resolution provided that certain streets be "improved by curbing with sandstone curbstones, filling and paving with eight inches of blast slag, three inches of crushed limestone, and three inches of crushed granite, the estimate of the cost of such improvement made by the engineer of such board being \$84,000." Held insufficient, as the statute requires the estimate to be itemized as to the cost of each particular item.

Appeal from Cook County Court; Wm. T. Hodson, Judge.

Application by the city of Chicago for confirmation of a special assessment to which Joseph Bickerdike and others filed objections. From a judgment confirming the assessment, objectors appeal. Reversed.

Joseph H. Fitch, for appellants. William M. Pindell and Charles M. Walker, Corp. Counsel (Edgar Bronson Tolman, of counsel), for appellee.

WILKIN, J. This is an appeal from the county court of Cook county by certain property owners to reverse a judgment confirm-

ing a special assessment against their property, fronting upon Troy, Albany, Whipple, Sacramento, Richmond, and Waveland streets, in the city of Chicago. Upon the bearing several objections were presented to the application for confirmation, all of which were overruled. Three of these objections are again urged here as grounds for reversal of the judgment below.

Counsel for appellants first contends that the engineer's estimate of cost as made by him was not made a part of the record of the first resolution of the board of local improvements, and therefore there was a failure to comply with the requirements of section 7 of the act of 1897 (Laws 1897, p. 104), upon which the proceeding is based. That section provides, among other things, that the board of local improvements shall adopt a resolution describing the proposed improvement, to be at once transcribed into the record of the board, and by the same resolution fix a day and hour for the public consideration thereof, and shall also cause an estimate of the cost of such improvement to be made in writing by the engineer of the board, over his signature, which shall be itemized to the satisfaction of said board and shall be made a part of the record of such resolution. In this case no estimate whatever of the cost of the improvement was made a part of the first resolution of the board. That resolution, read by Charles A. Busby, who was in the employ of the board of local improvements, was dated March 12, 1902, the material parts of which are as follows: "Be it resolved by the board of local improvements of the city of Chicago, that a local improvement be and is hereby originated, to be made within the city of Chicago; * * * that the roadways of a system of streets, as follows, to-wit, * * * and also the roadways of all intersecting streets, * * * be improved by curbing with sandstone curbstones, filling and paving with eight (8) inches of blast slag, three (3) inches of crushed limestone and three (3) inches of crushed granite, the estimate of the cost of such improvement made by the engineer of said board being \$84,000, and that Thursday, the 3d day of April, 1902, at eleven o'clock a. m., in room 203, City Hall, be fixed as the time and place for the public consideration thereof." The same witness, Busby, testified that "at the time of the adoption of this resolution there was on file in the office of the board a written estimate of the cost, made and signed by the engineer. I have that estimate here. The record of the board contains no reference to this estimate, except the resolution I have read." Manifestly, this was not a compliance with the requirement that the estimated cost of the improvement shall be made a part of the record of the resolution, much less an itemized estimate of that cost. All that appears from this resolution as to the estimate of the cost is the statement of the board that

the engineer had estimated the cost of the improvement in gross at \$84,000. It does not appear that his itemized estimate, or that any estimate whatever by him, was made a part of the record of the resolution.

It is claimed by counsel for the city that all that the property owner is entitled to be informed of is the character of the improvement (as, brick, asphalt, or macadam), the extent of the improvement, and the cost of the same; that it would be of no possible benefit for him to know the cost of the different materials which constitute the improvement, etc. In support of this position reference is made to section 7, supra, and *Givins v. City of Chicago*, 186 Ill. 399, 57 N. E. 1045. Certainly, the language of the statute does not support the contention, nor does the case cited. No such question was involved in that case. The statute does, in express terms, require the itemized estimate, and that the notices of the public meeting contain the substance of the resolution adopted by the board, "and the estimate of the cost of the proposed improvement," etc.—not what the board say the estimate was, but the engineer's report of that estimate; that is, an itemized estimate, as required to be made a part of the record of the resolution. These requirements are not merely for the purpose of enabling the board to act, but are also for the benefit and protection of the owners of property to be assessed. What items are to enter into the improvement, and the cost of each of them, are facts material to be considered by the property owner in determining whether he will consent to or oppose the improvement, and for his protection the requirements of the statute must be complied with. *Clarke v. City of Chicago*, 185 Ill. 354, 57 N. E. 15; *Bass v. City of Chicago*, 195 Ill. 109, 62 N. E. 913. In the *Clarke Case* it is said: "Statutes delegating the power to levy taxes or assessments must be construed strictly. This power cannot be rightfully exercised by corporate bodies unless it is authorized either in express terms or by necessary and clear implication. Authority for its exercise must be found in statutory grant or requirement. Where the statute provides a particular mode for its exercise that mode must be pursued, and no other can be substituted for it by the officials who undertake to exercise it. *Webster v. People*, 98 Ill. 343. The proceeding under the act of June 14, 1897, is a statutory proceeding, and every step provided by the proceeding prior to the passage of the ordinance must be strictly complied with, subject to such qualification as may be contained in section 9 of the act"—citing authorities. The proceedings prior to the adoption of the ordinance required by the statute are jurisdictional, without which no valid ordinance can be passed, and consequently no valid assessment be made. The requirement of the statute is plain and reasonable. Failure to comply with it cannot be excused. In so far as this view is

in conflict with *McChesney v. City of Chicago*, 201 Ill. 344, 66 N. E. 217, that case must be overruled.

The estimate on file with the board, testified by the witness Busby, is as follows:

Curbstone, sandstone lin. ft. 28,131, at 65c.	\$18,285 15
Filling, cu. yds. 28,050, at 25c.	7,012 50
Paving with eight inches of blast furnace slag, three inches of crushed limestone, three inches of crushed granite, sq. yds. 48,807, at \$1.15.	56,128 05
Adjustment of sewers, catchbasins, and manholes	2,574 80
Total	\$84,000 00

After the adoption of the resolution for the improvement, as above stated, an ordinance was recommended by the board and passed by the city council, as follows: "Upon the several road-beds thus prepared between said points shall be spread a layer of blast furnace slag free from dirt, said layer of slag to be of a depth of eight inches after being thoroughly rolled to an even surface with a steam roller of ten tons weight. Said slag shall be practically uniform in quality and as near cubical in form as possible, and broken so as to pass through a ring of four inches internal diameter, and all the larger pieces shall, as far as practicable, be placed at the bottom of the layer. Upon said layer of slag shall be spread a layer of the best quality of broken limestone. Said limestone shall be crushed to a size so as to pass through a ring of two inches internal diameter. Said layer of limestone shall be of a depth of three inches, after having been rolled with a roller of ten tons weight until solid and unyielding; and upon said layer of broken limestone shall be spread a layer of the best quality of limestone screenings, so as to completely fill all the interstices in the layer of limestone, the said layer of broken limestone and screenings to be covered with a topping of crushed granite, said granite to be crushed to a size so as to pass through a ring of two inches internal diameter, and said layer of crushed granite shall be of a depth of three inches after having been rolled with a roller of ten tons weight. Upon said layer of crushed granite shall be spread a layer of the best quality of fine, well-screened bank gravel, so as to completely fill all the interstices in the layer of granite, and upon said layer of bank gravel shall be spread a layer of the best quality of granite screenings to the depth of one-half inch."

It will thus be seen that the item in the ordinance, "and upon said layer of bank gravel shall be spread a layer of the best quality of granite screenings to the depth of one-half inch," was not included in the estimate of the engineer nor in the resolution of the board, but was added after the public hearing, and it was objected that for that reason the ordinance was invalid. As the judgment below must be reversed for the

reasons above stated, it will not be necessary at this time to pass upon this question.

The ordinance is not subject to the objection that it gives a discretion to the board or its engineer in the use of different sizes of slag, limestone, and granite.

For refusing to sustain the first above named objection the judgment of the county court must be reversed, and the cause remanded for further proceedings consistent with the views herein expressed.

Reversed and remanded.

(161 Ind. 282)

GARDNER v. STATE

(Supreme Court of Indiana. Oct. 9, 1903.)

CRIMINAL LAW—LIMITATIONS—INDICTMENT— BEGINNING OF PROSECUTION— APPEAL—RECORD.

1. Burns' Rev. St. 1901, § 1799 (Horner's Rev. St. 1901, § 1730), declares that the first pleading on the part of the state is either an indictment or information. The statutes further provide that warrants must be issued on informations as soon as filed, and that when an indictment is found the court may direct the clerk to issue a warrant returnable forthwith, and, if no order is made, the clerk is required to issue warrants on indictments within 10 days after the close of the term. Burns' Rev. St. 1901, § 1741 (Horner's Rev. St. 1901, § 1672), provides that, as soon as an indictment is presented, and examined by the court, or an information filed, the clerk shall indorse thereon the date of such filing or presentation, and record such indictment or information with its indorsement. *Held*, that a criminal prosecution was commenced, so as to stop the running of limitations, on the return of the indictment into court, and it was not necessary, to prevent the operation of the statute, that a warrant be issued on the indictment.

2. Where, on an appeal in a criminal case, there is but one instruction in the record, and the evidence is not set out, it will be presumed that other instructions fully covered what the state was required to prove in regard to venue.

3. Where on an appeal there is but one instruction in the record, and the evidence is not set out, the fact that the jury found defendant guilty as charged in the indictment warrants the assumption that the evidence properly established that the crime was committed in the county named in the indictment.

Appeal from Circuit Court, Whitley County; Joseph W. Adair, Judge.

William N. Gardner was convicted of rape, and appeals. Affirmed.

F. J. Heller and Wm. F. McNaghy, for appellant. C. W. Miller, Atty. Gen., W. C. Geake, C. C. Hadley, and L. G. Rothschild, for appellee.

JORDAN, J. Appellant was prosecuted upon an indictment which charged him with having, at the county of Whitley and state of Indiana, on the 15th day of February, 1898, committed the crime of rape upon a girl under the age of 14 years. He was tried by a jury, and found guilty, and over his motion for a new trial was sentenced by the court to be imprisoned for an indeterminate period in the state's prison, disfranchised,

¶ 1. See Criminal Law, vol. 14, Cent. Dig. § 232.

and rendered incapable of holding any office of trust or profit. From this judgment he appeals.

The evidence upon which appellant was convicted is not before us; neither have the instructions of the lower court been certified up, except a single one thereof, upon which appellant alone bases his ground for a reversal. The record discloses that the indictment was returned by the grand jury of Whitley county into the lower court and filed April 17, 1902. Appellant was tried and convicted in the following November. Instruction No. 2, of which appellant complains, was given by the court to the jury at the request of the state, and it is disclosed by the bill of exceptions to have been the only one given upon the particular subject-matter therein embraced and mentioned. No other instruction was given by the court which in any manner or form modified, limited, changed, or withdrew instruction No. 2 from the jury. It is stated in the bill of exceptions that there was no evidence given upon the trial by the court which either showed or tended to show when the warrant for the arrest of the accused upon the indictment returned was issued; nor was there any evidence to establish when the warrant came to the hands of the sheriff for service. By the particular instruction in controversy the court informed and advised the jury, in effect, as a legal proposition, that the prosecution was commenced when the indictment against the defendant was returned into court by the grand jury, without regard to the time when the warrant thereon was issued. As the evidence is not in the record, we are not advised as to the time when the crime of which appellant was convicted was actually committed. It is insisted, however, that the charge of the court in controversy was erroneous, inasmuch as it advised the jury, in effect, as a matter of law, that the return of the indictment into court was the commencement of the prosecution, and that such return or presentment alone served to arrest the running or operation of the statute of limitations. Appellant's counsel urge and contend that within the meaning of the laws of this state pertaining to public offenses and the prosecution thereof a criminal action cannot be deemed or held to have been commenced on the part of the state until a warrant for the arrest of the accused has been issued upon the indictment or information charging the offense. The argument seemingly is advanced that the issuing of the warrant is the act which crowns the commencement of the prosecution, and that therefore, until such warrant is issued, the statute continues to run in favor of the accused party. The learned Attorney General in his brief on behalf of the state admits that the question which he concedes to be involved in this appeal is one which under the laws of this state is surrounded with more or less doubt, and that little light is

cast upon the proposition by the decisions of this court. Section 1662, Burns' Rev. St. 1901 (section 1593, Horner's Rev. St. 1901), provides that prosecutions for rape and other crimes therein mentioned may be commenced at any time within five years after the commission of the offense. It follows, therefore, in the case at bar, that among other things it was essential to the conviction of the defendant that the state establish beyond a reasonable doubt that the prosecution was commenced within five years after the crime charged was committed. As the initiative step in this prosecution was taken by the state in the circuit court of Whitley county, the point presented involves the inquiry when, under such circumstances, may a criminal action or prosecution upon the part of the state be deemed and considered to have been commenced within the meaning of our laws pertaining to criminal procedure? While it is true that the Legislature under our Civil Code has defined what shall be deemed to be the commencement of a civil action, nevertheless it has wholly failed to expressly provide what shall constitute the beginning of a criminal prosecution. In a solution of this question it is proper that we look to some of the provisions of our Criminal Code. Section 1799, Burns' Rev. St. 1901 (section 1730, Horner's Rev. St. 1901), declares that the "first pleading on the part of the state is either an indictment or information." It is provided by our statutes that warrants must be issued upon informations as soon as they are filed, and that when an indictment is found the court may direct the clerk to issue a warrant returnable forthwith. If no order is made by the court, the clerk is required to issue warrants upon the indictments returned within 10 days after the close of the term. Section 1750, Burns' Rev. St. 1901 (section 1681, Horner's Rev. St. 1901). By section 1741, Burns' Rev. St. 1901 (section 1672, Horner's Rev. St. 1901), it is provided that as soon as an indictment is presented, and examined by the court, or an information filed, the clerk shall indorse thereon the date of such filing or presentation, and he shall then record such indictment or information with its indorsement in a record book kept for that purpose. There is certainly nothing in any of these provisions of our Criminal Code, or in others thereof, to our knowledge, which indicate that the Legislature intended that a criminal prosecution could not be considered as commenced, so as to arrest the operation of the statute of limitation, until the clerk had issued a warrant upon the indictment or information in the particular case.

An examination of the decisions of this court reveals the fact that for a period of over 40 years the court has considered the return of an indictment as constituting the commencement of a prosecution. *Jones v. State*, 14 Ind. 346, decided in 1860, was a prosecution for receiving stolen property.

Davison, J., in that appeal, in passing upon the question as to whether the action was barred by limitation, said: "The indictment, which was the commencement of the prosecution, was found October 12, 1859. * * * We are of the opinion that the statute of limitation commenced running in this case in September, 1856, when the defendant received the stolen mare, and therefore continued to run. It follows, this prosecution, not having been commenced until the 13th of October, 1859, is barred by the statute." In *State v. Hoke*, 84 Ind. 137, the accused was charged with the crime of larceny. Elliott, J., in that case said: "The second count of the indictment referred to against the appellee charges the crime of larceny; that it was committed on the 24th day of November, 1878, which was more than two years before the return of the indictment. The prosecution seeks to avoid the force of the statute of limitation by the following statement: [Here follows a statement of certain facts to show that the commission of the crime was concealed by the accused.] * * * The fifth count of the indictment is bad. It shows that the crime charged was committed more than two years before the return of the indictment, and that the accused, instead of concealing the fact that a crime had been committed, made that fact public." In *Hoover v. State*, 110 Ind. 349, 11 N. E. 434, this court, in considering the question there involved, said: "When a person is arrested on a criminal charge without a warrant, the proceeding is, in a certain sense, the commencement of a prosecution. 1 Bishop, *Crim. Proc.* §§ 30, 31. But, where the filing of an affidavit is necessary to obtain a warrant, the prosecution is deemed to have been commenced when the affidavit is filed. It is the affidavit which, in such a case, invokes the jurisdiction of the officer or tribunal before whom or which it is filed. Wharton, *Crim. Pl.* § 1." In *Zimmerman v. State*, 4 Ind. App. 583, 31 N. E. 550, which was a prosecution by indictment against Zimmerman for obstructing a public highway, the Appellate Court in that case, by Reinhard, J., said: "But if, as assumed in the hypothesis of the instruction, the appellant obstructed the highway in 1886, and maintained the obstruction thereafter 'until within two years of this date,' the prosecution would not be barred, the 'date' mentioned being evidently the day of trial. The appellant would be guilty if he had maintained the obstruction to within two years next before the day of the return of the indictment." *Carr v. State*, 36 Tex. Cr. R. 390, 37 S. W. 426, was a prosecution of the accused by indictment for rape. Pending a trial on this charge he appears to have been convicted of the crime of larceny, and was sentenced to imprisonment in the state's prison for a term of two years. In the prosecution for rape the court at each term while the defendant was in prison made an entry showing that the cause was continued for

the reason that the defendant was in the penitentiary, and upon his discharge from prison Carr was arrested and tried upon the indictment for rape. In regard to his plea in respect to the statute of limitation the court of Criminal Appeals in that case said: "The court correctly overruled the plea of limitation. Limitation does not apply when the facts are as stated, and only applies when the indictment has not been returned within the term specified in the statute. In order to prosecute for the crime of rape, the indictment must be presented within one year from the time the offense is committed. When the indictment is once presented into court, the cause may be continued from time to time indefinitely, without interposing the question of limitation. As stated in the plea itself, the offense was committed on the 17th day of July, 1892, and the indictment was returned the following January, 1893; clearly within a year, as specified in the statute. There is no merit in the contention of the appellant." In *Boughn v. State*, 44 Neb. 889, 62 N. W. 1094, the court held that: "An indictment must be found, or information filed, within the time fixed by the statute of limitations. It is not sufficient that the prosecution be instituted by complaint, arrest, or preliminary examination within the statutory period." In *Warrace v. State*, 27 Fla. 362, 8 South. 748, the court said: "It is not ordinarily necessary to prove the offense to have been committed on the day of the month or the year specified in the indictment, but it is essential that the proof should show, in cases not punishable with death, that the crime was committed within two years from the presentment of the indictment." Upon the same question, see, also, *Anderson v. State*, 20 Fla. 381, and *In re Griffith*, 35 Kan. 377, 11 Pac. 174. Mr. Bishop, in his work on *Statutory Crimes* (3d Ed.) p. 261, says: "There is American authority for saying that the word 'prosecution' in a statute limiting criminal causes is an equivalent for 'indictment,' so that only on the finding of an indictment will the running of a statute be stayed." Vide Wharton's *Crim. Pl. & Prac.* § 316, and Bishop on *Statutory Crimes*, § 257.

Without further consideration or references to authorities bearing upon the proposition, we are of the opinion, and so conclude, that the answer to the question above propounded must be that a criminal prosecution by indictment may be deemed and considered as commenced at the time the indictment is returned and presented to the court by the proper grand jury, and from that time the further running of the statute of limitation will be arrested. If the prosecution is by affidavit and information, then and in such cases the action may be deemed to be commenced at the time the information is filed with the clerk by the state through its proper officer. We have been cited to the case of *Flick v. State*, 22 Ind. App. 550, 51 N. E. 951, in support of appellant's contention. It

may be said that the decision in that appeal sustains the insistence of appellant, but we cannot yield our sanction to the holding in that case. It is there held that the commencement of a criminal prosecution dates from the issuing of the warrant upon the indictment for the arrest of the accused, and that the statute of limitation in such a case will continue to run after the return of the indictment until a warrant is issued thereon. The reasons advanced by the learned judge who wrote the opinion of the court in that case are unsound and untenable, and do not, in our judgment, authorize the holding therein. We expressly disapprove the ruling of the court in *Flick v. State*, supra.

It is finally claimed and urged by appellant's counsel that the instruction complained of is erroneous for the further reason that it makes no mention of, nor does it advise the jury in regard to, the question of venue. The evidence, as we have said, is not before us; neither are any of the instructions in the case in the record, except the one in controversy. Therefore under this state of the record we must assume that the trial court in other instructions which it gave to the jury fully advised them in respect to what the state was required to prove in regard to the venue, and the fact that the jury found the defendant guilty as charged in the indictment warrants the assumption that the evidence properly established that the crime of which the accused was convicted was committed in Whitley county.

The record presents no error, and the judgment is therefore affirmed.

CHICAGO, I. & L. RY. CO. v. BARNES.¹

(Supreme Court of Indiana. Oct. 9, 1903.)

MASTER AND SERVANT—RAILWAYS—DEATH—COMPLAINT—DEMURRER.

1. If the complaint in an action for the negligent killing of plaintiff's decedent states a cause of action on any theory, from the facts therein alleged, it is sufficient against a demurrer.

2. Where a complaint charges several acts of negligence on the defendant's part, it is sufficient, on trial, to prove that the injury complained of resulted from one of the negligent acts charged.

3. A complaint against a railway company for negligently causing the death of a brakeman in its employ, stating that he was uncoupling a train standing across a highway in a switchyard in the nighttime, and, while giving the required signals to the engineer, was killed by the negligent backing of another train along a near parallel track, without warning, signal, or light, stated a cause of action under Burns' Rev. St. 1901, § 7083, declaring a railway company liable for injury to employes caused by the negligence of any person in its service who has charge of any switchyard, locomotive engine, or train; and it was not necessary that the complaint allege that the company owed decedent the duty of having a light or watchman on its cars, or to give signals.

4. The complaint was sufficient, whether or not the statute requiring signals for highways applies to highways crossing a switchyard.

5. Allegations in a complaint that a railroad corporation itself negligently run its train against an employe and killed him excluded the theory that the negligent act charged was done by persons for whose acts the company was not responsible.

Appeal from Circuit Court, Montgomery County; Jere West, Judge.

Action by Lucinda Barnes, administratrix, against the Chicago, Indianapolis & Louisville Railway Company. Judgment for plaintiff, and defendant appeals. Case transferred from the Appellate Court under section 1337u, Burns' Rev. St. 1901. Affirmed.

E. C. Field and W. S. Kinnan, for appellant. Whittington & Whittington, for appellee.

JORDAN, J. Action by appellee against appellant for the negligent killing of her decedent. Trial by jury, and a general verdict awarding damages in the sum of \$2,500, together with answers to numerous interrogatories, returned. Over motions by appellant for judgment on the answers to the interrogatories and for a new trial, judgment was rendered on the general verdict. The errors assigned relate to the overruling of the demurrer to each paragraph of the complaint, and to the overruling of the above-mentioned motions.

The complaint appears to have been unskillfully drafted, and abounds in repetition. We have, to an extent, summarized the first paragraph of the complaint, and gathered therefrom the following facts: Appellee is the administratrix of George E. Coombs, deceased, and appellant is a railroad corporation duly organized, operating and controlling a railroad running through the state of Indiana, which, among others, runs through the counties of Montgomery and Monroe. On and prior to the 2d day of December, 1899, Coombs, the decedent, was in the employ of appellant as a brakeman, serving it as such on one of its freight trains which ran over its said railway. Immediately beyond the corporate limits of the city of Bloomington, in Monroe county, Ind., appellant on and previous to the aforesaid date had a switchyard, wherein it negligently constructed and maintained, as alleged, several switch tracks or sidings, and also a roundhouse and telegraph station. These side tracks or switches were about one-fourth to one-half mile in length, and parallel with the main railroad track. The distance between these switch tracks was from 6½ to 7 feet, and freight cars running thereover would, it is alleged, protrude and extend over and beyond the track or tracks to a distance of from 2 to 2½ feet. The open space between the cars when running or standing on opposite tracks in the said switchyard did not exceed 3 feet. Thereby the space between the cars was not sufficient to enable brakemen to discharge their duties as such in the said yard with reasonable safety. About midway of the

¹ 2 See Negligence, vol. 37, Cent. Dig. § 203.

² Superseded by opinion, 73 N. E. 91.

switchyard a public highway runs east and west, and crosses the main and switch tracks situated in the said yard. This highway is used and traveled by the public generally. On the date of the fatal accident, to wit, December 2, 1899, one of appellant's freight trains, upon which the decedent was employed and serving as a brakeman, was going south over appellant's road. It was composed of a locomotive engine and a large number of freight cars. Upon the arrival of this freight train at the aforesaid switchyard, it was run into the yard, onto track No. 3, and was moved through the yard towards the south until the engine and a part of the cars thereof had crossed the aforesaid highway, when it was stopped, thereby causing a part of the train to block or obstruct said highway. It is alleged then that Coombs, the decedent, while acting in the line of his duty as a brakeman on said train, and in compliance with the rules of appellant controlling the operation of said train by its servants, and also in compliance with and in obedience to the laws of the state of Indiana, prohibiting the obstruction of public highways, alighted from the train, on the west side thereof, onto the said highway crossing, for the purpose of uncoupling the cars of the train, in order that it might be cut apart, and the cars thereof which were obstructing the highway crossing removed therefrom. When the train reached the switchyard, and at the time said Coombs alighted therefrom, it was about 9 o'clock, at night, and very dark; there being no lights of any kind whatever either at any point in the switchyard, or at the crossing of the said highway. Coombs, when he alighted from the train, and at the time he was engaged in the line of his work, as hereinafter mentioned, neither saw nor heard any train on the side track immediately next to the track upon which his said freight train was standing. He was engaged in his duties east of track No. 2, and was between tracks No. 2 and No. 3, and was standing at the time of the accident as near to the latter track as it was possible for him to be, and was then and there engaged in uncoupling the cars of his train, and in giving and receiving signals from those in charge thereof. The engine attached to his freight train, together with other engines in the yard near by, was blowing off steam, and made such a noise that it was impossible for him to hear the running or approach of any train on track No. 2. While in the line of his duties and discharging the same as aforesaid stated, the defendant railroad company carelessly, negligently, and recklessly backed and run, from the south, a train, consisting of 15 freight cars and a locomotive engine, along, over, and upon track No. 2, backing and running the said train over and across the said public highway. One of the cars of the said train, in the north end thereof, was a very large box car, and, including the projections

thereof, was about 10 feet, and over, in width. There was no light upon the said train, and it was run and backed with no watchman or lookout thereon, and no signal whatever of its approach was given. The bell on the engine at no time was rung when the train was in motion. Neither was the engine whistle sounded at any time when the said train was being backed down to the said highway crossing. It is disclosed, in general, that no signal or warning whatever, of any kind, was given by the defendant of the approach of said train; and it is alleged that the engine bell of said train was not rung, nor was the engine whistle sounded, when the said train was within 80 rods of the said highway crossing, nor at any point when the train was approaching the said crossing where the decedent was engaged in uncoupling cars and in giving signals, as aforesaid stated. Said train and cars struck and killed said decedent while engaged in the discharge of his duties as hereinbefore alleged. It is further charged that the defendant so negligently constructed its side tracks and switches at the said highway crossing where the decedent was killed as aforesaid that the space between the cars on the train upon which he was brakeman and the cars of the train by which he was killed did not exceed $2\frac{1}{2}$ feet. Coombs had no knowledge whatever of the approach of the train at the time he was killed, and no warning was given him by the defendant of the danger to which he was exposed. At the close of the pleading, among other things, it is alleged "that by reason of the defendant's negligence in not having a light or a watchman at said highway crossing, and in not having a light, signal, person, or watchman on said car and train thus pushed over said track and highway crossing, and in not sounding the whistle nor ringing the bell on said engine of said train, and by reason of said defendant's negligence in not giving any signal or warning whatever of the approach of said train to the crossing of said public highway, and by reason of said defendant's negligence in pushing a train of fifteen freight cars ahead of an engine attached thereto, and by reason of all the negligent acts and omissions of said defendant herein set forth, plaintiff alleges that said defendant negligently and carelessly injured and killed said George E. Coombs."

The second paragraph of the complaint is substantially as the first; hence, if the latter is sufficient to withstand a demurrer, it necessarily follows that the former can be upheld. It is insisted by counsel for appellee that the complaint sufficiently discloses several acts of negligence which will render the railroad company liable either at common law or under the employers' liability act, being section 7083, Burns' Rev. St. 1901. By this section it is provided, "that every railroad company * * * operating in this state shall be liable for damages for person-

al injury suffered by any employé while in its service, the employé so injured being in the exercise of due care and diligence in the following cases: * * * Fourth. Where such injury was caused by the negligence of any person in the service of such corporation who has charge of any * * * switch yard, locomotive engine or train upon a railway."

Appellant's counsel urge that the complaint is insufficient on demurrer, because it does not charge that appellant owed the decedent any duty in regard to the operation or running of its train in its switchyard at the time of the accident. It is said that the only duty owing by appellant was to properly construct and maintain its tracks. This duty, it is asserted, the law imposed upon the railroad company, and that a violation of this duty is the only one charged in the complaint. The further contention is that the duty of appellant to have a light or watchman on its cars, or to give signals or warning in regard to the movement or running of its trains in the switchyard in question, was not a duty imposed by any statute or ordinance, and did not arise out of any general law applicable to the case. It is contended that, if such a duty existed, it should have been expressly shown under the averments of the complaint. It is claimed that it is not disclosed to have been the custom of appellant, previous to the accident, to have a lookout or watchman or light upon its cars when they were being backed or run on the tracks in the switchyard, or to give any warning or signals upon such occasions by ringing the engine bell or sounding the whistle. It is urged that under such circumstances no duty to do so could arise either by operation of law or in fact. As there are no facts averred in the complaint in respect to a pre-existing custom or practice in regard to giving signals or warning of the running or movement of trains in appellant's switchyard, the insistence is that there is nothing shown in this respect upon which decedent had a right to rely. The contention is finally made that the complaint wholly fails to disclose any duty of appellant, for a breach of which it would be liable for the death of appellee's decedent.

In considering the sufficiency of the pleading in controversy, it may be said that our Civil Code declares that the complaint in an action shall contain a statement of the facts constituting the cause of action, in plain and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended. If it can be determined that the complaint in this case states a cause of action upon any theory, from the facts as therein alleged, it must be held sufficient to withstand a demurrer. It appears that the pleader, in drafting it, has attempted to charge several acts of negligence upon the part of appellant. In regard to such practice, it may

be said that the rule is well affirmed that a complaint may allege several acts of negligence, and on the trial it will be sufficient to justify a recovery if it be established that the injury complained of resulted from one of the negligent acts as charged in the complaint. *Long v. Dorey*, 50 Ind. 385; *The Diamond, etc., Co. v. Edmonson*, 14 Ind. App. 594, 43 N. E. 242, and cases there cited; *The Standard Oil Co. v. Bowker*, 141 Ind. 12, 40 N. E. 128; 12 Ency. of Pl. & Prac. 345. We are satisfied in this case that the complaint, under its averments, sufficiently discloses such negligence upon the part of appellant's servants in charge of its freight train in the switchyard, by which decedent was killed, in running and operating the same, as will render the railroad company responsible for his death, by virtue of the provisions of clause 4, § 7083, supra, as hereinbefore set out. This we think may be said to be the main or principal theory of the complaint, as outlined by the facts therein alleged. Under the circumstances and conditions described, the negligent running and operation of the train is shown to have been the proximate cause of the fatal accident. The deceased at the time he was killed was engaged in the line of his duty at work between tracks No. 2 and No. 3, uncoupling the cars of his train, which, as it appears, had been stopped on track No. 3, and was giving the required signals to the engineer—all, as it appears, for the purpose or in order that the train might be cut apart, and the cars removed from the public highway crossing which they were temporarily obstructing, all of which he was doing, as it is disclosed, in compliance with the rules and requirements of appellant. The accident occurred in the darkness of night, when there was an entire absence of lights in the switchyard and at the public crossing. It is shown by the averments of the complaint that the train which killed decedent was negligently, carelessly, and recklessly run by the defendant across the public highway where he was engaged in his work, without having either watchman or lights thereon, and without giving any signal or warning whatever of its approach. Had there been any signal or warning given of the running or approach of this train to the point at the highway crossing where he was at work at the time, or any precaution whatever exercised by appellant, or its servants in charge of the train, in running or operating the same, it is reasonable to suppose that the deceased would have been warned or admonished in time to have escaped the accident. He was not bound to anticipate that appellant, under the circumstances, would back its train through the switchyard, down to and across the public highway, without giving some signal or warning. He was, as shown, where his duty called him; and appellant owed the duty, under the circumstances, not to subject or expose him to peril or danger as it did. It is not the rule, as counsel for appellant con-

tend, that the complaint should positively charge that appellant at the time of the accident owed the decedent a duty. It was not necessary to allege in the complaint that a certain act or line of conduct was a duty imposed upon appellant by law, for, as a rule, the law implies the duty from the facts stated or alleged in the pleading. It is elementary that a conclusion of law is not required to be alleged. *Cribben v. Callaghan*, 156 Ill. 449, 41 N. E. 178; *Railroad Co. v. Coit*, 50 Ill. App. 640. The rule affirmed by repeated decisions of this court is that a general averment of negligence has a technical significance, and, in an action for negligence, if a legal duty and a violation thereof are disclosed, the general averment of the negligence complained of will be sufficient on demurrer to sustain the charge. Under the facts as alleged in the complaint, both the legal duty which appellant owed to the deceased, as its servant, and the violation of such duty, are sufficiently shown. Absence of any knowledge on the part of the decedent at the time he was killed of the danger or peril to which appellant exposed him, and which resulted in his death, is expressly shown by the averments of the complaint. It will be observed that the pleader charges in the complaint that the defendant (that is, the railroad corporation itself) negligently and carelessly run its train upon and across the public highway, and upon and against the said decedent, and thereby struck and killed him. These allegations exclude the theory that the act or acts of negligence were done by persons for whose conduct the defendant was not legally responsible.

Appellant's counsel earnestly contend that neither the railroad company, nor its servants in charge of the train which killed the deceased, owed any duty to give the statutory signals when the train was approaching the public highway crossing in the switchyard. It is contended that this statutory requirement does not extend to the running or movements of trains in a switchyard, and can have no application where a servant of the company is injured in a switchyard, as was the deceased in this case. As to whether the provisions of our statute which require signals to be given by railroad companies when their trains are approaching public highway crossings are applicable under the facts in the case at bar, we need not decide, for, aside from the requirements of this statute, the complaint, on the question of negligence, is sufficient. The language and reasoning of *Baker, J.*, speaking for the court, in the appeal of *Indianapolis Union Railway Company v. Houlihan*, 157 Ind. 494, 60 N. E. 943, 54 L. R. A. 787, are quite pertinent and applicable to the question herein involved. In that case it is said: "Conceding that the engineer's statutory duties to sound the whistle and ring the bell on approaching a highway crossing, and to stop his engine before crossing an intersecting

railroad, do not apply in this case, it does not follow that the engineer owed no duty to appellee. It was his duty to exercise that diligence for appellee's safety which a man of ordinary prudence would have exercised under like circumstances." See, also, *Stoy v. L. E. & St. L. R. Co.* (at last term) 66 N. E. 615.

The facts alleged in the complaint under consideration fully establish that the servants of appellant in charge of the train in controversy, and for whose negligence in the premises the statute holds the railroad company responsible, did not, in the running and operation of the train, under the circumstances, exercise that diligence or care for the safety of appellee's decedent which a person of ordinary prudence would have exercised under like or similar circumstances. We conclude that the complaint states a good cause of action, and the demurrer thereto was properly overruled.

In answer to the contention that judgment should have been awarded appellant upon the special findings of the jury, it may be said that there is no such antagonism between the general verdict and the special findings of fact as would defeat the former. There was no error in denying that motion. There is evidence in the record which supports the general verdict, and also the material facts found by the jury in their answers to the interrogatories propounded.

We have considered all the questions presented by appellant's learned counsel, but find no error, and the judgment is therefore affirmed.

(161 Ind. 249)

STATE ex rel. ANTRIM v. REARDON et al.

(Supreme Court of Indiana. Oct. 8, 1903.)

QUO WARRANTO—RELATOR—PRIVATE CITIZEN.

1. Under *Burns' Rev. St.* 1901, §§ 1145, 1146 (*Rev. St.* 1881, §§ 1131, 1132; *Horner's Rev. St.* 1901, §§ 1131, 1132), authorizing quo warranto to determine right to hold an office on relation of a private citizen only when he claims an interest in the office, it is not enough that he is a citizen and taxpayer.

Appeal from Circuit Court, Grant County; H. J. Paulus, Judge.

Quo warranto on the relation of Pat. Antrim against Daniel C. Reardon and others. Judgment for defendants, and relator appeals. Affirmed.

John A. Kersey, for appellant. G. A. Henry and P. H. Elliott, for appellees.

MONKS, C. J. The relator, a "resident citizen and taxpayer" of the city of Marion, filed in the court below an information in the nature of a quo warranto to compel appellees to show by what authority they assumed to act in the capacity and perform the duties of police commissioners of said city. It was alleged in the information that

¶ 1. See *Quo Warranto*, vol. 41, Cent. Dig. § 41.

the relator requested the prosecuting attorney to institute and prosecute this proceeding, and that he refused to do so; that appellees were appointed by the Governor members of the board of metropolitan police commissioners for said city of Marion under sections 3419-3730, Burns' Rev. St. 1901 (Acts 1901, pp. 24, 25; Acts 1897, pp. 90-96), and were acting as such under said appointment, and that the law under which they were appointed was unconstitutional. Appellees' demurrer for want of facts was sustained to this information, and judgment was rendered in favor of appellees. The errors assigned call in question the action of the court in sustaining the demurrer to the information. Appellees insist that the information is insufficient because the facts alleged do not show that the relator, a private person, claims or has any interest in said office of police commissioner. The relator contends that the act under which appellees were appointed is unconstitutional, and that, the prosecuting attorney having refused to file an information when requested to do so, he, as a citizen and taxpayer, has such right.

The common-law rule requires that proceedings in the nature of quo warranto be instituted in the name of the state by the Attorney General or other prosecuting officer, and a private citizen has no right to file the information in his own name or of his own volition, because the law does not permit the use of this remedy by a citizen to redress the wrongs of the state. High on Extra Legal Rem. § 697; Throop on Pub. Officers, § 776; Dillon's Mun. Corp. (4th Ed.) §§ 888, 889; Landes v. Walls (Ind. Sup.) 66 N. E. 679, 681. Section 1145, Burns' Rev. St. 1901 (section 1131, Rev. St. 1881 and Horner's Rev. St. 1901), provides that: "An information may be filed against any person or corporation in the following cases: First. When any person shall usurp, intrude into, or unlawfully hold or exercise any public office or any franchise within this state, or any office in any corporation created by authority of this state." Section 1146, Burns' Rev. St. 1901 (section 1132, Rev. St. 1881, and Horner's Rev. St. 1901), provides that "the information may be filed by the prosecuting attorney in the circuit court of the proper county upon his own relation whenever he shall deem it his duty to do so, or shall be directed by the court or other competent authority, or by any other person on his own relation, whenever he claims an interest in the office, franchise or corporation which is the subject of the information." This being an inquiry as to the right to hold a public office, the rule under our statute is that the relator, if a private person, must allege facts showing some right or interest in the office in himself. Reynolds v. State, 61 Ind. 392, 401-405; State v. Adams, 65 Ind. 393; State v. Peterson, 74 Ind. 174, 179-181; Mulliken v. City of Bloomington, 72 Ind. 161, 163; State v. Smith, 32 Ind. 213; Dillon's Mun.

Corp. §§ 898, 901; High on Extra Legal Rem. § 697. To enable a private person to maintain such an action under our statute, his interest must be a special interest, and one not common to the general public. As the facts alleged do not show that the relator has such interest in said office, the court did not err in sustaining the demurrer to the information. It is settled law in this state that the court will not pass upon a constitutional question if the case can be decided upon other grounds. Hart v. Smith, 159 Ind. 199, 64 N. E. 661; Chicago, etc., R. R. Co. v. Glover, 159 Ind. 170, 62 N. E. 11.

Judgment affirmed.

(161 Ind. 242)

CLEVELAND, C., C. & ST. L. RY. CO. v. STEWART.

(Supreme Court of Indiana. Oct. 7, 1903.)

RAILWAYS—PERSONAL INJURIES—HIGHWAY CROSSINGS—EVIDENCE—SUFFICIENCY—APPEAL.

1. Where error is assigned upon the denial of motion for new trial, the question presented on appeal is not one of fact, but of law, and, if there is competent evidence on which the verdict may rest, this court cannot consider conflicting views of its weight or credibility, nor compare it with other evidence in the case which might justify a different conclusion.

2. In order to reverse the action of the trial court on the denial of a motion for a new trial on the ground of the insufficiency of the evidence, the lack of evidence must be so clear that it would have been the duty of the trial court, on proper request, to have directed a verdict for the party complaining of the decision.

3. Evidence in an action against a railway company for personal injuries received at a highway crossing, examined, and held to support a verdict for plaintiff.

4. Where appellant fails to set out any of the instructions complained of, or a succinct statement thereof, as required by Sup. Ct. Rule 22, 55 N. E. v, the court cannot consider them.

Appeal from Circuit Court, Clay County; P. O. Colliver, Judge.

Action by John T. Stewart against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company. From a judgment for plaintiff, defendant appeals. Transferred from the Appellate Court under section 1 of Act May 15, 1901 (Acts 1901, p. 590; Burns' Rev. St. 1901, § 1337u). Affirmed.

Knight & Knight and John T. Dye, for appellant. S. A. Hays and W. J. Beckett, for appellee.

DOWLING, J. The appellee recovered a judgment against the appellant for a personal injury sustained by him at a street crossing in the city of Indianapolis by reason of the alleged negligence of the appellant. The railroad company appeals, and assigns for error the overruling of its motion for a new trial. The reasons for the motion discussed by counsel for appellant are (1) that the verdict is not sustained by sufficient evidence; (2) that the court erred in giving instructions numbered 6, 7, 8, and 9; and (3) that the

answers of the jury to certain questions of fact were not sustained by sufficient evidence.

The material facts shown by the evidence were these: The appellee, a farmer living five miles from Indianapolis, 38 years old, and having the use of all his faculties, was passing through the city in an open buggy, drawn by a gentle horse, between 11 and 12 o'clock on the night of May 24, 1899. The night was neither very light nor very dark. He drove south on Missouri street, one of the public streets of the city, to the point where that highway is intersected by seven railroad tracks; one of them, the first or north track, being used by the appellant. From the point of intersection eastward for several hundred feet the tracks were straight, or nearly so, and, if the view were entirely unobstructed, an engine or train approaching from the east could be seen and heard when several blocks or squares distant. The view was not wholly unobstructed, and a telephone pole, a derrick for hoisting machinery, fences near the tracks, and a watchman's shanty interfered to some extent with the view of trains coming from the east. The appellee began to look and listen for trains when he was about one square north of the crossing. Before he started over the tracks, he stopped his horse some 10 feet north of the first track, and looked both east and west, and listened for approaching trains, but saw and heard none. He observed one train east of Missouri street, moving eastward on one of the tracks, its locomotive blowing off steam and making considerable noise. Another engine was standing still at a point west of Missouri street. Appellee saw no train coming toward him, and heard no bell or noise indicating the approach of a train, and he started to cross the first track. Just as his horse was about to pass the north rail of the first track, appellee discovered a train near the switchman's shanty, some 120 feet distant, coming toward him, as he thought, at a speed of from 25 to 30 miles an hour. He then had not time to go back or to get across the track. His buggy was struck by the locomotive, his horse was knocked or dragged down under the pilot of the engine, and the appellee was thrown out of the buggy and injured. The train, consisting of a locomotive and seven cars, was a heavy one, and was stopped within a space of from 20 to 30 feet from the point of collision with the buggy. The headlight on the locomotive was burning, and the bell was operated by air and rung automatically. The train was running at the rate of from 8 to 20 miles per hour, and was within the corporate limits of the city. An ordinance prohibited the running of trains in the city at a greater rate of speed than 4 miles per hour.

Counsel for appellant say in their brief: "The evidence in this case clearly discloses that appellee was guilty of gross contributory negligence in driving upon the railroad track in front of an approaching train, which could

have been seen and heard by him in ample time to have avoided the collision if he had looked and listened attentively when at a safe distance from the crossing, or if he had heeded what he might have seen and heard before driving upon the crossing." In determining the question whether the trial court erred in holding that the evidence was sufficient to sustain the verdict, the power of this court is closely circumscribed by the rule that we cannot weigh the evidence, and which rule has been strictly adhered to in all previous cases. That question was in the first instance for the jury, and next for the judge of the trial court upon the motion for a new trial. Where error is assigned upon the denial of the motion, the question presented on appeal is not one of fact, but of law. If there is competent evidence upon which the verdict may rest, this court cannot consider conflicting views of its weight or credibility, nor compare it with other evidence in the case which might justify a different conclusion. *Deal v. State*, 140 Ind. 354, 360, 39 N. E. 930. In all the cases referred to by counsel for the appellant in which it is said that it is the duty of the court to set aside a verdict when it is against the weight of the evidence, the statement relates to the trial court, and not to this court on appeal. The rule by which this court is governed finds forcible expression in *Ft. Wayne, etc., R. Co. v. Huselman*, 65 Ind. 73, 76, in which it is said: "Whether or not the evidence in any case is clear or overwhelming or conclusive is a question for the jury trying the cause, and the judge presiding at such trial. When a jury have passed upon this question, and returned their verdict, and when the court, under whose eye and within whose hearing the evidence has been introduced and the cause has been tried, has refused to disturb the verdict upon the weight or sufficiency of the evidence, we are clearly of the opinion that it is neither our province nor our duty to reverse the judgment of the trial court merely because it may seem to us, from our reading of the record, that 'the evidence in support of the finding is clearly and overwhelmingly or conclusively contradicted.'" "The jurisdiction of this court on appeal, as has been well said, is expressly limited to the correction of errors of law." *Deal v. State*, 140 Ind. 354, 358, 39 N. E. 930, 931. In reviewing the action of the trial court upon the denial of a motion for a new trial on the ground of the insufficiency of the evidence to sustain the verdict, the lack of evidence must be so clear and complete that it would have been the duty of the trial court, on proper request, to have directed a verdict for the party complaining of the decision.

In the case before us there are practically but two questions, upon the evidence: Did the appellee exercise such care as a person of ordinary prudence would exercise under the same circumstances? Was the negligence of the appellant the proximate cause of the injury? The crossing, it may be conceded, was

an unusually dangerous one. Missouri street was intersected by seven railroad tracks. The appellee was acquainted with the place, and knew that the tracks were there. As he drew near to the crossing, he began to look and listen for trains while one square north of the first track. He stopped his horse when within 10 feet of the first track, and again looked both east and west, but neither saw nor heard any train moving toward him. It is true that the evidence showed that the track eastward was straight, or nearly so, and that from certain positions a traveler could see several hundred feet along its line; but there was also proof, and a good deal of it, that there were obstacles which prevented or interfered with such view. It appeared that there was a watchman's shanty only 5 feet from the north rail of the first track, 120 feet east of the Missouri street crossing. It was $6\frac{1}{2}$ feet wide and 8 feet high. This structure was only 6 or 7 feet from a large house described as the "Harvester Building." The witnesses also described certain high, close fences on Missouri street, and houses near to the line of the first track. It was further shown that a telephone pole, a large derrick, and a pile of earth obstructed the view to some extent. One witness, Elza Perry, testified that he was in a road wagon about 15 feet behind appellee just before the accident, and that he could not see the locomotive until it passed the watchman's shanty. William Sedam, another witness, swore that he was in the wagon with Perry, and that he did not see the locomotive until it was between the shanty and the crossing. The appellee, Perry, and Sedam testified that an engine and train were moving eastward on another track, and that this locomotive was making a noise by blowing off steam. Each of these witnesses thought that the train which struck the appellee was running at from 25 to 30 miles an hour. That the appellee exercised some care and caution in attempting to cross the tracks was clearly proved. With a mass of testimony of this character, it is impossible for us to say that there was no evidence from which the jury were authorized to find, as they did, that the appellee exercised care proportionate to the known dangers of the situation, and that it was entirely possible that the obstacles referred to prevented him from seeing the train until it was too near him to permit advance or retreat. So, too, we cannot declare that the jury erred in their conclusion that the noise of the escaping steam from another locomotive, and the movement of another train, and the ringing of bells on other engines, did not prevent appellee from hearing the noise made by the train which struck him. The proof that the train was running at an unlawful rate of speed is uncontradicted. Taking all the evidence together, we cannot say that, if the appellee had looked, he must have seen, and, if he had listened, he must have heard, the approaching train.

By their verdict, the jury found that the proximate cause of the accident and injury was the negligence of the appellant in failing to keep a proper lookout on its train, and in running the train at a dangerous rate of speed, in excess of the limit fixed by the city ordinance. Whether the appellee exercised reasonable care was a proper question for the jury, and there was some evidence, at least, to sustain their conclusion that he did exercise such care. Under the circumstances, it would have been error if the court had directed a verdict for the appellant, and, for similar reasons, we cannot say that the verdict is unsupported by the evidence. 2 Thompson, Negligence, § 1487; City of Huntington v. First, 22 Ind. App. 66, 53 N. E. 246; City of Bedford v. Woody, 23 Ind. App. 231, 53 N. E. 838; City of Bluffton v. McAfee, 23 Ind. App. 112, 53 N. E. 1058; City of Bedford v. Neal, 143 Ind. 425, 41 N. E. 1029, 42 N. E. 815; Sale v. Aurora, etc., Turnpike Co., 147 Ind. 324, 46 N. E. 669; Wabash R. Co. v. Biddle, 27 Ind. App. 161, 59 N. E. 284, 60 N. E. 12; Indianapolis, etc., R. Co. v. Boettcher, 131 Ind. 82, 28 N. E. 551; Thomas v. Hoosier Stone Co., 140 Ind. 518, 39 N. E. 500; Bonebrake v. The Board, 141 Ind. 62, 40 N. E. 141; Deal v. State, 140 Ind. 354, 39 N. E. 930; Rarick v. Ulmer, 144 Ind. 25, 42 N. E. 1099.

The answers of the jury to the questions of fact submitted to them were sustained by the evidence, and all of them were not only consistent with the general verdict, but tend strongly to support it.

Counsel for appellant have failed to set out in their brief any of the instructions to which they object, or a succinct statement thereof, as required by rule 22 (55 N. E. v) of this court, and for that reason we cannot consider them. However, we have read all the instructions given, and, were those objected to before us, we could not hold that, taken in connection with the other instructions given to the jury, they contained any misdirection which would authorize us to reverse the judgment.

We find no error. Judgment affirmed.

(161 Ind. 251)

LEVY v. STATE.

(Supreme Court of Indiana. Oct. 9, 1903.)

CONSTITUTIONAL LAW—LICENSES—TRANSIENT MERCHANTS—EQUAL PROTECTION OF LAWS—STATUTES—SUBJECT—DEPRIVATION OF PROPERTY—SPECIAL LAWS—TAXATION.

1. An objection to an act as not being a constitutional exercise of legislative authority was too vague to raise any question, but the particular provision of the Constitution supposed to be violated should have been pointed out.

2. Act March 11, 1901 (Burns' Rev. St. 1901, §§ 7231a, 7231t), defining "transient merchants," and prohibiting the transaction of business by them without a license, and imposing a penalty for its violation, did not violate the fourteenth amendment of the federal Constitution, insuring equal protection of the laws.

3. Act March 11, 1901 (Burns' Rev. St. 1901, §§ 7231a, 7231t), is entitled "An act defining

transient merchants, providing for taxing, licensing and regulating transient merchants, fixing license fees, regulating sales of goods, wares and merchandise by transient merchants, creating liens for unpaid license fees, to prevent and punish fraudulent sales of goods, wares and merchandise by transient merchants, providing penalties and giving towns and cities power to tax, license and regulate transient merchants." *Held*, that the act did not violate Const. art. 4, § 19, forbidding more than one subject to be embraced in an act.

4. As the act applied to all transient merchants, whether residents or nonresidents, it did not grant to one class of citizens privileges and immunities which on the same terms did not equally belong to all citizens, contrary to Const. art. 1, § 23.

5. The act was not in conflict with Const. art. 1, § 21, as authorizing the taking of property without due compensation.

6. The act was not a special law, contrary to Const. art. 4, § 22, merely because of the incidental provision of section 7 that the license fees be paid into the common school fund.

7. If section 7 was void, it would not vitiate the balance of the act.

8. The exemption of sheriffs, assignees, and other public officers from paying a license on sales by them did not render the act violative of Const. art. 10, § 1, requiring uniform taxation, and declaring that no property shall be exempt therefrom, except such as is used for purposes therein stated.

9. The act was not in violation of Const. art. 1, § 1, guaranteeing to every citizen life, liberty, and the pursuit of happiness.

10. It is competent for the Legislature to exact a license fee, and at the same time to subject to taxation the property employed in the occupations licensed.

Appeal from Circuit Court, Whitley County; Joseph W. Adair, Judge.

Abe Levy was convicted of transacting business as a transient merchant without a license, and appeals. Affirmed.

Marshall, McNagny & Clugston, for appellant. Miller, Elam & Fesler, C. W. Miller, Atty. Gen., L. G. Rothschild, W. C. Geake, and C. G. Hadley, for the State.

DOWLING, J. An information filed against the appellant charged him with a violation of the act of March 11, 1901 (Acts 1901, p. 466, c. 208; Burns' Rev. St. 1901, §§ 7231a, 7231t), prohibiting the transaction of business by any transient merchant without a license. He was found guilty, and judgment was rendered upon the finding. The validity of the statute is brought in question, and duly presented by motions to quash the information and for a new trial. The objections taken to the act, as stated by counsel for appellant, are (1) that it is not a constitutional exercise of legislative authority; (2) that it violates the provisions of the fourteenth amendment of the Constitution of the United States, by denying to the transient merchant the equal protection of the laws; (3) that it violates section 19, art. 4, of the state Constitution, more than one subject being embraced in the act; (4) that it contravenes section 23, art. 1, of the state Constitution, by granting to one class of citizens

privileges and immunities which upon the same terms do not equally belong to all citizens; (5) that it conflicts with section 21, art. 1, of the state Constitution, by authorizing the taking of the property of the citizen without due compensation; (6) that it is a special law for the support of the common schools, and therefore void, under section 22, art. 4, of the Constitution; (7) that it violates section 1, art. 10, of the Constitution, which requires that taxation shall be uniform and equal, and that no property shall be exempt therefrom, except such as is used for municipal, educational, literary, scientific, religious, or charitable purposes; (8) that it violates section 1, art. 1, of the Constitution, which guarantees to every citizen of the state life, liberty, and the pursuit of happiness; (9) that the act is void because it imposes double taxes.

It appeared upon the trial, among other facts, that the appellant was a resident of the city of Ft. Wayne, in this state, where he carried on a general clothing business. He rented a room in Churubusco, a town of 1,200 inhabitants, in said Whitley county. He stated that he intended to occupy it for a few days only. He put no furniture in the room, but placed therein a stock of clothing and notions. He did not apply for or receive a license to transact business in the said town or county as a transient merchant. He exhibited his goods for sale, and sold the merchandise mentioned in the information at the time and place and to the person and for the price named. The population of Whitley county was less than 20,000.

The provisions of the act of March 11, 1901, *supra*, to be considered upon this appeal, are: Section 1, which declares that it shall be unlawful for any transient merchant to engage in or transact business as such merchant without having first obtained a license as required by the statute; section 2, prescribing the mode of application for the license, the fees to be paid therefor, and the mode of issuing the same; section 4, which fixes the penalty for a violation of the act; section 6, defining the term "transient merchant"; section 7, directing that all license fees collected under the act be paid into the common school fund of the state; and section 8, which exempts from the operation of the statute commercial travelers, sales by sample for future delivery, hawkers and peddlers, sheriffs, constables, and other public officers selling goods according to law, and assignees and receivers appointed in this state. Many of the points of objection to the statute made by counsel are merely stated, but not discussed, and we are left to conjecture the reasons on which they are supposed to rest. The importance of the main question, however, has led us to make a careful examination of all the objections suggested, and of the authorities bearing upon each of them. The case made by the information and the proof is that the appellant, being a transient merchant, within the mean-

§ 4. See Constitutional Law, vol. 10, Cent. Dig. § 667.

ing of the act of March 11, 1901, *supra*, as such merchant sold an article of merchandise as charged in the information, not being licensed so to do, and in violation of the statute. If the statute is valid, the conviction was proper. The only question is the constitutionality of the act.

The general principles by which courts are governed in determining the validity of acts of the Legislature are too familiar and well established to require a citation of the cases in which they have been announced or followed. The presumption is generally in favor of the validity of the statute, and an act will never be stricken down by the courts unless the grounds of its invalidity are clearly apparent. In doubtful cases the statute must be upheld. Where the power to enact a law exists, the legislative discretion concerning the time, the circumstances, and the situation calling for the exercise of such power is not subject to review or control by the courts. Where a power is granted or reserved to the Legislature, the grant or reservation carries with it the right to use the necessary means to effect the object of such grant or reservation. The authority of the Legislature to determine what things are injurious to the interests and welfare of the public, and what measures are necessary for the safety, comfort, and well-being of the citizens of the state, is extensive and far-reaching, and, as has often been said, is incapable of strict definition or limitation. A legislative declaration that an evil exists, or that injury is likely to result to the public from particular trades or occupations unless restrained or regulated by law, is entitled to the highest respect by the courts, and should never be disregarded unless clearly in conflict with some provision of the Constitution. As was said in *Fry v. State*, 63 Ind. 559, 30 Am. Rep. 238: "It is the settled doctrine of the decisions of this court that 'the legislative authority of this state has the right to exercise supreme and sovereign power, subject to no restrictions except those imposed by our own Constitution, by the federal Constitution, and by the laws and treaties made under it. This is the power under which the Legislature passes all laws.' *Beauchamp v. State*, 6 Blackf. 299; *Doe v. Douglass*, 8 Blackf. 10, 44 Am. Dec. 732; *Lafayette, etc., R. Co. v. Gelger*, 34 Ind. 185. It must appear very clearly that the legislation is in conflict with some express provision of the Constitution, or the statute will be upheld." On the other hand, the authority of the Legislature is not supreme; but must be exercised in subordination to the rules of the federal and state Constitutions. The personal liberty of the citizen is the especial object of the care and protection of the Constitution, and it can be abridged or taken away only when the public welfare requires such interference with it.

The first objection, *viz.*, that the act is not a constitutional exercise of legislative au-

thority, is too vague and indefinite to raise any question. The particular provision of the Constitution supposed to be violated should be pointed out.

The second is without merit. The act does not deny to the transient merchant the equal protection of the laws. *Duncan v. Missouri*, 152 U. S. 377, 14 Sup. Ct. 570, 38 L. Ed. 485; *Minneapolis, etc., Co. v. Emmons*, 149 U. S. 364, 13 Sup. Ct. 870, 37 L. Ed. 769; *State v. Gerhardt*, 145 Ind. 439, 44 N. E. 469, 33 L. R. A. 313.

The third is equally groundless. The statute embraces a single subject—transient merchants—and the issuing of licenses to them, and that subject is clearly expressed in the title. *State v. Bailey*, 157 Ind. 324, 61 N. E. 730, 59 L. R. A. 435; *Gustavel v. State*, 153 Ind. 613, 615, 54 N. E. 123.

The fourth objection, that the act grants special privileges and immunities, is without foundation. Its provisions apply to all transient merchants, whether residents or non-residents of the county and state. The classification adopted is a natural and reasonable one, and as much so as that of auctioneers, hawkers, and peddlers. *Davis Coal Co. v. Pollard*, 158 Ind. 607, 617, 62 N. E. 492; *Parks v. State*, 159 Ind. 211, 64 N. E. 862.

The fifth, that the act authorizes the taking of the property of the transient merchant without compensation, has no application to statutes of this kind. *Fire Dept. v. Noble*, 3 E. D. Smith, 440; *Aurora v. West*, 9 Ind. 74; *Decker v. Sargeant*, 125 Ind. 404, 25 N. E. 458; *Davis v. Fasig*, 128 Ind. 271, 27 N. E. 726; *People v. Mayor, etc., of Brooklyn*, 4 N. Y. 419, 55 Am. Dec. 286; *Parks v. State*, 159 Ind. 211, 220, 64 N. E. 862.

The sixth point, that the act is a special law for the support of the common schools, has nothing to rest upon except the incidental provision by section 7 that the license fees shall be paid into the common school fund of the state. The law is a general law regulating the licensing of transient merchants. It is not a revenue law. This section, even if void, would not vitiate the act. *Pennsylvania Co. v. State*, 142 Ind. 428, 435, 41 N. E. 937; *Judy v. Thompson*, 156 Ind. 533, 535, 60 N. E. 270; *City of East St. Louis v. Trustees of Schools*, 102 Ill. 489, 40 Am. Rep. 606; *Youngblood v. Sexton*, 32 Mich. 406, 20 Am. Rep. 654; *Fire Dept. v. Noble*, 3 E. D. Smith, 440.

The seventh objection is made upon the theory that the statute is an exercise of the taxing power of the state, and therefore that the exemption of sheriffs, constables, assignees, receivers, and other public officers from its operation is unauthorized. Even if the purpose of the law was to raise revenue, the exemption of public officers from its provisions would be legal. The sale of property by public officers or persons appointed for that purpose by courts is not a business or occupation, and, even if such officers and persons had not been expressly exempted from the

operation of the statute, they could not have been held subject to its provisions. The evident object of the act is not to raise revenue, although it may have that result, but to regulate and restrain a species of trade, which, in the opinion of the Legislature, might otherwise be injurious to the public interests.

The ninth objection, that the act imposes double taxes upon the transient merchant, is unimportant. It is competent for the Legislature to exact a license fee, and at the same time to subject to taxation the property employed in the occupation licensed. Familiar instances of this kind are found in the licensing of liquor saloons and billiard rooms, and the taxing of the stock of liquors and the furniture used in these occupations. *Goldsmith v. Huntsville*, 120 Ala. 182, 24 South. 509; *Savings Society v. Colte*, 6 Wall. 594, 18 L. Ed. 897; *Pullman Southern Car Co. v. Nolan* (C. C.) 22 Fed. 276; *Scottish, etc., Ins. Co. v. Herriott*, 109 Iowa, 606, 80 N. W. 665, 77 Am. St. Rep. 548; *Com. v. Lancaster Savings Bank*, 123 Mass. 493.

The eighth objection alone raises a serious question. Do the first, second, fourth, sixth, seventh, and eighth sections of the statute unlawfully deprive the citizen of the liberty to use and enjoy his property, and to pursue his happiness, as those rights are secured to him by section 1, art. 1, of the Constitution? Although the Legislature may not arbitrarily declare acts, occupations, or things, which are in fact harmless in themselves to be injurious to the public, and, in the exercise of the police power, subject them to governmental control, yet, when it does impose conditions and restrictions upon particular acts, occupations, or things, it must be presumed that a sufficient reason or necessity for such legislation existed. Those who assail a statute of this kind upon the ground that it is not a legitimate exercise of the police power must be able to show that the act, occupation, or thing prohibited or regulated is not injurious to the public, or likely to impair the public welfare. In *Chesapeake, etc., Tel. Co. v. Manning*, 186 U. S. 238, 245, 22 Sup. Ct. 881, 46 L. Ed. 1144, in disposing of the objection to an act of Congress fixing the rate of charges for telephone service, but which failed to provide for notice to the telephone companies affected, and which did not show a previous investigation by Congress of the subject of such rates, the Supreme Court, by Brewer, J., says: "But it is well settled that the courts always presume that the Legislature always acts advisedly and with full knowledge of the situation. Such knowledge can be acquired in other ways than by the formal investigation of a committee, and courts cannot inquire how the Legislature obtained its knowledge. They must accept its action as that of a body having full power to act, and only acting when it has acquired sufficient information to justify its action." The occupation of the itinerant or transient merchant, and the mode of conducting it, closely resemble the business

of hawkers and peddlers, and the methods generally practiced by them in disposing of their goods and wares. The transient merchant has no fixed place of business, but migrates from town to town, remaining only long enough to dispose of his stock of goods. He is usually a stranger in the community where he offers his goods and makes his sales, and is often wholly irresponsible. Tempting advertisements and extravagant representations in regard to the character of his stock and the prices at which it will be sold are calculated to create excitement and to deceive the unwary, who are generally without redress for the impositions practiced upon them. The description of the methods of the hawker taken from Jacob's Law Dictionary, and quoted at length in *Grafty v. Rushville*, 107 Ind. 506, 8 N. E. 609, 57 Am. Rep. 128, and in *South Bend v. Martin*, 142 Ind. 40, 41 N. E. 315, 29 L. R. A. 531, have sometimes been applied to the itinerant or transient merchant: "Hawkers. Those deceitful fellows who went from place to place buying and selling brass, pewter, and other goods and merchandise, which ought to be uttered in open market, were of old so called; and the appellation seems to grow from their uncertain wandering, like persons that with hawks seize their game where they can find it. * * * Hawkers and peddlers, etc., going from town to town, or house to house, are now to pay a fine and duty to the king." It was said in *Grafty v. Rushville*, *supra*, that one purpose of the statute empowering cities to pass ordinances restraining hawking and peddling was to protect and encourage local traders and merchants, and another to prevent the indiscriminate invasion of the houses and places of business of citizens, and shield them from the practices of itinerant traders of unknown repute. It was also added by the court in this case that "the police power of the city may be properly exerted to restrain all such as by their methods of doing business are liable to invade social order by seeking purchasers for their wares in the homes of citizens, or in the streets and public places of a city, to the discouragement of the more legitimate methods of others, on whom the municipality is dependent for its support." See, also, *City of South Bend v. Martin*, 142 Ind. 31, 41 N. E. 315, 29 L. R. A. 531; 21 Am. & Eng. Ency. Law, p. 791. Nearly all the reasons assigned by the courts for the necessity of police regulation of hawking and peddling apply with equal force to the occupation of the itinerant or transient merchant. If the one occupation is a proper subject for legislative control, the other is equally so. The necessity for the protection of the public against imposition and dishonest practices of various kinds has resulted in legislation relating not only to hawking and peddling, but to the business of itinerant vendors and auctioneers, sales at markets and fairs, and other like trades, and statutes of this character have generally been sustained as a proper exercise of the police power.

er. The act of March 11, 1901, *supra*, is closely akin to these enactments. It is said in *Cooley on Const. Law* (1st Ed.) 412, that "a license fee imposed upon 'all transient persons keeping stores' in the town imposing it has been sustained as a police regulation, though called a 'tax' in the legislation which permitted it." *Wilmington Com'rs v. Roby*, 30 N. C. 250, and *Concord Com'rs v. Patterson*, 53 N. C. 182, are cited in the note on the text. In *Commonwealth v. Crowell*, 156 Mass. 215, 30 N. E. 1015, the court say: "The object of the statute would seem to be to protect the public from the imposition liable to be practiced upon it by itinerant venders, who are not hawkers or peddlers, because hiring, leasing, or occupying a building for their business, but who sell temporarily or transiently in one locality, or in traveling from place to place, goods, wares, or merchandise, and who might naturally be supposed to be free to some extent, at least, from the restraints and influences inducing fair and honest dealing which apply to persons established permanently in trade in a given locality. The statute applies to residents and nonresidents, and is not, as we construe it, designed or calculated to prevent fair and free competition, but only to protect the public against fraud, and to place the traffic under what the Legislature, having regard to the character of the business, deems wholesome restraints. It comes within what is termed the 'police power,' and stands on the same ground as the acts relating to hawkers and peddlers, auctioneers, pawnbrokers, and others, of which there are numerous examples. *Com. v. Ober*, 12 Cush. 493; *Com. v. Blackington*, 24 Pick. 352; *Blair v. Forehand*, 100 Mass. 136, 97 Am. Dec. 82, 1 Am. Rep. 94; *Fisher v. McGirr*, 1 Gray, 2, 7, 61 Am. Dec. 381; *Cooley, Const. Lim.* 596." Statutes similar to the one before us have been upheld in other states also: *State v. Harrington*, 68 Vt. 624, 35 Atl. 515, 34 L. R. A. 100; *Carrollton v. Bazzette*, 159 Ill. 284, 42 N. E. 837, 31 L. R. A. 522; *Peoria v. Gugenheim*, 61 Ill. App. 375; *Ottumwa v. Zekind*, 95 Iowa, 622, 64 N. W. 646, 29 L. R. A. 734, 58 Am. St. Rep. 447; *Wolf v. Runnels*, 90 Me. 253, 38 Atl. 100; *Greensboro v. Williams*, 124 N. C. 167, 32 S. E. 492; *Bohon's Assignee v. Brown*, 101 Ky. 354, 41 S. W. 273, 38 L. R. A. 503, 72 Am. St. Rep. 420; *Com. v. Newhall*, 164 Mass. 340, 41 N. E. 647; *Ex parte Mosler*, 8 Ohio Cir. Ct. R. 324.

It is to be observed that the law under consideration is not an ordinance of a city or town, passed in pursuance of authority given to such municipal corporation by the Legislature to license and regulate the business of transient merchants, but that it is an act of the General Assembly, and that the amount of the fees to be paid for a license, and the restrictions imposed upon the occupation, are prescribed by the act itself. For this reason, none of the cases to which the reasonableness or unreasonableness of the sum to be paid

for the license, or the validity of the restrictions placed upon the occupation by municipal ordinances adopted by cities or towns, is of controlling authority.

The author of a recent work on Constitutional Law refers briefly but satirically to the Ohio statute regulating the business of transient merchants, but no reason is given by the author for his disapproval of the law, and no cases are referred to in support of his views.

In our opinion, the several sections of the act of March 11, 1901, which we have mentioned, are valid, and the judgment of the trial court is affirmed.

(81 Ind. App. 376)

THOMPSON v. JAMISON et al.

(Appellate Court of Indiana, Division No. 2.
Oct. 6, 1903.)

WILLS—CONSTRUCTION—LIFE ESTATE—REMAINDER IN FEE.

1. A testator gave to his wife all his personal estate, and the income of his real estate during her life. He then gave to each daughter, "for and during her natural life," real estate described, and at her death the same to "be divided among her children then living * * * to be theirs in fee simple." A subsequent clause of the will provided that "in case either of my daughters die leaving no child or children the lands bequeathed to her in that event shall go to the children of the surviving daughter or daughters." *Held*, that the will vested a life estate in each of the daughters, with a fee simple in their children, and, if any daughter died without children, the fee passed to the children of her sister or sisters.

Appeal from Circuit Court, Jackson County; Thos. B. Buskirk, Judge.

Action by Hettie K. Thompson against Louisa H. Jamison and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Burrell & Prince and John C. Lawler, for appellant. Long & Long, Applewhite & Applewhite, and Frank Branaman, for appellees.

WILEY, J. Appellant was plaintiff below, and brought her action against appellees to quiet title to certain real estate. Her complaint was originally in three paragraphs, to each of which demurrers for want of facts were sustained. Subsequently appellant dismissed the second paragraph. Sustaining the demurrers to the first and second paragraphs is assigned as error.

The complaint avers that appellant and appellees, Elizabeth Thompson and Louisa H. Jamison, were the daughters of Walter Harrell, deceased, and that Esther C. Harrell was his widow, and that they were his sole heirs; that the said Walter Harrell died testate, and a copy of the will is filed as an exhibit. By the will the testator gave to his wife all of his personal property, and the rents and profits of all of his real estate during her life. He then made bequests to his three daughters as follows: Item 2: "I will and bequeath to my daughter Elizabeth

Thompson for and during her natural life the following real estate * * * [a description of it follows], and at the death of my said daughter the said lands are to be divided among her children then living to share and share alike, to be theirs in fee simple." Item 3: "To my daughter Hettie K. Thompson I will and bequeath for and during her natural life the following lands * * * to hold the same during her natural life and at her death the same to be divided among her children then living, in fee simple, to share equally, viz.:" (Description of the lands follows.) Item 4: "To my daughter Louisa Harrell [now Jamison] I will and bequeath the following real estate * * * for and during her life and at her death the same to be divided equally among her children then living, if any, in fee simple viz.:" (Description of lands follows.) A subsequent provision of the will is as follows: "In case either of my daughters die leaving no child or children the lands bequeathed to her in that event shall go to the children of the surviving daughter or daughters." The complaint alleges that the widow renounced the will, as to her, and elected to take under the statute, and thereupon filed a petition in the Jackson circuit court for partition, and such proceedings were had as that certain of the lands described in the will were set off to her in fee simple. It is then averred that the partition did not affect the lands of appellant, except that it took a proportionate share of hers, together with those of her sisters, to make up the acreage set off to her mother. It is then averred that by the will the testator intended to, and did in fact, bequeath to appellant the real estate described in her complaint, in fee simple; that appellees are asserting some claim adverse to hers; and that she is entitled to have her title quieted. There is no substantial difference between the first and third paragraphs of complaint.

The facts are well pleaded, and the single question for decision is, what estate did the appellant take under the will? If a life estate only, the lower court properly sustained the demurrer to the complaint. We have set out all of the important provisions of the will, to the end that the intention of the testator might more clearly appear. The fact that the widow elected to take under the law does not affect the rights of the other legatees, for it is shown that they accepted the provisions of the will, and took possession of their respective lands after the widow had had partition. The intention of the testator is clearly and explicitly expressed, and it is manifest that he intended to vest in his daughters a life estate only, the fee to rest in their respective children. It is also equally plain that he intended that, in the event either of his daughters should die without issue, the portion of the real estate bequeathed to her should go to the children of the other daughter or daughters. Counsel for ap-

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pellant urge that, if this construction is given the will, it would result in a partial intestacy as to the lands bequeathed to the appellant, "for the reason what is attempted to be a residuary clause, following item 4, only disposes of the land or title given this daughter (appellant), and if it should stand alone, and only be a life estate, and with the death of the legatee the title thereto ends, and, if no title, none could pass." This position is not tenable. The testator by his will creates and vests two titles—a life estate in appellant, and the fee simple in her children, if she has any at her death, and, if not, the fee goes to the children of her sister or sisters. In other words, the children are given the fee, subject to the life estate of the daughters. One rule of construction is that a testator will not be presumed to have intended partial intestacy unless the language of the will compels such construction. *Korf v. Gerichs et al.*, 145 Ind. 134, 44 N. E. 24; *Borgner v. Brown*, 133 Ind. 391, 33 N. E. 92; *Spurgeon v. Schelble*, 43 Ind. 216; *Cate v. Cranor*, 30 Ind. 296. In this case, under the plain language of the will, to hold that the testator intended partial intestacy would be a strained construction, and not permissible under the rule stated. Section 2737, Burns' Rev. St. 1901, provides that "every devise, in terms denoting the testator's intention to devise his entire interest in all his real and personal property, shall be construed to pass all of his estate in such property." In the will before us, it is manifest that the testator intended to dispose of all of his estate, both real and personal, and the language is so plain that there can be no doubt that he disposed of it according to his best judgment. There being no uncertainty about it, and the disposition appearing equitable and just, that intention should be respected. In the case of *Cain v. Robertson*, 27 Ind. App. 198, 61 N. E. 26, the exact question here under consideration was involved, and decided adversely to appellant's contention. Under the authorities, appellant was only given a life estate, with a remainder over.

Judgment affirmed.

(31 Ind. App. 379)

PRICE v. LONN.

(Appellate Court of Indiana, Division No. 1.
Oct. 8, 1903.)

ACTION ON NOTE—INSTRUCTIONS.

1. In an action on a note, against one whose prima facie liability was that of a guarantor, an instruction to find for him, if, when he placed his name on the back of the note, it was agreed that he signed it as indorser, is erroneous; it being necessary, in addition to a finding that he was an indorser, that a valid defense releasing him from liability as an indorser be found.

2. An instruction, in an action on a note, to find for defendant, if it was agreed, when he signed it, that he was not to be held liable, is erroneous, no such defense being pleaded.

Appeal from Circuit Court, La Porte County; John C. Richter, Judge.

Action by Gideon A. Price against J. O. William Lonn. Judgment for defendant, and plaintiff appeals. Reversed.

M. R. Sutherland, for appellant. E. E. Weir, L. Darrow, and E. H. Garnett, for appellee.

HENLEY, J. Appellant commenced this action against the appellee upon a promissory note. The note was an Illinois contract, and, as such, governed by the laws of that state. The note was dated August 2, 1899, signed by the Juniper Remedy Company, and was payable to the order of the Schroeder Manufacturing Company on demand. J. O. William Lonn indorsed the note before its delivery by writing his name across its back. Afterward it was assigned and indorsed by the Schroeder Manufacturing Company to appellant. Appellee's answer was in five paragraphs. In the first paragraph of answer it is alleged that the note was signed under a special agreement with the payee that the appellee was to be held as an indorser, and not as a guarantor. The second paragraph is a verified general denial. The third paragraph alleges that appellee indorsed the note for the accommodation of the maker of the note, the payee having full knowledge of the same, and of the further fact that there was no consideration for the acceptance or indorsement of said note going to or received by appellee, and that appellant received the note long after its maturity, with full knowledge of all said facts. The fourth paragraph alleges that appellee did not execute the note sued on in the capacity of guarantor, but that he signed the same under an agreement that he should be held only as an indorser, and that under the law of Illinois, as set out in said answer, he is discharged, because the note was not protested for nonpayment, and notice of the protest and nonpayment given to the indorser. The fifth paragraph of answer averred that "the law of the state of Illinois, where the note sued upon was executed, as expressed by the decisions of the Supreme Court of said state in relation to notes of the character sued upon in this action, was at the date of the execution of said note, and now is, as follows, to wit: That notes payable on demand mature and become due immediately upon delivery; that the statute of limitations commences to run against the same on the date of their execution; that, to protect persons taking notes payable on demand against equities, such person must take the same within a reasonable time after their execution; that the person so taking such a note, whether by indorsement or delivery, takes the same dishonored; that any time in excess of thirty (30) days is an unreasonable time within which a note payable on demand, under the decisions of the Supreme Court of Illinois, can be taken, without the same being dishonored; that in all

cases where diligence is not used in the presentment of such note, and the same is dishonored, the guarantor is discharged, if injury and damage result by reason of the laches of the holder; * * * that, under the laws of the state of Illinois, * * * a guarantor who is compelled to pay a note for his principal has a right of action against his principal for the money so paid; * * * that the note sued on in this action was delivered on the day of its execution, as shown by the date on the face of the same; that no demand was made of this defendant for the payment of the same for more than six months after its delivery; that the plaintiff did not obtain the same until more than six months after its execution; that at the time of the execution of this note the principal on the note, to wit, the Juniper Remedy Company, was solvent and abundantly able to pay all of its debts; that since the execution of this note, and before the commencement of this action, but at a period of more than thirty days after the execution of said note, the Juniper Remedy Company became insolvent, and had no property subject to execution out of which any claim against it could be made; that at the time the plaintiff took and accepted said note from the Schroeder Manufacturing Company the same was dishonored; that by reason of the failure of the Schroeder Manufacturing Company to present said note to the Juniper Remedy Company within a period of thirty days from the date and delivery of the same [appellee] was rendered unable to make his claim out of the Juniper Remedy Company; and that by reason of all the facts hereinabove set forth [appellee] is, under the laws of the state of Illinois, fully and finally discharged from liability of said note." Each paragraph was attacked by demurrer. The ruling of the trial court in holding sufficient each of the first, third, fourth, and fifth paragraphs of answer is assigned as error.

It is conceded that under the law of Illinois the liability of appellee in this case was prima facie that of a guarantor, and that he could be sued without joining any of the other parties to the instrument as defendants. The brief abstract of each paragraph of the answer shows the defenses relied upon, and the issues presented. We do not deem it important to discuss any question arising upon the pleadings. The judgment of the trial court must be reversed because of an erroneous instruction. Under the assignment of error that the trial court erred in overruling appellant's motion for a new trial, it is contended that the following instruction given by the court to the jury is erroneous, viz.: "The court instructs the jury, as a matter of law, that if they find from all of the evidence that, at the time the defendant J. O. William Lonn placed his name on the back of the note sued on, it was agreed that he signed it as indorser, or if it was agreed that the defendant J. O. Wil-

Ham Lonn was not to be held liable for the payment of the amount of the note, then the jury should find for the defendant." Even if the jury, under the evidence, could have found that appellee was an indorser of the note sued upon, that fact alone would not have relieved appellee from liability. It was necessary that the jury also find, in addition to the fact that the appellee was an indorser, some valid defense releasing him from liability as such indorser. The latter part of the instruction is also bad. There could have been no evidence admissible under the issues presented to which this part of the instruction would be applicable. No one of the defenses presented by the answers is based upon an agreement that at the time the note was signed the parties agreed that J. O. William Lonn should not be held liable in any way. The instruction is not within the issues, and it is not within any evidence admissible under the issues. The jury may have accepted the testimony of appellee that it was agreed at the time of the execution of the note that he was not to be held in any capacity thereon, and, under the instruction of the court, returned a verdict in his favor. The case of *Shirk v. Mitchell*, 137 Ind. 187, 36 N. E. 853, is very much in point here. The Supreme Court in that case say: "It is quite apparent that the last two instructions are not applicable to any evidence which was admissible under the issues in this case. It is established by a long line of decisions that a party must recover, if at all, upon the facts stated in his pleadings. It would be a dangerous practice, subversive of legal principles, to permit a party to plead that a note was executed for the purchase money of an engine, and make no complaint as to the fairness of the transaction of purchase, and then defeat the action by proof that he had been induced to enter into such contract through the fraud of the seller. An answer of fraud is essentially and radically different from an answer of breach of warranty, and there is nothing in the answer or cross-complaint in controversy which would give the appellants an intimation before the trial that the fairness of the transaction in which Michener sold the engine to appellees, and they executed their notes, would be questioned. The case should have been tried upon the issues made by the pleadings. It has often been decided that every pleading must proceed upon some single, definite theory, and that a party must stand or fall upon the theory of his case as he presents it in his pleadings."

The jury, under the evidence introduced in support of the issue made by the complaint, the fifth paragraph of answer, and reply thereto, might have properly returned a verdict in appellee's favor, but we have no way of determining from the record whether or not the verdict is based upon the issue supported by competent evidence. Other alleged

errors discussed by counsel may not appear upon another trial of this cause. The motion for a new trial ought to be sustained.

Judgment reversed, with instruction to the trial court to sustain appellant's motion for a new trial.

(31 Ind. App. 414)

LAWRENCE et al. v. LEATHERS.

(Appellate Court of Indiana, Division No. 2.
Oct. 9, 1903.)

MALICIOUS PROSECUTION—MALICE—PROBABLE CAUSE—INSTRUCTIONS FOR COURT AND JURY—EVIDENCE—SUFFICIENCY—ADMISSIBILITY.

1. In an action for malicious prosecution, plaintiff must allege and prove that the prosecution complained of was instituted without probable cause and with malice.

2. In an action for malicious prosecution, the question of malice is for the jury.

3. Where, in an action for malicious prosecution because of plaintiff's wrongful arrest for the offense of removing articles from a hotel which were subject to a landlord's lien, the jury found that one of the defendants had nothing personally to do with the prosecution complained of; that he did not know that an affidavit would be filed until after the prosecution had terminated; that he did not advise the making of such affidavit, nor direct or authorize his codefendant to make the same; and that he was neither owner nor part owner of the hotel—the court should enter judgment for such defendant notwithstanding the general verdict for plaintiff.

4. Where the facts in an action for malicious prosecution were not controverted, it was the duty of the court to instruct the jury as to whether probable cause for the prosecution complained of did or did not exist, while when the facts were disputed the court should instruct hypothetically, or otherwise leave the jury to find the facts.

5. A hotel landlord procured the arrest of a person for removing baggage from his hotel, which was subject to the landlord's lien. He had the means of identifying such person as the one who registered at the hotel under another name, and who brought the baggage to the hotel, but took no steps to do so. It did not appear that there was any occasion for haste in the institution of the criminal action. The evidence failed to identify the accused. *Held*, as a matter of law, that the landlord did not use that degree of reasonable inquiry which the occasion required.

6. In an action for malicious prosecution, the advice of counsel, based on defendant's incorrect statement of the facts, is not a defense.

7. Where, in an action for malicious prosecution, defendant not only relied on the information contained in a letter from a third person, received before the institution of the criminal case, but also called such third person to testify in support of the statements contained in the letter, plaintiff had the right, on the cross-examination of such third person, to prove the falsity of such statements, though defendant did not know the falsity thereof, and acted on the statements contained therein.

Appeal from Superior Court, Marion County; Vinson Carter, Judge.

Action by David J. Leathers against Henry W. Lawrence and another. From a judgment for plaintiff, defendants appeal. Affirmed in part, and reversed in part.

¶ 6. See *Malicious Prosecution*, vol. 23, Cent. Dig. § 42.

Harold Taylor, for appellants. Rochford & Wall, for appellee.

ROBY, J. Appellee sought by this action to recover damages from appellants for alleged malicious prosecution. Trial by jury; verdict for \$1,300; remittitur of \$500; judgment for \$800, from which the appeal is taken. Motions made by the appellants for judgment on the answers to interrogatories, returned with the verdict, and for a new trial were overruled, such action being assigned as error.

The law governing suits for malicious prosecution has been established by numerous adjudications. It is essential to their maintenance to aver and prove that the prosecution complained of was instituted without probable cause and maliciously. *Helwig v. Becknell*, 149 Ind. 131, 133, 46 N. E. 644, 48 N. E. 788. Malice is a question of fact to be determined by the jury. *Helwig v. Becknell*, supra. The existence or nonexistence of probable cause, upon facts found by the jury, is a question of law for the court. *Pennsylvania, etc., Co. v. Weddle*, 100 Ind. 138; *Cottrell v. Cottrell*, 126 Ind. 181, 25 N. E. 905; *Terre Haute, etc., Co. v. Mason*, 148 Ind. 578, 46 N. E. 332. The seventh instruction given at the trial herein by the court of its own motion correctly defined the term "probable cause." The tenth and twelfth instructions so given erroneously submitted the question as to whether probable cause for the prosecution existed, to the jury generally, as an issue for its determination. *Pennsylvania, etc., Co. v. Weddle*, supra; *Cottrell v. Cottrell*, supra.

The facts giving rise to the prosecution complained of were as follows: Appellant Lawrence was the owner of the Spencer House, a hotel in Indianapolis. On November 4, 1900, it was reported to him that a man who had registered at the hotel under the name of Paul De Lury, and had been occupying one of the rooms therein, had not occupied his room the night before, and that there was baggage therein. The man had left without paying his bill, amounting to \$15. The baggage consisted of sample cases containing shoes, and an order book bearing the name of a Cincinnati shoe house. De Lury had registered from St. Louis. White made inquiry thereafter, but was unable to learn of any salesman of the name. On January 19th following, he inquired of one Sullivan, a traveling salesman from Cincinnati, who examined the cases, samples, and order book, and told White that they were evidently from the Cincinnati Shoe Company, and belonged to a salesman named Leathers. White asked him to call upon the shoe company upon his return home, and tell them where the samples were, and that they could have them by settling the bill. Sullivan did call upon the company, and thereafter wrote White as follows: "I called on Mr. Julian of the Cincinnati Shoe Co., relative to the sam-

ples you have, that were left by Mr. Leathers. He said he had written to you and thought you would send him samples if he would inform you as to the whereabouts of Leathers. I found out that Leathers lives in Indianapolis, and you can probably locate him by looking in the directory or calling on F. E. Brown or W. H. Ban, shoe merchants of E. Washington St. From Mr. Julian's remarks I do not think he cares to lose anything on this deal if he can help it, so you can act accordingly. He would like to get the samples without making good the bill you have against Leathers." The same day that this was received, White also received a letter from the shoe company, as follows. "Cincinnati, Ohio, Jan. 19, 1901. Manager Spencer House, Indianapolis, Ind. Dear Sir: We understand from a traveling man, Mr. Sullivan, that you have a lot of our samples in your possession, left there by a man who was traveling for us and who, it seems, beat you out of a board bill and also beat us out of a lot of money. We would like to have these samples and would probably give more for them than anybody else. Please write us the circumstances and see if we cannot adjust the matter and get our shoes. We understand also that you would like to have this young man's address. If this matter is adjusted to our satisfaction we can tell you where to find him. And not four miles from your own office. Yours very truly, Cinti. Shoe Co." After the receipt of these letters he looked in the city directory, and found that there were only three persons named Leathers listed therein; the appellee's occupation being given as that of clerk. He thereupon visited one of the merchants indicated in Sullivan's letter, and asked him if he knew a traveling man by the name of Leathers. He said that he did know such a man; that he had traveled for the Cincinnati Shoe Company, but did not think that he was working for them at that time; that he lived on Park avenue. White then, without making any further inquiries, consulted a deputy prosecuting attorney, and made a statement of the facts, as he had ascertained them, to him. The attorney asked him if he could identify the man, and White said that he could not, but that one of his clerks could. The attorney told him that, according to his statement and the letters, he thought he had a good case. White had at that time no doubt but that Leathers was the man who had left the samples at the hotel. He had no acquaintance with or knowledge of him, and acted deliberately and without anger. Thereupon the attorney prepared and said appellant executed an affidavit charging appellee with the crime of unlawfully removing articles of value from a boarding house, as defined by the act of March 3, 1897 (Acts 1897, p. 123; section 7254b, Burns' Rev. St. 1901). The affidavit was at once filed, and a warrant for appellee's arrest issued by a justice of the

peace. The warrant was served, and appellee placed under arrest. The hotel clerk, instead of identifying him as De Lury, stated that he had never seen him before. The prosecution was then dismissed, and this action thereafter brought against White and Lawrence, it being averred in the second paragraph of the complaint. Upon which the jury found for appellee that said defendants were the owners and proprietors of a certain boarding house, and that defendants unlawfully procured plaintiff to be arrested.

It is evidently the theory of the pleader that such alleged joint ownership or partnership rendered the defendant Lawrence responsible for the alleged wrong by his co-defendant White. Such relation in itself is not, however, sufficient to render the non-acting partner liable. In the absence of knowledge, he would not be responsible for the act of his codefendant, unless it was made to appear that he had in some way authorized White to take the steps complained of. *Rosenkrans v. Barker*, 115 Ill. 331, 3 N. E. 93, 56 Am. Rep. 169; *Gilbert v. Emmons*, 42 Ill. 143, 89 Am. Dec. 412; *Marks v. Hastings*, 101 Ala. 165, 13 South. 297. The jury, with its general verdict, returned answers to interrogatories, from which it appears, without conflict or contradiction, that appellant Lawrence had nothing personally to do with the prosecution complained of; that he did not know that an affidavit would be made or filed until after the prosecution had terminated; that he did not advise or suggest the making of such affidavit, nor authorize or direct appellant White to make the same; and that White was neither owner nor part owner of the hotel. These facts are sufficient to exonerate said appellant from liability, no matter what construction be given the complaint. His motion for judgment upon the interrogatories and their answers, notwithstanding the general verdict, should have been sustained.

It was the duty of the court, the facts not being controverted, to instruct the jury as to whether probable cause for the prosecution complained of did or did not exist. When the facts are disputed the court instructs hypothetically or otherwise, leaving the jury to find the fact. "Probable cause" is defined as "that apparent state of facts found to exist upon reasonable inquiry; that is, such inquiry as a given cause renders convenient and proper, which would induce a reasonably intelligent and prudent man to believe the accused person had committed, in a criminal case, the crime charged." *Hutchinson v. Wenzel*, 155 Ind. 49, 54, 56 N. E. 845; *Lacy v. Mitchell*, 23 Ind. 67.

The affidavit made by White was based upon the second section of the act, and proceeded upon the theory that appellee had removed baggage from the hotel, which at the time was subject to the landlord's lien. *State v. Engle*, 156 Ind. 339, 50 N. E. 698.

There may be evidence tending to show that De Lury did remove part of his baggage, but the fact is decidedly obscure. He surely left a considerable amount. There does not appear to have been any occasion for haste in the institution of a criminal action. The offense charged was not of such an aggravated nature as to arouse apprehension that appellee, known to be a resident of Indianapolis for some years, would become a fugitive from justice on account of it. The identity of Leathers with De Lury was the important fact. Goods once in the possession of Leathers had been left at the hotel by De Lury. White had the means of identification at hand. He had only to call upon his employé in order to be certain. Instead of taking any steps to learn the truth, he assumed the identity of the person, notwithstanding the difference of name. Appellee was entitled to the presumption of innocence, and such facts as White had learned regarding him did not tend to weaken such presumption. The belief that justifies accusation and arrest must be founded upon facts and circumstances that would induce a reasonable and prudent man, mindful of the right of individual security possessed by every citizen, to act. Had White been arrested himself under exactly the same circumstances, he would likely not be satisfied with the inquiry made. It is believed he did not exercise that degree of reasonable inquiry that the circumstances and situation suggested, and the court should have so instructed the jury. The result reached was, upon this part of the case, correct, and the error is not, therefore, a reversible one.

The statement of facts made to the prosecuting attorney was not a correct one. It included the identification of the person by the employé. Such identification was not made, and had not been made. The advice of the attorney, based upon such information, is not a defense. *Flora v. Russell et al.*, 138 Ind. 153, 37 N. E. 593; *Paddock et al. v. Watts*, 116 Ind. 146, 18 N. E. 518, 9 Am. St. Rep. 832. The general rule is that probable cause is established by facts known to the prosecutor at the time the criminal action was instituted. The letter written by the shoe company, and above set out, was directly revelant to that issue, being, as it was, one of the conditions in the light of which White acted. Appellants took the deposition of W. A. Julian, president of the shoe company, who testified that he sent the letter in question to the manager of the hotel. He also testified in chief that appellee was employed by the shoe company in the spring of 1900, and left its employment in the following November; that he carried its samples; that he did not return his samples, and that he carried an order book, which was not returned; that he saw the samples in question at the Spencer House on October 10, 1901; that he never had any

man named De Lury in his service, and knew no man by that name; that he had a call from Sullivan, and immediately thereafter wrote the letter referred to; that Sullivan told him that appellee had left without paying his board bill. On cross-examination the witness was compelled, over objection, to testify, in effect, that the statement of the letter that appellee had "beat us out of a lot of money" was not true. He was also compelled to testify that before he wrote the letter he had been informed by appellee that the sample case had been stolen from him. Appellants did not know the falsity of the letter, or the bad faith of the writer. They acted only upon its statements. They were in no wise responsible for the wrong done by the shoe company to the appellee either in writing the letter or prior thereto. Had they chosen to introduce the letter in evidence without attempting to support its statements by oral testimony, the appellee could not have been permitted to disprove such statements. "Those facts and circumstances which are known to the prosecutor at the time he instituted the prosecution are alone to be considered, in determining the question of probable cause." *Pennsylvania, etc., Co. v. Weddle*, supra; *Walker v. Pittman*, 108 Ind. 341, 9 N. E. 175. The oral evidence delivered by the witness Julian tended to give weight to that which had been written by him. His opportunity of knowing the truth was exhibited. The tendency of the questions asked and the answers made by him was to give probability to the assertion made in the letter. They directly connected appellee with the sample case and order book, and made the truth of the statement an important element in the trial. *Walker v. Pittman*, supra. The facts stated by him were not communicated to appellants prior to the prosecution. Appellants, by offering evidence supportive of the statements contained in the letter, opened the door to appellee, and there was therefore no error in admitting evidence tending to discredit such statements. *Elliott*, App. Prac. § 628.

The instructions given by the court, taken as a whole, correctly state the law as applicable to the evidence, and do not, therefore, furnish ground for reversal. *Hutchinson v. Wenzel*, 155 Ind. 49, 56 N. E. 845. Those requested and refused were in part covered by those given, and, in so far as they related to the question of probable cause, correctly refused; its existence not being, as heretofore stated, deducible from the facts proven. No error appears sufficient to justify a reversal of the judgment as against appellant White. Upon the whole evidence, the result reached seems to have been a correct one, as to him.

The death of appellee since the appeal having been suggested, it is ordered that the judgment against appellant White be affirmed as of the date of submission, and that

as to appellant Lawrence the judgment be reversed, and the cause remanded, with directions to sustain his motion for judgment notwithstanding the general verdict.

(31 Ind. App. 384)

ROBINSON v. FOUST.

(Appellate Court of Indiana, Division No. 1.
Oct. 8, 1903.)

MARRIED WOMEN—SEPARATE PERSONALTY—
MAINTENANCE OF HUSBAND—PERSONS IN
LOCO PARENTIS — CONTRACTS — ENFORCE-
MENT.

1. A wife is not bound to use her separate personal property for the support of her husband, nor to use the same for the payment of his funeral expenses and the expenses of his last sickness.

2. Intestate entertained affection for his grandson, who was plaintiff's husband, and, after he had been stricken with consumption, agreed that, if plaintiff would apply her separate estate to the maintenance and comfort of her husband during the remainder of his life, intestate would bequeath to her \$3,500, if she was living at intestate's death; and thereafter agreed to pay the doctor's bill and funeral expenses of plaintiff's husband on his death, such sum to be deducted from the bequest specified. *Held* that, plaintiff having expended her property in the care of her husband relying on such promise, she was entitled to enforce the contract against intestate's estate.

Appeal from Circuit Court, Montgomery County; Jere West, Judge.

Action by Emma Robinson against John M. Foust, as administrator of the Estate of Aaron Foust, deceased. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Crane & Anderson, for appellant. Whittington & Whittington, for appellee.

ROBINSON, C. J. Appellant filed a claim against the estate of appellee's decedent, averring, in substance: That in 1890 she was married to Edward A. Kelsey, grandson of decedent, Aaron Foust, and lived with him as his wife until his death on the 14th day of February, 1886, leaving appellant as his only heir. Edward was the only child and heir of Catherine Kelsey, who died in November, 1864, prior to the death of her father, Aaron Foust, leaving Edward, who was about 18 months old, whom decedent took into and maintained in his family until he was about 6 years old, regarding him as a son, and declaring and intending that he should have a child's portion of his estate. At the time of her marriage appellant was given \$50 in cash and \$150 in personal property by her father. In the fall of 1884 her husband became sick of consumption, and died February 14, 1886. When he became sick he was without any money or property of any kind or means of support, and was unable to work or in any way support himself or appellant, and was soon confined to the house

¶ 1. See *Husband and Wife*, vol. 26, Cent. Dig. § 593.

and to his bed, and so continued until his death. In the spring of 1885 appellant had the personal property given her by her father and some \$200 or \$300 in other property her father had given her. Aaron Foust frequently visited Kelsey while sick, and often requested appellant to provide for him, and to furnish him out of her means with provisions, fuel, medicine, and pay the rent of the house, and during the last few weeks of Edward's life to provide attendants for him, and promised her that if she would do this he would help her as far as he then could, and that he would see to it that she was amply paid therefor, and would make suitable provision for her at his death. Appellant, relying on these promises, and induced thereby, expended all of her means and property in paying for the support and maintenance of her husband and in providing provisions, fuel, and medicines, and paying rent from February, 1885, until her husband's death. Again, in January, 1886, Aaron Foust promised appellant that if she would continue to support her husband, and provide him with provisions, fuel, medicines, rent, and attendants, as she had been doing, he would pay her for what she had already paid out and expended and might thereafter expend, and would make provision for her out of his estate. That on that day, in order to evidence such promise, Aaron Foust executed the following instrument:

"At my death I promise my grandson E. A. Kelsey that his wife shall be paid from my estate three thousand and five hundred dollars if living. [Signed] Aaron Foust."

Afterwards, on the same day, Aaron Foust proposed to pay the doctor's bill and funeral expenses, and in that event the amount thereof should be deducted from the \$3,500 mentioned in the foregoing instrument, and as evidence of such promise executed the following:

"Crawfordsville, Indiana. January 25, 1886. I, Aaron Foust her in prisent of friends and witnes promls my grandson Edward A. Kelsey that at my death his wife if living shall have all due him the same as if he was living after his Dr. Bil and Furnel is taken out.

"sign.

"Witness, Albert Kelsey,

"Witness, M. Fahey,

"Witness, Susan E. Coleman.

"Aaron Foust.

"Written by Mike Fahey."

Both instruments were on that day delivered to appellant's husband. That appellant, induced by these promises, expended her property and money in the support of her husband during the year of 1885 and until the time of his death, and in so doing expended all of her property except a part of her household goods; and at the request of appellee's decedent, and relying upon and induced by the above promises, appellant's father, at her request, paid the house rent

for many months, and paid for an attendant during the last few weeks of her husband's life. Prior to and at the time of the execution of the above instruments decedent promised appellant that for what she had done and might thereafter do in supporting her husband she would be paid, and that he intended that she should have out of his estate at his death the sum of \$3,500. At that time and at the time of his death Aaron Foust owned property of the value of \$26,000, which he disposed of to others, making no provision whatever for appellant.

The rule of the common law that the husband and wife could not deal together rests upon the theory that in legal contemplation the husband and wife are one person, and not upon the theory that the wife is under a legal disability. This rule still prevails except where the Legislature has expressly modified or annulled it, and the question is not whether disabilities have been removed, but whether the rule has been annulled. The common-law status of husband and wife very plainly denies to both the husband and wife a right to compensation for services rendered by either for the benefit of the other. It is quite true that the common-law rights and duties growing out of the marital contract have been very materially modified in many respects by statutes. And while the enlightened policy of modern legislation has given a married woman certain rights and powers denied her by the common law, yet these statutory innovations upon the common law have not gone so far as to permit unrestrained commercial dealings between husband and wife. The statutory right of the wife to recover for her own services does not change the relation between husband and wife, nor does it exonerate the wife from the performance of any proper services for the benefit of the husband. It is the duty of husband and wife to protect and care for each other in sickness. This duty, arising out of the married relation, is to be performed in conformity with the mutual obligations assumed when they became husband and wife. The common-law and scriptural obligation to be a "help-meet" to her husband still rests upon the wife, and, unless she carries on a separate business, or works for others on her own account, her earnings are the property of the husband. *Board v. Brown*, 4 Ind. App. 288, 30 N. E. 925; *Hensley v. Tuttle*, 17 Ind. App. 253, 46 N. E. 594; *Kedey v. Petty*, 153 Ind. 179, 54 N. E. 798. Had appellant and her husband entered into a contract that she should be reimbursed out of his estate for money of her own expended for his support, the contract could not have been enforced. *Corcoran v. Corcoran*, 119 Ind. 138, 21 N. E. 468, 4 L. R. A. 782, 12 Am. St. Rep. 390. If it be admitted that it was appellant's legal duty as a wife to use her own property and means to furnish her husband with the necessaries of life, it follows that a promise to reimburse her is with-

out consideration. *Shurtle v. Terre Haute, etc., Co.*, 131 Ind. 338, 30 N. E. 1084; *Spencer v. McLean*, 20 Ind. App. 626, 50 N. E. 769, 67 Am. St. Rep. 271. But, if it be admitted that it was her legal duty to use her own means for his support, it would follow that her estate must pay a claim of a third person furnishing such support. However, appellant's claim is not for any services rendered her sick husband. The consideration for the promise made for her benefit was not the performance of any wifely duties. Nor is it a question as to the moral and social obligations of the wife to care for and support her sick husband. The extent to which a wife will observe such obligations beyond the discharge of the wifely duties imposed by the marriage relation is a question she must determine for herself. Her personal property, which the common law gave to the husband upon marriage, is now, by statute, hers absolutely. She may do with it as she might do if unmarried. There was no common-law right of the husband to support out of the wife's property corresponding to the wife's right to support out of her husband's property. And the statute which makes her personal property hers absolutely has imposed no burdens in the husband's favor. She may contract with reference to it as she chooses. *Young v. McFadden*, 125 Ind. 254, 25 N. E. 284. There is no statutory provision in this state making the "expenses of the family" and the "education of the children" chargeable upon the property of both husband and wife, or of either of them. *Grant v. Green*, 41 Iowa, 88. Under the married woman's acts the property she claims to have used was hers as though unmarried, and there is no statute imposing upon her the legal duty to use it in any particular way.

The instrument sued on is in writing, signed by the decedent, and contains a promise by the decedent to pay the claimant a sum of money from his estate if she be living at the time of his death. She avers the consideration for this promise. The decedent entertained for his grandson the love and affection of a father, and desired that he be properly provided for in his last sickness. He contracted for the performance of certain acts, and placed an estimate upon their value to him. Nothing is averred to authorize us to disturb that estimate. We cannot substitute our judgment for his. The decedent obtained all he contracted for, and the claimant, relying upon the promise as made, performed the conditions agreed upon. See *Wolford v. Powers*, 85 Ind. 294, 44 Am. Rep. 16, and cases cited; *Price v. Jones*, 105 Ind. 543, 5 N. E. 683, 55 Am. Rep. 230; *Mullen v. Hawkins*, 141 Ind. 363, 40 N. E. 797; *Farber v. National, etc., Co.*, 140 Ind. 54, 39 N. E. 249; *Ditmar v. West*, 7 Ind. App. 637, 35 N. E. 47; *Shover v. Myrick*, 4 Ind. App. 7, 30 N. E. 207. The claim is sufficient against a demurrer.

Judgment reversed.

(32 Ind. App. 219)

SHAPIRO v. SCHULTZ.*

(Appellate Court of Indiana, Division No. 1.
Oct. 9, 1903.)

BUILDING CONTRACTS—ASSIGNMENT—MECHANICS' LIENS—RIGHT OF ASSIGNOR TO SUE.

1. A building contractor assigned the contract and the amount to be earned thereunder to indemnify the assignee for loss as surety on the assignor's note to a bank for a much smaller sum than would be due under the contract, it being agreed that the contractor should perfect his right to a mechanic's lien for the whole amount earned under the contract. In an action by the contractor to enforce the lien the assignee was made a party defendant, acquiesced in the course pursued by the assignor, and disclaimed all interest in the contract. *Held*, that the contractor by such assignment did not part with his right to sue to enforce the lien.

Appeal from Superior Court, La Porte County; H. B. Tuthill, Judge.

Action by John C. Schultz against Joseph Shapiro. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

James F. Gallaher, for appellant. C. R. & J. B. Collins, for appellee.

BLACK, J. The appellee brought suit to recover for work and labor performed and for materials furnished in the construction of a building under a contract between him and the appellant, and to enforce a mechanic's lien against the building and the lot on which it was erected, owned by the appellant. Other persons were made defendants, among them one August Kroll. The matter in dispute in the argument on this appeal relates to an assignment made to said Kroll by the appellee before the filing of his notice of intention to hold a mechanic's lien on the premises. The court rendered a special finding. The facts which illustrate the contention of the parties here may be stated briefly. The appellant having determined to improve his real estate by constructing a building thereon, and having prepared and approved plans and specifications therefor, the appellee proposed to furnish all material and labor for the construction of the brickwork of the building for \$1,000. This proposal was accepted by the appellant on the 21st of March, 1901, and the appellee at once commenced the work and furnished material for his part of the construction, and he completed his undertaking without improper delay on the 15th of July, 1901. Appellee did certain other work and furnished additional materials therefor, pursuant to special contracts made by the parties as the work progressed, the whole amount thereof being \$80. April 12, 1901, the appellee executed his promissory note to a certain bank for \$400, and the defendant Kroll executed the same as surety, and the appellee then assigned, in writing, his claim against the appellant under said agreement to furnish the material and to do the work on the building

* 1. See *Mechanics' Liens*, vol. 24, Cent. Dig. § 278.

* Rehearing denied.

as aforesaid; and the appellant was notified by Kroll of the assignment, which was made by the appellee to Kroll to secure the latter from any harm, and as security on the note, the assignment being accepted by Kroll as such security, and not otherwise. And it was agreed between Kroll and the appellee that the latter should perfect his mechanic's lien in connection with the claim so assigned; and on July 25, 1901, the appellee perfected his mechanic's lien by filing in the office of the county recorder notice (shown by the finding to be in the usual form) to the appellant of the appellee's intention to hold a mechanic's lien on described premises for \$1,080. The assignment of April 12, 1901, above mentioned, was set out in the finding, and purported to be made in consideration of \$1 and other good and valuable considerations, and by its terms the appellee thereby set over, assigned, and sold to Kroll all the income, profits, and amounts receivable and thereafter payable upon the contract between the appellant and the appellee aforesaid. The same writing contained an order from the appellee to the appellant authorizing and directing him to pay to Kroll any and all moneys due the appellee, or that might become due to him, by reason of said building contract; and the assignment was, on April 13, 1901, delivered to the appellant. At the commencement of this action the note executed by Kroll as surety was due and unpaid, and it was previously agreed between the appellee and Kroll that the funds received of the appellant should in part be paid to the bank in an amount to fully pay and cancel the note. The finding showed payments of certain amounts by the appellant to various persons upon the orders of the appellee, and the payment of a certain sum by the appellant to the appellee, and that there was a balance of \$895.21 due under the contract. The finding stated, as was otherwise shown in the record, that Kroll and the defendants other than the appellant had each filed an answer therein disclaiming any interest in the cause of action, or any part thereof; and it was accordingly found that said Kroll and other defendants have no interest in this suit or in the cause of action sued upon herein. The conclusions of law were in favor of the appellee for the recovery of the balance so found due and for the foreclosure of the mechanic's lien.

The specifications in the assignment of errors relate to rulings on certain paragraphs of reply and to the court's conclusions of law. The appellant, in his brief, indicates as the real matter involved in the appeal the question whether the appellee had a right of action on the contract against the appellant after he had assigned all sums due him thereon to Kroll and had instructed the appellant to make all payments to Kroll. The assignment in question was a formal transfer and order for the payment of the entire amount to be earned under the contract.

The purpose of the assignment was to indemnify the assignee from loss as surety on the assignor's note to the bank for a much smaller sum, it being agreed between the parties to the assignment that the assignor should perfect his right to enforce a mechanic's lien for the whole amount earned under the contract. The assignee, Kroll, was a party defendant, and by his answer acquiesced in the course which had been taken by the assignor, and disclaimed all interest in the contract. We cannot see wherein the appellant has been deprived of any right. He is protected by the judgment herein from any demand upon the contract in behalf of any assignee; and the nature of the transaction as between the assignor and the assignee, as shown by parol evidence, left in the former, we think, the right to protect his entire interest by the perfecting of a mechanic's lien for all the work done and materials furnished under the building contract. He was bound, as principal, for the payment of the note on which Kroll was surety, and the assignment to Kroll was by way of indemnity, the occasion for which appeared to no longer exist. The court, having all the parties in interest before it, was able to do justice to all.

Judgment affirmed.

(31 Ind. 397)

ALERDING et al. v. ALLISON.

(Appellate Court of Indiana, Division No. 1.
Oct. 8, 1903.)

WORK AND LABOR—PAYMENT—CONTRACT TO BEQUEATH—PERFORMANCE—ACCEPTANCE OF LEGACY—SATISFACTION OF CLAIM—STATUTE OF FRAUDS—GENERAL DENIAL.

1. Plaintiff rendered services for testatrix on an oral understanding or arrangement that she was to be remunerated therefor by testamentary bequest. Testatrix made a bequest in plaintiff's favor, which, though much smaller than the amount plaintiff testified testatrix had agreed to give her, she availed herself of. Testatrix bequeathed various amounts to others, which could not have been paid if the legacy to plaintiff was not a payment of her claim; but there was no evidence to show testatrix had ever admitted liability to plaintiff to the amount contended. *Held*, that the legacy bequeathed constituted a satisfaction of the claim.

2. A parol contract for services to be paid for by a testamentary bequest is within the statute of frauds.

3. Under Burns' Rev. St. 1901, § 380, providing that under a mere general denial of any allegation no evidence shall be introduced that does not tend to negative what the party making the allegation is bound to prove. *Held*, that the defendant in an action on a quantum meruit for services rendered testatrix, to be paid for by a testamentary bequest, was entitled to take advantage of the satisfaction of the contract under a general denial without a plea of estoppel.

Appeal from Circuit Court, Marion County; Vinson Carter, Special Judge.

Action by Irene Allison against Herman Alerding and others, as executors of the es-

¶ 2. See *Frauds*, Statute of, vol. 23, Cent. Dig. § 132.

tate of Helen J. Tate, deceased. From a judgment in favor of plaintiff, defendants appeal. Reversed.

Hefron & Harrington and Daniel Walt Howe, for appellants. La Fayette Perkins, and Smith, Duncan, Hornbrook & Smith, for appellee.

ROBY, J. Appellee's claim was in two paragraphs. The first contained a bill of particulars as follows: "The estate of Helen J. Tate, to Irene Allison, Dr. To services from February 25, 1882, to December 18, 1889, as companion, housekeeper, cook, and nurse, 406 weeks, at \$25 per week, \$10,150.00. To services from December 18, 1889, to June 26, 1900, as companion, cook, adviser, housekeeper, and nurse, 547 weeks, at \$10 per week, \$5,470.00. Total \$15,620.00." In the second it was substantially averred that the appellee on February 25, 1882, entered the employment of Helen J. Tate under an agreement that, if she continued in such employment until such time as she should marry, and faithfully perform her duties thereunder, she should receive by will or otherwise one-half the estate of which Mrs. Tate should die possessed; that, if she remained in said employment until Mrs. Tate's death, she should receive by will or otherwise the entire estate; that on December 18, 1889, appellee intending soon to be married and to quit said employment, Mrs. Tate promised that if she would not quit such employment, but continue thereunder until her death, holding herself in readiness from that time on, although married, to do and perform faithfully such services as she was able which she might be called upon by Mrs. Tate to do, appellee should receive by will or otherwise the entire estate of which Mrs. Tate should die possessed; that appellee should not be required to live with Mrs. Tate, but could dwell elsewhere, and come back and forth to her residence as often as she might be needed or called upon; that, relying on said promises, appellee diligently, in compliance with said agreement, remained continuously in said employment until the 26th day of June, 1900, when Mrs. Tate died. Full performance of said agreement on her part is averred, and that said Helen J. Tate failed to carry out by will or otherwise said agreement on her part, but, on the contrary, devised and bequeathed most of her property, both real and personal, to other parties, except five hundred dollars and part of the household goods. "Claimant further says that the aforesaid services rendered by her to said Helen J. Tate under said employment are reasonably worth the sum of \$25 per week for the 406 weeks from the 25th day of February, 1882, to the 18th day of December, 1889, and \$10 per week for the 547 weeks from said 18th day of December, 1889, to said 26th day of June, 1900, or \$15,620 in all, which sum the claimant avers is justly due

her from said estate and wholly unpaid. Wherefore," etc. Answers to each paragraph of general denial, payment, and statute of limitations. Trial by jury. Verdict for appellee assessing her recovery at \$6,000, with answers to interrogatories. Judgment on verdict. Error assigned is in overruling motion for new trial.

The evidence shows that in November, 1881, appellee, then 15 years old, went to work in the Tate family as a domestic at \$3 per week. The Tates then lived on a farm of several hundred acres near Indianapolis, and had in their employment a number of persons, both male and female. In February, 1882, Mrs. Tate asked appellee's mother to let her adopt the girl. The request was refused. The conversation following is relied upon to establish the contract set up. It was testified to by the mother and another daughter. The mother's version was as follows: "Q. What did Mrs. Tate say? A. She said: 'Then I have another question to ask you. Would you be willing to let her remain here as one of the family, and I do for her like I would for my own child, and care for her and clothe her and give her spending money?' And I says: 'Well, if you take good care of her.' And she said: 'I will. I will take good care of her.' I said: 'She is young, and I have never put anything hard on her, and I do not want you to put anything hard on her.' Q. What else? A. She said another thing—that: 'If she lives with me until she is married, I will give her half I have got, and, until my death, I will make her my heir.' Q. If she lived there until she was married she was to give her half of what she had? A. Yes, sir. Q. But if she remained until Mrs. Tate's death then she was to make her her heir? A. Yes, sir. Q. Is that right? A. Yes, sir. And if she died in the meantime she would put her in a nice spot in Crown Hill, and cover her with flowers." Appellee thereafter continued in the family, being treated as a member of it, but doing a great deal of work. On December 18, 1889, appellee left, and took lodging with Mrs. Grube, in Indianapolis, where she remained until the last of the following November, being married on March 27, 1890. She and her husband have since lived in the city, and have two children. In the fall of 1892 the Tates also moved into the city, locating about two miles from appellee. After this appellee visited them frequently, and it is fairly inferable from the evidence that she gave them attention such as a daughter might have done, but not to have been expected, in view of their various ailments, from one not sustaining such relation. Lizzie Billips, a colored woman, who had worked for the Tates some time, testified that she was called into a room at their residence after appellee had left, but before her marriage, and overheard a conversation, which she gives as follows: "A. I heard Mrs. Tate say if Mr. Allison would agree to let

her come back—backwards and forwards—as long as she was alive, that she would not give her anything when she got married, but she would give her something at her death. She expected to leave her so that she would not want for anything any more, if he would agree to let her come. Q. Did they agree to it? A. Yes, sir; he did. * * * A. What I told you this morning. Mrs. Tate said that she was willing for Mrs. Allison and Mr. Allison to get married if she would come back and forwards—come to her beck and call; that was Mrs. Tate's words. * * * She said she would not give her anything when she was going to get married, but she would give her something at her death." There was evidence of various statements made by Mrs. Tate to the effect that she intended to provide for appellee in her will; that she would leave her well fixed so that she would not have to work any more; that she intended to pay her for what she had done, and that it would be all hers anyway. None of the expressions so testified to contained any direct allusion to any contract or agreement upon her part to make such a disposition.

Mrs. Tate left at her death a will, containing 33 specific items, the thirty-fourth one naming her executors. By this will she disposed of all her property, inventoried at \$54,041. The 15th item thereof was as follows: "Item 15. I give and bequeath to Irene Allison, wife of James Allison, all the furniture, carpets, pictures, ornaments, utensils, and other household articles of every description in my residence and not otherwise in this will specifically bequeathed to other legatees." The twenty-sixth item as follows: "I give and bequeath to Mrs. Irene Allison, the same mentioned in item No. 15 of this will, the sum of five hundred dollars (\$500.00)." Before the claim in suit was filed, appellee received and receipted for the articles described in item 15, appraised at \$310. It thus appears that Mrs. Tate did make a testamentary provision for appellee. Appellee claims that the contract required a larger one. Had the provisions made been in accord with the alleged agreement, there would, of course, be no room for recovery of the reasonable value of services rendered thereunder. *Eaton v. Benton*, 2 Hill, 576, 578. The general doctrine of satisfaction by legacy is that when one, being indebted to another, gives him by will a sum of money as great or greater than the debt without saying anything about it, this shall nevertheless be a satisfaction of the debt. *Pomeroy*, Eq. § 527. The exceptions to this rule are stated by appellee's learned counsel, and are so numerous as to practically make the rule an exception to the exceptions. In the case at bar the general doctrine is not applicable. The distinction and the rule that is applicable is stated by *Pomeroy* in his *Equity Jurisprudence* as follows: "The general doctrine as to a presumption of satisfaction and the limitations upon it described in the fore-

going paragraphs are based upon the bare facts of a debt and a legacy, upon their respective natures, and upon the relative situation of the testator and the creditor legatee; and they assume that there is no express language in the will, accompanying the legacy, and declaring its object and effect, or no previous arrangement between the parties stamping a special character upon the testamentary gift. It is therefore well settled that if one person renders any service to another upon an understanding or arrangement that he is to be remunerated therefor by a testamentary benefit, and the party receiving the services afterwards makes a bequest or devise in his will in favor of the other, which is in its amount and value a reasonably sufficient compensation, such testamentary provision is a satisfaction, and the creditor party cannot enforce his demand as a debt by an action against the estate. It would seem that under these circumstances the creditor party would not even have an election, since he had agreed to look to the testamentary benefit alone for compensation. This result, however, must evidently depend upon the terms of the original agreement in pursuance of which the services were rendered. Wherever, also, there being an existing indebtedness, it is agreed between the parties, either expressly or impliedly, that it shall be paid by some benefit bestowed in the debtor's will, and a testamentary provision is subsequently made in favor of the creditor, which he accepts, his demand will thereby be satisfied. He cannot both take the bequest and enforce his claim against the estate. In this, however, the creditor has an election either to accept the bequest in satisfaction of his pre-existing demand." *Pomeroy*, Eq. § 530. That the agreement was to pay appellee by a testamentary provision is asserted by her. A testamentary provision for her has been made. She has availed herself of it. Had the will contained a recital that the bequest made was intended to be in full for all claims or debts, accepting the legacy would amount to a satisfaction of the claim. *Rose v. Rose*, 7 Barb. 174. The intention that it shall be so taken appears in this case both upon the face of the will and from the facts exhibited in connection therewith. If the legacies were not thus intended, the testator is placed in the position of attempting the impossible—of making bequests to various persons, knowing that appellee held an unsatisfied contract entitling her to the entire estate. Deficiency of assets requires that a legacy be construed as a satisfaction. *Toller*, 338; 2 *Williams*, Executors (7th Ed.) p. 615; *Cuthburt v. Peacock*, 1 Salk. 155.

The conversation testified to by Mrs. Billips, and also relied upon as establishing appellee's contract, does not tend to show that either party to it understood that upon her marriage appellee became entitled to one-half of the estate of Mrs. Tate at her death. In

view of the verdict, it must be at this stage of the case taken as established that such contract did then exist, and that at the death of Mrs. Tate appellee was entitled to the entire estate. The evidence nevertheless tends to show that such liability was denied by Mrs. Tate, or perhaps it is better to say that it was not in any wise admitted. That the legacy could be in addition to what appellee was by contract entitled to recover is impossible. The situation occupied by Mrs. Tate when the will was made, and her attitude toward the contract, and the terms of the contract negative the idea that the legacy given was intended to be in addition to the contract obligation; and the appellee, having elected to take such legacy, cannot be permitted thereafter to claim additional compensation. The contract being within the statute of frauds was not enforceable. *Wallace v. Long*, 105 Ind. 522, 531, 5 N. E. 666, 55 Am. Rep. 222. The action is brought to recover the value of what it is alleged was done by one party to it in reliance upon the contract, the other party having refused to perform. *Wallace v. Long*, supra. The making of such contract and its violation by Mrs. Tate are averred in the complaint. The allegation as to its violation was not well made, but, assuming it to be sufficient, it follows that proof of such facts by the appellee in the first instance were essential. No plea of estoppel was therefore necessary to enable the appellants to take advantage of the satisfaction of said contract, they thereby negating that which it devolved upon the appellee to prove. Section 380, Burns' Rev. St. 1901.

It follows that the judgment should be reversed, and it is so ordered. Cause remanded, with instructions to sustain motion for new trial and for further proceedings.

(31 Ind. App. 390)

FRANKLIN INS. CO. v. FEIST et al.

(Appellate Court of Indiana, Division No. 2.
Oct. 8, 1903.)

FIRE POLICY — INSURED'S INTEREST — SOLE AND UNCONDITIONAL OWNERSHIP — COMPLAINT — SUFFICIENCY — REPLY — EXEMPTIONS.

1. A complaint in an action on a fire policy, which describes the property insured as lot 25 in M.'s addition to a certain city, is not bad because the policy shows that defendant insured plaintiff against loss by fire of a dwelling situated on lot 25 in M.'s Fifth addition to the city, though the variance may be ground for an objection to the introduction of the policy in evidence.

2. A fire policy stipulated that it should be void if the interest of the insured in the property were otherwise than unconditional and sole ownership. Prior to the issuance of the policy the insured executed a deed conveying the property to a third person. The deed was without consideration, and prepared without the knowledge or consent of the grantee therein. It was never delivered, and the insured retained possession thereof except for the time it was recorded. The insured kept possession of the

property, and exercised absolute dominion over it. The deed was not to have any effect except in the event of the insured's death before the death of her husband. *Held*, that the insured was the unconditional and sole owner of the property covered by the policy.

3. In an action on a fire policy the insurer alleged in his answer that the policy sued on stipulated that it should be void if the interest of the insured were otherwise than unconditional and sole ownership; that at the time of the issuance of the policy the insured had made a conveyance thereof to a third person. The answer also averred that the insured represented that she was the owner of the property insured; that the insurer relied on such representations, and that plaintiff had previously conveyed the property to a third person. The insured replied, alleging that the deed to the third person was without consideration, that it was made without his knowledge or consent, that it was never delivered, that the insured retained possession of it except during the time it was being recorded, that insured retained possession of the property and exercised absolute dominion over it. *Held*, that the reply was good as to all the allegations in the answer.

4. The reply was not a departure from the complaint in the action, which averred title in the insured to the property covered by the policy.

5. Where in an action on a policy defendant alleged that a valid judgment was a lien on the property, contrary to the terms of the policy, and plaintiff claimed that the property was exempt from the liability of the judgment, it must be shown that the judgment arose out of an action on contract, express or implied; the right to exemption applying only to such judgment.

Appeal from Circuit Court, Daviess County; H. L. Houghton, Judge.

Action on a fire policy by Catherine Feist and others against the Franklin Insurance Company, in which the State Building & Loan Association was made a party defendant as mortgagee of plaintiff. From a judgment for plaintiffs, the insurance company appeals. Reversed.

Andrew J. Clark and Gardiner & Slinp, for appellant. C. K. Thorp and John Downey, for appellees.

COMSTOCK, J. Appellee Feist sued the appellant, Franklin Insurance Company, on a fire insurance policy. Appellee the State Building & Loan Association was made a party defendant as mortgagee of appellee Feist. Said policy was issued on the 5th day of October, 1899, and was to be effective for three years from date. By said policy appellant agreed to insure appellee Feist in the sum of \$600 against damage to a dwelling house, and to insure her in the sum of \$400 against loss to her personal property located in said dwelling. On the 23d day of May, 1900, the house and personal property were destroyed by fire. The loss on personal property was adjusted at \$200, and paid, leaving the controversy, so far as this appeal is concerned, solely for damage to the house. The complaint was in one paragraph. A demurrer thereto, for want of facts, was overruled. The defendant insurance company answered separately in four paragraphs. The first admits the execution of the policy, and

¶ 2. See Insurance, vol. 28, Cent. Dig. § 605.

that said policy contained a clause stipulating that the loss, if any, under said policy, should be paid to the State Building & Loan Association of Indiana, as its interests may appear. That the building was damaged by fire, and proof of loss made. That the loss on personal property was agreed upon and fully settled prior to the bringing of action. That the plaintiff represented that she was the owner of the property in fee simple at the time of the issuance of said policy. That the policy sued on contains the following provision: "This entire policy, unless otherwise provided by agreement endorsed thereon or added thereto, shall be void if the interest of the insured be otherwise than unconditional and sole ownership, or if the subject of the insurance be a building on ground not owned by the insured in fee simple." That at the time of the issuance of the policy plaintiff was not the owner of the property and building covered by said policy, and that she made conveyance of the same November 2, 1896, to one Antonia Feist. That so having conveyed said property prior to the time of the issuance of said policy, plaintiff had no insurable interest in and to the same when said policy was issued, and, the conditions as to the title having been violated, the policy was void from the time of its issuance. The second pleads that plaintiff represented that she was the owner of the property described in the policy; that appellant relied upon such representations as to ownership, and issued its policy for a premium of \$4.80; that appellant had no knowledge as to the title of the property other than the representations of plaintiff; that the plaintiff had, in fact, conveyed said property, before the issuing of said policy, to one Antonia Feist, and was not the owner thereof at the time of the issuance of said policy or at the time said property was damaged by fire. Also pleads the provision as to ownership set out in paragraph 1, and brings into court the sum of \$5 for the plaintiff for the premium paid for the execution of said policy. The third pleads payment prior to the bringing of the action. The fourth, that, among other things, it is provided by the terms of said policy that, unless otherwise provided by agreement indorsed thereon or added thereto, the same should be and become void if the property insured is, or shall after the execution of said policy become, incumbered, without the consent of the defendant, or if any change other than by the death of the insured take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase or hazard), whether by legal process or judgment, or by voluntary act of the insured, or otherwise; that there was a valid and subsisting judgment rendered by the Daviess circuit court, in the state of Indiana, in favor of Arnold J. Padgett and J. Alvin Padgett; that the same was, and still is, a lien upon the premises and building damaged by fire, as plaintiff

well knew, and that defendant insurance company had no knowledge of said judgment, and no indorsement concerning the same was made upon the policy sued on. The appellee replied in two paragraphs to each paragraph of the answer, the first being a general denial. In the second paragraph to the first and second paragraphs of answer appellee alleged that prior to the contract of insurance sued on she and her husband united in signing a deed for the property described in the policy to one Antonia Feist; that said deed was without any consideration whatever, and purely voluntary; that it was prepared and signed without the knowledge or consent of said Antonia Feist; that it was never delivered; that appellee always retained possession of the deed, except for a short time it was in possession of the recorder for the purpose of being recorded; that appellee always kept possession of the property described in the deed, paid the taxes on it, improved it, and exercised absolute dominion over it; that said Antonia Feist had no knowledge that said deed had been made, signed, or recorded until long after the fire which destroyed the property, and upon information of these facts, and at the request of the appellee, voluntarily reconveyed said property to appellee; that at the time of the execution of said deed she meant and intended to hold and retain the same for and during the continuance of the married relations between her and her husband, and same was not to be delivered, or to have any force or effect as a conveyance, except in the event she should die prior to her said husband; that same should not be considered as delivered except in that event. It is further averred that she and her husband are Germans, and are unable to read the English language; that she had confided in and relied upon the advice of one Samuel Mattingly, a notary public, and who was agent for the defendant Building & Loan Association, who advised her that such a deed as she signed would in no way affect her right and interest in the property in the event she survived her husband, and that she acted upon his advice, and procured him to make the deed; that she did not read and could not read any of the provisions of said policy, and that none of said provisions in said policy were read to her, and she had no knowledge or information about any of the provisions of said policy; and that she never had possession of said policy, but same was always in possession of the loan association, which had the mortgage on said property. Appellee's second paragraph of reply to appellant's fourth paragraph of answer, setting up judgment lien, alleges that plaintiff and one Joseph Feist are wife and husband; that they live together as one family in the state of Indiana, and have so lived for 40 years; that plaintiff has been a resident and householder of Indiana for 40 years; that her husband is an invalid, and has no estate; that at the

time of the rendition of the judgment set out in defendant's answer, and ever since, all the property of which plaintiff was owner was worth less than \$600, and that she claims all of said property free from judgment lien set out in said fourth paragraph of answer. A trial resulted in a verdict in favor of appellee for \$634.20, \$122 of which appellee, with the leave of the court, remitted, and judgment was rendered in her favor for \$512.20. The Building & Loan Association filed a cross-complaint, which was, with the consent of the court, withdrawn, and which need not be further mentioned. Appellant assigns as error the action of the court in overruling appellant's demurrer to appellee's complaint; in overruling appellant's demurrer to the second paragraph of appellee's reply; in overruling appellant's demurrer to the fourth paragraph of appellee's reply; and in overruling the appellant's motion for a new trial.

It is insisted that the complaint is insufficient, because it declares ownership of the plaintiff in lot No. 25 in McTeagart's addition to the city of Washington, Daviess county, Ind., while the policy shows that the defendant insurance company agreed to insure plaintiff against loss by fire of a dwelling situated on lot 25 in McTeagart's Fifth addition to the city of Washington, Ind. The variance between the description in the complaint and in the policy is manifestly clerical. The complaint alleges that appellant owned the dwelling house and personal property therein on a certain lot. Whether the error was in the complaint or in the policy, it was evident the court would have given leave to correct. The variance might have been good ground of objection to the introduction of the policy in evidence, but did not make the complaint bad.

It is contended the second paragraph of reply to the first and second paragraphs of answer is bad—First, because, on its face it declares the property to have been conveyed in trust for the use of Joseph Feist, and that that was the purpose of the grantor; second, because it purports to answer both the first and second paragraphs of the answer, which it does not do; third, because said grantor expressly admits by her pleading that under certain conditions said deed was to pass title from her to her grantee, and, no words of limitation having been inserted in said deed, it must be taken and considered as a deed absolutely in fee simple as against the grantor in this case; fourth, because it is a departure from the facts pleaded in the complaint. The paragraph in question declares that at the time of making the deed it was the intention of the grantor to retain it in her possession during the existence of the marriage relation between appellee and her husband, Joseph Feist, and that it was not to be delivered and to have no effect except in the event appellee should die before her husband. A delivery of a deed is an essential part of its execution; without delivery there

is no execution. A delivery is not effective without an intent on the part of the grantor that it is to be delivered, accompanied by an act to carry out such intent. *German Ins. Co. v. Gibe* (Ill.) 44 N. E. 490; *Osborne et al. v. Eslinger*, 155 Ind. 351, 58 N. E. 439, 80 Am. St. Rep. 240; *Fifer et al. v. Rachels et al.*, 27 Ind. App. 654, 62 N. E. 68. There are numerous decisions to the effect that the acceptance of a party to whom a conveyance is made for his benefit will be presumed until the contrary appears, and the instrument takes effect without waiting for a delivery to the grantee named. The authorities in this state go no farther than to hold that, if a deed is recorded by the grantor, the delivery will be presumed, but this presumption may be overthrown. The question of delivery is to be determined by the court or jury. *Fireman's, etc., Ins. Co. v. Dunn*, 22 Ind. App. 336, 337, 53 N. E. 253, and cases cited. It appears that appellee, after the deed was placed on record, took possession of the same, and exercised dominion over it, and that the grantee had no knowledge of its existence, and it was the purpose that it should not be delivered except upon conditions set out. There was no delivery. *Weber et al. v. Christen et al.* (Ill.) 11 N. E. 893, 2 Am. St. Rep. 68; *Gifford v. Corrigan* (N. Y.) 11 N. E. 498; *Forward v. Continental Ins. Co.* (N. Y.) 37 N. E. 615, 25 L. R. A. 637; *Knop v. National Fire Ins. Co.* (Mich.) 59 N. W. 653; *Imperial Ins. Co. v. Dunham* (Pa.) 12 Atl. 675, 2 Am. St. Rep. 686; *Elliott v. Ashland Ins. Co.* (Pa.) 12 Atl. 676, 2 Am. St. Rep. 703; *Osborne et al. v. Eslinger*, supra; *Fireman's, etc., Ins. Co. v. Dunn*, supra.

The first and second paragraphs of answer pleaded substantially the same defects, viz., no title, no insurable interest, because of the deed to Antonia Feist. It is good as to both. The fact that there was no delivery, and therefore no conveyance, meets these objections. We cannot agree with counsel for appellant that the reply is a departure from the complaint.

The complaint avers title in appellee. Appellant averred facts to show there was no title; that the title had been conveyed. The reply pleaded facts to avoid the facts set up in the answer. These facts support the complaint.

It is urged that the second paragraph of reply to the fourth paragraph of answer is bad, for the reason that the husband and wife cannot each claim an exemption to the amount of \$600 when living together. As it does not appear that the husband was claiming an exemption as a householder, the question is not presented. It is, however, argued against this paragraph that it does not show that the judgment which it is alleged in the answer was a lien upon the property insured was a judgment upon a contract of the appellee. The right of exemption is given only upon contracts express or implied, and when such right is pleaded it must ap-

pear that the judgment was of the character entitling the claimant to the exemption. The reply contains no facts upon which to predicate the claim. *Goldthait et al. v. Walker et al.*, 134 Ind. 527, 34 N. E. 378, and cases cited.

Judgment reversed, with instruction to sustain demurrer to second paragraph of reply and to the fourth paragraph of answer. Questions presented by motion for a new trial may not be raised again, and are therefore not considered.

SOUTHERN INDIANA RY. CO. v. DAVIS.¹

(Appellate Court of Indiana, Division No. 2.
Oct. 6, 1903.)

INJURY TO EMPLOYE—CONCURRENT NEGLIGENCE—RULES—CUSTOM AND HABIT—EVIDENCE—CONCLUSION—NEGATIVE TESTIMONY—IRRESPONSIVE ANSWER—SPECULATIVE DAMAGES—FELLOW SERVANTS—INSTRUCTIONS—STATEMENT OF COUNSEL—HARMLESS ERROR.

1. Though injury to a fireman on a locomotive from a collision is due to the concurrent negligence of a railroad company other than his employer and of the engineer in control of his engine, so that he has a cause of action against his employer, he may sue the other company separately.

2. The habit and custom of the conductors, engineers, and employes of two railroad companies as to what shall be done when their trains approach an intersection where trains of one company come on the track of the other company, may make a new rule and supersede an old one.

3. The answer of witness, in an action for injury to a locomotive fireman, to the question what prevented plaintiff from answering to witness' calls to go out on engines, "sometimes he would be feeling bad, and would fall down with his ankle," is objectionable, as a conclusion.

4. Testimony of witness, in an action for personal injury, that plaintiff never complained of his ankle before the accident, though of a negative character, may be considered by the jury.

5. The answer to the question what had been plaintiff's condition with respect to his ankles since the accident, that he complained of them for some time thereafter, is irresponsible.

6. Overruling a motion to strike out, addressed to a question and answer, is not error, the question being proper.

7. In an action for injury to a locomotive fireman, testimony that extra firemen on the road were in line of promotion to regular firemen in case of vacancy is improper, it not appearing that there was any rule that promotion would follow a vacancy; so that it was speculative.

8. Negligence of a locomotive engineer is not to be imputed to his fireman, who is not charged with the management or authorized to manage the engine, but is subject to the orders and directions of the engineer.

9. In an action for injury to a locomotive fireman from collision between his train and that of defendant, a railroad company other than his employer, an instruction erroneously relieving his engineer from negligence is harmless; the negligence of his engineer not being imputable to him.

10. Refusal of an instruction covered by others given is not error.

11. Refusal of an instruction bottomed on plaintiff's not knowing a custom is harmless,

the jury, by answers to special interrogatories, having found that he knew the custom.

12. Statement of plaintiff's counsel, in his argument to the jury, that the interrogatories had been put to them by defendant to entangle them, is not prejudicial, the court having sustained a motion to withdraw the language from the jury, and in his instructions directed the jury to disregard it.

Appeal from Circuit Court, Martin County; H. Q. Houghton, Judge.

Action by John R. Davis against the Southern Indiana Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

James B. Marshall, F. M. Trissal, and Shea & Wood, for appellant. A. J. Clark and Gardiner & Gardiner, for appellee.

COMSTOCK, P. J. Appellee was plaintiff below. The Evansville & Indianapolis Railroad Company owns and operates a railroad running north and south by the town of Elnora, in Daviess county, at which place it maintains a station. The Southern Indiana Railway Company, appellant, owns and operates a railroad running east and west from Elnora to Westport, in Decatur county. The latter company uses the former's Elnora station, which it reaches from the north, by means of passing its trains over the north stem of a Y onto the main track of the Evansville & Indianapolis Railroad Company, thence backing down to the station, and thence regaining its own track by heading out on the south stem of the Y. On August 24, 1898, as appellant's passenger train No. 1, headed in a northerly direction, was in the act of passing from the Y to the main track of the Evansville & Indianapolis Railway Company, it collided with the latter's south-bound locomotive drawing its passenger train No. 33.

The complaint was in two paragraphs. The first charges the defendant with negligence as follows: "That for the purpose of moving, conducting, and running the locomotives, cars, and trains of the defendant from said town of Elnora to the town of Washington, in the state of Indiana, the defendant, the Southern Indiana Railway Company, by an agreement with said Evansville & Indianapolis Railway Company, has certain track privileges over the right of way and railroad tracks of said Evansville & Indianapolis Railway from the place where the defendant's switch at Elnora, Indiana, intersects and transfers its locomotives and cars to the main line of said Evansville & Indianapolis Railway tracks to the town of Washington as aforesaid; that by the rules and regulations adopted and agreed upon by and between the defendant and said Evansville & Indianapolis Railway Company it was at the time hereinbefore complained of the duty of the defendant, its agents, engineers, conductors, and other employes in operating its locomotives, cars, and trains, before it entered upon the track of the said Evansville

¹ 3. See *Negligence*, vol. 37, Cent. Dig. § 124.

² Superseded by opinion, 69 N. E. 550. Rehearing denied.

& Indianapolis Railway Company, to stop its locomotives, cars, and trains on said switch hereinbefore mentioned, and send forward a flagman to prevent the locomotives, cars, and trains that might be upon the said right of way and tracks of the defendant railway company herein from entering upon the right of way and tracks of the Evansville & Indianapolis Railway Company in violation of the rules governing the track privileges of the defendant company upon the right of way and tracks of the said Evansville & Indianapolis Railway Company, and for the purpose of giving to the locomotives, cars, and trains of the Evansville & Indianapolis Railway a preference over said tracks of the Evansville & Indianapolis Railway Company, and for the further purpose of protecting the lives of the employees and the property of said Evansville & Indianapolis Railway Company; that the Evansville & Indianapolis trains had right of track inside the yard limits at Elnora; that the defendant negligently and carelessly failed to discharge the alleged duty as above set out, but negligently and carelessly ran its train at the rate of twenty-five miles per hour over said intersection and onto the main track of the Evansville & Indianapolis Railroad, and collided with the said train thereon, causing plaintiff's injury." The second paragraph is substantially as the first, except that it does not allege that the Evansville & Indianapolis train had the right of track. To these two paragraphs of complaint separate demurrers were addressed, which were overruled by the court, and exceptions were reserved by appellant.

The appellant's answer was in two paragraphs: First. General denial. Second. Sets out the facts of track connection at grade, joint use of track by appellant and Evansville & Indianapolis Railroad between Elnora and Washington, Daviess county, for a period of more than four months, during all of which time appellee was a fireman on the Evansville & Indianapolis, and was familiar with said joint use of track, station, and yards. "Rule I. S. I. railway trains and engines will occupy the main track inside the yard limits at Elnora in time of all trains. Have your train under full control." Also rule C and marginal rule, as follows: "(C) When tracks of two railroads cross each other, or in any way connect at common grade, all trains or engines passing over such tracks must come to a full stop before reaching such crossing." "Yard limit signs have been erected at the following points: Overholzen and Lancaster Branch, Worthington, Elnora, and Washington. It will not be necessary for any train or engine occupying the main track inside the yard limits to be protected by flagmen except in the time of second-class trains"—were in full force and effect on said date, with full knowledge of appellee. That appellee, with the other employees, disregarded rule C and rule I, and

violated the law by running their train at a high rate of speed, to wit, 30 miles per hour, inside yard limits at Elnora, without having train under full control, and without coming to a full stop, and without first ascertaining that appellant's train was approaching the intersection in full view on its schedule time, and about to pass out on the Evansville & Indianapolis track, where it had right of way at that time.

The plaintiff filed reply in three paragraphs: The first, a general denial. The second alleges that the engine was in the exclusive and full control of the engineer of the Evansville & Indianapolis Company; that he (the appellee) was under complete control and subject to the orders and direction of the engineer and conductor. The third alleges, in substance, that the defendant had for a period of more than four months been in the habit of sending out a flagman at said point of intersection at the time mentioned, and that because of that fact a custom was established which gave the Evansville & Indianapolis train right of track, and therefore a right to proceed across said intersection without stopping, because said flag was not out. Demurrers to second and third paragraphs of reply were overruled, and exceptions taken.

Upon the trial a verdict was returned in favor of appellee for \$4,500, of which sum appellee remitted \$1,000, and the court rendered judgment for \$3,500. A motion for judgment on the facts found in answer to interrogatories submitted to the jury and a motion for a new trial were each overruled, and exceptions taken.

Specifications of the assignment of errors from 1 to 6, inclusive, question the sufficiency of the several paragraphs of the complaint. In *Southern Ind. R. Co. v. Peyton*, 157 Ind. 690, 61 N. E. 722 (a case growing out of the same collision. Peyton was the engineer and appellee was the fireman on the locomotive on the Evansville & Indianapolis Railroad), the questions raised by these specifications are decided adversely to appellant.

The seventh and eighth specification of error relate to the sufficiency of the appellee's second paragraph of reply, to which a demurrer was overruled. We have set out the substance of the paragraph in question, and the paragraph of answer to which it referred. It avers that the engine that was so operated as to cause appellee's injury was under the exclusive and full control of the engineer, and that appellee was under the complete control and subject to the orders of and the directions of the engineer and conductor. It is insisted that this paragraph of the reply is bad because it shows that another than appellant caused appellee's injuries. The reply must be considered in connection with the other pleadings to which it relates. The complaint alleges that appellee's injuries were due to the negligence of

appellant; the answer that the collision was caused by the disregard of the law and the rules for the operation of the Evansville & Indianapolis Railway Company. The reply avers that the appellee was not in any way responsible for either the violation of the law or of the rules governing the operation of the Evansville & Indianapolis Railway Company, of which he was an employé. The injury to the appellee was due to the negligence of appellant and the Evansville & Indianapolis Railway Company. Under the co-employé's liability act, if the accident was due to the negligence of the engineer in control of the engine of which the appellee was fireman, under the averments of the second paragraph of reply he would have had a right of action against his employer corporation. If the accident was due to the negligence of the appellant and the Evansville & Indianapolis Railway Company, he would have a right of action against either or both of them. He charges that the negligence of the appellant caused his injury. That the negligence of another corporation, for which he was in no way responsible, contributed to his injury, would not defeat his right of action against appellant.

The ninth and tenth errors assigned question the sufficiency of the third paragraph of the reply. It is argued that this paragraph proceeds upon the theory that, although the appellant company and the Evansville & Indianapolis Railway Company had written rules, made for the purpose of controlling the movements of trains and for the government of employés at the particular time and place in question, to wit, the junction of the two roads at Elnora, yet the employés of the appellant company and appellee could, by a custom or habit, established by themselves, without any authority from their employers, change the written rules; that they might then continuously and repeatedly violate the rules, and excuse themselves from negligence on that account. The construction given to rule C (which requires a train approaching a crossing to stop) by the Supreme Court in *Southern Ind. R. Co. v. Peyton*, supra, did not require the appellee engineer to stop his train at the intersection of the roads to ascertain whether another train was about to come upon his track. The custom, conduct, and manner of handling both roads for more than four months immediately preceding the accident, by their respective conductors, engineers, and employés, gave to and recognized the right of the Evansville & Indianapolis trains to have the right of way in the yards at the town of Elnora and at a point therein where appellee was injured, and appellant has daily for said four months, when its trains were approaching the point of junction, sent forward a flagman on the Evansville & Indianapolis Road to warn the engineer of any approaching train. The custom and the omission of which proximately contributed to appellee's injury was omitted by appellant.

68 N.E.—13

Rules may be made and be superseded by habit and custom. *Southern Ind. R. Co. v. Peyton*, supra.

It is averred that upon occasion named the appellant failed to give the customary signal. Upon the construction of the rule referred to, we do not feel warranted, upon the facts averred, to hold, as a matter of law, that the fireman was guilty of contributory negligence.

The following question was propounded to James L. Cox, a witness in behalf of appellee, upon his examination in chief: "What, if anything, prevented him [appellee] from answering or responding to your calls to go out upon engines, if you know?" Upon motion of appellant the court struck out a portion of the answer, but overruled the motion as to the following: "Sometimes he would be feeling bad, and would fall down with his ankle." The witness had testified that it was his duty to see that the engineers and firemen reported to him when they were called out. The evidence is claimed to be incompetent as irresponsible, as self-serving, as made in the absence of appellant, and long after the injury was received. It has been frequently decided in this state that an injured person may give in evidence declarations connected with existing suffering and expression of it, but cannot give an account of the manner in which he received his injuries. The interval of time between the injury and expression of pain would go to the weight of the testimony, but not its admissibility. *Board, etc., v. Leggett*, 115 Ind. 544, 18 N. E. 53; *Peirce, Rec., v. Jones*, 22 Ind. App. 173, 53 N. E. 431; *City of Huntington v. Burke*, 21 Ind. App. 661, 52 N. E. 415. The answer was the statement of a conclusion, and the motion should have been sustained. Upon cross examination the following question was asked the witness: "When he went to work, and did not go out on the road, you do not know, of your own personal knowledge, his reason, do you?" to which he answered: "Yes, sir. I know that he always came over before he would go to report, and would say that, if anything happens to-night, I cannot go out, on account of my ankle hurting me." It is manifest that the witness drew an inference from this statement of the appellee to account for his failing to go on duty.

The following question to the same witness, and answer thereto, were objected to upon the grounds given to the last question considered. "Q. If you know, you may state whether he ever made complaint of his ankle until after he was injured in the wreck of the Evansville & Indianapolis Railway. Ans. No, sir; never did make any complaint until after he was hurt." The evidence elicited by this question was of a negative character. Necessarily, it could be entitled to but little weight, but that was for the jury.

The court permitted the following question to Daniel S. Cook, and the answer thereto,

over appellant's objection: "Q. What has been his condition with reference to his ankles, and also his lower limbs, since the wreck? Ans. Well, he complained of his ankles for some time after the wreck." The generally understood meaning of the verb "complain" is to express regret or pain. The answer was not responsive.

The following question addressed to the witness Paine: "What was his condition at the time, and especially with reference to his ankles?" was answered, "Well, he complained of his ankles, and they would swell up on him." The motion to strike out was addressed to the question and answer. The question was proper. It was not error to overrule the motion.

The court overruled the appellant's objection to the following question put to Daniel S. Cook: "Q. What has been his condition, with reference to his ankles, and also his lower limbs, since the wreck?" The witness answered, "Well, he complained of his ankles for some time after the wreck." The answer was irresponsible, and the motion to strike out should have been sustained.

The following question to Ida Kern: "Q. During that time you may state whether he made any complaint about being unable to labor or work," was answered: "Well, during the time that he was there he was laid up several different times complaining of his ankles hurting him, and I made inquiry several times why he was not at work, and they said it was on account of his ankles." The court struck out all after "him." For reasons last above given there was no error in this ruling.

John R. Davis, appellee, was permitted to answer, over appellant's objection: "Q. State, if you know, whether an extra fireman on the Evansville and Indianapolis railroad and the Evansville and Terre Haute Railroad, at the time you were injured, was promoted to regular fireman in case of vacancy? Ans. Yes, sir; they were in line of promotion." The testimony was improper. The promotion was too problematical and uncertain. It was speculative. It does not appear that there was any rule that promotion would follow vacancy. *Railroad Co. v. Elliott*, 149 U. S. 266, 13 Sup. Ct. 837, 37 L. Ed. 728; *Brown, Adm'r, v. The Chicago, etc., R. Co.*, 64 Iowa, 652, 21 N. W. 193.

Appellant complains of instructions Nos. 4 and 6 given to the jury at the request of appellee. Instruction No. 4 in effect said that, if the appellee was not charged with the management, or authorized to manage, the engine and train upon which he was employed, and that as fireman he was immediately before and at the time of receiving his injuries subject to the orders and directions of the engineer of the engine on which he was employed, and when directed he was obliged to obey, then the negligence, if any, of said engineer should not be imputed to him. In this there was no error. What we have said with

reference to the second paragraph of reply is applicable to this instruction.

Instruction 6 informed the jury that, if the switch target showed the track clear to the engineer and fireman of the Evansville & Indianapolis Railway, even though said engineer and fireman saw or might have seen defendant's train approaching the intersection on its Y, they would have the right to presume that the employees in charge of defendant's train would stop the same before it approached so near the Evansville & Indianapolis Railway as to make it unsafe for the train on that road to pass by, and they would have had a right to act upon that, and proceed upon their way until they discovered that the employees would not stop their train, even though it should then be too late to stop the Evansville & Indianapolis train in time to prevent such collision. The instruction was too broad. It in effect relieved the engineer and fireman of the obligation of using ordinary care. The facts set out in the instruction were to be taken into account in determining the question of the negligence of the Evansville & Indianapolis Railway Company; but, conceding that this instruction was error, it could not overthrow the rights of the appellee, to whom the negligence of the engineer and conductor could not be imputed.

It is argued that the refusal to give to the jury instructions Nos. 1, 10, and 21 tendered by appellant was error. Instruction 1 directed the jury to return a verdict in favor of the appellant. It took from the jury the right to determine the question of negligence and contributory negligence. The rejection was not error. Instruction 21 is as follows: "Twenty-First. There has been evidence introduced for the purpose of showing that the servants of the defendant company had by practice and custom changed the written rules of said company governing the movements of their trains at the point of intersection where said accident occurred. I instruct you that, no matter what has been the practice and custom of the servants of the two companies as to stopping and flagging their respective trains at the point of intersection, unless John R. Davis knew of said practice and custom, and acted upon it, he cannot excuse himself for intentionally and voluntarily violating the rules of his said company, with which it was his duty to become familiar. If you find that under such circumstances the said John R. Davis violated the rules of his company in approaching said intersection upon the date of such accident, and you further find that his said violation of said rules in any way contributed to his injury complained of, then I instruct you that he cannot recover in this action, and your verdict must be for the defendant." Instruction 10 reads: "If you find in this case that the plaintiff, John R. Davis, could have seen the Southern Indiana train approaching said intersection, and could have known of the danger in time to have avoided it by care pro-

portionate to the dangerous surroundings, then the said John R. Davis is charged with seeing what he could have seen and knowing what he could have known; and if, under such circumstances, the said John R. Davis did so fail to see and know, and his said failure in any way contributed to his injury, then I instruct you that he cannot recover in this action, and your verdict should be for the defendant." In other instructions requested by the appellant and given by the court the jury in varying phraseology were repeatedly and plainly told that it was the duty of the appellee to be diligent in the exercise of his natural senses; that he could not recover alone upon the negligence of the appellant, but must himself be free from fault contributing to his injury; that he must be held to have seen what he could have seen by looking carefully and by the exercise of ordinary care. The instruction refused was fully covered by others given, and it was therefore not reversible error to reject it.

The jury found, in answer to interrogatories, that prior to the date of the collision the train upon which the appellee was fireman had been flagged by the servants operating appellant's train in approaching said point of intersection, and that appellee knew the custom of the servants of the appellant railway company operating its said trains of flagging the Evansville & Indianapolis Railway trains when they were approaching said point of intersection prior to the accident. These special findings show, in the light of instructions given to the effect that if the injury of appellee was in any way due to the voluntary violation on his part of a rule or rules of his company for his conduct in the line of his employment, he could not recover, although his injury might also be attributable to the negligence of appellant; that appellant's right could not have been prejudiced by this action of the court. It is contended that the answers to interrogatories are in irreconcilable conflict with the general verdict. Considered together with any other facts which the jury might have reasonably found under the issues and the evidence, such conflict does not exist.

It is claimed that the damages assessed are excessive. There is evidence that appellee's injury was permanent. "The damages are not so great, in view of the evidence, as to induce the belief that the jury acted from prejudice, partiality, or corruption." This court would not, therefore, under numerous decisions, be sustained in disturbing it. *Lauter v. Duckworth*, 19 Ind. App., at page 544, 48 N. E. 867, and cases cited.

W. R. Gardiner, as attorney for appellee, in his closing argument to the jury, with reference to interrogatories which had been submitted to the jury to be answered, used this language: "These interrogatories have been put to you by the defendant for the purpose of entangling you." The defendant excepted to said language, and moved the

court that it be stricken out, and withdrawn from the jury, and the jury discharged. The court sustained said motion so far as to withdraw said language from the jury, admonished and instructed the jury not to consider such statement in deciding said cause, and no further statement on the subject was made in the jury's presence, but overruled the motion as to the discharge of the jury. In instruction No. 7 the court said: "In the consideration of this cause you will not consider the question of what party to this suit requested interrogatories to be submitted to you. That is not a matter which you should consider at all, but in determining the right of the parties to this suit you should only consider the evidence and the law applicable thereto, as given by the court." The court properly treated the statement of counsel as improper, and his oral and written instructions directed the jury to disregard it. The withdrawal of the language from the jury by the court and the admonition and instruction given induce the conclusion that the appellant was not thereby prevented from having a fair trial. There is evidence fairly tending to sustain the verdict, and, being within the issues, we cannot concede the claim of appellant that it is contrary to law.

It is earnestly insisted by appellee that the evidence is not in the record, and that the questions raised by appellant upon the admissibility of certain testimony and the giving of certain instructions and the refusal to give others was not properly presented. We have herein, for the consideration of the questions raised, treated the evidence as properly before us.

There is no question as to appellee's injury. There is evidence to sustain the verdict of the jury finding that his injury was proximately caused by the negligence of appellant, and that appellee was free from fault proximately contributing thereto. The errors designated herein were not of a character to have prejudiced the rights of appellant.

Judgment affirmed.

ROBY, J. I concur in the result, but do not concur in the expressions relative to the admission of evidence.

WILEY, J. I concur in the result.

(31 Ind. App. 370)

INDIANA NATURAL GAS & OIL CO. v.
VAUBLE.

(Appellate Court of Indiana, Division No. 1.
Oct. 6, 1903.)

MASTER AND SERVANT—INJURIES TO SERVANT—DEFECTIVE SCAFFOLDING—KNOWLEDGE OF DEFECT—COMPLAINT—INSTRUCTIONS—CURING ERROR.

1. Where, in an action for injuries to a servant, the complaint alleged that the injury occurred because of the weak scaffolding con-

structed by defendant's superintendent to support certain pipe, by the fall of which plaintiff was injured, and that such insecure blocking was known to defendant's superintendent and unknown to plaintiff, and was the cause of the injury, and that the scaffolding was constructed under defendant's immediate supervision, the complaint was not objectionable on the ground that it disclosed an obvious defect on an ordinary careful observation, but sufficiently stated a cause of action.

2. Where, in an action for injuries to a servant by the fall of certain pipe, alleged to have resulted from an insecure scaffolding erected by defendant, an instruction enumerating certain facts which, if proved, would authorize a verdict for plaintiff, but omitting all reference to plaintiff's knowledge or means of knowing the condition of the scaffolding, was erroneous.

3. Where, in an action for injuries to a servant by reason of the defective condition of certain scaffolding, the court gave an instruction which was erroneous, in eliminating plaintiff's knowledge or means of knowing of the condition of the scaffolding, such instruction could be cured only by withdrawing it from the jury, and not by the giving of another instruction correctly stating the law.

Appeal from Circuit Court, Fulton County; Chas. Kellison, Special Judge.

Action by Henry Vauble against the Indiana Natural Gas & Oil Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

W. O. Johnson, Steis & Hathaway, and Holman & Stephenson, for appellant. Chas. E. Barrett and George Burson, for appellee.

ROBINSON, C. J. Suit for personal injuries. The complaint avers: That appellant was engaged in laying a 10-inch pipe line, which was made up of large joints of pipe, weighing 800 to 1,000 pounds, and joined together at the ends with a coupling, requiring the assistance of a number of men. Appellee was in appellant's employ as a tongsman; his duty being, under the supervision of a superintendent and foreman, to use a pair of tongs, and assist in coupling together the joints of pipe, and laying the pipes after put together. That in laying the line across the Tippecanoe river a temporary trestle or staging had been constructed, upon which the joints were placed and fastened together preparatory to being lowered to the bed of the stream. That in the performance of this work, and under the direction of a superintendent, appellee and other employés working under the immediate direction of two foremen had carried onto the staging several joints of pipe, and placed them on blocking placed by appellant to receive them, and had fastened the joints together, when, in the opinion of the superintendent, it became necessary to remove a joint of the pipe, because defective; and, to do this, one of the foremen ordered appellee and others to move the pipe across to the other side of the staging. That while appellee and other employés were moving the pipe under the command and immediate direction of the foreman who had control and direction of the men, owing to the great weight of the joints of pipe resting

on the blocking, and owing to the careless, negligent, defective, and insecure manner in which the blocking had been arranged and placed, such supports or blocking slipped, broke, and fell, letting the pipe and staging or blocking fall; and, in falling, the pipe and blocking fell upon appellee's foot and leg, injuring the same. That the fall of the pipe was because of the want of care, the ignorance and incompetence, of the foremen and superintendent under whose immediate supervision and direction the blocking and scaffolding for the support of the pipe had been placed, "and in so carelessly placing it that it was weak and insecure, and in carelessly and unskillfully directing and ordering said pipe moved while resting on such insecure and weak supports. That the insecure and weak nature of the blocking placed to receive said pipe, and upon which it rested, being at the time unknown to the plaintiff at the time it fell, but was known to the defendant's foremen, Carr and Hart, and to the superintendent, Nelson, or could have been known by them by the use of ordinary care and observation, and the fall of said pipe, and the consequent injury to the plaintiff, would not have occurred, but for the carelessness and negligence of the defendant's superintendent and foremen in attempting to remove said pipe while on such insecure supports. Wherefore the plaintiff avers that the accident and injury so as aforesaid sustained by him was caused by the fault and negligence of the defendant, its superintendent and foremen, as aforesaid, and without fault or negligence on his part." The pleading charges that the injury occurred because of the weak and insecure condition of the blocking and scaffolding constructed by appellant's superintendent and foremen for the support of the pipe. It is not the theory of the pleading that the material used in the construction of the blocking and scaffolding contained some latent defect, which was known or could have been known to appellant, but that the blocking and scaffolding constructed to receive the pipe was weak and insecure from some cause not stated. It was this "insecure and weak nature of the blocking placed to receive the pipe" which was known to appellant's foremen and superintendent, and unknown to appellee. It cannot be said that the facts averred disclose that appellee had the same means and opportunity of knowledge as appellant had. It is not only averred that appellant's superintendent and foremen had knowledge of the weak and insecure nature of the blocking, but also that it was constructed under their immediate supervision and direction. The facts pleaded do not disclose an obvious defect or danger, open to ordinary careful observation. It is not averred that appellee had no knowledge of the danger, and it is true that the averment of the want of knowledge must be as broad as the averment of knowledge on the part of

appellant. But it is not averred that appellant knew the blocking and scaffolding were in danger of falling, and negligently failed to notify appellee of the danger. The charge is not that the blocking and scaffolding had, from some cause, become weak and insecure, but that appellant, by its superintendent and foremen, had constructed weak and insecure blocking and scaffolding for the support of the pipe. It would necessarily follow from this averment, without a direct averment to that effect, that appellant had knowledge of this weakness and insecurity. And it is averred that appellee did not know that the blocking and scaffolding were weak and insecure. The complaint states a cause of action. *Big Creek Stone Co. v. Wolf*, 138 Ind. 496, 38 N. E. 52.

Complaint is made of the eighth instruction given to the jury: "Should you find and conclude from an examination of all the evidence in the case that the plaintiff has established and proved all the material allegations of his complaint, and that he has shown that he was in the employ of the defendant company, and that he was engaged in the work of the defendant, and in the line and scope of his duty, at the time he received the injury complained of, and that such injury was occasioned by the falling of an iron gas pipe and its supports upon his foot and leg in the manner complained of, and that the fall of such pipe and subsequent injuries was occasioned by the giving way of the blocking or supports placed under said pipes, and that the blocking or supports was arranged and placed under the pipe by and under the direction of the defendant's superintendent, foreman, or boss having control and direction of the plaintiff at the time; and you further find that through the ignorance, want of skill, incompetence, negligence, or carelessness of such superintendent, foreman, or boss, the blocking and supports placed under said gas pipe was insufficient, or so carelessly placed and arranged that it was insufficient to support said gas pipe when being moved thereon under the direction of such superintendent, foreman, or boss, and that by reason thereof said supports and blocking fell over or slipped from position, and allowed the gas pipe, or the supports or blocking, to fall upon the plaintiff's leg or foot, by which the plaintiff was lamed and injured as complained of; and if you further find that the giving way or falling over of the blocking and supports and the fall of the pipe and injury to the plaintiff was not brought about or in any manner caused by the carelessness or negligence of the plaintiff—then your verdict should be for the plaintiff, and you should assess," etc. An essential averment of the complaint was that appellee had no knowledge of the weak and insecure condition of the blocking and scaffolding. Such an averment repels not only actual knowledge, but also any implied knowledge. *Evansville, etc., R. Co. v. Duel*, 134 Ind. 156,

33 N. E. 355. But to sustain such an averment, appellee was required to prove not only that he had no knowledge of this defective condition, but also that he could not have known it by the exercise of ordinary care. If he did know it, or could have known it by the exercise of ordinary care, and voluntarily continued in the work, he assumed the risk. *Consolidated Stone Co. v. Summit*, 152 Ind. 297, 53 N. E. 235; *Pennsylvania Co. v. Ebaugh*, 152 Ind. 531, 53 N. E. 763; *Cleveland, etc., Co. v. Parker*, 154 Ind. 153, 56 N. E. 86; *Chicago, etc., R. Co. v. Glover*, 154 Ind. 584, 57 N. E. 244. The instruction undertakes to enumerate certain facts which, if proven, will authorize a verdict in appellee's favor. It omits appellee's knowledge of the weak and insecure condition of the blocking and scaffolding. It plainly directs the jury to find for appellee if the facts enumerated were proven. Under this instruction, appellee would be entitled to a verdict, even though he had full knowledge of the defective condition of the blocking, or could have had such knowledge by the exercise of ordinary care. Such an instruction is not cured by another which correctly states the law. It can be corrected only by withdrawing it from the jury. *Chicago, etc., R. Co. v. Glover*, *supra*.

The motion for a new trial should have been sustained. Judgment reversed.

(34 Ind. App. 382)

LEONARD v. WHETSTONE et ux.¹

(Appellate Court of Indiana, Division No. 1.
Oct. 6, 1903.)

BREACH OF MARRIAGE PROMISE—INDUCEMENT—LIABILITY OF PARENTS—SLANDER—REMEDIES.

1. A parent is not liable to his son's fiancée for advising and inducing him to break his contract to marry her.

2. Where the parents of plaintiff's intended husband induced him to break his contract to marry her by false and slanderous charges made against plaintiff, plaintiff's only remedy against such parents was an action for slander.

Appeal from Circuit Court, Tipton County; W. W. Mount, Judge.

Action by Della Leonard against John Whetstone and wife. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Shirts & Fertig, John E. Garver, and Dan Waugh, for appellant. Stuart & Reagan, for appellees.

HENLEY, J. In this appeal, error is properly assigned, presenting the questions arising out of the action of the trial court in sustaining the demurrer of appellees to the two paragraphs of complaint filed by appellant. Each paragraph of the complaint seeks to recover damages from appellees for injuries sustained by appellant by reason of the alleged wrongful acts of appellees in procuring

¹ Appeal to Supreme Court denied.

their son to cancel and break a marriage contract existing between him and appellant, the said son having at the time seduced appellant and begotten her with child. The averments of the first paragraph of complaint are briefly as follows: That appellees are possessed of a large amount of property; that the families of appellant and appellees resided in the same neighborhood, and were intimately acquainted, and of equal social standing; that the son of appellees was a young man of intelligence and fine address, and was in every way fitted to be the husband of appellant; that said son, with the knowledge and consent of appellees, for three years was appellant's suitor, and was often at her home and with her in public; that he won her love, and they became engaged to be married, and that, under such promise to marry, said son seduced appellant and begot her with child; that appellees knew these facts before they committed the alleged wrongful acts. It is further alleged that appellant was in every way fit and competent to become the wife of said son, and that, being pregnant by him, she requested him to marry her at once, in order to protect her good name; that said son agreed to do so, and applied for a license to marry her; that appellees learned of said facts, and conspired together to wrong the appellant and to prevent the marriage, by maliciously persuading, commanding, and hiring their said son not to marry appellant, and to violate his said marriage contract; that appellees falsely stated to the clerk of the circuit court that their said son was a minor, and commanded the clerk not to issue the marriage license, and, to further cause said marriage contract to be broken, they told their said son that if he married appellant they would drive him from home, and disown and disinherit him; that appellees hired another person to take said son to parts unknown, and paid said son large sums of money to remain away, so that appellant could not communicate with him; that by reason of said acts and words of appellees the said son refused to marry appellant; that thereupon appellant sued the said son for breach of said marriage contract and for seduction, and recovered a judgment against him for \$5,000; that no execution has been issued on said judgment, and that the same is unpaid and uncollectible; that the appellant, on account of said promise to marry, made preparations therefor, and denied herself the society and attentions of other young men; that, but for the wrongful and malicious acts of appellees, their said son would have married appellant, and continued to love and respect her. The further allegation is made that, at the time this action was commenced, appellant had become the mother of the child begotten as aforesaid, and that by the acts of appellees she had been damaged in the sum of \$10,000. Counsel for appellant, in their brief, say: "The

second paragraph is like the first, except that it alleges, as additional means used by appellees to prevent the marriage, that they spoke to their son certain false and slanderous words of and concerning appellant, imputing to her the sin of whoredom and the crime of abortion." It will thus be seen that both paragraphs of the complaint are drawn upon the theory that appellees are liable in damages to appellant by causing their son to refuse to carry out his promise to marry through and by reason of the acts in the complaint alleged to have been done and committed by them. It also clearly appears in each paragraph of the complaint that the action commenced by appellant against John W. Whetstone, the son of appellees, in which action she recovered judgment for \$5,000, was for the breach of the marriage contract, and that the seduction was alleged therein only for the purpose of aggravating the damages. In other words, it appears that appellant elected to prosecute her action against the son *ex contractu*. The proximate cause of the damages recovered by her, and represented by the judgment, was the breach of the marriage contract, and not the seduction. The rule applicable to joint trespassers, as stated in *Fleming v. McDonald*, 50 Ind. 278, 19 Am. Rep. 711, is therefore not in point here. We cannot hold other than that a parent has a perfect right to advise a child whether he or she shall enter into a contract of such importance as one of marriage. Nor should parents' advice be withheld from a child where an agreement to marry has been made, and, in the judgment of the parents of either of the contracting parties, the union ought not to take place. Judge Cooley, in his work on Torts (2d Ed.) p. 277, says: "The prevention of a marriage by the interference of a third person cannot, in general, in itself, be a legal wrong. Thus, if one, by solicitation or by the acts of ridicule or otherwise, shall induce one to break off an existing contract of marriage, no action will lie for it, however contemptible and blamable may be the conduct." But if a person is induced to refuse to comply with his agreement to marry by false and slanderous charges made against the other party to the agreement by a third person, the action is not against the third person for causing a breach of the contract, but for slander or libel, as the case might be. Appellees' advice may have induced their son to refuse to perform his contract to marry appellant. This was not an actionable wrong upon the part of appellees. If the son was of legal age, he had a right to refuse to act upon the advice given. He was not advised to commit the crime of seduction, nor does the complaint so charge. Neither paragraph of the complaint, under the acknowledged theory of the pleader, states a cause of action. The demurrer was properly sustained to both paragraphs.

Judgment affirmed.

(284 Mass. 274)

ARCHAMBAULT v. ARCHAMBAULT.(Supreme Judicial Court of Massachusetts.
Hampden. Oct. 21, 1903.)**MASTER AND SERVANT—INJURIES TO SERVANT—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—ASSUMPTION OF RISK—EVIDENCE.**

1. Plaintiff was injured by the falling of a stone which he was cutting in defendant's stone-yard. In order to facilitate the cutting, the stone was tilted up by means of stone chips placed beneath it on blocks, in accordance with custom. Plaintiff had worked on the stone for four or five days prior to the accident, but was not present when it was last tilted up. Plaintiff testified that he knew that if the stone was not properly propped he would get hurt, and that he made no effort to inform himself as to how it was propped. When the stone fell, plaintiff had finished working on it, and was leaning over or upon it, in the act of picking up some tools or a match. *Held*, that the risk that the stone might fall was obvious, and one which plaintiff assumed.

2. Evidence *held* to show that plaintiff, an employé, was not in the exercise of due care at the time of his injury.

3. Evidence *held* insufficient to establish negligence on the part of defendant.

Exceptions from Superior Court, Hampden County; Frederick Lawton, Judge.

Action by Ovid Archambault, by his next friend, against Joseph L. Archambault. From a judgment in favor of defendant, plaintiff brings exceptions. Exceptions overruled.

Adelard Archambault, for plaintiff. C. T. Callahan, for defendant.

MORTON, J. This is an action of tort to recover for personal injuries caused to the plaintiff by the falling of a stone upon him while employed in the defendant's stone-yard in Holyoke. At the close of the plaintiff's evidence, the presiding judge ruled that the plaintiff could not recover, and directed a verdict for the defendant. The case is here on exceptions to this ruling and direction.

We think that the ruling was right. At the time of the accident, the plaintiff was 18 years old, and had been in the defendant's employ 5 months, learning a stone cutter's trade. On the day of the accident, he was set to work by the defendant on a stone designed for cornice work. The stone weighed about a ton, and was 13 feet long and 10 inches thick, and 13 inches wide on one side, and 9 inches on the other. It was lying on wooden blocks about 2 feet high, and rested on its narrowest side. It did not lie flat, but was tilted up by means of stone chips placed beneath it on the wooden blocks, so as to facilitate the work of cutting. This, as the testimony showed, was the usual and customary way of tilting up a stone on which a workman was engaged. The cutting was along the "nose" or projecting part of the stone, and as it progressed the stone was gradually tilted up. The chips were in about an inch from the edge. The plaintiff had worked on the stone from time to time for four or five days previous to the accident,

and had become familiar with the gradual shaping of it, but was not present when it was last tilted up, or when it was originally set up, which was done under the direction and supervision of the defendant. The plaintiff had previously seen the defendant putting stone chips under stones to tilt them up, and had no reason to think that there was anything else under this. He testified that he knew that if it was not properly propped up he would get hurt, and that he made no effort to inform himself how it was propped up. There was testimony tending to show that when the stone fell the plaintiff had finished working on it for the day, and was leaning over it or upon it, either in the act of picking up some tools which it was a part of his duty to pick up, or in the act of picking up a match to light his pipe with. We think that the chance that the stone might fall as it did was one of the obvious risks assumed by the plaintiff. We also think that he was not in the exercise of due care, and that there was no evidence of negligence on the part of the defendant.

Exceptions overruled.

(184 Mass. 217)

HOAG v. ALDERMAN.(Supreme Judicial Court of Massachusetts.
Hampden. Oct. 20, 1903.)**PARTNERSHIP—COMPENSATION OF PARTNER.**

1. A partner may become entitled to compensation for his services in the work of the partnership if it is of such a nature as to show an expectation or understanding for compensation.

2. Plaintiff and defendant and a third party formed a copartnership for the purchase, management, and sale of real estate, title to which was to be taken in defendant's name. In the receipt given by defendant to plaintiff for his contribution to the capital it was stated that plaintiff was to bear one-third of the expense "in connection with said property." Defendant had charge of the repairs of property purchased, buying material, superintending the work, etc., and also collected rents. On the retirement of the third party it was orally agreed that defendant should receive \$1,500 for his services, of which plaintiff should pay \$500. *Held*, on an accounting between plaintiff and defendant, that the evidence supported a finding that defendant's services were rendered under such circumstances as to create an implied contract to pay for them.

Exceptions from Superior Court, Hampden County; John A. Aiken, Judge.

Bill by Charles E. Hoag against Charles H. Alderman. Decree in defendant's favor, and plaintiff excepts. Exceptions overruled.

Charles E. Hoag, for plaintiff. Clinton Gowdy and John McKean, for defendant.

KNOWLTON, C. J. This is a bill in equity for an account from the defendant as a partner of the plaintiff in the purchase, management, and sale of real estate. The

¶ 1. See Partnership, vol. 38, Cent. Dig. § 131.

only matter now in dispute is whether the defendant is entitled to an allowance of \$500 which the plaintiff agreed to pay him for his services in the care and management of the property. A justice of the superior court heard and decided the case upon facts and evidence contained in a master's report, and the case comes before us upon exceptions taken by the plaintiff to his refusal to give certain rulings.

The court ruled, in accordance with the eleventh request, namely: "That if the defendant chose to do a service which at the time he meant to be gratuitous, or not at the express request of the plaintiff, he cannot recover for such services, even though they are beneficial to the plaintiff;" and refused the sixth and tenth requests, because they were inapplicable to the case; the sixth being that a mere moral obligation is not a sufficient consideration to support even an express promise, and the tenth that a past or executed consideration is not sufficient to create a liability. He also found "that the acts of the defendant, done with the knowledge and consent of the plaintiff, and more or less beneficial to him, were tantamount to a request on his part that the defendant do what he did." He found that this sum should be allowed to the defendant. The finding is, in substance, that the defendant's services were rendered under such circumstances as to create an implied contract on the part of the plaintiff to pay for them. If there was any evidence to warrant this finding, there was no error of law in the refusal to give the rulings requested. It is a familiar rule of law that in an ordinary partnership, in the absence of an express agreement, a partner is not entitled to compensation for services rendered in the business of the firm. This rule is of general application, and is applied with considerable strictness. *Dunlap v. Watson*, 124 Mass. 305. The reason for it is that in what the partner does for the firm's business he is presumed to be acting in his own interest, and, in the absence of an express agreement to the contrary, it is ordinarily expected and implied that each member of the firm will devote himself to the promotion of the interests of the partnership without compensation. It follows that courts, in ordinary cases, will not make a comparison of services rendered by the several copartners for the purpose of determining their value, or whether either of the parties shall receive compensation. This rule is founded on the presumed intent of the copartners in entering into the contract of partnership. Of course, if there is an express agreement for compensation, the agreement is given effect. The partnership may be of such a peculiar kind, and the arrangements and the course of dealing of the partners in regard to it may be such, as pretty plainly to show an expectation and understanding, without an express agreement upon the subject, that certain

services of a copartner should be paid for. Such cases, presenting unusual conditions, are exceptions to the general rule above stated. *Bradford v. Kimberly*, 3 Johns. Ch. 431; *Caldwell v. Leiber*, 7 Paige, 483; *Emerson v. Durand*, 64 Wis. 111-118, 24 N. W. 129, 54 Am. Rep. 593; *Levi v. Karrick*, 13 Iowa, 344; *Lewis v. Moffett*, 11 Ill. 392-399; *Van Housen v. Copeland*, 180 Ill. 74-83, 54 N. E. 169; *Cramer v. Bachman*, 68 Mo. 310; *Godfrey v. White*, 43 Mich. 171, 5 N. W. 243; *Lee v. Davis*, 70 Ind. 464-469. See *Winchester v. Glazier*, 152 Mass. 316, 25 N. E. 728, 9 L. R. A. 424. The real question in each case is, what was the intention and the understanding of the parties? to be derived from their contract of copartnership. An express agreement in regard to compensation shows their intention. In the absence of an express agreement on that subject, the presumption that no compensation is to be allowed precludes compensation, unless the other agreements as to the business to be done and the mode of conducting it show that compensation for certain services was intended. If this intention is doubtful, the subsequent course of dealing and conduct of the parties may be considered in determining whether there is such an implication in favor of the allowance of compensation as is tantamount to an express agreement.

The same principle is applicable to the question whether, after the death of one of the partners, an allowance will be made for services of a surviving partner in closing and settling the business of the firm. While it is a rule that no allowance will be made in such cases, it is held in this commonwealth, as well as elsewhere, that the circumstances may be so exceptional as to warrant giving compensation for personal services. *Robinson v. Simmons*, 146 Mass. 167, 15 N. E. 558, 4 Am. St. Rep. 299; *Dewing v. Dewing*, 165 Mass. 230-231, 42 N. E. 1128; *Thayer v. Badger*, 171 Mass. 279, 50 N. E. 541.

In the present case the question is not whether the finding of the superior court in favor of the defendant was right as a finding of fact, but whether it was wrong in law. It is not a question as to the weight of the evidence, but whether there was any evidence in favor of the defendant. The report shows, in the first place, that the title was to be taken and held in the name of the defendant, whereby he had control of the property as holder of the legal title. Secondly, in the receipt which was given by the defendant to the plaintiff for the money contributed towards the purchase it was expressly stated "that the plaintiff was to bear one-third of the expenses in connection with said property." There were six houses, and it was found that "nearly all of said property was out of repair, and immediately after said purchases said parties commenced to make necessary repairs." These repairs were made with the knowledge, consent, and approval of all parties, there being then a

third joint owner with the plaintiff and defendant, whose share has since been set off, so that he is not interested in this suit. "The defendant had charge of nearly all of these repairs, buying the material and superintending the work." He also collected the rents. These services were of a kind that, if rendered by another person procured by the defendant for the purpose, would have been paid for as a part of the expenses which the plaintiff, by the acceptance of the writing, had agreed to bear in his proper proportion. Afterwards, when an adjustment was made by which McKean, the other joint owner, retired from the enterprise, it was orally agreed by him and the plaintiff and the defendant that the defendant should receive \$1,500 for his services in connection with the property, of which McKean should pay \$500 and the plaintiff should pay \$500; and in the conveyance of a part of the property which was made to McKean he assumed the payment of \$500 upon an outstanding mortgage accordingly. While this agreement of the plaintiff to pay the defendant would not be binding upon him, for want of consideration, if the defendant previously had no claim that could be enforced, and if there was no other than a moral duty of reimbursement (see *Johnson v. Kimball*, 172 Mass. 398, 52 N. E. 386), yet the fact that the three parties agreed upon the payment is important evidence of their original understanding in regard to the meaning of the term "expenses" in relation to such services as the defendant rendered in connection with the property. The partnership was very different from one for the transaction of ordinary business, to which the members of the firm are expected to devote their time and attention. While the ordinary presumption is against the finding of the superior court in this case, and while there is important evidence against the defendant's contention, we are of opinion that the facts stated in the report constitute evidence from which the judge might find as he did.

Exceptions overruled.

(184 Mass. 247)

COOK v. CITY OF SPRINGFIELD.

(Supreme Judicial Court of Massachusetts.
Hampden. Oct. 20, 1903.)

OFFICERS—LICENSE COMMISSIONERS—SERVICES—QUANTUM MERUIT.

1. License commissioners of the city of Springfield, appointed as authorized by St. 1894, c. 428, are public officers, and their appointment does not constitute a contract between them and the city for the payment of their services.

2. St. 1894, c. 428, provides for the appointment of a board of license commissioners of the city of Springfield, and section 6 declares that the city shall pay such board such salaries as the city council may from time to time establish. *Held* that, where the city council failed to establish any salary to be paid for the services of the secretary and chairman of the board of commissioners outside of his service as chairman and secretary, he could not recover therefor on a quantum meruit.

Exceptions from Superior Court, Hampden County; Frederick Lawton, Judge.

Action by William F. Cook against the city of Springfield on a quantum meruit for services. From a judgment in favor of defendant, plaintiff brings exceptions. Overruled.

Alfred S. Hayes and Alvah G. Sleeper, for plaintiff. Henry A. King, for defendant.

LORING, J. The plaintiff was a license commissioner of the city of Springfield under St. 1894, c. 428, for a term beginning June 1, 1896, and ending May 31, 1902. By section 6 of that act it is provided that "each city shall pay its board of license commissioners such salaries as the city council, subject to the approval of the mayor, may from time to time establish," and it is conceded that under that act the license commissioners were to be paid, and were not to serve gratuitously. In October, 1894—nearly two years before the plaintiff's term of office began—the city council of Springfield passed an order that the compensation of the chairman should be \$250 a year, and that the other two members of the board should serve without compensation. In January, 1897—that is to say, in the January succeeding the June when the plaintiff's term of office began—he and his fellow commissioners petitioned the city council to increase the salary of the chairman, and that a salary be paid to the other members of the board, on which the petitioners were given leave to withdraw. A like petition was made by them in April, 1900, with the same result. In June, 1900, the plaintiff was appointed chairman and secretary of the board, and served as such during the remainder of his term; and for the time during which he has served as chairman he has received compensation at the rate of \$250 per annum, but he has received no other compensation. On November 18, 1901, the plaintiff petitioned the city council "to take such action as will result in paying him the annexed bill of \$5,000 for services as a member of the board of license commissioners from January 1, 1896, to June 1, 1901, said bill being at the rate of \$1,000 per year," on which he was given leave to withdraw. On December 23, 1901, the city council passed an order fixing the compensation of the member of the board who acted as chairman and secretary at the rate of \$250 a year, and the compensation of the other two members at the rate of \$5 per annum, these salaries to be the compensation for services rendered from July 2, 1894, to December 31, 1901. On March 21, 1902, the plaintiff brought this action against the city to recover the reasonable value of his services as license commissioner from the beginning of his term to December 1, 1901, outside of his service as chairman and secretary; and he testified that these services were reasonably worth \$5,500, being at the rate of \$1,000 a year. The plaintiff also testified to the character of the services rendered by him, and that he estimated

that he devoted 75 days each year to the work. The defendant tendered the plaintiff compensation at the rate of \$5 per annum, with costs. This was declined. A verdict was ordered for the defendant, and the case is here on an exception to that ruling.

What was said by this court of assessors in *Walker v. Cook*, 129 Mass. 577, 578, is true of license commissioners. In that case Endicott, J., said: "The assessors, therefore, are public officers, in the performance of whose duties the whole community has an interest. Towns have no authority to direct or control them, but all their powers and duties are prescribed and regulated by statute; and, in case they do not perform their duties, the town has no remedy against them. They are not, in any sense, the agents or servants of the town, and the town, by the election of assessors, enters into no contract with them for the payment of their services." The plaintiff was not employed by the defendant city, and has not rendered service at its request for which it has come under a contract, as in the case of a city engineer. *Chase v. City of Lowell*, 7 Gray, 33. See, in addition to *Walker v. Cook*, 129 Mass. 577, *Sikes v. Hatfield*, 13 Gray, 347; *Farnsworth v. Melrose*, 122 Mass. 268. The plaintiff has been appointed to a public office, which, by an act of the Legislature, is to be filled by an appointment of the mayor of the defendant city, and whose compensation the Legislature has directed the city council of the defendant city to fix and the defendant city to pay. If that compensation is not fixed, the law would issue its writ of mandamus requiring the city council to perform its duty and fix it (*Attorney General v. Lawrence*, 111 Mass. 90; *Attorney General v. Boston*, 123 Mass. 460), and, when fixed, if it was not paid, the law would give him an action to recover it, not by reason of a contract, express or implied, in fact between the plaintiff and the city, but by reason of the statute which makes it its duty to make that payment (*Walker v. Cook*, 129 Mass. 577, 579). The plaintiff's contention comes to this: Where a public office is created, and the compensation to be paid for services rendered by the incumbent of the office is to be fixed by a public body, the omission of that body to perform its duty transfers that duty to the court. It is hardly necessary to say that this is not so.

Exceptions overruled.

(184 Mass. 245)

MANNING v. CITY OF SPRINGFIELD.

(Supreme Judicial Court of Massachusetts.
Hampden. Oct. 20, 1903.)

MUNICIPAL CORPORATIONS—SEWERS—DEFECT IN SYSTEM—LIABILITY OF CITY—EVIDENCE.

1. Where, in an action against a city for damages arising from water coming on plaintiff's premises through a city sewer, there was no evi-

dence that the sewers were defective in construction, or obstructed or out of repair, and nothing to show that they were established otherwise than by persons acting as public officers under the statute, and the proof tended to show that the defect, if any, in the sewers, was in the system, which failed to carry off immediately a great accumulation of water, due to a heavy rainfall, plaintiff could not recover.

Exceptions from Superior Court, Hampden County; Albert Mason, Judge.

Action by Mary Manning against the city of Springfield. There was a verdict for defendant, and plaintiff brings exceptions. Exceptions overruled.

Jas. L. Doherty and W. G. Brownson, for plaintiff. Henry A. King, for defendant.

KNOWLTON, C. J. This is an action of tort, to recover for injuries to the plaintiff's real estate from water that came in upon it on two occasions, through the drain pipe connected with the sewer, and from the street, proceeding from the sewer out through a manhole in front of the plaintiff's house. The drain pipe had an opening into the plaintiff's yard, which was considerably below the level of the street, and into two sinks in the lower tenements of the building. The plaintiff's drain had been connected with the sewer since 1878 or 1879, but no water had ever come back through it until these occasions, the first of which was in March, 1901. At these times there was, for a few hours, a very heavy fall of rain—some of the witnesses said, heavier than had ever been known before. The ground was then frozen, and the sewers all over the city were heavily charged with water. There was no evidence that the sewer in front of the plaintiff's house, or the sewers connected with it, were defective in construction, or obstructed or out of repair, and there was no evidence that any of these sewers was authorized or established otherwise than by tribunals whose members acted as public officers under the statutes. The evidence all tended to show that the defect in the sewers, if there was a defect, was in the system, which did not carry off immediately so great and rapid an accumulation of surface water as came at these times. For this system the city, in its corporate capacity, was not responsible, for it was established by officers acting judicially under the authority of law. It has often been decided that for faults or imperfections in its system of sewers a city or town is not liable, although it is liable for negligence in the work of construction or in the maintenance or repair of sewers. *Child v. Boston*, 4 Allen, 41, 81 Am. Dec. 680; *Merrifield v. Worcester*, 110 Mass. 216-221, 14 Am. Rep. 592; *Buckley v. New Bedford*, 155 Mass. 64, 29 N. E. 201; *O'Brien v. Worcester*, 172 Mass. 348-353, 52 N. E. 385; *Hewett v. Canton*, 182 Mass. 220-244, 65 N. E. 42; *Johnston v. District of Columbia*, 118 U. S. 19, 6 Sup. Ct. 923, 30 L. Ed. 75. Under this rule, upon

¶ 1. See *Municipal Corporations*, vol. 36, Cent. Dig. §§ 1779, 1780.

the evidence before the court, the presiding justice rightly directed a verdict for the defendant.

Exceptions overruled.

(184 Mass. 204)

DOOLEY v. GREENFIELD & T. F. ST. RY. CO.

(Supreme Judicial Court of Massachusetts.
Franklin. Oct. 20, 1903.)

STREET RAILROADS—INJURIES TO PEDESTRIANS—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

1. In an action to recover for the death of plaintiff's intestate, who was run over by one of defendant's street cars, evidence held to show that, though deceased stepped between the rails to avoid travelers approaching him on the street, he was guilty of negligence in not stepping off the track, and out of the way of the car approaching him from the rear, and the evidence was therefore insufficient to take the case to the jury.

Exceptions from Superior Court, Franklin County; Lemuel Le B. Holmes, Judge.

Action by Matthew Dooley, as administrator of the estate of Michael Dooley, deceased, against the Greenfield & Turners Falls Street Railway Company. From a judgment in favor of defendant, plaintiff brings exceptions. Overruled.

Winn & Griswold and A. L. Green, for plaintiff. Dana Malone, for defendant.

BARKER, J. The plaintiff's intestate was run over and dragged along the ground for some distance by one of the defendant's street cars on September 12, 1902, and was dead when picked up. The action was for negligently causing his death. The motor-man of the car and three passengers testified that the deceased was lying on the track between the rails when first seen by them, and that he lay motionless until struck and dragged by the car almost instantly after he first became visible to them, and there was no evidence to contradict this testimony. The evidence which the plaintiff contends should have been submitted to the jury upon the question whether the deceased came to his death while in the exercise of due care was that of four persons who testified that they were riding upon the highway in wagons drawn by horses, and of one person who was riding a bicycle, all going in the direction opposite to that of the deceased and of the street car, and that shortly before the accident they met the deceased walking in the highway in the opposite direction to that in which these witnesses were going. This evidence, if believed, would justify an inference that when seen by these witnesses the deceased was walking along the highway towards his home. Three of these witnesses testified that they were in one wagon, and this wagon was the earlier of the two to meet the deceased. The bicyclist was alone, and met the deceased after the meet-

ing between him and the first wagon. The other of these witnesses testified that he was alone in a wagon which rattled and made much noise, and that he was driving at the rate of eight or nine miles an hour. The highway was 55 feet wide, with the car track within its limits, and south of its center line. North of the center line was a macadam driveway, 26 feet wide. At the place where the deceased was struck, a pathway made smooth by the use of foot travelers and bicyclists ran along between the rails of the car track. According to the testimony of the witnesses who testified that they were in the first wagon, the defendant, when seen by them, was walking next to the inside rail of a curve, and on the outside of the rail next to the highway. The bicyclist testified that the deceased was walking outside of the rails when he first saw him, and that the deceased stepped between the rails to get out of the way of the bicycle. The witness who testified that he was riding in the second wagon testified that the deceased was walking between the rails. The night was cloudy, with a strong wind, which blew in the direction opposite to that in which the car was moving, and which made a great noise in the trees. Neither of the witnesses who testified to meeting the deceased walking saw anything of the accident, or knew until the next day that an accident happened. The plaintiff admits that when the deceased was met by the first wagon the car was more than half a mile away, and that it was not in sight when the deceased was met by the bicyclist. The witness who testified that he rode in the second wagon testified that when he passed the deceased the car was from 20 to 30 feet away from the deceased, and that the witness did not see the car stop, and did not stop himself, and that the deceased was walking along, looking ahead, and did not turn his head either way to right or left. He also testified that he said nothing to the deceased, and did not warn him that the car was coming, or say anything to him whatever; that he did not stop to see if any accident happened, because he did not think there would be any; that he supposed the deceased would get off the track. Unless it was competent for the jury to find from the evidence that the deceased did for his own safety what ordinarily careful persons are accustomed to do under like circumstances, the verdict for the defendant was ordered rightly, because of the plaintiff's failure to show that his intestate was in the exercise of due care. Assuming that the jury might find, against the testimony of the four witnesses who swore that they saw the deceased lying on the track between the rails, that he was walking between the rails to avoid a wagon approaching him in front, and that when the wagon passed him the car was approaching him from behind, and was only 20 or 30 feet distant, under such circumstances an ordinarily careful person

would step off the track, and out of the way of the car, as the witness who testified that he saw the deceased in such circumstances testified that he expected him to do. There was no testimony that the deceased was so walking when struck by the car, and, even if it could be so inferred, no reason consistent with his due care for his continuance upon the track could be drawn, except by conjecture. In our opinion, there was no sufficient evidence to justify the submission of the case to a jury. See *Hillyer v. Dickinson*, 154 Mass. 502, 28 N. E. 905; *Brooks v. Old Colony R. Co.*, 168 Mass. 164, 64 N. E. 566.

Exceptions overruled.

(184 Mass. 233)

LODGE et al. v. FLETCHER et al.

(Supreme Judicial Court of Massachusetts.
Hampden. Oct. 20, 1903.)

MUNICIPAL CORPORATIONS—INVESTIGATION
BY LEGISLATIVE BODY OF CITY
—PROHIBITION.

1. The court will not issue a writ of prohibition to prevent the aldermen of the city, as the legislative department thereof, from proceeding to hear evidence which may be voluntarily laid before them, showing misconduct on the part of any officer of the city, to the end that they may take proper action to prevent the continuance of any misconduct, but without assuming authority to take action directly against any such officer.

Report from Supreme Judicial Court,
Hampden County; Hammond, Judge.

Petition for a writ of prohibition by Joseph T. Lodge and another against Samuel E. Fletcher and others, aldermen of the city of Chicopee. Case reserved for full court. Petition dismissed.

C. T. Callahan, for petitioners. L. E. Hitchcock, City Sol., for respondents.

KNOWLTON, C. J. This is a petition for a writ of prohibition to restrain the defendants, members of the board of aldermen of Chicopee, from proceeding with a hearing or investigation of conduct of the petitioners as members of the licensing board of said city, appointed under the provisions of Rev. Laws, c. 100, § 3. The case was heard before a single justice upon the petition, answer, and an agreed statement of facts; and, after ruling that a writ of prohibition should not issue, he reserved the case for the full court. All the averments of matters of fact contained in the pleadings are agreed to be true. It appears that the board of aldermen passed an order that they "enter upon an investigation in reference to the granting of junk dealers' licenses and other matters during this and preceding years," and provided for the summoning of witnesses and the attendance of the city solicitor, and, in the order, gave authority to persons summoned as witnesses to be represented by counsel. The petitioners and many other persons were summoned as witnesses, and the hearing was

begun. Numerous affidavits had previously been filed with the board of aldermen in relation to the granting of licenses to junk dealers, some of them setting forth the payment of money to secure such licenses. Three other affidavits had been filed, referring to conduct of one, at least, of the petitioners, in reference to the granting of liquor licenses. In regard to the investigation as to the granting of junk dealers' licenses no question is made. After testimony had been received in regard to that subject, a witness was asked a question as to liquor licenses, and he refused to answer. Without further action, or apparent attempt at action, the aldermen adjourned the investigation, and this petition was brought. It appeared by the averments of the answer that the respondents never assumed jurisdiction over the petitioners, nor intended to assume such jurisdiction; that no charges were formally preferred against the petitioners or against any officers of the city, although some of the affidavits already referred to implied improper conduct on the part of one or more of them, and no persons were summoned before the aldermen except as witnesses. The respondents "admit that they have no authority to deal with or to take action directly against, or to exercise any authority over, said petitioners, as members of the board of license commissioners, and that they have no authority to compel witnesses to attend and testify before said board relative to any action of said petitioners as members of said board of license commissioners." They aver that it was their privilege and duty, as the only representative legislative body in the city, to receive any evidence which might be voluntarily laid before them that may tend to show misconduct on the part of any officer of the city, to the end that they may take proper action to prevent the continuance of such misconduct, if any is found to exist. Upon these facts, it is plain that the court ought not to issue a writ of prohibition. Such a writ can only issue to prevent improper judicial action. It appears that the respondents are not acting judicially, or assuming authority to pronounce any judgment which will affect the rights of anybody. The aldermen of Chicopee, under the charter of the city, are a legislative body, constituting the entire legislative department of the city. St. 1897, p. 191, c. 239, § 2. It can act judicially only for certain specified purposes, under the laws. It cannot act judicially in such an investigation as was proposed. There is therefore no ground on which the writ can be issued. *Washburn v. Phillips*, 2 Metc. 296; *Connecticut River Railroad v. County Commissioners*, 127 Mass. 50-53, 34 Am. Rep. 338; *Inhabitants of Hyde Park v. Wiggins*, 157 Mass. 94-99, 31 N. E. 693; *Smith v. Whitney*, 116 U. S. 167, 6 Sup. Ct. 570, 29 L. Ed. 601; *In re Radl*, 86 Wis. 645, 57 N. W. 1105, 39 Am. St. Rep. 918; *Ex parte Death*, 18 Q. D. 647; *Re Local Government Board*, 16 Ir. L. R. 150. How far

and with what effect the investigation can proceed upon testimony voluntarily offered, it is not necessary in this case to consider.

Petition dismissed.

(184 Mass. 210)

BASSETT v. FIDELITY & DEPOSIT CO.

(Supreme Judicial Court of Massachusetts.
Hampshire. Oct. 20, 1903.)

EXECUTORS—BOND—LIABILITY OF SURETY—EXECUTOR'S INDEBTEDNESS TO TESTATOR.

1. The surety on the bond of an executor, whose insolvent firm was indebted to the testator, and which firm continued in business for over a year after the death of the testator, was liable for the amount of the indebtedness.

2. The surety on the bond of an executor indebted to the testator cannot set up in defense to his liability therefor that no demand was made for the payment of the debt, it being the duty of the executor to make the demand, and the executor not being permitted to say that he could make no demand on himself.

3. An executor who is negligent in failing to account for the amount due from his firm to the testator is chargeable with interest from the date of the testator's death.

4. In an action against a surety on an executor's bond, when the executor is chargeable with more than the penalty of the bond, plaintiff is entitled to interest on the penal sum from the date of the writ.

Exceptions from Superior Court, Hampshire County; Elisha B. Maynard, Judge.

Action on a probate bond by one Bassett against the Fidelity & Deposit Company, the surety thereon. Judgment for plaintiff affirming the findings of an assessor directed to find the amount for which execution should issue, and defendant brings exceptions. Exceptions overruled.

John C. Hammond and Henry P. Field, for plaintiff. Peabody & Arnold, for defendant.

LORING, J. The principal exception of the defendant corporation is to the refusal of the court to recommit the case to the assessor to take evidence as to the insolvency of the executor and of the firm of which he was a member at the date of the testatrix's decease. The contention which has been made in support of this exception is that the obligation of a surety on an executor's bond goes no farther than to guaranty that the executor will lawfully administer the assets of the testatrix which had an existence in fact, and which came to his hands or knowledge, and that it is beyond the scope of such a bond to create assets which the testatrix never had by making the surety guaranty debts due from insolvent creditors; and for that reason it cannot be made liable for the full amount of the notes held by the testatrix made by the executor's insolvent firm. But there is another side to the case. An executor or administrator is appointed for the sole purpose of enforcing in behalf

of those interested in the estate the rights of the estate against others. When the estate has a claim against the executor or administrator himself, he is incapacitated from performing that duty and taking to himself that office. For that reason, on broad principles of policy, it was laid down by the common law of England that he must yield all controversy as to the debt due from himself, and treat it as an asset of the estate. No one is bound to accept the office, and if he elects to do so he thereby tacitly assents to this condition. The common law did not allow him to accept the office and keep his rights in a controversy when his duty and his personal interest were in a direct conflict. To allow him to accept the office, and then to settle the amount which the creditors and others interested in the estate would have got had he not taken the office but had allowed some disinterested person to be appointed to enforce these rights, would not be doing justice to those whose rights the law undertakes to preserve. Take the case at bar as an example. The executor's firm was going on with its business when the testatrix died, and went on in business for some 14 months after that time. The law could hardly be said to have fully preserved the rights of those interested in the estate if it allowed this creditor of the estate to accept an office where it became his duty to collect the amount due from his own firm by pressing for payment, and after 14 months of inaction on his part to settle the rights of the beneficiaries by a judicial inquiry as to what would have happened had a disinterested person been appointed to perform the duty owed to these beneficiaries. But it is not necessary to discuss the question further. It is concluded by authority in this commonwealth. The rule was originally laid down in 1814 in *Stevens v. Gaylord*, 11 Mass. 256. The history of the rule and the cases, both in England and in this country, are given in *Winship v. Bass*, 12 Mass. 199, and in *Tarbell v. Jewett*, 129 Mass. 457. The rule is one of general application, and has been held to be applicable not only in case of executors and administrators, but also in case of assignees in insolvency (*Benchley v. Chapin*, 10 Cush. 173), guardians (*Mattoon v. Cowing*, 13 Gray, 387), and receivers appointed to wind up insolvent corporations (*Commonwealth v. Gould*, 118 Mass. 300). It has been recognized and applied in the following cases in addition to those cited above: *Hobart v. Stone*, 10 Pick. 215; *Kinney v. Ensign*, 18 Pick. 232; *Ipswich Mfg. Co. v. Story*, 5 Metc. 310; *Sigourney v. Wetherell*, 6 Metc. 553; *Willey v. Thompson*, 9 Metc. 329; *Chenery v. Davis*, 16 Gray, 89; *Leland v. Felton*, 1 Allen, 531; *Chapin v. Waters*, 110 Mass. 195; *Hazleton v. Valentine*, 113 Mass. 472; *Choate v. Arrington*, 116 Mass. 552; *Pettee v. Peppard*, 120 Mass. 522; *Martin v. Smith*, 124 Mass. 111; *Choate v. Thorn-*

¶ 3. See *Executors and Administrators*, vol. 22, Cent. Dig. § 2385.

dike, 138 Mass. 351; *Stetson v. Moulton*, 140 Mass. 597, 5 N. E. 809. And, finally, it was held in *Leland v. Felton*, 1 Allen, 531, that an executor should be charged with the full amount of notes belonging to the testator made by a firm of which he was a partner, although it was insolvent when the testator died, as well as with the full amount due on notes made by himself, who also was insolvent at that time. The defendant in the case at bar asks us to hold that, although an insolvent executor is to be charged with the debt due from him, the sureties on his bond are not to be held liable therefor. But that is out of the question. That contention flies directly in the face of the elementary principles governing the effect of a decree allowing a probate account and the elementary principles as to the obligation of a surety on a probate bond. In the first place, a decree of a probate court allowing an account of an executor or other official is binding on all interested in the estate, including sureties on the bond of the accountant. If there is error, the error must be corrected in the probate court, as it may be if there was fraud, or if the party in question had not such notice as to be concluded by the decree. *Jennison v. Hapgood*, 7 Pick. 1, 19 Am. Dec. 258; *Sever v. Russell*, 4 Cush. 513, 50 Am. Dec. 811; *Parcher v. Russell*, 11 Cush. 107. It is settled that a surety on a probate bond is a party interested in the accounts of the principal, and for that reason has a right of appeal to the Supreme Judicial Court. *Farrar v. Parker*, 3 Allen, 556. In the second place, the obligation of a surety on a probate bond is the obligation of the principal. The bond is a joint bond, and the judgment necessarily must be the same against both. This is more than a technical rule of law; it is a place where the true character of a surety's liability comes to the surface. The ground on which it was held that a surety has a right of appeal in such a case was that the decree settling the account of the principal, "if once properly established, fixes the amount of liability of the sureties on their bond." *Farrar v. Parker*, 3 Allen, 556, 558. And *Endicott, J.*, in *Tarbell v. Jewett*, 129 Mass. 457, 468, speaking of *Leland v. Felton*, 1 Allen, 531, said that it was held that the executor would be charged for his own notes and for the notes of his firm held by the testator, although both he and the firm were insolvent, "which, of course, rendered his sureties liable." Again, in *Choate v. Arrington*, 116 Mass. 552, 556, *Wells, J.*, said: "The surety is liable for whatever is properly chargeable to his principal in the official capacity on account of which the bond was given." To the same effect, see *Ames, J.*, in *Chapin v. Waters*, 110 Mass. 195, 197. It is apparent that this was assumed to be the case in *Leland v. Felton*. In that case the executor had resigned, and the plaintiff, *Leland*, had been appointed administrator with the will annexed *de bonis non*. The

main contention of the defendant, *Felton* (the executor who had resigned), was that the debt due the testator was suspended, not extinguished, by his being executor; that it was revived by his resignation; and that the remedy of the administrator was an action on the notes against him and his partners, in which he could recover a personal judgment, but that he could not be charged with the amount by the probate court in his executor's account. If the liability of the surety was different from that of the executor, there was no possible object in this defense. The sole purpose of the defense was to protect the sureties, and from an examination of the court records it appears that after the decision in *Leland v. Felton*, 1 Allen, 531, judgment was recovered in an action brought against the principal and sureties in the Supreme Judicial Court in the October Term, 1863, no defense being interposed by the sureties. It further appears from an inspection of the records of the probate court that several payments were made on account of that judgment by one of the sureties. The defendant's request, therefore, is a request that we overrule the case of *Leland v. Felton*, 1 Allen, 531. But after a careful consideration of *Baucus v. Stover*, 89 N. Y. 1; *Same v. Barr*, 45 Hun, 582, affirmed in 107 N. Y. 624, 13 N. E. 939; *Lyon v. Osgood*, 58 Vt. 707, 7 Atl. 5; *Garber v. Commonwealth*, 7 Pa. 265; *McCarty v. Frazer*, 62 Mo. 263; *State v. Gregory*, 119 Ind. 503, 509, 22 N. E. 1; *Harker v. Irick*, 10 N. J. Eq. 269; *Spurlock v. Earles*, 8 Baxt. (Tenn.) 437—cited and relied on by the defendant, we are of opinion that, for the reasons given, the true rule was laid down in *Leland v. Felton*, and that it is now too late to question the practice which was then adopted, and has been in force for over 40 years.

There is nothing in the other points taken by the defendant in defending its liability. There was evidence which warranted the finding made by the assessor that the sums advanced by her resulted in a debt due to the testatrix, the time for payment of which had arrived. Even if a demand had been necessary, the defendant cannot set up that no demand was made, as he seeks to do. It was his duty, as executor, to make a demand, and he could not set up that he could not make a demand on himself. See *Stevens v. Gaylord*, 11 Mass. 256, where *Jackson, J.*, says: "In the case of his own debt, which he admits to be due, it is obvious that he can never prove a demand and refusal." In the case at bar there was a breach of the bond in failing to account, an agreement for judgment in favor of the plaintiff, and the case was sent to an assessor to fix the amount for which execution should issue. He charged the executor with interest on the demand notes of his firm, amounting to \$18,453, and with interest on \$3,500, the value of the Glendale stock, with annual rests, at 6 per cent., to the date of his report; and, as this sum exceeded the penal sum of

the bond, he reported that execution should issue for the penal sum of the bond, with interest from the date of the writ. The superior court directed that execution should issue for the full amount of judgment and interest from the date of the rendition thereof. The defendant contends that in contemplation of law these two sums have been in the hands of the executor since the death of the testatrix, and that on the authority of *Wyman v. Hubbard*, 13 Mass. 232, *Stearns v. Brown*, 1 Pick. 530, *Boynton v. Dyer*, 18 Pick. 1, 7, an executor is not chargeable with interest on funds in his hands. But the rule laid down in the last of those cases is that an executor is not chargeable with interest "except where they actually receive it, or make some profitable use of the funds, or are guilty of negligence in accounting for them." This defendant was guilty of negligence in not accounting for these two amounts.

It appears that the parties made an agreement that judgment might be entered for the penal sum of the bond, but it would seem from the record before us that no judgment has in fact been entered. The plaintiff is at least entitled to judgment for interest on the penal sum of the bond from the date of the writ (*Harris v. Clap*, 1 Mass. 308, 2 Am. Dec. 27; *Pitts v. Tilden*, 2 Mass. 118; *Warner v. Thurlo*, 15 Mass. 154; *Brighton Bank v. Smith*, 12 Allen, 243, 90 Am. Dec. 144), and the amount of that judgment bears interest. We understand that the superior court's order was intended to be made in conformity with this. On a judgment being entered nunc pro tunc, execution may issue as ordered by the superior court.

Exceptions overruled.

(184 Mass. 196)

COMMONWEALTH v. CONLIN.

(Supreme Judicial Court of Massachusetts.
Berkshire. Oct. 19, 1903.)

CRIMINAL LAW—DRUNKENNESS—DEFENSES— PRIVACY—APPEAL—LEGALITY OF ARREST.

1. Under Rev. Laws, p. 1791, c. 212, § 39, providing that a person guilty of "drunkenness by the voluntary use of intoxicating liquor" shall be punished, the fact that defendant was drunk in a private dwelling house, where she made no disturbance, and was not exposed to public view, was no defense.

2. Where the record on appeal from a conviction for drunkenness showed that defendant was regularly brought before the superior court by virtue of a complaint issued by such court, the fact that she was arrested without a warrant before such complaint was issued, and whether her arrest was legal or illegal, was immaterial.

Exceptions from Superior Court, Berkshire County; Wm. Schofield, Judge.

Anna Conlin was convicted of drunkenness, and she brings exceptions. Overruled.

John F. Noxon, Dist. Atty., for the Commonwealth. P. J. Moore, for defendant.

KNOWLTON, C. J. At the trial upon this complaint for drunkenness the defendant offered no evidence, but requested the court

to rule "that upon all the evidence the defendant could not be convicted." The court refused so to rule, and instructed the jury "that if they were satisfied upon all the evidence that the defendant, when found in this room, was drunk by the voluntary use of intoxicating liquor, she might be convicted under this complaint." To the refusal and to the instruction an exception was taken. The evidence tended strongly to show that the defendant was very much intoxicated by the use of whisky at the time of the original arrest, although she was lying upon a couch, and was making no noise or other disturbance. The exception presents the question whether one can be convicted of drunkenness in a private dwelling house, where he is making no disturbance, and is not exposed to public view. This question is answered by the language of Rev. Laws, p. 1791, c. 212, § 39. The offense made punishable by this section is "drunkenness by the voluntary use of intoxicating liquor," and the place where the offense is committed, whether public or private, is not an element to be considered in determining whether an accused person is guilty under the law. None of the cases relied on by the defendant bear upon the construction of this statute.

The defendant contends that her arrest without a warrant was illegal, and that, therefore, she could not be convicted upon the complaint. The legality or illegality of the arrest does not in any way affect the offense with which she was charged in the complaint. In *Com. v. Tay*, 170 Mass. 192, 48 N. E. 1086, it was held that the superior court has jurisdiction on appeal to try upon a complaint for being an idle and disorderly person one arrested without a warrant, whether his arrest was legal or illegal. So here, if the defendant was regularly brought before the court to answer to a complaint for drunkenness which had been duly made and received, it was immaterial upon the question of her guilt whether she had been arrested legally or illegally, or arrested at all, before the complaint was made. The record shows that she was "brought before said court by virtue of a complaint in due form of law, issued by said court," etc., and nothing in the record indicates that any question of jurisdiction was raised either before the district court or before the superior court. Although the warrant is not set out in the record, we infer that a warrant was duly issued and served. Inasmuch as the warrant is merely the process by which the defendant is brought before the court, it is not the usual practice to send to this court a copy of it, where the jurisdiction is not questioned. Upon the whole record, we must assume that the court had jurisdiction. At the trial no request was made, and no instruction was given, and, so far as we can see, no question was raised, in regard to jurisdiction. The only question was whether the evidence warranted a conviction of the offense charged.

Exceptions overruled.

(204 Ill. 32)

CITY OF MT. VERNON v. EVANS & HOWARD FIRE BRICK CO.

(Supreme Court of Illinois. Oct. 21, 1903.)

STATUTES — LOCAL LAWS — APPLICATION OF GENERAL LAWS — REVIEW BY COURTS — SPECIAL ACTS — REPEAL — IMPLICATION.

1. Whether a general law can be made applicable in any case in which local or special legislation is not expressly prohibited, is a question within the discretion of the General Assembly, and is not subject to review by the Supreme Court.

2. The mere fact that the operation of Act May 15, 1903 (Laws 1903, p. 144), fixing the times for the holding terms of the circuit court in Jefferson county, is limited to that county, does not render the act objectionable as a special enactment.

3. Under Const. 1870, art. 6, § 14, providing that the General Assembly shall provide for the time of holding court in each county, which shall not be changed except by the General Assembly next preceding the general election of the judges of said courts, the Legislature had power to pass Act May 15, 1903 (Laws 1903, p. 144), fixing the time of holding courts in Jefferson county, and limit its effect to such county.

4. Since Act May 15, 1903 (Laws 1903, p. 144), fixing the time of holding courts in Jefferson county, is a complete, independent, and original act, it operates to repeal prior acts regulating such subject, though it contains no express words of repeal.

Appeal from Circuit Court, Jefferson County; P. A. Pearce, Judge.

Action by the Evans & Howard Fire Brick Company against the city of Mt. Vernon. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Geo. H. Stein and Wm. C. Blair, for appellant. Albert Watson, for appellee.

BOGG, J. In this, an action of assumpsit instituted in the circuit court of Jefferson county by the appellee company against the appellant city, judgment in the sum of \$42.50 and costs of the suit was entered against the city at a term of the circuit court begun and holden in said county of Jefferson on the second Monday in the month of July, 1903. This appeal prosecuted to reverse that judgment presents for determination but a single question, which is whether an act of the General Assembly approved May 15, 1903, purporting to fix the times for holding a term of the said circuit court in the said county of Jefferson on said second Monday of July in each year, and also on the second Monday in the months of January, April, and October in each year, is a valid enactment. The act is as follows: "An act to fix the time of holding the circuit courts in the county of Jefferson. Section 1. Be it enacted by the people of the state of Illinois, represented in the General Assembly: That the circuit court shall, after the taking effect of this act, be held in the county of Jefferson, as follows: On the second Monday of January, the second Monday of April, the second Monday of July and the second Monday of October of each year: pro-

vided, there shall be no jurors summoned for the July terms of court in said county, unless by special order of the judge of said court." Laws 1903, p. 144. The insistence of the appellant city is the act is a local or special law, and for that reason void. Section 22 of article 4 of the Constitution of 1870 provides the General Assembly shall not adopt a local or special statute in certain specified cases enumerated in the section. The time for holding terms of the circuit courts in the different counties of the state is not among such specified cases or enumerated subjects, but the section further provides that the General Assembly shall pass no local or special laws in any cases other than those specified, where a general law can be made applicable, and the argument is a general law could have been made applicable, and that hence the act under consideration should be declared invalid. Whether a general law can be made applicable in any case in which local or special legislation is not expressly prohibited is a question committed to the judgment and discretion of the General Assembly, and the conclusion reached by the lawmaking body is not subject to be reviewed by this court. *Owners of Land v. People*, 113 Ill. 296. However, the mere fact the act is restricted in its operation to the county of Jefferson does not necessarily determine that it is a special enactment. A statute may be general and yet be operative only in a particular locality. *West Chicago Park Commissioners v. McMullen*, 134 Ill. 170, 25 N. E. 676, 10 L. R. A. 215. Section 14 of article 6 of the Constitution of 1870 provides (to quote therefrom): "The General Assembly shall provide for the time of holding court in each county, which shall not be changed except by the General Assembly next preceding the general election for judges of said courts." Under this constitutional provision it is clearly within the legislative province to provide for the time of holding court "in each county" by a separate enactment applicable to a single county. The act in question was adopted by the General Assembly next preceding the general election for judges of the circuit courts in all of the circuits of the state. A prior statute, adopted May 9, 1903 (Laws 1903, p. 144), provided for the holding of terms of the circuit court in Jefferson county at different times than as fixed by the latter enactment. The later act is not amendatory of the former, but revises the whole subject of the prior act, and is within itself a complete, independent, and original act. It was clearly the legislative intent the later act should be a substitute for the prior one. It operated to repeal the prior act, although express words of repeal are not employed, and constitutes the subsisting legislation relative to the times of holding the different terms of circuit court in Jefferson county. *People v. Board of Education*, 166 Ill. 388, 46 N. E. 1099; *Culver v. Third National Bank*, 64 Ill. 528.

The judgment is affirmed. Affirmed.

¶ 1. See Constitutional Law, vol. 10, Cent. Dig. § 130.

(184 Mass. 279)

NASHUA RIVER PAPER CO. v. COMMONWEALTH.(Supreme Judicial Court of Massachusetts.
Worcester. Oct. 31, 1903.)**EMINENT DOMAIN—METROPOLITAN WATER
SUPPLY ACT—INJURY TO BUSINESS
—DAMAGES—WHEN AWARDED.**

1. The metropolitan water supply act (St. 1895, p. 1418, c. 488, § 14), which authorizes damages to be assessed by the water commission when real estate is taken for the reservoir, when land is entered on and used, when real estate is injured by the taking of the waters of Nashua river, when real estate not taken, situated in the towns of Boylston and certain parts of Clinton, is decreased in value by the doings of the water board, and when one owning an established business on land in the town of West Boylston, whether the land is taken or not, deems that his business is decreased in value by the act of the board, and which directs the commissioners to determine the "damages to, and value of, real estate, machinery and business," does not authorize an award of damages to a business not carried on within the prescribed limits.

Exceptions from Superior Court, Worcester County; John W. Hammond, Judge.

Petition by the Nashua River Paper Company for the recovery of damages caused by the metropolitan water board, acting under the metropolitan water supply act. Case reserved for the determination of petitioner's right to recover for the loss of profits resulting from a temporary interruption of its business caused by the taking of land by the board. Judgment for the commonwealth.

Charles M. Thayer, for petitioner. Ralph A. Stewart and Frederic B. Greenhalge, Asst. Atty. Gen., for the Commonwealth.

KNOWLTON, C. J. The only question reserved for our consideration is "whether the petitioner was entitled to have the loss of profits, resulting from a temporary interruption of its business caused by the taking, considered by the commission in making its award." We understand this to refer to the damage to business, as distinguished from the diminution in rental value of the property, caused by temporary conditions affecting the uses to which it was adapted, including its use in the business then carried on upon it. Such a diminution, although only temporary, is paid for in assessing damages to property caused by a taking, under statutes in the common form. *Bailey v. Boston & Providence Railroad Company*, 182 Mass. 537, 66 N. E. 203; *Boston Belting Company v. Boston (Mass.)* 67 N. E. 428.

The petitioner contends that it is entitled to damages to its real estate by reason of the peculiar provisions of St. 1895, p. 1418, c. 488, § 14, under which the assessment is made. This section mentions five classes of cases in which damages may be assessed under it: First, when real estate is taken for the reservoir; second, when real estate is entered upon and used; third, when real estate is injured by the taking of the waters of Nashua

river, whether the real estate is within or without the commonwealth; fourth, when real estate not taken, situated in the town of West Boylston or in specified parts of the towns of Boylston and Clinton, and not owned by the owner of the Lancaster Mills, is directly or indirectly decreased in value by the legislative act or the doings of the water board thereunder; fifth, when one owning an established business on land in the town of West Boylston, whether the land is taken or not, deems that his business is decreased in value, by the loss of custom or otherwise, by the carrying out of the legislative act.

This petition presents a case of the third class. The petitioner's contention rests upon the provision that the commission appointed "shall determine the damage to and value of real estate, machinery, and business;" and the precise question is whether the damage to business is to be determined in all classes of cases in which assessments are made under this section, or only in those classes in which there is a provision for the allowance of damages to business, apart from the use of the word "business" in the provision just quoted. Under sections 12 and 13 of this chapter, owners of property may recover damages caused "by any taking of property or by any change of grade, alteration or discontinuance of any railroad or public way, or by the construction or maintenance of any reservoir or other work, or by interference with the use of any water, or by any act or thing done by said board under this act." These damages are to be determined by a jury in the superior court "in the same manner as damages for lands taken for highways are determined." Property owners are to be compensated for damages caused by a variety of specified acts, and for damages caused by any other act of any kind under the statute. The rule stated includes damages to property no part of which is taken, if the damages are direct and proximate, as distinguished from remote and consequential, and if they are special and peculiar, as distinguished from general and public. *Rev. Laws, c. 48, § 15; Sheldon v. Boston & Albany Railroad Company*, 172 Mass. 180, 51 N. E. 1078; *Putnam v. Boston & Providence Railroad Company*, 182 Mass. 351, 65 N. E. 790. If an assessment is made under these sections, no damages can be allowed for loss in a business as distinguished from the diminution in value of the real estate where the business is conducted. *New York, New Haven & Hartford Railroad Company v. Blacker*, 178 Mass. 386, 59 N. E. 1020; *Bailey v. Boston & Providence Railroad Company*, 182 Mass. 537, 66 N. E. 203; *Boston Belting Company v. Boston (Mass.)* 67 N. E. 428. The first three classes of cases mentioned in section 14 are included in sections 12 and 13, and if the contention of the petitioner is correct, a property owner whose land has been taken or entered upon, and used or injured by the taking of the waters, may recover

damages to his business if he brings his petition under section 14, while no such damage can be allowed him if he brings his petition under sections 12 and 13. It cannot be supposed that the Legislature intended to prescribe one rule of damages for a property owner who brings his suit in the superior court, and a different rule for the same injury if he brings his petition for the appointment of a commission in the Supreme Judicial Court. In either mode of proceeding, if either party desires it, the assessment is ultimately to be made by a jury. See section 15. *Sawyer v. Com.*, 182 Mass. 245-249, 65 N. E. 52, 59 L. R. A. 726. Whether the petition is brought before the superior court or the Supreme Judicial Court, the case before the jury is the same. We must therefore consider the statute as prescribing the same rule for the assessment of damages under each section, unless we find a plain provision to the contrary.

The fourth and fifth classes of cases mentioned in section 14 differ from the others. They include only real estate within a certain prescribed part of the territory affected by the statute. For these a different rule of damages is prescribed. The reasons for making such a rule are stated in the report of the state board of health to the Legislature of 1895 (pages xviii, xix). Under the provision in the last part of this section, every owner of an established business in West Boylston is to be compensated if his business is decreased in value, by loss of custom or otherwise, and by St. 1898, p. 636, c. 551, § 1, a similar provision is made for persons in Boylston, and by St. 1897, p. 429, c. 445, § 1, and St. 1901, p. 451, c. 505, § 1, the provision is extended to a part of the town of Sterling and a part of the town of Clinton. These are the only parts of the statute which mention "business" in express terms. In the fourth class of cases mentioned in the section, compensation is to be given if real estate within the prescribed limits not taken is "directly or indirectly decreased in value" by the taking of the board under the act. This is a provision for the payment of indirect, remote, and consequential damages, which are not allowed in ordinary cases, when property is taken under the right of eminent domain. *Fairbanks v. Com.* (Mass.) 67 N. E. 335; *Burnett v. Com.*, 169 Mass. 417, 48 N. E. 758. These damages may include an injury to business as one of the elements of the indirect decrease in value of the property. Where whole villages are submerged and populous places are made desolate, there is such a change in external conditions as may greatly affect the value of property for use in business, although it is not directly injured. The petitioner's property is not in Boylston or in the designated part of Clinton.

To sustain the contention that damage to business should be allowed under this section in all cases of injury to real estate, outside of the prescribed limits as well as within

them, would render nugatory and meaningless the special provision for indirect, remote, and consequential damages in cases of the fourth class above mentioned, and the express provision for damages to business near the end of the section and in the subsequent statutes which we have cited.

We are of opinion that the direction to commissioners to "determine the damage to and value of real estate, machinery, and business" must be interpreted to mean value of real estate when real estate is taken, and damage to real estate and machinery when the real estate and machinery are not taken, but are damaged, and the damage to business in those cases where damage to business is provided for by the statute; leaving damages to be assessed in the usual way where no special provision is made. As the petitioner's property does not fall within either of the cases in which an assessment for damages to business is authorized, the amount in question cannot be allowed.

Judgment for respondent.

(184 Mass. 221)

DRISCOLL v. SMITH.

(Supreme Judicial Court of Massachusetts.
Fampden. Oct. 20, 1903.)

HIGHWAYS — EXTENT — EQUITY — ADEQUATE
REMEDY AT LAW — DEFENSES — WAIVER
— EVIDENCE — ESTOPPEL — FINDINGS.

1. Where, in a suit to restrain the defendant from closing a certain street, defendant proceeded to a hearing on the merits before a master without objection, he thereby waived an objection in his answer that plaintiff had a plain and adequate remedy at law, and that the bill did not state a cause for relief in equity.

2. Where a bill sought to restrain a continuing interference with plaintiff's right of passage over a certain street, plaintiff's remedy at law was not as efficient as his remedy in equity, and therefore was not adequate.

3. Where defendant conveyed certain land to plaintiff, and the deed bounded the land in part "on the northerly line of Smith St.," defendant was estopped by his deed to deny that there was a street called "Smith Street," over which plaintiff had a right of passage.

4. In an action to determine the length of a street, proof thereof is not confined to plans indicating the street and its connections, or showing the limits of the street by fences and other structures, but evidence of user and of acts and declarations in regard to it by the owner of the land over which it is contended to pass is admissible.

5. Where a master found that a certain street, though not appearing on any recorded plat, did appear on the surface of the ground to extend to a certain point, and was commonly known and used as "S. Street," and that such name was given it by defendant, and that defendant represented to plaintiff and others that it was his intention to make the street a main thoroughfare leading to such point, and that he did work on it to fit it for travel, a further finding that defendant was estopped to deny that such street extended to the point in question was justified.

Appeal from Superior Court, Hampden County.

¶ 2. See Estoppel, vol. 12, Cent. Dig. § 31.

Bill by Michael F. Driscoll against Quartus J. Smith. From a decree dismissing the bill, plaintiff appeals. Reversed.

Green & Bennett, for plaintiff. Brooks & Hamilton, for defendant.

MORTON, J. The plaintiff is the owner of a lot of land in Chicopee conveyed to him by the defendant. The deed bounds the land in part "on the northerly line of Smith St." The bill alleges, amongst other things, that the defendant is the owner of the land over which Smith street extends, and that he has built a fence across the same, and forbidden the plaintiff to travel on the same, and has done other things inconsistent with plaintiff's use of the street; and it prays that the defendant may be compelled to remove the fence, and may be restrained from any and all acts inconsistent with the use of the street by the plaintiff. The defendant filed an answer which set up, amongst other defenses, that the plaintiff had a plain and adequate remedy at law, and had not stated a case which entitled him to relief in equity. These grounds of objection were in the nature of a demurrer. The plaintiff joined issue, and the case was sent to a master, to hear the parties and report the facts and the evidence to the court. The master, without any objection, so far as appears, on the defendant's part, heard the parties, and took a view, and made a report of his findings, with the evidence. The defendant filed exceptions in regard to matters of evidence before the master, and in regard to certain findings by the master. The court overruled all of the defendant's exceptions to the admission of evidence, and all the exceptions to the master's report, except one, the fifth, relating to a finding by the master that the defendant was "estopped to deny the existence of Smith street from the plaintiff's lot in a straight line to the old cider mill, and thence out to Prospect street," which it sustained, and "upon all the facts set forth in the master's report, and in accordance with the decision in Washburn v. Miller, 117 Mass. 376," ruled that, upon the defenses set up in the eighth and ninth sections of the answer (the objections in the nature of a demurrer), the defendant was entitled to a decree, and ordered the bill to be dismissed, with costs. Both parties appealed, but the defendant has not pressed his appeal, and we regard it as waived. Lest, however, we may have misconceived the defendant's position in regard to his appeal, we add that we discern no error in the overruling of the defendant's exceptions. But we think that the court erred in ruling that the defendant was entitled to avail himself of the objection to the maintenance of the bill set up in the eighth and ninth sections of the answer, and in sustaining the fifth exception to the master's report, and in dismissing the bill.

By proceeding without objection to a hearing on the merits before the master, the defendant must be taken to have waived the allegations in his answer that the plaintiff had a plain and adequate remedy at law, and that the bill did not state a case that entitled him to relief in equity. Parker v. Nickerson, 137 Mass. 487. Moreover, we think that the remedy at law is not adequate, and that the bill states a case for relief. The case is one of continuing interference with the plaintiff's right of passage over Smith street, and not, as in Washburn v. Miller, 117 Mass. 376, a case of part trespasses, and therefore presents a case for equitable relief. Cobb v. Mass. Chemical Co., 179 Mass. 423, 60 N. E. 790; B. & M. R. Co. v. Sullivan, 177 Mass. 230, 58 N. E. 689, 83 Am. St. Rep. 83. It is true that the plaintiff could have brought an action at law, but the remedy would not have been as practical and efficient as in equity, and therefore not adequate. Nathan v. Nathan, 166 Mass. 295, 44 N. E. 221.

The defendant does not contend, and could not successfully contend, that he is not estopped by the boundary in the deed to deny that there was a street called "Smith St.," over which the plaintiff had a right of passage. The only question would seem to be, therefore, how far Smith street extended at the date of the plaintiff's deed. This was a question of fact, to be determined, like any other question of fact, by competent evidence. Such evidence is not confined to plans with lines upon them indicating the street and its connections, nor to showing the limits of the street by fences or other similar structures. The extent of the street may be shown, as in the present case, by use, by what was commonly known and called "Smith St.," and by the acts and declarations in regard to it of the owner of the land over which it is contended that it passes. The defendant contended that the way extended only to the brow of the hill. But the master has found that, when the plaintiff took his deed, Smith street extended to Prospect street along the line contended for by the plaintiff. He has also found that this was what was commonly known as "Smith Street," and that, while it did not appear on any recorded plan or on any plan, it did appear on the surface of the ground, and was the only street or road to which that name could apply, and there was nothing to indicate where any portion of it that might be distinctively called "Smith Street" should end, and the rest considered merely as a farm road, except that the street was worked to a width of 42 feet east of the brow of the hill, and only to a width of 10 or 12 feet from that point to Prospect street. The master has further found that the name of "Smith Street" was given to this street by the defendant (meaning, as we construe the report, to the street out to Prospect street), and that the defendant represented

to the plaintiff and other parties that it was his intention to make this street a main thoroughfare leading out to Prospect street, and that he did work upon the street in fitting it for travel. These and other findings by the master as to the extent to which the street was used were well warranted by the evidence, and we think that the master was right in finding and ruling as he did that the defendant was estopped to deny that Smith street extended from the plaintiff's lot to Prospect street.

The result is that we think that the decree dismissing the bill should be reversed, and a decree entered for the plaintiff, with costs. So ordered.

(184 Mass. 260)

WESTLAKE et al. v. DUNN et al.

(Supreme Judicial Court of Massachusetts.
Berkshire. Oct. 21, 1903.)

**DEEDS—DELIVERY—FRAUD—MORTGAGE BY
GRANTEE—CANCELLATION—ESTOP-
PEL TO ASSERT TITLE.**

1. Where a deed intrusted to an attorney to deliver and receive the purchase money is obtained by an intended purchaser by representing that he desired it to show to a friend who was to let him have the purchase money, and would return it, the delivery is not such as to pass the title.

2. Where an intended purchaser obtains a deed, executed in blank as to grantee, and intrusted to an attorney to deliver and receive the purchase money, by promising to return it, and inserts his name as grantee, such conduct is fraudulent, and no title vests in him.

3. Where an intended purchaser fraudulently procures a deed from the grantor, the acceptance by the grantor of a deed from him before discovery of the fraud is not a ratification of the prior transaction.

4. Where a deed, executed in blank as to grantee, and intrusted to an attorney to deliver and receive the purchase money, is fraudulently obtained by the intended purchaser, who inserts his name as grantee, and hypothecates the property conveyed to a bank for a loan, the grantor is not estopped to assert his title, either on the ground that his and his attorney's conduct was such as to induce the bank to loan the money, or because they were negligent in permitting the intended purchaser to take the deed.

Exceptions from Superior Court, Berkshire County; Jabez Fox, Judge.

Bill by Horace G. Westlake and others against John H. Dunn and another. Decree for plaintiffs, and defendant Berkshire County Savings Bank brings exceptions. Exceptions overruled.

H. C. Joyner and H. M. Whiting, for plaintiffs. Hibbard & Hibbard, for defendants.

MORTON, J. This is a bill in equity to have a deed from the plaintiff Westlake to the defendant Dunn, alleged to have been obtained by fraud, declared null and void, and to have a mortgage from Dunn to the defendant bank of the same property canceled and discharged. The court ruled and found in favor of the plaintiffs, and the case is here on exceptions by the defendant bank

to the refusal of the court to give certain rulings requested by it. The defendant Dunn did not appear, and the bill was taken pro confesso against him.

There is no serious dispute as to the facts. The evidence consisted of the testimony of one Bell, the attorney for Westlake, and who is also one of the plaintiffs, and a statement of facts by the attorneys for the bank, and the deeds and documents referred to in the testimony on one side and the other. From this evidence it appears that Westlake was the owner of certain real estate in Pittsfield, which he wanted to sell, and that there were negotiations between him and Dunn in regard to a sale of the same. In consequence of these negotiations, the plaintiff Bell prepared a deed of the property at the request of Westlake. This deed was signed and acknowledged by Westlake. When he signed and acknowledged it, it was unsealed, and the name of the grantee was blank. In this condition the deed was handed to Dunn, in order that he might show it, as he represented, to some intended purchaser. Mrs. Westlake had not signed it, however, and it was returned, at Bell's suggestion, to have her sign it, which she did. Subsequently the seals and the revenue stamps were put on, but the name of the grantee still remained blank. In this condition, Dunn obtained the deed from Bell, to whom Westlake had intrusted its delivery, and the receipt of the purchase money, by representing that he wanted to take it to show to a friend who was going to let him have \$2,000 of the purchase money, and that he would return it in a few minutes. He did not return it, but wrote in his own name as grantee, and then took it to the defendant bank, to which he had previously applied for a loan on the property of \$2,000, which had been approved, and delivered it to the bank, and executed a note and mortgage to the bank for \$2,000, which thereupon paid him that amount, and on the same day caused the deed and mortgage to be duly recorded. The officers of the bank and its attorney acted in good faith, and had no knowledge of the fraud that had been perpetrated by Dunn. Subsequently the plaintiff Westlake discovered the fraud, and, upon the commencement of foreclosure proceedings by the bank in June, 1901, brought this bill.

Without going further into detail, it is clear, we think, that the deed was obtained from Bell by Dunn under circumstances that warranted the finding made by the court that the deed never was delivered with intent to pass the title, and also the further finding made by the court that there was a fraudulent insertion by Dunn of his name as grantee. The deed never having been delivered with intent to pass the title as a completed deed, or with authority to Dunn to insert the name of the grantee, it had no force or validity as a deed, no title vested in Dunn, and he could, of course, convey none. The insertion of his name as grantee by himself was an

act wholly unauthorized, even if it did not constitute a forgery. The subsequent acceptance by Westlake of a deed from Dunn to himself, before the discovery of the fraud, and the recording of it, did not constitute a ratification of what had been done, and a confirmation of Dunn's title, because, in accepting the deed and causing it to be recorded, Westlake acted in ignorance of the fraud that had been committed by Dunn.

The bank contends that Westlake is estopped to set up title in himself, and is not entitled to relief in equity. If that is so, it must be either on the ground that the conduct of Westlake and his agent, Bell, was calculated to, and did, induce the bank to lend the money and take the note and mortgage, and that they knew or ought to have known that such was likely to be the effect of their conduct (*Stiff v. Ashton*, 155 Mass. 130, 29 N. E. 203), or on the ground of negligence on the part of Westlake and Bell in suffering Dunn to take the deed, and thereby enabling him to commit the fraud and procure the loan from the bank, and that, as between two innocent parties, the one whose negligence has contributed to the wrongdoing complained of should suffer the loss occasioned thereby, and not the other. The effect of such a contention, if sustained on either ground, would be to leave the title in Dunn and the bank. But we think that the contention of the bank cannot be sustained. Neither Westlake nor Bell did or said anything which they knew or ought to have known would or could induce the bank or any one else to lend money to Dunn, and take a mortgage on the land in question as security. They were entirely ignorant of the whole transaction. They had no reason even to suspect that Dunn was going to make the use which he did of the deed. This ground of estoppel therefore falls. *Stiff v. Ashton*, supra. So, also, we think, does the other. It was not negligence on Bell's part to intrust the deed, with the name of the grantee left blank, to Dunn, to show, as he represented, to a friend, with the promise to return it in a few minutes, Dunn had no authority to fill in the blank, either with his own name, or that of any other person, though he had said that he was going to take the deed to himself, and there was no objection to his doing so, provided he paid the purchase price. Neither Westlake nor Bell owed any duty to any one to see that Dunn did not use the deed in the manner in which he did. If there was no such duty on their part, then there was no negligence. See *O'Herron v. Gray*, 168 Mass. 573, 47 N. E. 429, 40 L. R. A. 498, 60 Am. St. Rep. 411; *Scollans v. Rollins*, 179 Mass. 346, 60 N. E. 983; *Schofield v. Londerborough* (1896) App. Cas. 514. A deed is a different instrument from the instruments referred to and dealt with in *Russell v. American Bell Tel. Co.*, 180 Mass. 467, 62 N. E. 751, and in *Scollans v. Rollins*, supra.

The rulings requested by the defendant

were given in part, and refused in part. We discover no error on the part of the court in dealing with them as it did. The result is that the exceptions must be overruled. So ordered.

(184 Mass. 230)

JOYCE v. AMERICAN WRITING PAPER CO.

(Supreme Judicial Court of Massachusetts.
Hampden. Oct. 20, 1903.)

MASTER AND SERVANT — DANGEROUS MACHINERY — WARNING AND INSTRUCTIONS — NEGLIGENCE — KNOWLEDGE OF DEFECTS — EXERCISE OF DUE CARE.

1. Where the plaintiff's accounts of the manner in which he received his injuries are conflicting, the verdict will not be disturbed on the ground that the jury were left to guess how the accident occurred.

2. Where plaintiff was directed to relieve a cylinder clogged with rags, which contained a rapidly revolving drum, with a spiral line of spikes in it, and stated that he used a stick, as he had seen another employé do, which got caught and pulled his arm into the machine, a verdict for him will not be disturbed on a contention that it was impossible for him to have been injured as he claimed.

3. Where plaintiff was injured by having his arm caught in a machine in removing a congestion of rags, which he was directed to do as another employé did, who removed them with a stick, and he did not attempt to thrust the stick into the opening in ignorance of what was behind it, but was trying to remove the rags on the edge of it when the stick was caught, he cannot be denied a recovery because he was not exercising due care.

4. Where plaintiff was put to work to remove with a stick a congestion of rags from a three-inch opening in front of a rapidly revolving drum, with a spiral line of spikes on it, without cautioning him of the danger or telling him of what was behind the opening, and a person in front of the machine could not see what was behind it, a finding of negligence of the employer was warranted.

5. An employé unfamiliar with machinery is not chargeable with knowledge of the interior of a cylinder because he had once helped to clean another cylinder, though the outside of the two cylinders were similar.

6. Where plaintiff's arm was caught in a machine in attempting to remove a congestion of rags, evidence held to show that the risk was not an obvious one, which he assumed.

7. Where plaintiff's arm was caught in a machine in removing congested rags by reaching across the machine as another employé did, whom he was directed to follow, he was not negligent, as matter of law, because he did not go to the other side of the machine.

Exceptions from Superior Court, Hampden County; Elisha B. Maynard, Judge.

Action by Thomas Joyce against the American Writing Paper Company for damages for personal injuries. Judgment for plaintiff, and defendant brings exceptions. Exceptions overruled.

C. T. Callahan, for plaintiff. Brooks & Hamilton, for defendant.

LORING, J. In this case the jury were warranted in finding that these were the facts: The plaintiff was a boy in his six-

[1. See *Master and Servant*, vol. 24, Cent. Dig. § 218.

teenth year. He left school in the beginning of January and went to work in an alpaca factory, setting bobbins on spindles on spinning frames. After working there two months, he was employed by the defendant, and set to work in the ragroom, where he had nothing to do with machinery. After working there about two weeks, he was put to work in the duster room, and after working there a day and a half he went back to the ragroom for half a day, then returned to the duster room, and on the third day thereafter the accident complained of happened. His duty in the duster room was to collect the rags in a box as they came out of a railroad spike duster, and to carry them to a hole in the floor, where another employé stowed them in a boiler. This railroad duster consists of six cylinders placed in a row, with the axes parallel with each other and with the floor of the room. Under the cover of each cylinder is a revolving drum, on the face of which is set a spiral row of spikes about 3 inches long. These spikes are about 1 inch in diameter at the base, where they are set on the face of the drum, and taper to half an inch at the point. The drums revolve rapidly, making 100 to 125 revolutions a minute. The rags are carried forward from one drum to another, and are delivered through an opening in the covering of the rear drum into one of two boxes, which it was the duty of the plaintiff and another man or boy to have in place for the purpose. The opening through which the rags were delivered into the box was the entire width of the cylinder. The lower edge was formed by a beam, and the upper edge by a board nailed on the outside frame, making the end or side of the cylinder, and being the last board making the cylindrical cover of the drum in question. The opening was an opening of about 7 inches, extending the width of the cylinder, namely, 3 feet; and there was evidence that at the time of the accident a piece of canvas, 3 or 3½ inches long, was hung across the top edge of the hole, leaving below the canvas an opening of 3 to 4 inches. The opening was about up to the plaintiff's ears. Ordinarily the rags were delivered into the box set to receive them by the revolution of the drum, which revolved up and away from a person facing the opening. The plaintiff testified that Bachelor, who was his superintendent, told him to go to work on the duster, and to do as the Polander did who was working there; that when this opening got clogged with rags the Polander, with a stick, knocked them out into the box set to receive them. He also testified that at the time of the accident he was standing on one side of the opening, and that he reached across with his stick, about 3 feet long, which he held in the middle, to push away some rags which had collected on the other side of the opening. He gave several accounts of the way the accident happened. He said on direct examination that "the stick got caught

and pulled my arm into the machine. I don't know exactly how my arm got in there. I did not put my hand in there voluntarily." On cross-examination he said: "I don't know whether the stick got caught or not. I don't know how I got my arm in there. I was removing from the other side of the machine some rags, and I got my arm caught, but I don't know how I got it caught." It is not stated in the bill of exceptions just what the injury to the plaintiff's arm was. The exceptions go no farther than to state that his arm was hurt by coming in contact with the spikes in the rear drum of the duster.

To take up the defendant's contentions in the order of its brief:

1. We do not think that, by reason of the two stories told by the plaintiff, the jury were left to guess how the accident occurred.

2. We are not able to say that it was impossible for the plaintiff to have been hurt in one of the ways he testified to. The defendant has argued that the effect of getting the end of the stick caught on a tapering spike which was revolving upward would be to throw the arm of the person holding the stick up and out. But it is to be remembered that this 7-inch opening, 3 or 4 inches of which was covered by a piece of canvas, was as high as the plaintiff's ears; that the drum was making 100 to 125 revolutions a minute; and that the spikes were set on the drum in a spiral line. We cannot say that these could not have produced such a combination as to have resulted in some injury to the plaintiff's arm from the stick being caught.

3. What distinguishes the case from *Robinska v. Lyman Mills*, 174 Mass. 432, 54 N. E. 873, 75 Am. St. Rep. 364, and *Chmiel v. Thorndike Co.*, 182 Mass. 112, 65 N. E. 47, in the first place, is that the jury were warranted in finding that the plaintiff in the case at bar was doing what he was told to do. He testified that he was told to do as the Polander did, and that the Polander removed the rags with a stick, as he was doing. In this respect the case is somewhat like *De Costa v. Hargraves Mills*, 170 Mass. 375, 49 N. E. 735. In the second place, the plaintiff did not undertake to thrust the stick into the opening in ignorance of what was behind it, but he was trying to remove the rags on the edge of it, and the stick was caught.

4. The jury were warranted in finding that the plaintiff was put at work to remove with a stick a glut of rags from a 3-inch opening in front of a drum with a spiral line of spikes on it, making 100 to 125 revolutions a minute, without cautioning him of the danger, or telling him what was behind the opening. On the evidence the jury were warranted in finding that when the drum was in motion a person fronting the machine could not see what was behind the opening. We think that this could be found to be negligence.

5. We do not think that the plaintiff was chargeable with knowledge of the interior of the sixth cylinder because he had once helped clean the third cylinder. The fact that the outside of the two cylinders was the same does not fix upon a person knowledge that the interiors were also the same.

6. For the reasons already given, the risk which caused the accident was not an obvious one, which the plaintiff assumed.

7. We do not think that the plaintiff was, as matter of law, guilty of contributory negligence because he reached across the machine to remove the rags, in place of going to the other side. He was told to do as the Polander did, and the jury were warranted in finding that it was for that reason that he did not go to the other side.

Exceptions overruled.

(184 Mass. 187)

FOTERNICK et al. v. WATSON.

(Supreme Judicial Court of Massachusetts.
Suffolk. Oct. 19, 1903.)

**CONTRACTS—CONSTRUCTION LOAN—BREACH—
TENDER—WAIVER—CONSTRUCTION OF CONTRACT.**

1. Defendant contracted to make plaintiff a construction loan, the money to be paid over to plaintiff as the buildings progressed. Mortgages were duly executed to secure the same, when, just as the buildings were at the stage which would entitle plaintiff to the first payment, defendant left the state, and wrote plaintiff a letter that as a complaint had been made by the building inspector, and, as he was not willing to make a loan on a building not satisfactory to the inspector, he had discharged his mortgages on the property, that plaintiff might obtain the money of others. The objection of the building inspector was a slight one, and was immediately thereafter overruled by the supervisor of the building department; and the cost of removing it, if the objection had been valid, would not have exceeded \$15. Defendant remained away nearly a month, during which plaintiff lost his property by mortgage foreclosure by reason of his failure to obtain the loan. *Held*, that such facts justified a finding that defendant left the state to evade a tender of performance by plaintiff, so as to excuse plaintiff from proving an offer to perform, as a condition to his right to sue for breach of the contract.

2. Plaintiff, desiring to construct certain houses on land on which there was a mortgage for \$10,800, before purchasing the land agreed with defendant for a construction loan of \$36,000 on certain brick houses to be erected on the land, \$20,000 of which should be advanced when the buildings were at a certain stage of completion, and the balance in subsequent installments. Plaintiff agreed to give defendant a first mortgage on the land, except that defendant, if he so desired, might allow the mortgage on the land to remain, provided he would assume the same, and pay interest thereon from the date of the first payment under the contract, which in that case should be \$9,200. *Held*, that a finding that plaintiff was not entitled to any part of the loan until he had cleared the land of incumbrances, and that the first payment of \$20,000 could not be applied to the payment of the existing mortgage on the land, was error.

Exceptions from Superior Court, Suffolk County; Wm. B. Stevens, Judge.

Action by one Foternick and others against one Watson. From a judgment in favor of

defendant, plaintiffs bring exceptions. Sustained.

Abram Bon, Ohas. W. Bartlett, and E. R. Anderson, for plaintiffs. Whipple, Sears & Ogden and Robt. Homans, for defendant.

LORING, J. In this case the jury were warranted in finding the following facts: The plaintiff Foternick is a builder by trade. He wished to construct some houses on a parcel of land on which there was a mortgage for \$10,800. Before buying the land or otherwise entering upon the undertaking, he applied to the defendant for what is generally known as a construction loan; and on April 13, 1899, Foternick and one Lavinsky, in whose name Foternick proposed to take title as a matter of convenience, entered into a written contract with the defendant, whereby the defendant agreed to lend the plaintiffs \$36,000 "on first mortgage on five brick houses hereinafter described, to be erected" on the parcel of land in question, "as follows: \$20,000 when cellars and brick walls, except front walls, are completed to level of second floor and second floor is on," and the remaining \$16,000 in specified installments as the houses reached specified stages of completion; and the plaintiffs agreed to build on said land forthwith five brick houses as there described, and also "to give said Watson forthwith a mortgage on said land, which shall be a first mortgage when the first payment is called for, except that said Watson may, if he desires, allow the present first mortgage of ten thousand eight hundred dollars with interest at four per cent. per annum to remain on the land, provided he will assume same and pay interest thereon from date of first payment to us, which shall then be nine thousand two hundred dollars; said mortgage to Watson shall precede all labor on the premises and all contracts for labor and material, of which fact we agree to give said Watson satisfactory evidence when the first payment is called for." The \$36,000 was to be repaid in six months from April 13th, with interest on the whole \$36,000 at the rate of 12 per cent. per annum from April 13th. The defendant, who is a lawyer, was employed by the plaintiffs to examine the title. One half the lot was conveyed to the plaintiff Lavinsky on April 26th, and the other half on June 7th, both conveyances being subject to the mortgage for \$10,800. The purchase money was \$7,800, for which mortgages were given back, one on April 26th, and the other on June 7th, and what were then third mortgages, conditioned for the payment of \$36,000, were executed at the same time to the defendant, to wit, on April 26th and June 7th. Although there were two mortgages, conditioned to pay \$7,800 and \$36,000 respectively, there was but one sum of \$7,800 and one sum of \$36,000 to be paid. The plaintiff Foternick began work immediately after

June 7th, when he first got title to the premises. The jury would also have been warranted in finding that on Monday, August 7th, or Tuesday, August 8th, the construction of the five brick houses had so far progressed that the second floors were on, and the plaintiff Foterneck went to the defendant's office and told him that he was ready or would be ready in a few days for the first payment, and asked the defendant to come out and inspect the buildings, and that the defendant promised to do so on the following Thursday or Friday, at the latest. There was also evidence that the plaintiff waited at the buildings for the defendant on Thursday and on Friday until after the hour of the day had passed at which the defendant had been in the habit of visiting the buildings when he had been there before, and thereupon the plaintiff went to the defendant's office, and was told that the defendant had gone on his vacation. The plaintiff then went to his own office, and found the following letter from the defendant, dated August 10th: "Dear Sir: I have received notice from the Building Commissioner that complaint has been made by the Inspector against your buildings at the corner of Columbus Av. & Davenport St., on which I hold mortgage. I am not willing to make loans on buildings that are not satisfactory to the Inspector. As you may perhaps wish to place the loan with others who do not make this stipulation in their contracts, I have this day discharged my mortgages on the property." He also found a letter, signed by the inspector of buildings, notifying him "that a violation of Chapter 419 of the Acts of 1892 exists, to wit, Sect. 33—Light hard brick used for outside work," and that he was required "to remove this violation at once." It appeared that the inspector assigned to the plaintiffs' buildings by the building commissioner was one Follansbee. The plaintiff called at the building department to see Follansbee on Friday, August 11th, and on Monday, August 13th, and on the second day found that Follansbee also had gone away on his vacation. He then was referred at the building department to a Capt. Barry, who was a supervisor of construction, to whom an appeal lay from Follansbee's decision. On Wednesday, August 16th, Capt. Barry inspected the buildings. Capt. Barry was called as a witness by the plaintiffs. He testified that on August 16th he found that there were in fact no light hard bricks in the houses, and that there was no violation of the law, and "closed" the complaint, and indorsed a statement to that effect on the notice to the plaintiff. He further testified that his decision was final, unless an appeal was taken from it to the building commissioner, and in this case there was no appeal, and that, by the practice of the building department, the notice of violation is sent out on the report of the inspector, by filling in a blank signed in advance by the build-

ing commissioner. It also appeared that Follansbee in the following May indorsed on his original report as to the violation "that the complaint has been removed. Cost \$15." But there was no evidence that any of the brick which was in the buildings in August had ever been removed. There was evidence that what was meant by "Cost \$15," was that the removing of the brick which he reported was a violation of the building act, and substituting proper brick, would have cost \$15. It also appeared that the mortgages for \$36,000 were in fact discharged by the defendant by a release executed August 10, 1899, and put on record in the registry of deeds by the defendant on that day. There was evidence that the plaintiff Foterneck, on learning that the defendant had gone away, tried to get the money necessary to carry him through from other persons, and, failing to do so, lost all the money he had put into the undertaking, by a foreclosure of the mortgages for \$7,800 on September 13th. These mortgages became due on May 13th. The defendant went away on his vacation August 11th, and was away "about" a month.

After the plaintiff had rested, and while the defendant was putting in his evidence, and before he had rested, the defendant requested the presiding judge to rule that, by the true construction of the clause of the contract requiring the mortgage for \$36,000 to be a first mortgage "when the first payment is called for," the plaintiffs were not entitled to any part of the \$36,000 in order to pay off the prior mortgages of \$10,800 and \$7,800, or either of them, but had to make the \$36,000 mortgage a first mortgage when they called for the \$36,000, and before the defendant was bound to pay over any part of the \$36,000, and as there was no evidence that the first mortgage for \$10,800 and the second mortgage for \$7,800, or either of them, had been discharged before this action was begun, the plaintiff could not recover. The judge so ruled, and then directed the jury, on all the evidence, to return a verdict for the defendant, to which the plaintiff excepted.

In ruling that the plaintiff had not made out a case, because the \$7,800 mortgage had not been discharged before the date of the writ, the presiding judge seems to have disposed of the case on the footing that the plaintiff had called for the \$20,000, and not on the footing that he notified the defendant that he should call for it in a few days. The jury were warranted in finding the latter to be the fact. If they did so find, the plaintiff would have made out his case without showing performance by him in making the mortgage for \$36,000 a first mortgage, on showing that the conduct of the defendant had excused him from performing his part of the contract. In this view of the case, the construction of the contract does not seem to be material.

We are of opinion that the plaintiff had a right to go to the jury on the ground that the decision made by Follansbee, acting for the building commissioner, that there was a violation of Acts 1892, p. 471, c. 419, in using light hard brick, was reversed on appeal, and that the defendant had gone out of the commonwealth to evade a tender under the contract, and thereby the plaintiff was excused from notifying the defendant of the fact that Follansbee's decision had been reversed, and from tendering performance. We assume, for the purposes of this discussion, that the decision of the building department on the question of fact is final, although no reference has been made to any statute making it so. There was evidence that the defect, if there was one, could be cured at an expense of \$15; and the fact that the defendant saw Follansbee about the matter twice between Monday, August 7th, and Friday, August 11th, warranted the jury in finding that he knew the character of the defect. The fact that the defendant knew that the defect was one which, if it existed at all, could be cured at this trifling expense, taken in connection with the defendant's own testimony that before many months had passed he suspected that there was fraud on the part of the plaintiffs, and did not suppose that the building was ever to be completed, or anything further to be done about it, and in connection with the other circumstances in evidence, warranted the jury in finding that the defendant left the commonwealth to evade having a tender of performance made upon him. The case comes within *Gilmore v. Holt*, 4 Pick. 258; *Tasker v. Bartlett*, 5 Cush. 359; *Southworth v. Smith*, 7 Cush. 391. It is not necessary to decide whether the action of the defendant was not such a total repudiation of the agreement, even without a finding that he left the commonwealth to evade a tender, as to excuse further performance on the part of the plaintiff. It is true, as argued by the defendant, that, when one party to a contract relies on a repudiation as excusing him from making an offer to perform, the repudiation must be absolute. *Carpenter v. Holcomb*, 105 Mass. 280; *Wells v. Day*, 124 Mass. 38; *Galvin v. Collins*, 128 Mass. 525; *Lowe v. Harwood*, 139 Mass. 133, 29 N. E. 538. The case of *Pomroy v. Gold*, 2 Metc. 500, is explained in *Carpenter v. Holcomb*, 105 Mass. 280, 286. If the defendant in the case at bar had done no more than notify the plaintiff of the violation of the building laws, this would not have dispensed with the necessity of notifying him that the decision of Follansbee had been reversed by Barry on appeal, if the violation was ground for his refusing to go on. But the defendant did more than that. He discharged the mortgages to him, conditioned for the payment of \$36,000. We have assumed that the act of discharging the mortgages conditioned for the payment of the \$36,000 was not decisive. We assume that a new mortgage could have

been drawn, and that no liens would have been good against the new mortgage which would not have been good against the mortgage which was discharged, and under which no money had been advanced. The significance of the discharge of the mortgages lies in what that act would be fairly taken by the plaintiff to mean. In determining that question the rule is that, if the words used are doubtful, they will be construed against the party using them, in case the other party acted on them and was misled by them. *Barney v. Newcomb*, 9 Cush. 46; *Bascom v. Smith*, 164 Mass. 61, 41 N. E. 130. But in addition to discharging the mortgages the defendant left the state, and apparently left word at his office that he had gone away, but no word as to where he had gone. The plaintiff forbore to ask for the conversation which he had with the person left in charge of the defendant's office, on the defendant's objecting to its being put in evidence. What he was told when he called at the defendant's office at that time is material in this connection. Something further may appear when the case is tried again, and we express no final opinion on this matter.

The defendant has further contended that, even if the plaintiff was excused from performance, the plaintiff did not make out a case, because he did not notify the defendant of the reversal of Follansbee's decision, and because he did not show that he was able to make the mortgage for \$36,000 a first mortgage, and, lastly, because the time for performance had not come, within *Daniels v. Newton*, 114 Mass. 530, 19 Am. Rep. 384. If the plaintiff was excused from performance either because the defendant left to evade a tender, or because his acts, taken as a whole, amounted to a total repudiation of his agreement, the plaintiff was excused from giving that notice. What is said in *Scanlan v. Geddes*, 112 Mass. 15, 17, as to the necessity of a plaintiff in such a case to make known to the defendant that he is ready and willing to go on, must be taken to have reference to the fact that in that case the plaintiff did make known to the defendant that he was ready to go on with the contract before the repudiation. If the plaintiff is not in default, and the time for performance has not gone by, the plaintiff can maintain an action, on the defendant's wholly repudiating the contract, without giving notice after the repudiation takes place that he is ready to go on. See, in this connection, *Lowe v. Harwood*, 139 Mass. 133, 135, 29 N. E. 538.

No question was raised at the trial as to the plaintiff's not having shown that he was able to make the mortgage for \$36,000 a first mortgage, and, under the ruling which was made, we do not think that it is open now. It is by no means clear that he had to show that fact, in case he was excused from showing performance. It was held in

Lowe v. Harwood, 139 Mass. 133, 29 N. E. 538, that a purchaser could maintain an action against a vendor of real estate, on the vendor's repudiating his contract, without proving that he could have paid for the land, and this decision was put on the ground that "the degree of his ability [to pay for it] at any moment before he was called on to pay was no concern of the defendant's. The way for the defendant to test that was to tender performance on his side conditionally upon the plaintiff's performing his part of the agreement." Further facts in this connection may appear when the case is tried anew.

There is nothing in the suggestion of the defendant that this case comes within *Daniels v. Newton*, 114 Mass. 530, 19 Am. Rep. 384. No day of the year was fixed for the payment of the \$36,000, or any part of it. The time for the payment had come, so far as the calendar goes. It only remained to show performance or an excuse from performance on the part of the plaintiff to entitle him to maintain his action. In such a case the doctrine of *Daniels v. Newton* does not apply, as is recognized in that case. See *Daniels v. Newton*, 114 Mass. 530, 533, 19 Am. Rep. 384. See, also, *Nason v. Holt*, 114 Mass. 541, 542, note. The case comes within *Parker v. Russell*, 133 Mass. 74; *Lowe v. Harwood*, 139 Mass. 133, 29 N. E. 538.

The construction of the contract adopted by the presiding judge is, in our opinion, wrong. As the question has been fully argued, and may be material on the new trial, we will decide it now. The presiding judge ruled that the plaintiff was not entitled to the first payment of \$20,000 to pay off the prior mortgages of \$10,800 and \$7,800. The defendant contends that the case of *Gormley v. Kyle*, 137 Mass. 189, is decisive of the correctness of the ruling. But there is nothing in that case which affects the question. In *Gormley v. Kyle*, before there was any default on the part of the purchaser, the vendor tendered a deed of land, which was to be conveyed free from incumbrance, without discharging an outstanding incumbrance. It was held that it was no answer to say that the defendant could have retained enough of the purchase money to pay off that incumbrance. There is nothing in that case which holds that if the plaintiff had told the defendant that, when it came to passing the papers, he should have a release of the outstanding incumbrance duly executed, ready to be delivered on payment of the amount due thereon, which was less than the purchase money, the offer would not have been a good offer of a readiness to perform, or that a tender of a deed, coupled with such a release, would not have been a good tender. It is true, however, that, taken literally, the words used require the construction contended for by the defendant. But it is stipulated in the contract that, if the defendant elects to assume the first mortgage for \$10,800, the amount of the first payment

was to be \$9,200, in place of \$20,000. That shows that it was understood that \$10,800 of the \$20,000 was to be used in paying off the original first mortgage, and was not to be used for anything else, and, if not so used, was to be advanced. There is nothing to show that there was to be such a difference between the mortgage for \$10,800, which was the only incumbrance on the property when the contract was made, on April 13th, and any other incumbrance that might be on the property when the time for the first payment came, as to preclude the remaining \$9,200 being used to pay off the other incumbrances. The very object of the agreement leads to the same construction, namely, to provide the money necessary to carry the plaintiff through until the buildings were completed. For these reasons, we are of opinion that the ruling was wrong, and that the plaintiff had the right to look to the \$20,000 to make the mortgage for \$36,000 a first mortgage.

Exceptions sustained.

(134 Mass. 207)

COPELAND v. BOSTON DAIRY CO.

(Supreme Judicial Court of Massachusetts.
Franklin. Oct. 20, 1903.)

SALES—MILK—QUALITY—BURDEN OF PROOF—
EVIDENCE—BOOKS OF ACCOUNT—AGENTS.

1. Under Rev. Laws, c. 56, §§ 56, 57, making it a criminal offense to sell milk which on analysis is shown to contain less than the percentage of milk solids or milk fat there specified, the burden of proof, in an action to recover for milk sold, that the milk had not been watered, and contained the statutory amount of solids, was on the plaintiff, since a delivery of any other kind of milk would fail, as a matter of description, to be a compliance with the contract to sell and deliver milk.

2. Where, in an action for milk alleged to have been sold by plaintiff to defendant, it appeared that a teamster and collector who took the milk from plaintiff and other farmers to a railway station was paid both by plaintiff and defendant, and was the common agent of each, a passbook kept by him, showing the amount of milk purchased, was admissible as against defendant.

Exceptions to Superior Court, Franklin County; Lawton, Judge.

Action by Edgar F. Copeland against the Boston Dairy Company. From a judgment in favor of plaintiff, defendant brings exceptions. Sustained.

Action on contract to recover the price of milk alleged to have been furnished by plaintiff to defendant in March and April, 1900. Plaintiff is a farmer, and defendant a corporation selling milk in Boston. Defendant purchased milk of plaintiff and other farmers, which was put up in cans, and collected daily by a teamster, who delivered the same to an agent of defendant on a railroad car, on which the milk was transported, under the agent's custody, to Boston. The teamster was paid by the defendant a fixed price per can for carrying the same, which was deduct-

ed from the sum agreed to be paid to each farmer for a can of milk. A passbook was furnished the teamster monthly by defendant in which to record daily the number of cans furnished by each farmer, and at the head of each page was entered the name of the farmer, and the page was so ruled with numbers for days from 1 to 31, printed, and columns ruled for entering the number of cans received, etc. At the end of each month, the teamster forwarded the books to defendant by the agent on the railroad car, and later received from the agent a sealed envelope. The teamster, who was called a "collector," made his own arrangements with the farmers for the sum per can to be paid him. The passbooks were offered in evidence to show the amount of milk furnished, to which defendant objected. Defendant claimed that whatever milk or liquid was delivered by plaintiff during such months had been watered, and did not contain the amount of solids required by law, and there was evidence tending to show that water had purposely been put into the milk delivered by plaintiff to defendant. The court charged the jury that, if they should find that any substantial amount of milk was deliberately and intentionally watered by the plaintiff, the entire transaction would be tainted by fraud, and they might find for the defendant, but that the burden was on the defendant to satisfy the jury that the milk was so watered, to which instruction defendant excepted.

Dana Malone, for plaintiff. Fredk. L. Greene, Wm. A. Davenport, and F. M. Ives, for defendant.

LORING, J. The exceptions in this case must be sustained. By Rev. Laws, c. 56, §§ 56, 57, it is a criminal offense to sell milk which upon analysis is shown to contain less than the percentage of milk solids or milk fat there specified. A contract for the delivery of any other kind of milk would not support an action. See, in this connection, *Miller v. Post*, 1 Allen, 434. A contract to deliver milk means, as matter of construction, a contract to deliver milk up to the standard prescribed in Rev. Laws, c. 56, § 56, and a delivery of any other kind of milk would fail, as matter of description, to be a compliance with a contract to sell and deliver milk. The burden was on the plaintiff to prove that the milk delivered by him was up to this standard.

The passbooks seem to have been admissible in evidence without the testimony of the president of the defendant company, which was objected to. As we understand the bill of exceptions, the collector or teamster was paid both by the plaintiff and the defendant. If so, he was the common agent of each, and a passbook kept by him was admissible against either.

Exceptions sustained.

(184 Mass. 243)

ARKLAND v. TABER-PRANG ART CO.

(Supreme Judicial Court of Massachusetts.
Hampden. Oct. 20, 1903.)

MASTER AND SERVANT—INJURIES TO SERVANT—ASSUMPTION OF RISK—DUTY TO WARN—CONTRIBUTORY NEGLIGENCE.

1. Plaintiff, who was 27 years of age, and who was experienced in the use of wood-working machinery, was employed by defendant, and directed to operate a picture frame shaper, which was near a band saw. Plaintiff, after finishing certain other work, was directed to take certain wood patterns to the band-saw operator, and, while he was laying the patterns on the table, plaintiff's arm came in contact with the saw, and he was injured. *Held*, that defendant owed plaintiff no duty to fence or guard the saw, or to change its position, but that plaintiff assumed the risk of injury therefrom.

2. Defendant was not guilty of negligence in failing to warn plaintiff of the danger of coming in contact with the saw.

3. Evidence *held* to show that a servant's injury was occasioned by his own contributory negligence.

Exceptions from Superior Court, Hampden County; Jabez Fox, Judge.

Action by Edward W. Arkland against the Taber-Prang Art Company. From a judgment in favor of defendant, plaintiff brings exceptions. Overruled.

Green & Bennett, for plaintiff. Brooks & Hamilton, for defendant.

MORTON, J. This is an action for personal injuries—the loss of an arm—while in the defendant's employ. At the close of the plaintiff's evidence, the court directed a verdict for the defendant, and the case is here on exceptions to this ruling. Exceptions were also taken to the exclusion of certain questions, but they have not been pressed, and we therefore treat them as waived. We think that the ruling was right.

The plaintiff entered the defendant's employ on the morning of the day on which he was injured. He was set to work on a machine called a "shaper," shaping picture frames. This machine was situated near a band saw. He finished that job, and was then told by the foreman to mark out some patterns on wood, and when he had marked out the required number, was directed by the foreman to take them to a Mr. Sanderson, who was working at the band saw. He did so, and in some way, in laying them down on the table of the band saw, his arm came in contact with the band saw, and he received the injury complained of. He was 27 years of age, and testified on direct examination that he "had worked around wood-working machines, shapers, and so on," and on cross-examination that he "had worked about wood-working machines about six years in all." He knew what a band saw was, though he had never worked on one, and was not familiar with them. When the plaintiff entered

¶ 2. See *Master and Servant*, vol. 34, Cent. Dig. §§ 210, 313.

the defendant's employ, he assumed the obvious risks incident to it; and the danger of getting hurt if he came in contact with the band saw was one of them. The defendant owed him no duty to fence or guard the band saw, or to change its position with reference to that of the shaper on which he was set to work. *Stuart v. West End Street Ry. Co.*, 163 Mass. 391, 40 N. E. 180; *Hale v. Cheney*, 159 Mass. 268, 34 N. E. 255. The defendant had no reason to suppose that the plaintiff needed any warning or instruction in reference to the danger of injury from coming in contact with the band saw, and therefore was not negligent in failing to warn the plaintiff of the danger. For aught that appears, the plaintiff was at least of average intelligence, and, as he told the defendant's superintendent, had worked about wood-working machines, shapers, and so on, though he had never operated a band saw. He was an experienced workman, who had been employed among wood-working machinery, and there was nothing in his previous history or age to show the defendant that he required any warning or instruction in regard to the band saw. Sanderson was at work at the band saw when the plaintiff laid down the patterns on the table, and the accident would seem to have been due to inattention on the plaintiff's part to the proximity of the saw; in other words, to a want of due care on his part.

The result is that the exceptions must be overruled.

So ordered.

(184 Mass. 198)

COMMONWEALTH v. COLEMAN.

SAME v. WOOD.

(Supreme Judicial Court of Massachusetts.
Franklin. Oct. 19, 1903.)

GAMING—COMPLAINT OR INFORMATION—SUFFICIENCY—JOINDER—DESCRIPTION OF BUILDING—PROPERTY—EVIDENCE—VARIANCE—CONSTITUTIONAL LAW.

1. Rev. Laws, c. 214, § 8, imposing a penalty on one who knowingly suffers money or other property to be raffled for in a house, shop, or building occupied by him and under his control, and to be won there by throwing dice or by other game of chance, states but one offense, and the acts stated may be joined in one count.

2. An allegation that defendant, "in a building occupied by him and under his control, to wit, the hotel building known as the 'L. House,'" knowingly suffered a turkey to be raffled, designated the building distinctly, and was sufficient, under the statute.

3. It was not necessary that the complaint give the names of the persons who were permitted to raffle, nor the name of the person who won.

4. Under the statute, there could be a conviction of a person who occupied a building other than a shop, though his occupation or control was only of a part of the building.

5. Evidence that a small room in the said hotel was occupied and used as a Chinese laundry did not create a variance between the complaint and proof, in view of section 28, pro-

viding that no complaint for violating the law relative to any form of gaming shall be quashed if sufficient to enable the defendant to understand the charge and to prepare his defense, and no variance shall be deemed material unless, in substance, essential to the charge.

6. Under said section 28, there was no variance between the allegation that the property raffled was a turkey, and proof that it was the dead body of a dressed turkey.

7. Section 28 does not violate Declaration of Rights, art. 12, securing to an accused the right to have his offense fully and plainly, substantially and formally, described to him.

Exceptions from Superior Court, Franklin County.

James E. Coleman and one Wood were separately convicted of gaming, and except. Exceptions overruled.

The bill of exceptions of James E. Coleman states the case as follows: "This was a complaint to the district court of Franklin, charging that the defendant, 'in a building occupied by him and under his control, to wit, the hotel building known as the 'Loveland House,' knowingly did suffer a certain turkey to be raffled for, and to be won by throwing dice.' After conviction in the district court of Franklin, the complaint came to this court upon appeal, and the defendant filed in this court a motion to quash, assigning the following grounds: '(1) Because two separate and distinct offenses are set forth in the same complaint. (2) Because there is no sufficient allegation of the place where the defendant is alleged to have suffered a turkey to be won by throwing dice. (3) Because there is no allegation as to the person who by the sufferance of the defendant won a turkey, nor any allegation that such person's name is unknown.' This motion was overruled by the court, and the defendant duly excepted thereto. There was evidence tending to show that the defendant, on the date alleged in the complaint, occupied as a hotel and controlled the whole of a building in Northfield known as the 'Loveland House,' save one room, about 15x20 feet, on the ground floor, which room was rented and occupied exclusively as a Chinese laundry by another person. There was also evidence tending to show that the defendant had a license to sell intoxicating liquors on the premises. There was also evidence tending to show that in the presence of the defendant the carcass or dead body of a dressed turkey was raffled for in said building, and won by throwing dice in the room in which there was a billiard table, which room opened out of a barroom. Upon this evidence the defendant requested the court to rule that there was a variance between the allegation and the proof, in that it did not appear that a turkey was raffled for or won by throwing dice in a building occupied by or under the control of the defendant, and in that it did not appear that a live turkey was raffled for or won by throwing dice or otherwise." And to the court's refusal to give the rulings requested, defendant excepts.

¶ 3. See *Gaming*, vol. 24, Cent. Dig. §§ 222, 261, 266; *Lotteries*, vol. 33, Cent. Dig. § 29.

Dana Malone, Dist. Atty., for the Commonwealth. Frederick L. Greene and Wm. A. Davenport, for defendants.

KNOWLTON, C. J. The questions of law raised by the bills of exceptions in these two cases are the same in each, and our discussion in the first case will be equally applicable to the second, also. The defendant assigned three grounds for his motion to quash: First, because two separate and distinct offenses are set forth in the same complaint; second, because there is no sufficient allegation of the place where the defendant is alleged to have suffered the turkey to be won by throwing dice; third, because there is no allegation as to the person who by the sufferance of the defendant won the turkey, nor any averment that such person's name is unknown.

1. The complaint is founded on Rev. Laws, c. 214, § 8, and the first question is whether one who "knowingly suffers money or other property to be raffled for in such house, shop or building," and "to be won there by throwing or using dice, or by any other game of chance," is guilty of one offense, under this section, or of two different offenses, for each of which he is subject to punishment. We think it pretty plain that this part of the statute describes but one offense, which is knowingly permitting, in a place under one's control, a raffle or lottery, or other game of chance, for the disposition of property, to be carried on. Suffering property to be raffled for and suffering it to be won in either of the ways mentioned are only different acts, made punishable as different parts or stages of the same offense, and which, singly or together, subject the offender to but one punishment. Such acts may be joined in one count. *Com. v. Eaton*, 15 Pick. 273; *Stevens v. Com.*, 6 Metc. 241; *Com. v. Twitchell*, 4 Cush. 74; *Com. v. Hall*, 4 Allen, 305; *Com. v. Nichols*, 10 Allen, 199; *Com. v. Ferry*, 146 Mass. 203-208, 15 N. E. 484.

2. The allegation of the place where the defendant suffered the turkey to be raffled for designates the building distinctly, and is sufficient in form. The contention that there was a variance between the allegation and the proof will be considered later.

3. The answer to the question whether the complaint should give the names of the persons who were permitted to raffle for the turkey, and the name of the person who was suffered to win it by throwing dice, depends upon the nature of the offense described in the statute. The case most favorable to the defendant's contention on this point is *Com. v. Sheedy*, 159 Mass. 55, 34 N. E. 84, in which it was held, in a prosecution under section 7 of the chapter which is the foundation of this complaint, that a charge of a single act of disposing of a single article by way of lottery must state the name of the person to whom it was disposed of, or must aver that his name is unknown. The offense was treat-

ed as consisting of a single act, and the act was treated as necessarily involving the person who received the property. But the case shows that there are decisions upon complaints very closely analogous to the one now before us in which it was held that the name of the person receiving the property need not be given. *Com. v. Horton*, 2 Gray, 69; *Com. v. Harris*, 13 Allen, 534; *Com. v. Sullivan*, 146 Mass. 142, 15 N. E. 491; *Com. v. Brockaway*, 150 Mass. 322, 23 N. E. 101. In the later case of *Com. v. Swain*, 160 Mass. 354, 35 N. E. 862, it was held that where the offense is being present in a room, engaged in certain prohibited business, it is not necessary to mention the names of the persons participating in the prohibited acts. The substance of the offense here is knowingly suffering a lottery to be conducted in a place under the defendant's control, and we are of opinion that the rule stated in *Com. v. Swain* should be applied, rather than the rule in *Com. v. Thurlow*, 24 Pick. 374, and other similar cases cited in *Com. v. Sheedy*, *ubi supra*. The motion to quash was rightly overruled.

4. The defendant contends that there was a variance between the complaint and the proof in two particulars, namely: First, in that it did not appear that the building referred to was occupied by or under the control of the defendant; and, secondly, that it did not appear that a turkey was raffled for and won by throwing or using dice, but only the dead body of a turkey, dressed for use as an article of food. It appeared that the defendant occupied and controlled the hotel building known as the "Loveland House," except a small room on the ground floor, which was used for a Chinese laundry.

One question presented is whether, under this statute, there can be a conviction of a person who occupies a building other than a shop, if his occupation or control is of only a part of the building. It has been held, under the statute which punishes as the maintenance of a common nuisance the keeping of a "building, place or tenement" used for the illegal sale or illegal keeping of intoxicating liquor, that an indictment for the keeping of a building cannot be sustained unless it is proved that the defendant kept the whole building. *Com. v. McCaughay*, 9 Gray, 296; *Com. v. Bossidy*, 112 Mass. 277. But this is because of the peculiar language of the statute, which recognizes a distinction between a building and a tenement in a building. The statute now in question is different. It punishes the offense when committed in a "house, shop or building." As to the culpability of the occupant, it recognizes no difference between a house and a part of a house, or a building and a part of a building. There is special mention of a shop, but there is no special provision referring to a part of a house or building if the part is not a shop. It cannot have been intended that guilt or innocence, under the statute, should depend up-

on whether the occupant of the building where the offense is committed occupies or controls the whole or only a part of the building. We are of opinion that one who suffers the prohibited act to be done in a building is within the language of the statute, if he is in only a part of the building, and occupies or controls the part where he suffers the prohibited acts to be done, as well as when he occupies and controls the whole. Any other construction of the statute would render it nugatory, except in those cases where he was in a shop, or where he occupied and controlled the whole building, however large it might be.

The next question is whether, when the building occupied by him and under his control is only a part of the entire structure, it is necessary, according to the ordinary rules of pleading, to set out that fact, or whether it is enough to mention the building which he occupies or controls, leaving the rule of statutory construction applicable to the case to cover the ambiguity as to the extent of his occupation or control. The complaint would have been more definite, if, after the words "Loveland House," it had mentioned, under a *videlicet*, the part of the building used for hotel purposes. If we assume, without deciding, that under general rules of pleading the complaint would be fatally defective in this particular in its application to the facts proved, we are of opinion that Rev. Laws, c. 214, § 28, relieves the commonwealth of difficulty. This statute is as follows: "No pleading of misnomer shall be received, to a complaint or indictment, for violation of any law relative to lotteries, policy lotteries, the selling of pools or registering of bets, or any form of gaming; but the defendant may be arraigned and tried, and if convicted sentenced and punished, under any name by which he is complained of or indicted. No such complaint or indictment shall be abated, quashed, or held insufficient by reason of an alleged defect, either of form or substance, if the same is sufficient to enable the defendant to understand the charge and to prepare his defense. No variance between such complaint or indictment and the evidence shall be deemed material unless in some manner of substance essential to the charge under the rule above described." The variance is not material, under this statute, if the complaint is sufficient to enable the defendant to understand the charge and to prepare his defense. There can be no doubt that this complaint was sufficient in this particular. The defendant could not have been misled or left in doubt in regard to the charge against him because the complaint failed to aver that his occupation and control of the hotel building known as the "Loveland House" did not include one small room on the ground floor rented to another person. The statute was intended to cover cases like this, and plainly it is applicable.

5. It is clearly applicable to the other al-

leged variance, in that the property referred to is described as a turkey, which in a complaint for larceny would mean a living turkey, when in fact it was a dead turkey. See *Com. v. Beaman*, 8 Gray, 497. There is no doubt that the statute is applicable to the disposition of any kind of property, and the only question is whether the defendant was misled or sufficiently informed as to the charge. In *Com. v. Hodgkins*, 170 Mass. 197, 49 N. E. 97, where the statute was held applicable to dead lobsters and to living ones, it was decided that there was no material variance between a complaint which charged the possession of lobsters, and proof which showed the possession of dead lobsters. In common speech, the word "turkey" is applied to a dead fowl sold in the market, as well as to a living animal. Under this statute, we are of opinion that there was no variance which affected the rights of the defendant.

Although the subject was brought to our attention by the district attorney, it was not contended by the defendant's counsel that the part of the statute applicable to this case is unconstitutional. In *Com. v. Robertson*, 162 Mass. 90-96, 38 N. E. 25, it was said that "the provisions of article 12 of the Declaration of Rights, which secure to the accused person the right to have his crime or offense 'fully and plainly, substantially and formally described to him,' only require such particularity of allegation as may be of service to him in enabling him to understand the charge and to prepare his defense." See, also, *Com. v. Cody*, 165 Mass. 133-137, 42 N. E. 575; *Com. v. Dill*, 160 Mass. 536, 36 N. E. 472; *Com. v. Hall*, 97 Mass. 570. We are of opinion that this provision of the statute is constitutional.

In each case the entry will be: **Exceptions overruled.**

(184 Mass. 276)

MCCOMB v. O. R. BREWER LUMBER CO.

(Supreme Judicial Court of Massachusetts.

Berkshire. Oct. 21, 1903.)

DECEIT—PLEADING—EVIDENCE—APPEAL—EXCEPTIONS—WAIVER.

1. Where the declaration in tort for deceit in the sale by defendant of its corporate stock to plaintiff set out the false and fraudulent representations which induced plaintiff to purchase the stock, averred that the money paid for the stock was not put in defendant's treasury and used as working capital as promised by it, but was used by it for other purposes than its business, but did not allege that when defendant said it would be so used it had not the intention to perform that promise, evidence as to the promised use and actual use of the money was inadmissible, even on the question of damages.

2. Exceptions not argued on appeal will be considered waived.

3. Evidence of fraud not alleged in the declaration is inadmissible.

Exceptions from Superior Court, Berkshire County; John A. Aiken, Judge.

¶ 3. See *Fraud*, vol. 23, Cent. Dig. § 45.

Action by John R. McComb against the C. R. Brewer Lumber Company. Judgment granting insufficient relief, and plaintiff brings exceptions. Exceptions overruled.

H. C. Joyner and H. M. Whiting, for plaintiff. Charles Giddings, for defendant.

HAMMOND, J. The declaration contains three counts. The first is contract to recover a month's salary as defendant's treasurer, the second is contract for not complying with certain promises made in the sale of certain stock to the plaintiff by the defendant, and the third is tort for deceit in the same sale. No question was raised as to the pleadings, whether for misjoinder of counts or otherwise, and the case went to trial upon the declaration as it stood. At the close of the evidence the plaintiff waived the second count, and the case went to the jury upon the first and third counts, upon each of which there was a verdict for the plaintiff, the damages on the first being the full amount claimed, and upon the third \$1.

The exceptions relate only to the third count, and since the verdict was for the plaintiff on this they are material only so far as they respect the question of damages. The principal difference between the instructions given by the court and those requested by the plaintiff is that the court declined to permit the jury to consider the allegation with reference to the promised use of the \$9,000 paid by the plaintiff for the stock. As to this it is contended by the plaintiff that at the time the defendant promised to use the money as working capital it did not intend to keep the promise, and that a representation of a present intention is a representation of an existing fact, and therefore may be false and fraudulent. But, without implying that the plaintiff's contention would be true under any circumstances, the difficulty with his case is that the question is not raised upon the record. The ruling that the jury should not consider the allegation with reference to the promised use of the money appears to have been made with reference to the third count, and as applied to that it was correct. An examination of the count will show that it does not contain any allegation that at the time the defendant said that the money should be used for working capital it had not the intention to perform that promise. It first sets out the representations which induced the plaintiff to purchase the stock, then proceeds to state in what respects they were false and fraudulent and the defendant's knowledge of the falsity, and then follows the only allegation respecting the representation as to the promised use of the money: "And the nine thousand dollars paid by plaintiff to defendant was not put in its treasury and used as working capital, but was, with the approval of defendant, its directors and manager, used for other purposes than the business of defendant." This

is an allegation that the defendant failed to carry out its promise, and falls far short of an allegation that the defendant at the time it was made did not intend to carry it out. There is no allegation whatever as to the intent of the defendant at the time the promise was made. Indeed, it is difficult to read that count, either by itself or in connection with the other counts, without feeling that the pleader studiously avoided alleging anything as to that intent. While the evidence as to the promised use and the actual use of this money may have been admissible upon the second count, the object of which was to recover damages for breach of the promise, it was not material upon the third count, even upon the question of damages, for the reasons above stated.

It is further contended by the plaintiff that the instructions given by the court ignored the suppression by the defendant of the fact that a large portion of its capital stock had been used to secure the debt of the old corporation. The short answer to this is that this is not the fraud set out in the count, except so far as involved in the representations actually set out, and so far as involved with them the jury, under the instructions, were allowed to consider it. The result is that we see no error in the manner with which the court dealt with the requests, or in the instructions given.

As the question concerning the exclusion of the evidence of the amount for which the defendant's property was finally sold is not argued, we consider it waived.

Exceptions overruled.

(184 Mass. 307)

TORPEY v. TEBO.

(Supreme Judicial Court of Massachusetts. Worcester. Oct. 21, 1903.)

BILL OF EXCHANGE—NOTE GIVEN IN PAYMENT THEREOF—CONTRACT—CONSIDERATION.

1. An instrument dated August 14, 1901, which recites: "Mr. Wm. Tebo will please pay R. J. Torpey or order two hundred and fifty dollars and charge to my account. Due Oct. 1"—and signed by a third person, being an unconditional order to pay a certain sum in money at a fixed future time to the payee or order, is a bill of exchange, within Rev. Laws, c. 73, § 18, prescribing the requirements of negotiable instruments; the words "Due Oct. 1," simply meaning that it is to be paid October 1st.

2. A note executed by the drawee of a bill of exchange in payment thereof, when presented for payment at maturity, is a written contract, and parol evidence to contradict its terms is inadmissible.

3. A note given by the drawee of a bill of exchange in payment thereof when presented for payment at maturity is supported by a valuable consideration.

Exceptions from Superior Court, Worcester County; John H. Hardy, Judge.

Action on a note by Richard J. Torpey against William Tebo. Judgment for plain-

¶ 2. See Evidence, vol. 20, Cent. Dig. § 1799.

tiff, and defendant brings exceptions. Exceptions overruled.

The note sued on was given in payment or renewal of the liability on the following instrument, drawn on the maker:

"\$250.00 Aug. 14, 1901.

"Mr. Wm. Tebo

"Will please pay to R. J. Torpey or order two hundred and fifty dollars and charge to my account.

"Due Oct. 1.

John Ryan."

Arthur M. Taft and John B. Scott, for plaintiff. Marvin M. Taylor, for defendant.

LORING, J. This is an action on a negotiable promissory note for \$250, payable to the plaintiff, dated October 31, 1901. It appeared that the note sued on was given in payment or renewal of a prior note of like tenor, dated October 1, 1901, payable 30 days after date, and that that note was given in payment or renewal of the liability of the defendant by reason of his liability on a bill of exchange drawn on him by one Ryan. It also appeared that Ryan drew the bill of exchange in payment of groceries bought by him of the plaintiff, and that Ryan was a subcontractor under the defendant, who was building a house for one Horan, and money was coming to him as such subcontractor from Tebo. The defendant Tebo offered to show that his acceptance and both notes were given on the oral understanding that he was not to pay the \$250 unless he received that amount from Horan, and that Horan never had paid him anything. The defendant's argument is that the instrument drawn by Ryan on Tebo was an order, and not a bill of exchange; that an acceptance of an order by the drawee's writing his name on it is not a written contract, and for that reason that he could show what the true agreement made by word of mouth was, and that no liability under it ever came into existence; and, finally, that under these circumstances both notes were without consideration. But the instrument drawn by Ryan on Tebo was a bill of exchange. The defendant has not stated why he assumes that this is an order, and not a bill of exchange. We suppose it is because of the words "Due Oct. 1." But we think that those words mean that the \$250 in question is to be due October 1st, that is to say, is to be paid October 1st. So construed, the order was an unconditional order to pay a sum certain in money at a fixed future time to the payee or order. That instrument is a bill of exchange. Rev. Laws, c. 73, § 18.

It is not necessary to consider whether, by writing his name on the back of the draft, the defendant accepted it (as to which see *Young v. Glover*, 6 Jur. N. S. 637). If it be assumed that it was not accepted, the note of October 1st given by the drawee in payment of the draft when the draft was presented for payment at maturity was a

written contract, and evidence to contradict its terms was not admissible. *Tower v. Richardson*, 6 Allen, 351; *Wooley v. Cobb*, 165 Mass. 503, 43 N. E. 497.

On presentment of the draft for payment the plaintiff was entitled to have it honored or dishonored. If dishonored, he had a right of action against the drawer on giving him due notice of its dishonor. The defendant did not refuse payment, but offered to pay on time being given him, to which the plaintiff acceded, and this promise was put into the form of a promissory note. That note was founded on a valid consideration. Exceptions overruled.

(184 Mass. 266)

SPRINGFIELD ENGINE STOP CO. v. SHARP et al.

(Supreme Judicial Court of Massachusetts.
Hampden. Oct. 21, 1903.)

VENDOR AND VENDEE—PURCHASE ON TRIAL
—RIGHT OF BUYER—ELECTION TO
ACCEPT—EVIDENCE.

1. A purchaser of an article under an agreement giving him a specified period in which to use it, and return it at the expiration of the period if dissatisfied, has the full period agreed on for the trial, and has also, in the absence of any stipulation on the point, a reasonable time thereafter to signify his election to either accept it or return it.

2. The use by defendant, after the expiration of the trial period, of the stop placed on his engine under an agreement providing for a trial period by defendant, and requiring plaintiff to disconnect the stop at the expiration of the period if defendant was dissatisfied with it, and would not purchase it, is evidence of an election to accept it, in the absence of any evidence explaining such use.

3. The use by defendant of the stop after the expiration of the trial period on the day he notified plaintiff in writing that he would not purchase is not evidence of an election to purchase.

4. Where it was shown that defendant, after the expiration of the trial period, used the stop placed on his engine by plaintiff under an agreement providing for a 30 days' trial, and requiring plaintiff to disconnect it at the expiration of the period if defendant would not purchase, and there was no explanation given as to such use, plaintiff was entitled to have the question whether defendant elected to purchase it submitted to the jury.

Exceptions from Superior Court, Hampden County; Albert Mason, Judge.

Action by the Springfield Engine Stop Company against John C. Sharp, Jr., and others. Judgment for defendants, and plaintiff brings exceptions. Exceptions sustained.

Jas. L. Doherty and W. G. Brownson, for plaintiff. Spellman & Spellman, for defendants.

LORING, J. This was an action for the price of an engine stop. A verdict for the defendants was ordered by the court, and the case is here on an exception to that ruling.

It appeared that the plaintiff placed an engine stop on an engine of the defendants for a 30 days' trial, in competition with another

engine stop. The price was to be \$200, and the stop was to be taken off by the plaintiff if the defendants did not like the stop. The contract was by word of mouth, and nothing was said as to what should be done at the end of the 30 days if the defendants decided not to take the stop. The stop was installed and turned on for use on the afternoon of May 2d. On June 1st the defendants wrote asking for another 30 days' trial, and on June 8th the plaintiff wrote that it would extend the time of trial for 30 days, as requested. On the morning of Monday, July 3d, the defendants wrote to the plaintiff that after 60 days' trial they had determined to accept the other stop, and that the plaintiff's machine could be taken out at its convenience. The defendants' witness testified that "the plaintiff's stop was never used after the 3d day of July," and there was no other evidence on this point. Even if fractions of a day are ordinarily to be considered in computing the 30 days in such a case as this, there was evidence warranting a finding that the extension continued until, but not including, July 1st. The question whether the extension expired on June 30th or July 1st was a question of fact for the jury.

The plaintiff's first contention is that failure to give notice until July 3d, and the use of the stop on Saturday, July 1st, and Monday, July 3d, is conclusive of the defendants' liability, and in support of that contention it relies on *Prairie Farmer Co. v. Taylor*, 69 Ill. 440. That, also, was a case where a 30 days' trial was to be made of a machine, but in that case the machine was used for nearly a year without notice of an election, and what is said there must be taken to have had reference to the facts then before the court. The true rule is laid down in the other cases cited by the plaintiff, and it is this: The party to the contract who is to make the trial has the full period agreed upon for the trial, and, in the absence of any stipulation on the point, he has a reasonable time after the expiration of it to signify his election. See *Elphick v. Barnes*, 5 C. P. D. 321; *Spickler v. Marsh*, 36 Md. 222; *Kahn v. Klabunde*, 50 Wis. 235, 6 N. W. 888; *Waters Heater Co. v. Mansfield*, 48 Vt. 378.

The plaintiff's next contention is that it had a right to go to the jury on the use made on Saturday and on Monday as evidence of the defendants' election to take the stop. The retention of the stop after Friday, June 30th, apart from the use of it, had no significance. This was not the case of a sale or return. By the terms of the agreement, the plaintiff was to disconnect the stop from the engine and take it away if the defendants were not satisfied with it. But the use of the stop after the expiration of the period of trial agreed upon, unexplained, would be evidence of an election, as is the failure to return a machine taken under a sale or return agreement. See *Kahn v.*

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Klabunde, 50 Wis. 235; *Spickler v. Marsh*, 36 Md. 222; *Waters Heater Co. v. Mansfield*, 48 Vt. 378. The English cases are collected in *Benjamin on Sales* (4th Eng. Ed.) 593 et seq. In the case at bar the use of the stop on Monday could not be taken to be evidence of an election, for on Monday morning the defendants wrote to the plaintiff that they elected to take the other stop, and the letter was posted between 2 and 3 o'clock on that day. This letter deprives the use made of the machine on Monday of all force as evidence of an election, as was said in *Hunt v. Wyman*, 100 Mass. 198, 200, in a similar case. See, also, *Elphick v. Barnes*, 5 C. P. D. 321. There is nothing on the record showing why the defendants used the stop on Saturday. If, for example, the use on Saturday came from inadvertence, or because the defendants thought that the extension did not expire until the end of that day, the use on that day would be deprived of all force as evidence of an election, as we have held to be the case of the use on Monday; and there may have been other explanations of that use which would result in the same conclusion. But no explanation was given at the trial as to the use made of the machine on Saturday, and in this state of the evidence the plaintiff had a right to go the jury on the question whether the use of the stop on Saturday showed an election to take the stop, and that the defendants afterward changed their minds, and wrote the letter declining it on Monday.

Exceptions sustained.

(184 Mass. 290)

GLEASON v. WORCESTER CONSOLIDATED ST. RY. CO.

(Supreme Judicial Court of Massachusetts.
Worcester. Oct. 21, 1903.)

STREET RAILWAYS — INJURIES — PERSON ON TRACK — CONTRIBUTORY NEGLIGENCE — EVIDENCE — BURDEN OF PROOF.

1. In an action against a street railway for injuries sustained by one not a passenger, plaintiff cannot recover without evidence that he was in the exercise of ordinary care, even though defendant's servants were guilty of gross negligence.

2. In an action against a street railway for injuries received by one on its tracks, if from the evidence the inference of ordinary care on plaintiff's part can be only conjectural, there is no question for the jury.

3. Where one who was working in a ditch in a street beside a street railway track was killed by being run over by a car while standing on the track beside the ditch, he having stepped onto the track within 8 or 10 feet of the car, and in an action for the death there was evidence that he had been looking toward the approaching car just before going on the track, a verdict for defendant was properly directed because of insufficient evidence that deceased exercised care.

Exceptions from Superior Court, Worcester County; Henry N. Sheldon, Judge.

Action by one Gleason against the Worcester Consolidated Street Railway Company.

Judgment for defendant, and plaintiff brings exceptions. Exceptions overruled.

H. L. Parker, Jr., for plaintiff. Charles O. Milton and Chandler Bullock, for defendant.

BARKER, J. The action is for damages for causing the death of the plaintiff's intestate, who was struck and killed by one of the defendant's cars. As he was not a passenger, even if the defendant was guilty of negligence, or the defendant's servants were guilty of gross negligence in causing the death, the plaintiff cannot recover without affirmative evidence sufficient to justify a finding that her intestate was in the exercise of ordinary care. If from the evidence the inference that he exercised ordinary care can be only conjectural, the question ought not to be submitted to a jury. *Creamer v. West End Street Railway Co.*, 156 Mass. 320, 31 N. E. 391, 18 L. R. A. 490, 32 Am. St. Rep. 456; *Mathes v. Lowell, etc., Street Railway*, 177 Mass. 416, 59 N. E. 77; *Cox v. South Shore Street Railway*, 182 Mass. 497, 499, 65 N. E. 823, and cases cited. The plaintiff's intestate was employed in operating a stationary engine and air compressor, used in constructing a sewer in the street. The sewer trench was parallel with the defendant's tracks, and between them and the sidewalk, and the sides of the trench were sustained by sheathing, which came above the surface of the street. The edge of the trench was about two feet from the nearest track. The engine and compressor were at the northerly end of the trench, and the place where the plaintiff's intestate stood when operating them was about two feet from the nearest rail of the nearest track. Northerly of the boiler of the apparatus was a shield of boards, two or three feet square, to catch any oil flying from the compressor, and this shield was nearly parallel with the track, and about 18 inches from the rail, and between the edge of the shield and the boiler was just room for passage. The plaintiff's intestate could not reach the other side of the compressor nearest the sidewalk except by going out onto the street, and going round the end of the compressor. The occupation of the plaintiff's intestate confined him substantially to a single spot, in which he stood with his face toward the north, toward the pressure tank, and it was necessary for him to have his hand on the throttle a good share of the time, in order to control his engine. It was sometimes necessary to oil certain parts of the apparatus, but he was not engaged in oiling anything at the time, and there was nothing shown that would call him away from his engine, and no evidence that anything about his work required him to go between the rails of the track. Just before the accident he had gone around the boiler, and had some talk with the fireman, after which they both turned to their work. While they were talk-

ing, the plaintiff's intestate was looking southerly down the track toward the car which afterwards struck him, and which the fireman testified that he (the fireman) saw about 300 feet away as he turned to his work. The fireman had just turned to his work, and had only time to turn a valve, when the car flew by, and struck the plaintiff's intestate, who had stepped out upon the track at a point just opposite the wooden shield. The car knocked him down, and carried his body under the wheels and fender 60 feet up the track, which was upon an up grade of 5 per cent. There was conflicting evidence as to the rate of speed, and the evidence would have justified a finding that the rate was anywhere from 4 to 15 miles an hour. The plaintiff's intestate was unconscious until his death. Besides the testimony of the fireman, there was that of the motorman of the car, and also that of a traveler on the street, who testified that he was driving northerly, and that the plaintiff's intestate was standing beside his engine, and then, when the car was 8 or 10 feet away, stepped out upon the track, and turned north, and that he had just stepped upon the track when the car was upon him, and that he turned half round to the right, and put his hand up in front of the car. The motorman testified that he saw a man step onto the track from behind the engine about eight feet in front of the car. The fireman testified that the car was going eight or nine miles an hour, the motorman that it was going four or five miles an hour, and that he was ringing his gong all the time, and that at once, as soon as he saw the man, he shut off the power, turned on the whole reverse power, and put on the full force of the emergency air brake. The traveler testified that the car was going 15 miles an hour, and that he heard the gong when the car was at Kendall street, 300 feet away. Twenty minutes after the accident, the fireman found the throttle of the compressor wide open, although he never knew the plaintiff's intestate to leave his work unless he shut down his engine before. To step from a place of safety, only two feet away, upon the track of an electric street railway, directly in front of, and only eight or ten feet from, an approaching electric car, whether the car is approaching at the rate of four or five, or eight or nine miles, or fifteen miles an hour, is not evidence of care on the part of the person who does the act. It may or may not be consistent with ordinary care. If the person who does it is struck by the car and killed, no recovery can be had for his death without affirmative proof that he was exercising care to avoid being hit. Assuming, from the fact that the plaintiff's intestate left his engine without shutting it down, that he had occasion to pass in the street around the shield to the other end of the compressor, he knew that a car might at any time come up the street behind him, and that if he placed himself within

the space it would cover he might be hit unless he got out of the way. If we also assume, as the plaintiff contends could be inferred fairly, that he had just seen the approaching car, as he was looking towards it while talking with the fireman, he had had actual knowledge that a car was then approaching. His conduct in stepping onto the track within eight or ten feet of the car is as consistent with the theory that he had not seen the car, and went upon the track without taking any care to avoid being hit, or that he had forgotten that it was approaching, and so took no care or precaution, as with the theory that he had the danger in mind, and thought that he had time to enter upon the track and still get out of the way of the car. Either inference is purely conjectural. In our opinion, the verdict for defendant was ordered rightly, because there was no sufficient or affirmative evidence that the plaintiff's intestate exercised care. See *Kelley v. Wakefield, etc., Street Railway*, 175 Mass. 331, 56 N. E. 285; *Hurley v. West End Street Railway*, 180 Mass. 370, 62 N. E. 263. This view makes it immaterial whether the evidence offered by the plaintiff and excluded, to show negligence on the part of the defendant, was excluded rightly.

Exceptions overruled.

(184 Mass. 309)

FELCH v. INHABITANTS OF WEST BROOKFIELD.

(Supreme Judicial Court of Massachusetts. Worcester. Oct. 21, 1903.)

TOWNS—BRIDGES—DEFECTS—INJURIES—ACTION.

1. In an action against a town for injuries sustained owing to an alleged defect in a bridge, plaintiff claiming that the bridge was too narrow, it appearing that the plank bridge off one end of which the plaintiff's wheel fell was not a part of the traveled path, but outside of it, and constructed solely to facilitate access to and from the traveled path to a private way, which opened into the highway, and from which plaintiff was driving, he could not recover.

Exceptions from Superior Court, Worcester County; John H. Hardy, Judge.

Action by one Felch against the inhabitants of West Brookfield to recover for injuries owing to an alleged defect in a bridge, which plaintiff alleged to have been too narrow. Judgment for defendant, and plaintiff brings exceptions. Verdict ordered for defendant.

Jerry R. Kane, for plaintiff. Henry W. King and Charles M. Rice, for defendants.

BARKER, J. It being plain that the plank bridge off one end of which the plaintiff's wheel fell, causing the injury, was not a part of the traveled path, but outside of it, and constructed solely for the purpose of facilitating access to and from the traveled path to a private way, which opened into the highway on one side, and from which the plain-

tiff was driving, the case is governed by that of *Kellogg v. Inhabitants of Northampton*, 4 Gray, 65, 69. See, also, *Howard v. North Bridgewater*, 16 Pick. 189; *Shepardson v. Colerain*, 13 Metc. 55; *Smith v. Wendell*, 7 Cush. 498; *Harwood v. Oakham*, 152 Mass. 421, 25 N. E. 625; *Carey v. Hubbardston*, 172 Mass. 106, 51 N. E. 521; *Kelley v. Boston*, 180 Mass. 233, 62 N. E. 259.

Exceptions overruled.

(184 Mass. 225)

BRADY v. NEW YORK, N. H. & H. R. CO.

(Supreme Judicial Court of Massachusetts. Hampden. Oct. 20, 1903.)

MASTER AND SERVANT—CAR INSPECTOR—INJURY BY MOVING CARS—YARD INSPECTOR'S ORDER—SUPERINTENDENCY—RULE REQUIRING SIGNALS—ABANDONMENT—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—ADMISSIBILITY OF EVIDENCE.

1. A yard master, who has the only right to control and cause the moving of cars in the yard, and whose orders to the switching crew are obeyed, regardless of whether the cars have been inspected, is both a superintendent and a person in control of a train, within the employers' liability act, for whose negligence in moving cars the company is liable to a car inspector, though the latter represents a distinct department of the service and is not under the yard master's orders, and though the yard master is not on the cars, and had no right to order them moved before inspection was completed.

2. Evidence that, in an important railroad yard, a rule requiring a blue light to be placed on the end of cars or trains about which workmen were at work had been habitually disregarded; that no one had been disciplined therefor; that no action relative to the rule had been taken for more than eight months prior to an accident, when circular letters had been issued, calling attention to it; and that its application in a given case would have been difficult—warrants submitting to the jury the issue of the company's abandonment of the rule.

3. In an action by a car inspector for injuries occasioned by the yard master's directing the moving of cars against a car on which the inspector was at work, evidence of a conversation between them three weeks before, in which the yard master promised not to again move cars in a train being repaired, is admissible as bearing on the issues of the inspector's due care and the yard master's negligence.

4. Evidence as to whether, under the circumstances, the yard master should have sent so many cars as he did against the car on which the inspector was at work, with only one brakeman upon them, was admissible on the issue of the yard master's negligence.

Exceptions from Superior Court, Hampden County; Jabez Fox, Judge.

Action by one Brady against the New York, New Haven & Hartford Railroad Company. Verdict for plaintiff, and defendant excepts. Exceptions overruled.

J. B. Carroll and W. H. McClintock, for plaintiff. Walter S. Robinson, for defendant.

BARKER, J. The plaintiff was a car inspector employed at night in the defendant's Westfield yard. It was his duty upon the arrival of a train to inspect all its cars. If he found a car defective, it was his duty to

repair it where it stood, if possible; otherwise to have it set out from the train. His tour of work was from 6 o'clock in the afternoon until 7 o'clock the next morning. During this time from 10 to 13 freight trains came in, each composed of from 30 to 35 cars. About 1 o'clock in the night on August 16, 1901, two freight trains entered the yard in close succession, each containing cars to be inspected and shifted in the yard. The engines which drew in these trains were at once detached and taken to the round-house, leaving the cars standing in the yard on two separate tracks. The cars thus left standing were thenceforth in the charge of one Horrigan, the conductor of the yard, or yard master, and were not to be moved without his direction. For the purpose of moving them, there was a switching engine, with its engineer and fireman, and a switching crew, all of whom were under Horrigan's orders. Upon the arrival of a train, the inspection of its cars was the first thing to be done, and Horrigan had no right, in the proper discharge of his duty, to cause any car to be moved until the train in which it was had been inspected; but he in fact had the power to cause any of the cars to be moved as he might order, whether the inspection of the train had or had not been completed. Upon the arrival of the two trains, it was known both to Horrigan and the plaintiff that one of them had broken in two, and that some repairs to a car next the place where the broken train was apart would have to be made by the plaintiff. He first ascertained from Horrigan that the latter desired to deal first with the other train, and proceeded to inspect that train. When that inspection was completed, he proceeded to inspect the broken train, and to repair the defective car where it stood. In the meantime Horrigan, by means of the switching engine and crew, was dealing with the first train. Having finished with that train, he then began to deal with the cars of the second train, and so caused six or seven of its cars to be moved forcibly against the defective car which the plaintiff then was repairing, and which knocked him down and ran over him. The case was left to the jury upon the third count upon the issue whether the plaintiff's injury was due to the negligence of Horrigan as a superintendent, and upon the fifth count upon the issue whether the injury was due to the negligence of Horrigan while in charge and control of a train. After a verdict for the plaintiff, the case is here upon the defendant's exceptions, which were to the admission of evidence, to the refusal to give certain instructions requested, and to "the instructions given to the jury not in harmony with the defendant's requests."

1. The defendant contends that Horrigan was neither a superintendent nor a person in charge or control of a train, for whose negligence the plaintiff can recover. There was evidence tending to show that the depart-

ment of inspection was distinct from that in which Horrigan and the switching crew were employed, and that the plaintiff was not under Horrigan's orders, and that the latter had no right to order a car to be moved until the train of which it was a part had been inspected by the plaintiff. Assuming all these things as facts of the situation, yet the jury could find that Horrigan, in his capacity as conductor of the yard, or yard master, was in fact a person, and the only person, who had the right to control, and who by his orders to the switching crew did control, and cause, all the moving of cars in the yard, and that any order from him to the switching crew to move a car or cars was to be obeyed, and was obeyed, regardless of whether the inspection of the train had been completed or not. The switching crew acted upon his orders, and upon his orders only, and he gave and they obeyed the order in the execution of which the cars were let down against the car upon which the plaintiff was making repairs. Although Horrigan was not upon those cars, and a brakeman was upon them, and although the plaintiff was not at work under Horrigan, but in a distinct department of the defendant's service, we think that Horrigan was, within the meaning of the employers' liability act, a superintendent exercising superintendency in ordering the letting down of the cars, and also a person in charge or control of the train, and this is because all that was done or was to be done as to moving the cars was done and was to be done solely under his direct order and supervision.

2. Another contention of the defendant arises from the facts that on May 21, 1899, the defendant had issued a rule contemplating the placing of a blue signal on or at the end of a car, engine, or train under or about which workmen are at work, and that on September 27, 1900, and December 3, 1900, circular letters were issued calling attention to the rule, and that copies of these rules and circulars were in and about the yard and known to the plaintiff, and that he had placed no such signal to protect the car which he was repairing, but relied only upon the fact that Horrigan knew that the plaintiff was to repair the car where it stood, and that Horrigan had, in effect, promised not to cause any of the cars to be moved until the plaintiff had notified him that the repairs had been completed. The defendant asked an instruction that upon all the evidence the plaintiff was guilty of contributory negligence in failing to observe the rule with reference to blue signals. This was not given, and the jury were allowed to find whether the rule was at the time of the accident a rule of the company in force as such, and a practicable rule, which could and should have been regarded by the plaintiff at that time, or whether the defendant understood that it had become a dead letter, and had acquiesced in its abandonment.

While the question is somewhat close, we cannot hold that the presiding judge was wrong in allowing the jury to find an abandonment of the rule by the defendant. Long-continued practice to the contrary of what is prescribed by such a rule, it is held, may have the effect to show, too, that the rule is superseded or waived or abandoned. *McNee v. Coburn Trolley Track Co.*, 170 Mass. 283, 285, 49 N. E. 437, and cases cited; *Sweetland v. Lynn & Boston Railroad*, 177 Mass. 574, 579, 59 N. E. 443, 51 L. R. A. 783; *Boyle v. Columbia Fireproofing Co.*, 182 Mass. 93, 98, 64 N. E. 726. In the present instance there was abundant evidence tending to show that the rule had been disregarded constantly in the Westfield yard. That yard was substantially in the center of an important transportation system, and was a point where all cars were inspected whenever brought into it; and it is apparent that circumstances to which the rule would apply, and in which it must be either followed or disregarded, must have been of almost constant occurrence in the yard. The jury could have found that it had always been disregarded there, and that no action had been taken by the defendant for the enforcement of the rule, by disciplining those who did not comply with it, and no action whatever with reference to it for more than eight months next before the date of the plaintiff's injury. In addition to this, the jury could have found that it was difficult to comply with the rule, which, when repairs were to be made upon a car forming a part of a train, would compel the repairer to place a signal at each end of the train, and to remove the signals upon the completion of his work. The defendant's officers might well be presumed to know the habitual conduct of its employes in such an important yard. *Sweetland v. Lynn & Boston Railroad*, *ubi supra*. The jury might find, also, that, although the plaintiff knew of the previous promulgation and assertions of the rule, he properly might assume that its force had ceased. *McNee v. Coburn Trolley Track Co.*, *ubi supra*.

3. The considerations stated show that the defendant's requests, so far as they were not given, were refused rightly, and the exception to the charge was general, as not in harmony with the requests. The other exceptions were to the admission of evidence. Of these, several were to the admission of a conversation which took place between the plaintiff and Horrigan in the yard in the presence of the switching crew, about three weeks before the time when the plaintiff was hurt. The evidence admitted tended to show that, cars having been moved in a train on which the plaintiff was at work, making repairs, before he had finished his repairs, Horrigan promised that thereafter he would not order any car to be moved under such circumstances until after the plaintiff should have notified him that the repairs were com-

pleted. The defendant contends that this evidence should have been excluded, because not competent to show an abandonment by the defendant of the rule mentioned as to the placing of blue signals. But the evidence was competent upon the questions of the plaintiff's due care and of Horrigan's negligence. The other exceptions of this class were to evidence upon the question whether, under the circumstances in which Horrigan caused the cars which collided with the one on which the plaintiff was at work to be sent down upon it by the switching crew, so many cars as he sent could be sent properly with only one brakeman upon them. The evidence seems, in the actual aspect of the case as disclosed by the bill of exceptions, to have been of very little, if any, importance. But we cannot say that it was not competent upon the question of Horrigan's due care or negligence in sending down the cars which came against the one on which the plaintiff was at work.

Exceptions overruled.

(184 Mass. 240)

LODI v. MALONEY et al.

(Supreme Judicial Court of Massachusetts.
Hampden. Oct. 20, 1903.)

MASTER AND SERVANT—ASSUMED RISK— EVIDENCE.

1. Plaintiff was engaged with others in lowering a heavy boiler into a cellar by means of a wire rope connected with the boiler, and thence around a wooden post, the loose end being held by the men, who let it slip gradually. In the lowering the rope cut into the post, and plaintiff was directed to slacken it with his hands. It was obvious that as soon as the rope was slackened it would slip forward. By the order plaintiff was left to act in a safe and proper manner. The rope slipped, and caught plaintiff's hands. *Held*, that plaintiff assumed the risk of the method he chose to do the work, the general danger of which was obvious.

Exceptions from Superior Court, Hampden County; Elisha B. Maynard, Judge.

Action by Joseph H. Lodi against Michael Maloney and others for personal injuries. Judgment for defendants, and plaintiff brings exceptions. Exceptions overruled.

Leary & Beattie, for plaintiff. Brooks & Hamilton, for defendants.

BARKER, J. When the plaintiff, who had had 11 years' experience as a hod carrier, was hurt, the work in hand was the lowering of a boiler into a cellar. The boiler was 20 or 25 feet long, and weighed about 10 tons. It was to be allowed to slide down inclined beams, its motion being controlled by the manipulation of two wire ropes, one of which was fastened around each end of the boiler, and went thence to a wooden post, around which it took two or three turns, the other end of the rope being held by a gang of men, who were to let the rope slip

¶ 1. See *Master and Servant*, vol. 24, Cent. Dig. § 622.

slowly around the post as the weight of the boiler lowered it into position. One of the defendants was present, overseeing the work and directing the workmen. The plaintiff was in one of the gangs, manipulating one of the ropes, his position in the gang being that nearest to the post, around which the wire rope of which he had hold was passed. In the lowering process this rope cut into the post, and its motion stopped. The plaintiff left his place in the gang, and attempted with his hands to loosen the rope. While so engaged the rope started, and caught his hands between it and the post. The evidence was conflicting as to whether he made this attempt voluntarily, or in compliance with an order given by that one of the defendants who was present, directing the plaintiff to go and slack the rope with his hands; the order being accompanied with the statement, "It is all right," or "The rope is all right. Come around here, and slack it. Slack it with your hands." As a verdict was ordered for the defendants, we assume that the plaintiff acted upon an order, coupled with a statement that it was all right. The stakes around which the ropes were passed were only about nine feet from the ends of the boiler. When the lowering began, the boiler was at the edge of the cellar. The whole situation was open, the apparatus used was simple, and the plaintiff was so placed as to have a perfect opportunity to know and appreciate how the work went on, and what dangers attended it, and to control absolutely his own motions in whatever share of the work he attempted to perform. The order, if given as we assume, was, in substance, that the plaintiff should slack the rope by getting it out of the cut which it had made in the post. It was obvious that, as soon as this should be done, the constantly acting weight of the boiler would tend to pull the rope forward, and to carry the hands, if near enough to the post, between the rope and the post. In attempting to comply with the order, the plaintiff had liberty to choose, and chose, his own position. The order did not tell him to hurry, nor dictate to him where he should take hold of the rope, and it fairly cannot be construed except as an order to slack the rope with his hands, acting in such a manner as should be safe and proper. Where he should place his hands, and how he should work with them, was left to his own choice.

We are of opinion that the evidence would not justify a finding of negligence on the part of the employer, or of due care on the part of the plaintiff, and that the latter cannot recover for the results of a risk which turned against him because of the position which he chose to assume in doing a work, the general danger of which was obvious, and the degree of which varied with the position which the plaintiff chose to take. He certainly had as good an opportunity as his master of ascertaining and obviating the

danger for himself. *Haley v. Case*, 142 Mass. 316, 322, 7 N. E. 877; *Linch v. Sagamore Mfg. Co.*, 143 Mass. 206, 9 N. E. 728. The order did not contain an injunction to hurry, and the danger was obvious, and one growing naturally out of the work in hand; thus differentiating the case from that of *Millard v. West End St. Ry. Co.*, 173 Mass. 512, 53 N. E. 900, cited for the plaintiff.

Exceptions overruled.

(184 Mass. 263)

TOWN OF WILLIAMSBURG v. TOWN OF ADAMS.

(Supreme Judicial Court of Massachusetts. Hampshire. Oct. 21, 1903.)

PAUPERS—SETTLEMENT—SUFFICIENCY OF EVIDENCE—PRESUMPTION.

1. Evidence held to show that a pauper's mother had resided in a town five years without receiving relief as a pauper, so as to acquire a settlement therein.

2. A pauper's settlement, once acquired, is presumed to continue until another is acquired.

Exceptions from Superior Court, Hampshire County; Elisha B. Maynard, Judge.

Action to recover for expenses incurred in the relief of paupers by the town of Williamsburg against the town of Adams. Verdict for plaintiff, and defendant excepts. Exceptions overruled.

William G. Bassett and Edw. L. Shaw, for plaintiff. Dana Malone, for defendant.

HAMMOND, J. The verdict shows that the jury must have found that at the time the aid was furnished to Edward Guyott, Jr., he had a settlement in Adams through his mother, Mary, under and by virtue of St. 1874, p. 187, c. 274, as amended by St. 1879, p. 570, c. 242; and the only question before us is whether the evidence warranted such a finding.

The evidence tends to show that in the spring of 1864 she came with her husband and children from Canada to Adams, and lived there with them for five years, and then they all moved to some other town. The family were evidently of French extraction, and appear to have always lived in Canada until the year they came to Adams, and it does not appear that the husband ever had a settlement in this state. Indeed, the fair inference is that he never did have one. And it may fairly be inferred, also, upon the evidence, that before moving to Adams, Mary never acquired a settlement in this state. It is contended by the defendant that there was no evidence which would warrant a finding that she resided there without "receiving relief as a pauper." The evidence tended to show that all the time she was living in Adams with her husband and children, and that shortly after his arrival in Adams he purchased provisions in considerable quantities, and that he went

to work. There is nothing to show that he was aged, infirm, or indolent. On the contrary, the glimpses we get of him seem to show that he was active. The fair inference from the evidence is that he was an immigrant of middle age, able and willing to work, and that he kept his family together. Moreover, the defendant made no attempt to show affirmatively that any aid had been furnished to the family, or on its account. Upon this state of the evidence, the jury might properly find that Mary had received no relief as a pauper during her residence in Adams. She was evidently 21 years of age when she came there, but, being a married woman, she had acquired no settlement until the passage of St. 1879, p. 570, c. 242 (*Somerville v. Boston*, 120 Mass. 574), and was therefore an unsettled person, within the meaning of the phrase as used in that statute and in St. 1874, p. 187, c. 274. There can be no doubt upon the evidence that she was alive and in this commonwealth at the time of the passage of the later statute. The jury, therefore, could properly find that by her residence in Adams for five years she acquired, by virtue of these statutes, a settlement in that town. St. 1874, p. 187, c. 274; St. 1878, p. 139, c. 190, § 1, cl. 6; St. 1879, p. 570, c. 242, § 2; *Cambridge v. Boston*, 130 Mass. 357; *Dedham v. Milton*, 136 Mass. 424. A settlement once acquired is presumed to continue until another is subsequently acquired, and it does not appear that she ever acquired another, or that Edward, the pauper, ever acquired a settlement except through his mother.

Exceptions overruled.

(184 Mass. 255)

COMMONWEALTH v. IBRAHIM et al.

(Supreme Judicial Court of Massachusetts.
Worcester. Oct. 20, 1903.)

HOMICIDE—INDICTMENT—DEGREE—GRAND JURY—AUTHORITY—STATUTE— LEGISLATIVE POWER.

1. St. 1899, p. 430, c. 409 (Rev. Laws, c. 218, § 67), setting forth a form of indictment for murder, with the clause following the language which charges the crime, "and the jurors further say that the defendant is guilty of murder in the second degree, and not in the first degree," with the statement that "this may be added if murder in the first degree is not charged," changed the pre-existing law by authorizing grand juries to present indictment for murder in the second degree.

2. The crime charged by such an indictment is not a capital crime, and the trial can be had before a single justice, and is not subject to Rev. Laws, c. 157, § 8, requiring the trial of the indictment in capital cases to be heard before two or more justices.

3. It was within the power of the Legislature to permit such an indictment.

4. The act was not in conflict with the provision of the former statute that "the degree of murder is to be found by the jury," but the effect is merely that the former provisions do not apply to cases to which an indictment charges the degree of the crime.

Exceptions from Superior Court, Worcester County; Francis A. Gaskill, Judge.

Esad Ibrahim, Hussien Ibrahim, Teyfic Bekir, and Jelaladdin Ahmid were indicted for murder in the second degree, and from a judgment against Esad Ibrahim and Hussien Ibrahim they bring exceptions. Affirmed.

T. H. Gage, Jr., Frank F. Dresser, and Albert F. Flint, for defendants. Rockwood Hoar and George S. Taft, for the Commonwealth.

KNOWLTON, O. J. The important question in this case grows out of St. 1899, p. 430, c. 409 (Schedule of Forms, "Murder" [Rev. Laws, c. 218, § 67]), in which we find these words following the language which charges the crime: "And the jurors further say that the defendant is guilty of murder in the second degree, and not in the first degree. This may be added if murder in the first degree is not charged." The indictment in the present case charges the defendants with murder in the second degree, following this form, and the case, not being considered capital, was tried before one justice, against the objection of the defendants, instead of before two justices. Prior to the enactment of this statute, under St. 1858, p. 128, c. 154, re-enacted in Gen. St. c. 160, §§ 1-7; Pub. St. c. 202, §§ 1-7; Rev. Laws, c. 207, § 1, although the murder might be in the first degree or in the second degree, the indictment always contained charges which, if proved, might constitute murder in the first degree, and the degree of murder was expressly found by the jury at the trial. *Com. v. Gardner*, 11 Gray, 438; *Com. v. Desmarteau*, 16 Gray, 1; *Opinions of Justices*, 9 Allen, 585; *Green v. Com.*, 12 Allen, 155, 170-172; *Com. v. Gilbert*, 165 Mass. 45-58, 42 N. E. 336. These statutes and rules of law remain unchanged, except so far as they are modified by the form prescribed for an indictment for murder, and the accompanying statement from which we have quoted. In this there is an express provision for an indictment for murder in the second degree, whenever the grand jury do not deem it their duty to charge murder in the first degree. This language must be given effect, unless there are other provisions or principles of law which render it nugatory.

No question of authority in the Legislature to permit such an indictment is raised. The whole subject, so long as there is no departure from constitutional requirements, is within legislative control. There being different degrees of the same offense, punishable differently, it is in accordance with the general theory of criminal pleading to provide for indictments showing the extent and degree of the criminality charged against the defendant. It is also in accordance with the practice in many of the states which recognize different degrees of murder. See *State v. Hamlin*, 47 Conn. 95-117, 36 Am. Rep. 54; *Kennedy v. State*, 6 Ind. 485; *Fahnestock v. State*, 23 Ind. 231; *Synder v. State*, 59 Ind. 105-107; *State v. Bowen*, 16 Kan. 475; *Ward*

v. State, 96 Ala. 100, 11 South. 217; State v. Neely, 20 Iowa, 110; State v. Gilchrist, 113 N. C. 873, 18 S. E. 319. There is no good reason, either in principle or practice, why a grand jury should not be permitted in an indictment to charge a defendant with murder either in the first degree or in the second degree, according to their view of the evidence in the case. It seems plain that the Legislature intended to authorize this. The former statutes, which are re-enacted, are left in full force in all cases in which an indictment charges murder generally, which, in legal effect, may be murder in the first degree. In such cases, if the evidence at the trial leads the jury to a verdict of murder in the second degree, they so declare, as they make a like express declaration if they find the defendant guilty of the offense in the more aggravated form included in the charge. The provision that "the degree of murder is to be found by the jury" does not apply to cases in which no question in regard to the degree of the crime is presented to them. The defendant may plead guilty of murder in the first degree or in the second degree. *Green v. Com.*, 12 Allen, 155. The plea, if accepted, determines his guilt, whether it be of one degree or the other, and the jury of trials do not consider it. In like manner, a provision for an indictment for murder in the second degree does not conflict with this statute as to the duty of the trial jury to find the degree of guilt. It leaves them to perform that duty whenever an indictment in common form is before them, presenting a question as to the degree of the defendant's guilt. We are of opinion that this statute changed the pre-existing law by authorizing grand juries to present indictments for murder in the second degree. The crime charged by such an indictment is not a capital crime. *Green v. Com.*, 12 Allen, 155-173. A capital crime is one punishable with the death of the offender. In this commonwealth, for a long time, a different tribunal has been required for the trial of capital cases from that required for the trial of less heinous crimes. *Rev. St. 1836*, c. 82, § 26; *Id.*, c. 136, § 21; *St. 1859*, p. 632, c. 282. *Gen. St. c. 112*, §§ 5, 8, 9, 19, 20; *Id.*, c. 114, § 6; *St. 1869*, p. 748, c. 433, §§ 1, 2; *St. 1872*, p. 170, c. 232; *Pub. St. c. 150*, §§ 5, 8, 18, 19; *Id.*, c. 152, § 6; *St. 1891*, p. 966, c. 379, § 1; *St. 1894*, p. 186, c. 204; *Rev. Laws*, c. 157, § 7. In some of these statutes the words used are "a crime that is punishable with death," in some "a capital offense," in some "a capital crime," and in some "the crime of murder." As prior to the year 1899 an indictment for murder always contained all the allegations necessary to warrant a verdict of guilty of murder in the first degree, every trial for murder was a capital case, and these special provisions in regard to the trial pertained to all alike. As a trial upon an indictment for murder in the second degree is not a capital case, *Rev. Laws*, c. 157,

§ 8, providing that the trial of the indictment in capital cases shall be heard before two or more justices, is not applicable to it. This not only follows upon a true construction of the language of the statute, but it is analogous to the law and the practice in reference to a large number of crimes punishable by imprisonment for life. *Rev. Laws*, c. 207, §§ 17, 21, 22, 24; *Id.*, c. 208, §§ 1, 2, 14, 33, 42; *Id.*, c. 209, §§ 5, 6, 14; *Id.*, c. 210, § 1; *Id.*, c. 206, § 2. The court rightly held that the trial of the indictment might proceed before one justice.

The court rightly refused to rule that there was no evidence to warrant a verdict of guilty against these defendants. There were various circumstances, including the declarations of the deceased person, which well might satisfy the jury beyond a reasonable doubt that the fatal wound was not self-inflicted by the victim, but was inflicted upon him by the defendant Esad Ibrahim, as a part of an assault in which the two brothers were jointly engaged.

Exceptions overruled. Order overruling motion in arrest of judgment affirmed.

(184 Mass. 250)

BOURBONNAIS v. WEST BOYLSTON MFG. CO.

KELLY v. SAME.

(Supreme Judicial Court of Massachusetts. Hampden. Oct. 20, 1903.)

MASTER AND SERVANT—PLACES FOR WORK—ASSUMED RISK—QUESTIONS FOR JURY—EVIDENCE—ADMISSIBILITY—INSTRUCTION.

1. Plaintiff was working on a staging enlarging an elevator opening, when it fell, precipitating him from the third floor. The staging was built for a special purpose, and was ordered by a superintendent and erected under his direction. It was successfully used for such special work. The superintendent had been on the scaffold, and knew plaintiff was using it, and plaintiff knew the purpose for which it had been erected and for which it had been used. It had not been inspected after its completion. Held sufficient to sustain a finding that the staging was furnished by defendant, through its superintendent, as a completed structure for plaintiff's use in the work in which he was engaged.

2. Whether the superintendent was negligent in furnishing the staging, in not inspecting it, and in allowing plaintiff to use it, were questions for the jury.

3. Whether plaintiff was in the exercise of due care in working on the staging was for the jury.

4. Requested instructions relating to subjects concerning which complete general instructions were given without exception are properly refused.

5. The fall of staging furnished as a completed structure for a certain work, and allowed to remain in place for the other work, is not a passing risk of employment which was assumed.

6. Exceptions which are not argued will be treated as waived.

7. Where the jury might find from conflicting evidence that an upright supporting a staging which fell rested on brickwork, it was not error to ask an expert whether it would be safe to erect the staging with a corner post resting on a brick ledge, and to give his reasons for his opinion, and as to the liability of the brick

ledge to loosen, over objection that there was no evidence that the post rested on brick.

8. In an action for injuries occasioned by the fall of a staging, an offer to prove a custom among carpenters to examine staging before going on it may be properly excluded in the absence of evidence that plaintiff knew of the custom.

Exceptions from Superior Court, Hampden County; Elisha B. Maynard, Judge.

Consolidated actions by Emery Bourbonnais against the West Boylston Manufacturing Company and Benjamin D. Kelly against same defendant. Judgment for plaintiffs, and defendant brings exceptions. Exceptions overruled.

A. L. Green and F. F. Bennett, for plaintiffs. Brooks & Hamilton, for defendant.

BARKER, J. The plaintiffs were together upon a staging at work when it fell, precipitating them from the third story to the bottom of a tower. The general work going on was the repair and renovation of a mill building, and some 50 or 60 workmen were employed, among whom were several gangs of carpenters as well as millwrights, masons, painters, and plumbers. The plaintiffs were carpenters, and when the accident occurred were engaged in enlarging an old elevator opening in the fourth floor of the tower and in fitting the opening for a new and larger elevator which was to be put in. The staging consisted of uprights, most of which rested on the third floor of the tower and rose to within three or four feet of the fourth floor, and of braces to hold the uprights in place, and of plates nailed to the tops of the uprights, and planks forming the top or floor of the staging. It occupied the whole of one side of the third floor of the tower, the elevator opening through the third floor being under the staging, and that through the fourth floor being over the top or floor of the staging. Two of the uprights were in corners of the third-floor room of the tower, one in the northeast corner and one in the southeast corner. The upright in the northeast corner fell down the elevator opening which was in that corner of the room, thus letting down the flooring of the staging on which the plaintiffs were at work. There was evidence tending to show that the foot of this upright rested upon brick, and was insecurely fastened, and that two braces which at first had been put to keep it in place had been removed after the construction of the staging and before the accident. The cases went to the jury upon one count only of each declaration, which counts alleged negligence of a superintendent; the plaintiffs contending that the negligence consisted in setting them to work in an unsafe place. It is now admitted that there was evidence which would justify a finding that the two men whom the plaintiffs contended were superintendents were such within the meaning of the employer's liability acts. The cases had been tried once before, and there was

a conflict of evidence upon many matters involved. The defendant requested that verdicts in its favor should be ordered upon a variety of grounds, and also requested instructions upon different aspects of the case. The court refused to order verdicts for the defendant, and gave the jury full and complete general instructions on the questions of due care, assumption of risk, and other matters, to which no exceptions were taken, and refused to give the rulings requested, either in form or substance, except as appears from a part of the charge stated in the bill of exceptions. The defendant excepted to the refusal to give the rulings requested and to the rulings given in so far as they varied and were inconsistent with the rulings requested, but pointed out no particulars in which the charge had varied from, or was inconsistent with, the rulings requested. The bill also states some exceptions upon questions of evidence.

It is not contended that the staging was one constructed by workmen who were set to do a piece of work which involved the necessity of having a staging, and who accordingly built it for themselves. On the other hand, the staging was built to enable a special piece of work to be done, and was ordered by one of the superintendents, and built by two workmen under his supervision, before he proceeded to have done the special job for which the staging was ordered. This was the removal from the fourth story of the tower of the drum by which the old elevator was operated. The drum weighed six or seven hundred pounds, and in course of removal was handled by five men, whose weight, with that of the drum, had been upheld by the staging. This was about a fortnight before the plaintiffs were hurt, and in the meantime the staging had also been used in taking out a heavy beam which supported the fourth floor of the tower and in leveling or lowering that floor. Nor was the staging such an appliance as would have been put up by the plaintiffs or by any other workmen in order to enable them to do the work of enlarging and fitting the elevator openings. The evidence would justify a finding that, while the plaintiffs had no part in building the staging, they did know that it had been caused to be erected by one of the superintendents for the work of removing the drum, and that it had been successfully used, in doing that work, and subsequently in removing the beam and leveling the floor above, and then allowed to remain as if for further use. We think it might be found also from the evidence that the plaintiffs were in effect, though not in express words, told by a superintendent to use the staging in doing their work, and also that a superintendent was at one time on the staging when that work was going on, and knew that they were using it, and that neither the superintendent who had caused the staging to be built nor the one who ordered them to work upon it

or saw them at work upon it had inspected it at any time since its completion. Under such circumstances we think it was open for the jury to find that the staging was furnished by the defendant, through its superintendents, as a completed structure or appliance for the use of the plaintiffs in the particular work of enlarging and fitting the elevator opening in the fourth floor; and that the questions whether the superintendents were negligent in furnishing the staging, in not inspecting it before allowing the plaintiffs to use it, and in directing or allowing the plaintiffs to use it, and also the question whether the plaintiffs were in the exercise of due care in working upon it, were all questions of fact for the jury. This requires us to overrule the exceptions to the refusal to give the first, second, third, fourth, fifth, sixth, and seventh requests, and to the charge so far as it was not consistent with them.

As to the thirteenth, fourteenth, and fifteenth requests, it is enough to say that there was evidence tending to show that one or more braces, which had been put on to hold in place the corner post which fell, were not a part of the staging when the fall occurred, to say nothing of the evidence that one upright rested only on brick.

The subjects treated of in the eighth, ninth, tenth, and twelfth requests related to due care and assumption of risk, concerning which full and complete general instructions were given, to which no exception was taken; and, besides this, they seem to have been correctly dealt with in the portion of the charge which is set out in the bill of exceptions.

The fall of a staging which the jury could find had been furnished as a completed structure to be used in doing a certain work, and then allowed by a superintendent to remain in place and be used as a means of doing other work, cannot be held to be a transitory or passing risk of employment, like that of falling through openings made or left in floors, as in *Belque v. Hosmer*, 169 Mass. 541, 48 N. E. 338, on which the defendant relies in support of its exception to the refusal to give the eleventh instruction requested, which was refused rightly.

The only other request—the second—was that no sufficient service of notice was made. Neither the exception to the refusal of this request nor that to the admission of evidence of the service made of the notices given by each plaintiff has been argued, and we treat these exceptions as waived.

Three exceptions were taken to questions asked of an expert called to testify by the plaintiffs. The first question was, in substance, whether it would be a safe construction to erect the staging with one corner post resting upon a brick ledge; the second—the witness having answered that it was not proper construction—called for the reasons for that opinion; and the third was

as to the liability of a brick ledge to loosen under pressure. In support of these exceptions the defendant contends that there was no evidence that when the staging was constructed the northeast part or upright rested on the brick. But the witnesses who testified that that upright rested on a wall plate of timbers when the staging was first made also testified that it never rested on the brickwork, and in the conflict of testimony the jury might find that the upright always rested on the brickwork. Nor was it imperative that the court should exclude the question because it did not contain a statement as to the whole construction of the staging. We find no error in the admission of these questions.

The remaining exception is to the rejection of the defendant's offer to prove that there was a custom among carpenters to make an examination of a staging, to see whether it is in proper condition, before going upon it. In support of the exception the defendant contends that the evidence was relevant to the question of the plaintiffs' due care, as it would have tended to show that they must rely upon ascertaining for themselves whether the staging was safe before going upon it, and not depend for assurance of its safety upon inspection by the superintendent. Without passing upon the question whether the evidence of such a custom would have been competent upon the question of the plaintiffs' care or negligence if they knew of the custom, it could not affect them unless they knew of it; and it is enough to say, in overruling the exception, that the defendant did not offer to show that they knew of it. *Collins v. New England Iron Co.*, 115 Mass. 23, 25, and cases cited. See, also, *Dodge v. Favor*, 15 Gray, 82. Without that, the offer was, in effect, to show what other workmen were accustomed to do, and would open a multitude of collateral investigations, which the court properly could decline to allow the defendant to bring into the trial.

Exceptions overruled.

(184 Mass. 237)

MAHONEY v. BAY STATE PINK GRANITE CO.

(Supreme Judicial Court of Massachusetts.
Worcester. Oct. 21, 1903.)

MASTER AND SERVANT—PERSONAL INJURIES
—EVIDENCE—SUFFICIENCY—FELLOW
SERVANTS—SUPERINTENDENT.

1. Evidence that the "boss" of about 22 men at work on a quarry was the only man that gave directions, and was empowered to discharge men, and was accustomed to mark places where drilling was to be done, but did no drilling, was sufficient to sustain a finding that he was a superintendent, whose principal duty was that of superintendence, within the meaning of the statute relating to the liability of the master.

2. Evidence in an action for personal injuries, by an employe, examined, and held sufficient to warrant a finding by the court that defendant's superintendent was guilty of negligence which caused the accident.

3. An employé in a quarry, acting in pursuance of the orders of his superintendent, mounted a large rock to drill thereon, and was injured by the stone slipping along the sloping surface of the quarry. He could not have seen under the stone, and, though he might have known that there were some chips under it, it did not appear that it was possible for him to see the size and shape and quantity of the chips, so as to determine whether the stone was likely to slip. *Held*, that there was evidence from which it might be found that he was in the exercise of due care.

4. An employé in a quarry, directed by his superintendent to mount on a large rock for the purpose of drilling thereon, was not bound to make a careful inspection of everything pertaining to the safety of the place.

5. An employé does not assume risks caused by the negligence of a superintendent.

Exceptions from Superior Court, Worcester County; J. H. Hardy, Judge.

Action by John Mahoney against the Bay State Pink Granite Company for personal injuries. Judgment for plaintiff, and defendant excepts. Exceptions overruled.

John W. Corcoran and William B. Sullivan, for plaintiff. C. C. Milton and Daniel F. Gay, for defendant.

KNOWLTON, C. J. The defendant excepted to the refusal of the judge to make certain rulings requested. The court found for the plaintiff on the first count, which charges an injury to the plaintiff, caused by the negligence of Halligan, the defendant's superintendent, while the plaintiff was in the exercise of due care. If there was any evidence to support this count, the rulings requested were rightly refused. There was abundant evidence to warrant a finding that Halligan was a superintendent, whose sole or principal duty was that of superintendence, within the meaning of the statute. There were about 22 men at work on the quarry at this place, and Halligan was the "boss" who was accustomed to give directions to all these men. There was testimony that he had sometimes discharged men. There was another superintendent of the whole business, but there was testimony that he was not in the habit of staying at the quarry; that sometimes he did not come for a whole day; and that "Halligan was the only man who gave directions." Besides this, he was accustomed to mark with chalk lines the places where drilling was to be done, but he never drilled himself. *Crowley v. Cutting*, 165 Mass. 436, 43 N. E. 197; *Reynolds v. Barnard*, 168 Mass. 226, 46 N. E. 703; *O'Brien v. Look*, 171 Mass. 35, 50 N. E. 458; *Prendible v. Connecticut River Manufacturing Company*, 160 Mass. 131, 35 N. E. 675; *McCabe v. Shields*, 175 Mass. 438, 56 N. E. 699. The evidence tended strongly to show that he was negligent in putting in position the stone on which the plaintiff was working at the time of the injury. According to the plaintiff's testimony, this stone was about

six feet square and about five feet high, and it must have weighed several tons. The work was done with a derrick by two men who were acting under Halligan's direction, and who put the stone where he told them to put it. Both of them testified that, when it was put there, one of them told him it was not all right. According to one of the witnesses, the man at the derrick said, "There are a good many chips under the stone, and I don't think the stone is going to stay there," and that Halligan replied, "We'll leave it there. Swing your derrick out." The bed of the quarry was somewhat sloping, and there were many chips of broken stone of different sizes lying upon it, and, according to the evidence, these left the large stone in a sloping position. Afterwards Halligan ordered the plaintiff and two other men to get upon it and drill some lines which he had marked upon it. While they were at work at drilling, it slipped about 15 feet and injured the plaintiff. The evidence tends to show that it was the duty of Halligan to determine where and how the stone should be placed for the work to be done upon it. So far as appears, he was the only person who had any duty or responsibility in regard to that. Apparently it would have been easy to prepare a place for it on which it would have rested firmly. The judge might well find him guilty of negligence which caused the accident. *Malcolm v. Fuller*, 152 Mass. 160, 25 N. E. 83; *Dean v. Smith*, 169 Mass. 569, 48 N. E. 619; *Hennessey v. Boston*, 161 Mass. 502, 37 N. E. 668.

There was evidence from which it might be found that the plaintiff was in the exercise of due care. He was in the performance of his duty in obedience to Halligan's order. He was not there when the stone was put in position, and his attention was not directed to the risk of its slipping. According to the testimony, he could not see under the stone, although he might have known that there were some chips under it. It does not appear that it was possible for him to see the size and shape and quantity of the chips, so as to determine whether the stone was likely to slip. Primarily, it was not his duty to make a careful inspection of everything pertaining to the safety of the place where he was directed to work. He might well trust something to the superintendent. It was his primary duty immediately to obey Halligan's order to go upon the stone and drill the line. Moving the large stones with a derrick and putting them in place to be finished was not in the line of duty of the men employed to drill. It was a part of the business which properly could only be done by their employer, or by the superintendent representing him. Interference of workmen in that department of the business might have been resented by the superintendent. It was the plaintiff's duty to work at drilling where he was told to work. Of course, if he knew of a danger that should be guarded

¶ 5. See Master and Servant, vol. 24, Cent. Dig. §§ 546, 570.

against, he could not carelessly expose himself to it at his employer's risk; and if there was danger so obvious and so great that the exercise of due care would disclose it to him, and would show him that he ought to avoid it, he was bound to refrain from improperly exposing himself, but he might treat the direction to work upon the stone as an implied assurance that he could work there safely, from one who ought to know. In assuming the ordinary risks of the business, he did not assume risks caused by the negligence of a superintendent. *Hennessey v. Boston*, 151 Mass. 502, 37 N. E. 668; *Dean v. Smith*, 169 Mass. 569, 48 N. E. 619; *Malcolm v. Fuller*, 152 Mass. 160, 25 N. E. 83; *Crowley v. Cutting*, 165 Mass. 436, 43 N. E. 197.

Exceptions overruled.

(184 Mass. 310)

KILTY v. JACKSON et al., Railroad Com'rs.

(Supreme Judicial Court of Massachusetts. Worcester. Oct. 21, 1903.)

PROHIBITION—PARTIES—STRANGERS—DISCRETION OF COURT.

1. Where the petitioner for a writ of prohibition, to restrain the railroad commissioners from issuing a certificate of compliance to a certain street railway company, was a stranger to the proceedings, having no other interest than that of an inhabitant of the town, the refusal of the writ rested in the discretion of the court, and was not reviewable.

2. Since Rev. Laws, c. 112, § 100, gives to any interested party a remedy in equity for an erroneous ruling of any state board or commission relative to street railways, prohibition will not issue to restrain the railroad commissioners from issuing a certificate of compliance to a certain street railway company.

Exceptions from Supreme Judicial Court, Worcester County; James M. Morton, Judge.

Petition for a writ of prohibition by Lawrence F. Kilty against James F. Jackson and others. Judgment refusing the writ, and petitioner excepts. Exceptions overruled.

Thayer & Rugg, for petitioner. Frederick H. Nash, for respondents.

KNOWLTON, C. J. This is a petition for a writ of prohibition to restrain the railroad commissioners from issuing a certificate of compliance to the Hartford & Worcester Street Railway Company, under the provisions of Rev. Laws, c. 112, § 13, and chapter 111, § 46. The presiding justice refused the writ as a matter of discretion, and also made certain rulings to which the petitioner excepted. The case comes before us on these exceptions.

The ground on which the petition rests is that, because of the refusal of the selectmen of Oxford to grant a location to the street railway company in that town, the railroad

commissioners could not legally issue a certificate of compliance with the requirements of the law, preliminary to the establishment of a corporation. Oxford is one of the towns mentioned in the agreement of association through which the route was to run. The petitioner is a stranger to the proceedings, having no other interest in the matter than that of an inhabitant of the town of Oxford. If we assume, in accordance with the law in England and in some of the American states, that a writ of prohibition may sometimes be granted upon the petition of a stranger (see *Attorney General v. Boston*, 123 Mass. 400-479; *Smith v. Whitney*, 116 U. S. 167-173, 6 Sup. Ct. 570, 29 L. Ed. 601), we hold that the granting of a writ in such a case is not a matter of right, but a matter of discretion. This is the rule established by recent decisions in England, and generally approved where the subject has been considered elsewhere. *Queen v. Local Government Board*, 10 Q. B. D. 309; *Mayor of London v. Cox*, L. R. 2 H. L. 239; *Smith v. Whitney*, 116 U. S. 167-173, 6 Sup. Ct. 570, 29 L. Ed. 601; *In re Rice*, 155 U. S. 396-402, 15 Sup. Ct. 149, 39 L. Ed. 198; *In re Huguley Manufacturing Company*, 184 U. S. 297-301, 22 Sup. Ct. 455, 46 L. Ed. 549; *High's Extraordinary Remedies*, 606, and cases cited. Inasmuch as the writ in this case was refused in the exercise of the judge's discretion, as well as upon other grounds, this alone requires us to overrule the exceptions.

Another thing which brings us to the same result is the provision in Rev. Laws, c. 112, § 100, which gives to any interested party a right to a remedy in equity in case of an erroneous ruling of any state board or commission relative to street railways. It is a general rule that a court of law will not issue a writ of prohibition to an inferior court where there is a right of appeal or a remedy in equity which will give full and adequate relief from the anticipated error. *Jaquith v. Fuller*, 167 Mass. 123-128, 45 N. E. 54; *Fairweather v. McKim*, 168 Mass. 103, 46 N. E. 427; 23 Am. & Eng. Enc. of L. (2d Ed.) 207, and cases cited in note. We are of opinion that under this provision of the statute the court should refuse to exercise this extraordinary jurisdiction to correct an error of the railroad commissioners in any ordinary case.

It is unnecessary to determine whether the decision of the railroad commissioners, under Rev. Laws, c. 111, § 46, upon the question whether the preliminary requirements of the chapter have been complied with, is final, or is subject to revision by this court on questions of law; nor is there any occasion to consider the fundamental question which was decided by the railroad commissioners.

Exceptions dismissed.

¶ 1. See *Prohibition*, vol. 40, Cent. Dig. § 83.

(184 Mass. 283)

WISHART v. McKNIGHT.(Supreme Judicial Court of Massachusetts.
Worcester. Oct. 21, 1903.)**ADVERSE POSSESSION—INCEPTION—USE BY
GRANTEE—SUCCESSIVE CONVEY-
ANCES—CONTINUITY.**

1. Where grantor owned two adjoining lots, with a strip of land between the houses thereon leading to the only entrance into one of them, and this strip was included with that one by a fence, on a conveyance by him of that lot by a deed not including said strip, its continued use and occupation by the grantee became adverse, and did not continue permissive.

2. Where a grantee's fence included, and he used and occupied adversely, a strip of land adjoining the grantor's premises, not included in the deed, it was not necessary, in order to constitute a continuous adverse possession, that on successive leases or conveyances the strip should be formally passed from lessor to lessee, or that the new occupant be personally present on the premises before the former occupant departed.

Exceptions from Supreme Court, Worcester County; Edward P. Pierce, Judge.

Action by William A. Wishart against Joseph McKnight. Judgment for tenant, and demandant excepts. Exceptions overruled.

See 59 N. E. 1028.

John W. Corcoran, William B. Sullivan, and Allan G. Buttrick, for tenant. Herbert Parker, Charles C. Milton, and Henry H. Fuller, for demandant.

KNOWLTON, C. J. This is a writ of entry to recover a strip of land about 10 feet wide, extending back from the line of the street between the dwelling houses of the parties. The case has previously been before us on exceptions which appear in 178 Mass. 356, 59 N. E. 1028, 86 Am. St. Rep. 486, where may be found, with the statement of facts, a plan of the locus. The present exceptions are to the refusal to make certain rulings requested by the demandant, which relate to the sufficiency of the evidence to support a finding of the acquisition by the tenant of a title by disseisin. The tenant has not personally maintained the possession relied on so long as 20 years, but the evidence tended to show that he and his predecessors in title together held possession considerably more than 20 years. At the former hearing we decided that there might be such a transfer of possession of this property by the successive grantors and occupants of the adjacent premises with which this strip was used as would make a continuity of possession, by which at the expiration of 20 years a valid title by disseisin and limitation would be acquired. The several requests for rulings that there could be no finding for the tenant rest mainly upon two propositions, namely, first, an assumption that the occupation and use were originally permissive, and that there was no evidence that until very lately they became adverse; and, secondly, upon the contention that there was no such evidence of an immediate succession of proprietors and a transfer of possession as would create a

continuity of adverse occupation, within the meaning of the law.

The situation was unusual. There was no door in the front wall of the tenant's house, next the street. The house was erected very near the line of the lot, on the westerly side, and the only access to it was over this strip that ran down from the street on the easterly side, by a side door, which was entered by two steps, and that also ran by the rear corner of the house to the back yard, in which was a small building. The steps at the side door were upon the demanded premises, which are separated from the defendant's house lot by a fence running back from the street, erected prior to the year 1873. The evidence tended to show that in 1873 the tenant's property, with the strip in question, up to the fence, was occupied by a tenant of one who then owned the estates of both the demandant and the tenant, and that on July 6, 1874, the present tenant's predecessor in title took a deed of the estate now described in the tenant's deed, which did not include the strip in question, and that the tenant and his predecessors in title have occupied and claimed under that deed ever since, and that the strip has been occupied and used all this time, to the line of the fence, as if it belonged to the estate conveyed by the deed. So long as both estates were owned by the same person, and the present tenant's estate, with the adjoining strip, was occupied by a tenant of the owner of the whole, it might fairly be inferred that the use of the strip was permissive, and not adverse; but immediately upon the separation of the estates by a deed to the tenant's predecessor in title, and upon an attornment to the new owner, the relations of the parties were changed, and possession and use of this strip in connection with the present tenant's estate would no longer be imputed to the former tenancy from the demandant's predecessor, but presumably would be adverse to the former landlord, the holder of the title. We think there was ample evidence to warrant a finding that the possession, if permissive originally, was adverse after the termination of the tenancy by the conveyance to the present tenant's predecessor in title. To warrant a finding that there was a continuity of possession, we do not deem it necessary to show by express testimony that the new occupant was personally present upon the premises before the former occupant departed, and that there was a formal, manual transfer of possession of this strip as a part by itself. There is a fair inference that a tenant, on his departure at the expiration of his term, surrenders the possession to his landlord, and that their possession is continuous, or, rather, that the possession of the owner is continuous, although the two do not meet personally upon the premises at the end of the term. The possession of the tenant is the possession of the landlord. When we find a strip of land

so situated in reference to an adjacent dwelling house and lot that the house cannot be entered or used without passing over the strip, and that the strip is fenced off from other lands, as if belonging to the house, and is always used with it when the house is used, and is not occupied or used otherwise than with the house, and is always claimed by the occupant and the owner of the house as property belonging with it, it may fairly be inferred that the possession of the strip is given by the landlord to the tenant, and afterwards surrendered by the tenant to the landlord, and that, upon a sale of the house and lot, possession of this land, which is treated as belonging to the house, is transferred with the seisin and possession of the house. See *Leonard v. Leonard*, 7 Allen, 277; *Ammidown v. Ball*, 8 Allen, 293; *Pettingill v. Porter*, 8 Allen, 1, 85 Am. Dec. 671; *Sargent v. Ballard*, 9 Pick. 251; *Melvin v. Whiting*, 13 Pick. 184; *Allen v. Scott*, 21 Pick. 25-29, 32 Am. Dec. 238; *Jordan v. Riley*, 178 Mass. 524; *Percival v. Chase*, 182 Mass. 371-376, 65 N. E. 800; *Beckman v. Davidson*, 162 Mass. 347-350, 39 N. E. 38. The maintenance of possession of the house and the strip by all the successive owners, as if they belonged together, furnishes a presumption of fact that the seisin and possession of one part were transferred at the same time as the seisin and possession of the other part.

After a recital of evidence excluded, it is said in the former opinion in this case that "this evidence would have warranted the jury in finding that each of the grantees transferred to his successor his possession of the strip of land in question, and that thereby the demandant was continuously kept out of possession." This evidence was introduced in convincing form at the last trial. The evidence indicates that the possession relied on was adverse and under a claim of right. *Wheeler v. Laird*, 147 Mass. 421, 18 N. E. 212; *Bodfish v. Bodfish*, 105 Mass. 317; *Samuels v. Borrowscale*, 104 Mass. 207; *Holloran v. Holloran*, 149 Mass. 298, 21 N. E. 374.

We do not deem it necessary to consider the requests for rulings more particularly. There was no error in the refusal to grant them.

Exceptions overruled.

(184 Mass. 269)

AIKEN v. HOLYOKE ST. RY. CO.

(Supreme Judicial Court of Massachusetts.
Hampden, Oct. 21, 1903.)

STREET RAILROADS—BOY CLINGING TO CAR—WANTON INJURY—CONTRIBUTORY NEGLIGENCE AS DEFENSE—INSTRUCTION—COMPANY'S LIABILITY—PREVIOUS ACTS OF NEGLIGENCE—ADMISSIBILITY OF EVIDENCE.

1. Plaintiff, a boy 6½ years old, ran against a street car, and was clinging to the lower step near the forward end as the car rounded a curve. He cried to the motorman to let him off, but the motorman, though perceiving plain-

tiff's danger, turned on the power in a wanton and reckless way, thus starting the car quickly forward, and throwing plaintiff to the ground, injuring him. *Held*, that plaintiff's failure to exercise ordinary care, even at and after the motorman's act, was no defense, in view of the willful, wanton, and reckless character of the act.

2. An instruction, in a personal injury case, that, if defendant's act was willful and intentional, plaintiff need not show that he was "in the exercise of due care," means ordinary care, and is not objectionable as relieving plaintiff from special care, which peculiar circumstances might impose upon him.

3. A master is liable for the acts of his servant done recklessly or willfully in the course of his employment.

4. In a personal injury action involving the defense of contributory negligence, defendant's evidence of previous acts of carelessness on plaintiff's part is inadmissible.

Exceptions from Superior Court, Hampden County; Frederick Lawton, Judge.

Action for personal injuries by one Aiken, by his next friend, against the Holyoke Street Railway Company. Verdict for plaintiff, and defendant excepts. Exceptions overruled.

A. L. Green and F. F. Bennett, for plaintiff. Brooks & Hamilton, for defendant.

KNOWLTON, C. J. The most important question in this case grows out of the instructions to the jury upon the third count. This count charges the defendant, by its servants, with having started up the car recklessly, wantonly, and with gross disregard of the plaintiff's safety, while he was in a place of great peril upon the step of the car, and with having thrown him upon the ground and under the wheels of the car. There was evidence tending to show that the plaintiff, a boy 6½ years of age, ran near or against the car, and was upon the lower step at the forward end as the car was going around a curve from one street into another, and was clinging to the step, trying to get into a stable position, and that he there cried out to the motorman, "Let me off!" that the motorman saw and heard him, and knew that he was in a place of danger, and that he then turned on the power in a wanton and reckless way, with a view to start the car quickly; and that the plaintiff was thus thrown off and injured. This testimony was contradicted, but it was proper for the consideration of the jury. The judge instructed the jury that, if they found the facts to be in accordance with this contention of the plaintiff, they would be warranted in finding that the conduct of the motorman was wanton and reckless and in returning a verdict for the plaintiff. He also instructed them that, to maintain the action on this ground, it must be proved that the motorman willfully and intentionally turned on the power with a view to making the car start forward rapidly and go at full speed quickly, but that it was not necessary to prove that he did this with the intention of throwing the

¶ 4. See *Negligence*, vol. 37, Cent. Dig. § 263.

boy off and injuring him. He also told them that, to warrant a recovery upon this state of facts, the plaintiff need not show that he was in the exercise of due care. The defendant excepted to that part of the instruction which relates to due care on the part of the plaintiff.

The defendant contends that, while it was not necessary for the plaintiff to show due care anterior to the act of the motorman, he was bound to show due care which was concurrent with this act and immediately subsequent to it. This brings us to a consideration of the rules and principles applicable to this kind of liability. It is familiar law that, in the absence of a statutory provision, mere negligence, whatever its degree, if it does not include culpability different in kind from that of ordinary negligence, does not create a liability in favor of one injured by it, if his own negligence contributes to his injury. It is equally true that one who willfully and wantonly, in reckless disregard of the rights of others, by a positive act or careless omission exposes another to death or grave bodily injury, is liable for the consequences, even if the other was guilty of negligence or other fault in connection with the causes which led to the injury. The difference in rules applicable to the two classes of cases results from the difference in the nature of the conduct of the wrongdoers in the two kinds of cases. In the first case the wrongdoer is guilty of nothing worse than carelessness. In the last he is guilty of a willful, intentional wrong. His conduct is criminal or quasi criminal. If it results in the death of the injured person, he is guilty of manslaughter. *Commonwealth v. Pierce*, 138 Mass. 165, 52 Am. Rep. 264; *Commonwealth v. Hartwell*, 128 Mass. 415, 35 Am. Rep. 391. The law is regardless of human life and personal safety, and, if one is grossly and wantonly reckless in exposing others to danger, it holds him to have intended the natural consequences of his act, and treats him as guilty of a willful and intentional wrong. It is no defense to a charge of manslaughter for the defendant to show that, while grossly reckless, he did not actually intend to cause the death of his victim. In these cases of personal injury there is a constructive intention as to the consequences, which, entering into the willful, intentional act, the law imputes to the offender, and in this way a charge which otherwise would be mere negligence becomes, by reason of a reckless disregard of probable consequences, a willful wrong. That this constructive intention to do an injury in such cases will be imputed in the absence of an actual intent to harm a particular person is recognized as an elementary principle in criminal law. It is also recognized in civil actions for recklessly and wantonly injuring others by carelessness. *Palmer v. Chicago St. L. & P. Railroad Company*, 112 Ind. 250, 14 N. E. 70; *Shumacher v. St. Louis & Santa*

Fé Railroad Company (C. C.) 39 Fed. 174; *Brannen v. Kokomo, G. & J. Gravel Road Company*, 115 Ind. 115, 17 N. E. 202, 7 Am. St. Rep. 411. In an action to recover damages for an assault and battery it would be illogical and absurd to allow as a defense proof that the plaintiff did not use proper care to avert the blow. See *Sanford v. Eighth Avenue Railroad Company*, 23 N. Y. 343-346, 80 Am. Dec. 286. It would be hardly less so to allow a similar defense where a different kind of injury was wantonly and recklessly inflicted. A reason for the rule is the fact that, if a willful, intentional wrong is shown to be the direct and proximate cause of an injury, it is hardly conceivable that any lack of care on the part of the injured person could so concur with the wrong as also to be a direct and proximate contributing cause to the injury. It might be a condition without which the injury could not be inflicted. See *Newcomb v. Boston Protective Department*, 146 Mass. 596, 16 N. E. 555, 4 Am. St. Rep. 354. It might be a remote cause, but it hardly could be a cause acting directly and proximately with the intentional wrongful act of the offender. *Judson v. Great Northern Railway Company*, 63 Minn. 248-255, 65 N. W. 447. The offense supposed is different in kind from the plaintiff's lack of ordinary care. It is criminal or quasi criminal. Not only is it difficult to conceive of a plaintiff's negligence as being another direct and proximate cause foreign to the first, yet acting directly with it, but it would be unjust to allow one to relieve himself from the direct consequences of a willful wrong by showing that a mere lack of due care in another contributed to the result. The reasons for the rule as to the plaintiff's care in actions for ordinary negligence are wanting, and at the same time the facts make the rule impossible of application. The general rule that the plaintiff's failure to exercise ordinary care for his safety is not a good defense to an action for wanton and willful injury caused by a reckless omission of duty, has been recognized in many decisions, as well as by writers of text-books. *Aiken v. Holyoke Street Railway Co.*, 180 Mass. 8, 14, 15, 61 N. E. 557; *Wallace v. Merrimack River Navigation Express Company*, 134 Mass. 95, 45 Am. Rep. 301; *Banks v. Highland Street Railway Co.*, 136 Mass. 485, 486; *Palmer v. Chicago St. L. & P. Railroad Company*, 112 Ind. 250, 14 N. E. 70; *Brannen v. Kokomo, G. & J. Gravel Road Company*, 115 Ind. 115, 17 N. E. 202, 7 Am. St. Rep. 411; *Florida Southern Railway Company v. Hirst*, 30 Fla. 1, 11 South. 506, 16 L. R. A. 631, 32 Am. St. Rep. 17; *Shumacher v. St. Louis & Santa Fé Railroad Company (C. C.)* 39 Fed. 174; 7 Am. & Eng. Enc. of L. (2d Ed.) 443, and note; *Beach on Contributory Negligence* (3d Ed.) §§ 46, 50, 64, 65; 2 *Wood on Railroads* (2d Ed.) 1452; 3 *Elliot on Railroads*, § 1175; 1 *Thompson, Commentaries on Negligence*, § 206; *Cooley on Torts*

(2d Ed.) 810. We have been referred to no case in which it is held that it makes any difference whether the plaintiff's lack of ordinary care is only previous to the defendant's wrong, and continuing to the time of it, or whether there is such a lack after the wrong begins to take effect. It is difficult to see how there can be any difference in principle between the two cases. In this commonwealth, as in most other jurisdictions, liability does not depend upon which of different causes contributing to an injury is latest in the time of its origin, but upon which is the direct, active, efficient cause, as distinguished from a remote cause, in producing the result.

There are expressions in some of the cases which imply the possibility of contributory negligence on the part of the plaintiff in a case of a wanton and reckless injury by a defendant. If there is a conceivable case in which a plaintiff's want of due care may directly and proximately contribute as a cause of an injury inflicted directly and proximately by the willful wrong of another, such a want of care must be something different from the mere want of ordinary care to avoid an injury coming in a usual way. There is nothing to indicate the existence of peculiar conditions of this kind in the present case. Conduct of a plaintiff which would be negligence precluding recovery if the injury were caused by ordinary negligence of a defendant will not commonly preclude recovery if the injury is inflicted willfully through wanton carelessness. This is illustrated by the former decision in this case and by many others. *Alken v. Holyoke Street Railway Company*, 180 Mass. 8, 61 N. E. 557; *McKeon v. New York, New Haven & Hartford Railroad Company* (Mass.) 67 N. E. 329. As to this kind of liability of the defendant, it was certainly proper to instruct the jury that in reference to ordinary kinds of care to avoid an injury from a car the plaintiff need not show that he was in the exercise of due care if a lack of such care would have no tendency to cause the willful and wanton injury. The fair interpretation of the instruction given is that it referred to ordinary kinds of care to avoid an injury from an electric car. On this branch of the case there seems to have been no reason for an instruction in regard to any special care, and probably neither counsel nor the court had any care in mind except that in reference to which, in any view of the law, the instruction was properly given. We are of opinion that the ruling excepted to was correct.

The instruction that a master is liable for the acts of his servant done recklessly or willfully in the course of his employment was correct. *Howe v. Newmarch*, 12 Allen, 49; *Young v. South Boston Ice Company*, 150 Mass. 527, 23 N. E. 326; *Wallace v. Merrimack River Navigation & Express Company*, 134 Mass. 96, 45 Am. Rep. 301; *Ramsden v. Boston & Albany Railroad Company*, 104

Mass. 117, 6 Am. Rep. 200; *Mott v. Consumers' Ice Company*, 73 N. Y. 543.

The evidence of previous acts of carelessness on the part of the plaintiff was rightly excluded. *Hatt v. Nay*, 144 Mass. 186, 10 N. E. 807.

Exceptions overruled.

(176 N. Y. 168)

TAYLOR v. THOMPSON et al.

(Court of Appeals of New York. Oct. 6, 1903.)
PARTNERSHIP—SALE OF INTEREST—FRAUD—REMEDIES OF PURCHASER.

1. Where, by the false representations of a member of a firm, a party is induced to purchase the interests of other members of the firm and create a new partnership, composed of himself and such member, he cannot maintain an action individually against the firm to recover the resulting damages.

2. Where a person is induced to purchase the interest of two partners in a firm by the false representations of the other partner, the new firm cannot maintain an action for the deceit against the old firm.

3. Where a member of a firm, by false representations, induced another to purchase the interest of two other members of the firm, such outgoing members are not liable for the deceit practiced, where it was principally for the benefit of the remaining partner, and not as agent of the firm.

Appeal from Supreme Court; Appellate Division, First Department.

Action by William A. Taylor against Robert H. Thompson and others. From the judgment of the Appellate Division (77 N. Y. Supp. 438) affirming a judgment for defendants, plaintiff appeals. Affirmed.

Austen G. Fox and William D. Leonard, for appellant. John J. Crawford, for respondents.

BARTLETT, J. The plaintiff seeks to recover in this action damages by reason of alleged false representations made by the defendants upon the sale of a certain business which had been conducted by them under the firm name of Thompson, Culbert & Co. This sale took place in October, 1889, and, in order to deal with the questions of law presented, a history of the facts is essential. The defendants' firm of Thompson, Culbert & Co. were, in October, 1889, and for years prior thereto, importers of wines and liquors at 39 Broadway, in the city of New York. The defendants John and Robert Thompson were brothers. John Thompson was 70 years of age at the time of this transaction, and Robert was a very much younger man. Robert Thompson and the defendant Norris had practically nothing to do with this business except as contributors of capital, the management being left to John Thompson and the defendant Culbert. John Thompson contributed \$13,000 as capital, and Robert Thompson and Norris contributed \$6,500 each. Culbert, who was not financially responsible, furnished no capital, and received one-fifth of the profits for services rendered.

The defendants Robert Thompson and Norris were at this time respectively president and vice president of a corporation known as the Thompson & Norris Company, manufacturers of corrugated paper for packing purposes, and had for many years been doing business in the city of Brooklyn. In the month of August, 1889, the members of the firm of Thompson, Culbert & Co. became aware of the fact that, through the dishonesty of clerks, a defalcation had occurred amounting to \$30,000, being somewhat in excess of the paid-up capital of the business. After considerable discussion, the Thompsons and Norris concluded that it would be better to wind up the business, as John Thompson was advanced in years, and greatly disturbed by the defalcation, and Robert Thompson and Norris had no disposition to carry on a business outside of their corporate interests, to which reference has already been made. When Culbert was advised of the disposition on the part of his partners to wind up the concern, he stated that he would like to retain the business. The result was that Culbert's partners stated to him, in substance, that, if he could raise the money so as to return to them their capital and relieve them from all obligations to the creditors of the firm, they would sell the business. Culbert thereupon had an interview with his friend, Robert E. Bonner, who introduced him to the plaintiff, Taylor. Bonner was a man of means, and agreed to advance to Taylor the necessary amount to purchase this business if Taylor was satisfied to enter into business relations with Culbert. After certain negotiations between Taylor and Culbert, a firm was formed under the style of Culbert & Taylor, having for its object the taking over of said business. The assets of the business were ultimately turned over to Culbert & Taylor, the defendants Thompson and Norris received their contributions of capital, and were released from their obligations to the creditors of the firm of Thompson, Culbert & Co. Taylor, in the following June, 1890, claims to have ascertained that Culbert made fraudulent representations as to the assets and liabilities of Thompson, Culbert & Co., but notwithstanding this fact continued in firm relations with him for two years thereafter. Taylor testified in this connection as follows: "When I discovered the evidence of this fraud on the 30th day of June, 1890, Mr. Culbert was my partner, and continued to be such for two years after that time. I called his attention to the fact that he had perpetrated a fraud upon me. I did that, I think, about September of that year, and continued in partnership with him after that for nearly two years. He was a full partner, and entitled to half interest. He did not draw out a full one-half. I permitted him to be there with certain rights. I had him pretty well covered. I am still carrying on the business. It has been a profitable business since I took possession of it. It

was not at the time I took it." At the expiration of these two years Culbert is said to have assigned his interest in the firm to Taylor, and on the 16th day of January, 1893, this action was commenced by Taylor individually, naming as defendants the partners in the former firm of Thompson, Culbert & Co., including Culbert. The defendants John Thompson and Culbert were not served, and have not appeared. It is also to be observed that Culbert was not produced as a witness on the trial of this action.

This action has been twice tried. The plaintiff recovered a judgment on the first trial, which was reversed by reason of errors in the charge of the trial judge. It should also be observed that, notwithstanding the fact that Culbert is said to have assigned to Taylor his interest in the firm of Culbert & Taylor, that assignment was not offered in evidence on this second trial. The theory of the plaintiff's action apparently is that Culbert, as a member of the firm of Thompson, Culbert & Co. fully representing them in law as their agent, made certain false representations to him in negotiating the sale of this business as to the value of the assets and the amount of the liabilities, upon which he relied, to his damage of \$33,000 and upwards. The main contention of the plaintiff and appellant is that he was entitled to go to the jury on the question of what relation existed between him and Culbert during these negotiations which resulted in the sale of the business. We are of the opinion that there are certain undisputed facts upon which the directed verdict can stand. It is true that when these parties met at the office of counsel to close matters there is a conflict of evidence as to what occurred. Robert Thompson and Norris testified that they told Taylor at that time, and in the presence of counsel, that they had nothing whatever to do with the management of this business, and that they did not know what the assets of the business consisted of. John Thompson testified on the first trial, and his testimony was read on the second trial, he having died in the interval, referring to his interview at office of counsel, as follows: "My brother got up and said: 'Mr. Taylor, we know nothing about the assets, whether they were worth ten thousand dollars or one hundred thousand dollars. We sold out to Mr. Culbert on their appraisal, and we know nothing whatever about whether they are worth anything or a good deal.'" These statements were corroborated in the main by counsel. The plaintiff swore witnesses who denied that these statements were made. If the case rested on this portion of the evidence, it certainly should have been submitted to the jury. It, however, stands uncontradicted, as between Culbert and his partners, that he was to raise money and take over the business if he wished to continue it in connection with any third party. Culbert had been the part-

ner of plaintiff for years, and a member of a firm formed for the purpose of taking over this business, concededly, and the fact that he was not sworn at the trial nor served in this action permits the presumption that he could not have aided the plaintiff's case if placed upon the witness stand. The defendants' theory of the action rests upon this uncontradicted evidence that the Thompsons and Norris wished to abandon the business upon being paid the amount of their capital and be relieved from liabilities for the debts of the firm of Thompson, Culbert & Co.; that Culbert was acting wholly in his own interest, wishing to preserve the business for himself and some third person whom he might induce to advance the necessary capital and become associated with him in the conduct of the business. As already pointed out, this transaction took the form, so far as the papers are concerned, of a transfer from the firm of Thompson, Culbert & Co. to the firm of Culbert & Taylor. Taylor, when on the stand, testified that he took a bill of sale at the time he purchased. This is error, as there is attached to his amended complaint a bill of sale from the firm of Thompson, Culbert & Co. to the firm of Culbert & Taylor. It also appears by the dissolution agreement, whereby the firm of Thompson, Culbert & Co. was dissolved, that its property, assets, and good will were to be sold to Robert B. Culbert and William A. Taylor. The real transaction, without regard to the forms which the parties saw fit for convenience to adopt, is made very clear by evidence that is not disputed.

As above stated, the testimony of John Thompson, taken at the first trial, was read on the second trial, he having died meanwhile. The beginning of the transaction now before the court is therein disclosed with great clearness. He refers to the time when he first learned of the defalcation, and in that connection he testified: "I sent immediately for my brother and Mr. Norris, and they came, and I told them what had happened. I think I went over to Brooklyn to see them afterwards, and we decided then and there to sell out our claim upon the partnership, and make some disposition of the business—go into liquidation, and pay off the debts—and either go on with the business under some other name or retire entirely. I came back, and told Mr. Culbert of it. 'Well,' he said, 'if that is so, I would like to retain the business.' Mr. Culbert said: 'Mr. Bonner, who was a friend of mine, then told me he would assist me at any time that I wanted to go into business; and, if we were willing to sell out to him, that he would see Mr. Bonner, and see if he would furnish the money to buy out the stock.' I told him he could see him; that I was willing to sell out to him, and all I wanted was my money that I put into the firm. He asked if I would see the other two. I told him I would, and went and saw them, and in talking it over

we all agreed to sell out, provided we got back the capital we put in the firm and interest from the last of February to three o'clock on the day we would give them up possession. I came back, and told Mr. Culbert, and he said he would go and see Mr. Bonner. He went off and came back and said that Mr. Bonner told him to look the matter over, and, if it was all right, he would furnish him the money to buy it up. 'Now,' he said, 'if I buy this, you will stay with me for a short time, not to exceed three months, and attend to the office while I attend to the outside business, until I get some man to take care of the office,' which I agreed to do, and told him I would, provided he paid me my money and the interest, which he promised to do, if, on examination, he found the business or capital was not much depleted.

* * * The terms mentioned to Culbert upon which we were to sell out were that we were to be paid our capital and interest, and all debts of the firm, foreign and domestic, were to be provided for. This conversation was in August. * * * I first heard mention of Mr. Taylor about the last of September or the first of October. Mr. Culbert first mentioned him to me. He told me that Mr. Bonner had found a man to take charge of the office and have him take an interest in the business—a man by the name of Taylor, whom he did not know, he said, and was kind of sorry for it, because he did not know Mr. Taylor, and he might make it very unpleasant for him in the transaction of business; but he was going to be the head of the firm himself, and things had to go as he said himself; that Bonner was furnishing the money to buy the concern out." These statements of John Thompson are corroborated by Bonner, who was sworn by the plaintiff. This witness alludes to the first interview he had with Culbert in this matter. He said: "We were lunching together, as we did once in a while, and he spoke of the defalcation. * * * and said that he was afraid, as the result of the whole thing, that he was going to be forced out of the business, unless he could get capital to go in; and if he could get capital to go in he claimed that he had a very good business proposition, which would pay anybody, and would take about \$60,000. That, I think, was about the substance of the first conversation we had." When cross-examined as to this interview, Mr. Bonner said: "The idea was that he was afraid it might be dissolved and reorganized and he left out. He did not want to be left out. He wanted to stay in. Q. And he wanted you to assist him, so that he could stay in, did he not? A. Well, he didn't put that as broadly as that at first. Q. How did he put it? A. Well, he was just telling me his whole history, you know—his history, like one friend talks to another—and he led up to it by degrees. It resulted, practically— Q. He was telling you the trouble he was in? A. It resulted in that without absolutely saying here,

"Won't you lend me this money?" right straight out." It is clear from the uncontradicted evidence of these two witnesses that Culbert was primarily acting in his own interest, and that it was a matter of indifference to the other partners in the firm of Thompson, Culbert & Co. whether the transfer was made to him or to some person who could raise the money and enter into business relations with him, or to a firm to be formed.

If we adopt the plaintiff's theory of the action, that Culbert was throughout acting as the agent of the firm of Thompson, Culbert & Co., and had made false representations, which rendered himself and partners liable to the persons purchasing the business relying upon those representations, then it is clear that this action should have been brought in the firm name of Culbert & Taylor, as they were, on the face of the proceeding, the purchasers of the business, and received a written bill of sale, to which reference has already been made. It is difficult to understand, from the standpoint of plaintiff's theory, how he can maintain this action as an individual. Assuming, therefore, that this action should have been brought by the firm of Culbert & Taylor, we are met by insuperable legal difficulties. This is an action at law to recover damages for deceit, and it is well settled that no action can be maintained at law between the members of two firms having one member common to both. *Englis v. Furniss*, 2 Abb. Prac. 333; *Bosanquet v. Wray*, 6 Taunt. 597; *Jones v. Yates*, 9 Barn. & Cress. 532, 538. In *Englis v. Furniss*, supra, it was held that the action would not lie, although the common partner assigned his interest in the claim to his copartners. In the case at bar it is claimed that Culbert had assigned to Taylor any rights he had in the premises, but, as above pointed out, the assignment was not offered in evidence, and, if it had been, it would not have added any support to this form of action. If either the firm of Culbert & Taylor, or of Taylor individually, had any cause of action against one or more of the defendants, a judgment adjusting the rights of the various parties could only be rendered by a court of equity. *Bosanquet v. Wray*, supra, 9 Barn. & Cress. p. 605. It therefore follows, assuming the plaintiff's theory of the action to be correct, that the trial judge was justified in directing a verdict for the defendants for the following reasons: That plaintiff failed to show a state of facts supporting any action by him individually against the defendants; that the firm of Culbert & Taylor, if parties plaintiff, could not maintain this action at law against the defendant firm, Culbert being a common partner of both firms. If, on the other hand, we assume the defendants' theory to be correct—that the undisputed facts warrant the conclusion that Thompson, Culbert & Co. sold out to Culbert, agreeing to trans-

fer the property to him, or to such person or firm as he might form—then in negotiating with plaintiff Culbert was primarily and principally acting for himself and in his own interest. This being so, and in view of the long standing business relations between the plaintiff and Culbert after the alleged fraudulent representations were discovered, according to the testimony of the plaintiff, Culbert cannot be regarded as having acted as the agent of the defendant firm, but rather as carrying on an independent negotiation, for his own benefit, between himself and the plaintiff. The trial judge was therefore justified in directing a verdict for the defendants on this view of the case.

We are of the opinion that in any aspect of the case the judgments of the Trial Term and the Appellate Division should be affirmed, with costs.

O'BRIEN, VANN, CULLEN, and WERNER, JJ., concur. PARKER, C. J., concurs in result. MARTIN, J., absent.

Judgment affirmed.

(176 N. Y. 201)

PEOPLE v. PIERSON.

(Court of Appeals of New York. Oct. 13, 1903.)

INFANTS — MEDICAL ATTENDANCE — FAILURE TO FURNISH—MISDEMEANOR—INDICTMENT—CONSTITUTIONAL LAW.

1. An indictment under Pen. Code, § 288, providing that a person who willfully omits to perform a duty imposed on him by law, to furnish food or clothing or medical attendance to a minor shall be guilty of misdemeanor, which alleges that defendant, without lawful excuse, omitted "to perform a duty imposed upon him by law," to furnish medical attendance to his minor child suffering from pneumonia, and refused to allow her to be attended by a regular physician, is not bad for failing to allege that a regular physician should have been called, it being sufficiently implied from the language used.

2. The question whether, by refusing to furnish medical attendance for a minor, defendant is guilty of a misdemeanor, under Pen. Code, § 288, is to be determined by the fact whether an ordinarily prudent person, solicitous for the welfare of the child, would deem it necessary to call in the services of a physician.

3. The phrase "a duty imposed by law," as used in Pen. Code, § 288, has reference to persons designated by the common law and by the statute, as parents, guardians, or those who by adoption or otherwise have assumed the relation in loco parentis, and the duty so to do is made obligatory on them by statute, though not required by the common law.

4. The term "medical attendance," as used in Pen. Code, § 288, making it a misdemeanor to fail to furnish medical attendance to a minor, means attendance by a physician regularly licensed under Laws 1880, p. 723, c. 513, and does not include such attendance by a person who, because of his religious belief, neglects to furnish proper medical attendance to a minor, relying on prayer for Divine aid.

5. Pen. Code, § 288, making it a misdemeanor to omit to furnish medical attendance to a minor, is not in violation of Const. art. 1, § 3, guarantying full and free enjoyment of religious

profession and worship, in that such provision is not complied with by a layman who believes that prayer for Divine aid is the proper remedy for sickness, as such practices are inconsistent with the peace and safety of the state, which involve the protection of the lives and health of its children, as well as obedience to the laws.

Appeal from Supreme Court, Appellate Division, Second Department.

J. Luther Pierson was convicted of misdemeanor, and from an order of the Appellate Division (81 N. Y. Supp. 214) reversing such conviction, the people appeal. Reversed.

J. Addison Young, for the People. Robert E. Farley, for respondent.

HAIGHT, J. The indictment accused the defendant of the crime of violating section 288 of the Penal Code in that he "did willfully, maliciously, and unlawfully omit, without lawful excuse, to perform a duty imposed upon him by law, to furnish medical attendance for his said (J. Luther Pierson's) female minor child, under the age of two years, the said minor being then and there ill and suffering from catarrhal pneumonia, and he, the said J. Luther Pierson, then and there willfully, maliciously, and unlawfully neglecting and refusing to allow said minor to be attended and prescribed for by a regularly licensed and practicing physician and surgeon, contrary to the form of the statute in such case made and provided."

The facts disclosed upon the trial are without substantial dispute, and are in substance as follows: The defendant and his wife lived at Valhalla, near White Plains, N. Y., with an infant girl, 16½ months old, whom they had adopted. In January, 1901, the child contracted whooping cough, which continued to afflict her until about the 20th day of February, at which time catarrhal pneumonia developed, resulting in death on the 23d of February, 1901. The defendant testified that for about 48 hours before the child died he observed that her symptoms were of a dangerous character, and yet he did not send for or call a physician to treat her, although he was able financially to do so. His reason for not calling a physician was that he believed in Divine healing, which could be accomplished by prayer. He stated that he belonged to the Christian Catholic Church of Chicago; that he did not believe in physicians, and his religious faith led him to believe that the child would get well by prayer. He believed in disease, but believed that religion was a cure of disease.

In submitting the case to the jury the trial court charged, in substance, that, before the jurors could convict the defendant, they must find that he knew that the child was ill, and deliberately and intentionally failed or refused to call a physician, or to give the child such medicines as the science of the age would say would be proper that a child in its condition should have; that, if at the time he refused to call a physician, he knew

the child to be dangerously ill, his belief constitutes no defense whatever to the charge made. In other words, no man can be permitted to set up his religious belief as a defense to the commission of an act which is in plain violation of the law of the state. The jury rendered a verdict of guilty of the crime as charged. The Appellate Division has reversed, but, as we have seen, has examined the facts and found no error therein, but rests its reversal upon what it considers to be errors of law. The majority of the court appears to have entertained the view that the indictment failed to charge a criminal offense, for the reason that it did not contain an allegation that the case was one in which a regularly licensed and practicing physician ought to have been called.

Section 288 of the Penal Code, so far as is material upon the question under consideration, provides as follows: "A person who (1) willfully omits, without lawful excuse, to perform a duty, by law imposed upon him, to furnish food, clothing, shelter, or medical attendance to a minor, * * * or (4) neglects, refuses or omits to comply with any provisions of this section, * * * is guilty of a misdemeanor." It would seem that the legislative intent in adopting this provision of the Code is reasonably clear, although possibly more precise language could have been employed. It contemplates that there are persons upon whom the law casts a duty of caring for minors, but it does not specify the persons. They are, however, those upon whom the duty is "by law imposed." They are designated in the statutes and in the common law as the parents, guardians, or those who by adoption or otherwise have assumed the relation in loco parentis. The duty of such a person is specified by the provisions of the section. It is "to furnish food, clothing, shelter, or medical attendance." Giving the statute a reasonable construction, by applying the rule of necessity, it is apparent that it means the necessary food, clothing, shelter, or medical attendance required for the preservation of the health and life of the child. We quite agree that the Code does not contemplate the necessity of calling a physician for every trifling complaint with which the child may be afflicted, which in most instances may be overcome by the ordinary household nursing by members of the family; that a reasonable amount of discretion is vested in parents charged with the duty of maintaining and bringing up infant children; and that the standard is at what time would an ordinarily prudent person, solicitous for the welfare of his child and anxious to promote its recovery, deem it necessary to call in the services of a physician. But is it necessary that all of this should be set forth in the indictment? The indictment has alleged that the defendant unlawfully omitted to perform a duty imposed upon him, to furnish medical attendance for the child. If the medical attendance was not

necessary, it was not a duty required of the defendant to furnish it; but, if it was necessary, then it was his duty to furnish it, and his failure to do so would be an unlawful omission to perform a duty imposed, as charged in the indictment. We therefore think that the criticism made upon the indictment cannot be sustained.

It is now contended that section 288 of the Penal Code does not, in terms or in effect, make it the duty of any one to furnish medical attendance to a minor child, and that under the common law it is not part of the duty of parents to provide medical attendance for their children. We have already considered, in part, the provisions of the section, and have indicated our conclusion that the clause, "a duty by law imposed," as found in this section, had reference to the person upon whom the law imposed the duty of caring for minors, leaving it to the provisions of the section to particularize as to the character of those duties. In other words, that the section, properly construed, means that a person upon whom the law has imposed the duty to care for a minor, who willfully omits, without lawful excuse, to furnish such minor with necessary food, clothing, shelter, or medical attendance, is guilty of a misdemeanor. Under this construction of the statute, the duty of parents to furnish medical attendance for their children is expressly provided for, and is made obligatory upon them, even if they were exempt from such duty under the common law. These views are in harmony with section 289 of the Penal Code, which provides that "a person who (1) willfully causes or permits the life or limb of any child actually or apparently under the age of sixteen years to be endangered, or its health to be injured, or its morals to become depraved, * * * is guilty of a misdemeanor," and are also in accord with the view taken by this court in the case of *Cowley v. People*, 83 N. Y. 464, 38 Am. Rep. 464, in which the judgment of conviction was sustained, where the indictment charged the injury to the child's health by reason of a neglect to furnish and administer to it proper and sufficient medicine and furnish proper medical attendance, under the latter section of the Code.

We are thus brought to a consideration of what is meant by the term "medical attendance." Does it mean a regularly licensed physician, or may some other person render "medical attendance?" The foundation of medical science was laid by Hippocrates, in Greece, 500 years before the Christian era. His discoveries, experiences, and observations were further developed and taught in the schools of Alexandria and Salerno, and have come down to us through all the intervening centuries, yet medicine, as a science, made but little advance in northern Europe for many years thereafter—practically none until the dawn of the eighteenth century. After the adoption of Christianity by Rome,

and the conversion of the greater part of Europe, there commenced a growth of legends of miracles connected with the lives of great men who became benefactors of humanity. Some of these have been canonized by the church, and are to-day looked upon by a large portion of the Christian world as saints who had miraculous power. The great majority of miracles recorded had reference to the healing of the sick through Divine intervention, and so extensively was this belief rooted in the minds of the people that for a thousand years or more it was considered dishonorable to practice physic or surgery. At the Lateran Council of the Church, held at the beginning of the thirteenth century, physicians were forbidden, under pain of expulsion from the church, to undertake medical treatment without calling in a priest; and as late as 250 years thereafter Pope Pius V renewed the command of Pope Innocent by enforcing the penalties. The curing by miracles, or by interposition of Divine power, continued throughout Christian Europe during the entire period of the Middle Ages, and was the mode of treating sickness recognized by the church. This power to heal was not confined to the Catholics alone, but was also in later years invoked by Protestants and by rulers. We are told that Henry VIII, Queen Elizabeth, the Stuarts, James I, and Charles I, all possessed the power to cure epilepsy, scrofula, and other diseases known as the "king's evil"; and there is incontrovertible evidence that Charles II, the most thorough debauchee who ever sat on the English throne, possessed this miraculous gift in a marked degree, and that for the purpose of effecting cures he touched nearly a hundred thousand persons.

With the commencement of the eighteenth century a number of important discoveries were made in medicine and surgery, which effected a great change in public sentiment, and these have been followed by numerous discoveries of specifics in drugs and compounds. These discoveries have resulted in the establishment of schools for experiments and colleges throughout the civilized world for the special education of those who have chosen the practice of medicine for their profession. These schools and colleges have gone a long way in establishing medicine as a science, and such it has come to be recognized in the law of our land. By the middle of the eighteenth century the custom of calling upon practitioners of medicine in case of serious illness had become quite general in England, France, and Germany, and, indeed, to a considerable extent, throughout Europe and in this country. From that time on, the practice among the people of engaging physicians has continued to increase, until it has come to be regarded as a duty devolving upon persons having the care of others to call upon medical assistance in case of serious illness. Schouler, in his work on *Domestic Relations*, at page 318, speaking upon the

subject of parental duty in the maintenance of children, says: "It is a plain precept of universal law that young and tender beings should be nurtured and brought up by their parents, and this precept have all nations enforced." And again, at page 548, speaking upon the subject of what constitutes necessary maintenance, he says: "Food, lodging, clothes, medical attendance, and education, to use concise words, constitute the five leading elements in the doctrine of the infant's necessities." In England the first statute upon the subject to which our attention has been called, was that of 31 & 32 Vict. c. 122, § 37, which made it the duty of persons having the care of infants to provide them with "medical aid." This statute was amended in 1894 by 57 & 58 Vict. c. 41, so as to read substantially the same as section 289 of our Penal Code, to which we have referred. Our own statute upon the subject was adopted as part of the Penal Code, chapter 876, p. 70, of the Laws of 1881, containing the section under which the defendant is indicted.

Formerly no license or certificate was required of a person who undertook the practice of medicine. A certificate or diploma of an incorporated medical college was looked upon by the public as furnishing the necessary qualification for a person to engage in the practice of such profession. The result was that many persons engaged in the practice of medicine who had acquired no scientific knowledge with reference to the character of diseases or of the ingredients of drugs that they administered, some of whom imposed upon the public by purchasing diplomas from fraudulent concerns and advertising them as real. This resulted in the adoption of several statutes upon the subject. The first statute to which we call attention is chapter 513, p. 723, of the Laws of 1880, in which every person, before commencing to practice physic and surgery, is required to procure himself to be registered in the office of the clerk of the county where he intends to practice, giving the authority under which he claims the right to engage in the profession, either by diploma or license, and making a violation of the provisions of the act a misdemeanor. Although this statute was an amendment of chapter 746, p. 1793, of the Laws of 1872, it is the first statute that we have found which prohibits the practice of medicine by any other than a person possessing a diploma from a medical college conferring upon him the degree of doctor of medicine, or a certificate from the constituted authorities giving him the right to practice. This was followed by the Laws of 1887, p. 853, c. 647, entitled, "An act to regulate the licensing and registration of physicians and surgeons, and to codify the medical laws of the state of New York," which has been further amended and carried into the public health law of 1893, pp. 1541-1547, §§ 140-153, inclusive, in which there is an absolute prohibition to practice physics unless the person be

a regularly licensed physician in accordance with the provisions of the act.

It will be observed that the provision of the Penal Code under consideration was first adopted in 1881, following the statute of 1880 prohibiting the practice of medicine by other than physicians duly qualified in accordance with the provisions of the act. This, we think, is significant. The Legislature first limits the right to practice medicine to those who have been licensed and registered, or have received a diploma from some incorporated college, conferring upon them the degree of doctor of medicine; and then the following year it enacts the provision of the Penal Code under consideration, in which it requires the procurement of medical attendance under the circumstances to which we have called attention. We think, therefore, that the medical attendance required by the Code is the authorized medical attendance prescribed by the statute; and this view is strengthened from the fact that the third subdivision of this section of the Code requires nurses to report certain conditions of infants under two weeks of age "to a legally qualified practitioner of medicine of the city, town or place where such child is being cared for," thus particularly specifying the kind of practitioner recognized by the statute as a medical attendant.

The remaining question which we deem it necessary to consider is the claim that the provisions of the Code are violative of the provisions of Const. art. 1, § 3, which provides that "the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all mankind; and no person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state." The peace and safety of the state involve the protection of the lives and health of its children, as well as the obedience to its laws. Full and free enjoyment of religious profession and worship is guaranteed, but acts which are not worship are not. A person cannot, under the guise of religious belief, practice polygamy, and still be protected from our statutes constituting the crime of bigamy. He cannot, under the belief or profession of belief that he should be relieved from the care of children, be excused from punishment for slaying those who have been born to him. Children, when born into the world, are utterly helpless, having neither the power to care for, protect, or maintain themselves. They are exposed to all the ills to which flesh is heir, and require careful nursing, and at times, when danger is present, the help of an experienced physician. But the law of nature, as well as the common law, devolves upon the parents the duty of

caring for their young in sickness and in health, and of doing whatever may be necessary for their care, maintenance, and preservation, including medical attendance, if necessary; and an omission to do this is a public wrong, which the state, under its police powers, may prevent. The Legislature is the sovereign power of the state. It may enact laws for the maintenance of order by prescribing a punishment for those who transgress. While it has no power to deprive persons of life, liberty, or property without due process of law, it may, in case of the commission of acts which are public wrongs or which are destructive of private rights, specify that for which the punishment shall be death, imprisonment, or the forfeiture of property. *Barker v. People*, 3 Cow. 686-704, 15 Am. Dec. 322; *Lawton v. Steele*, 119 N. Y. 226-236, 23 N. E. 878, 7 L. R. A. 134, 16 Am. St. Rep. 813; *Thurlow v. Massachusetts*, 5 How. 504-583, 12 L. Ed. 256.

We are aware that there are people who believe that the Divine power may be invoked to heal the sick, and that faith is all that is required. There are others who believe that the Creator has supplied the earth, nature's storehouse, with everything that man may want for his support and maintenance, including the restoration and preservation of his health, and that he is left to work out his own salvation, under fixed natural laws. There are still others who believe that Christianity and science go hand in hand, both proceeding from the Creator; that science is but the agent of the Almighty through which He accomplishes results; and that both science and Divine power may be invoked together to restore diseased and suffering humanity. But sitting as a court of law for the purpose of construing and determining the meaning of statutes, we have nothing to do with these variances in religious beliefs, and have no power to determine which is correct. We place no limitations upon the power of the mind over the body, the power of faith to dispel disease, or the power of the Supreme Being to heal the sick. We merely declare the law as given us by the Legislature. We have considered the legal proposition raised by the record, and have found no error on the part of the trial court that called for a reversal. The other questions in the case involve questions of fact which are not brought up for review, and consequently are not before us for consideration.

The order of the Appellate Division reversing the judgment of conviction should be reversed, and the judgment of conviction of the trial court affirmed.

CULLEN, J. I concur in the opinion of Judge HAIGHT. The state, as *parens patriæ*, is authorized to legislate for the protection of children. As to an adult (except possibly in the case of a contagious disease which would affect the health of others), I

think there is no power to prescribe what medical treatment he shall receive, and that he is entitled to follow his own election, whether that election be dictated by religious belief or other consideration.

PARKER, C. J., and BARTLETT, VANN, CULLEN, and WERNER, JJ., concur. MARTIN, J., not voting.

Order reversed, etc.

(176 N. Y. 233)

KOLB v. NATIONAL SURETY CO. et al.

(Court of Appeals of New York. Oct. 13, 1903.)

SURETY COMPANY—SUBROGATION—JUDGMENT IN TORT—RELEASE OF ONE DEFENDANT—RELIEF IN EQUITY.

1. A surety company paid a debt on a judgment recovered in tort against several defendants, for one of whom it was surety on appeal from the judgment. By an order of the court it was subrogated to all the rights and securities of the judgment creditor, including those under a contract by which a judgment debtor agreed to pay a certain sum on the determination of the action, on payment of which he was to be released from liability. *Held*, that the surety company was entitled to collect such sum against the debtor.

2. After recovery of a judgment in tort pending an appeal, one of the judgment debtors agreed with the judgment creditor to pay a certain sum in consideration of his release from the judgment. A surety company paid the judgment in full, and was subrogated to the rights of the judgment creditor thereunder. *Held*, that the judgment debtor could not be released from the agreement on the ground that the surety company had released another judgment debtor in consideration of the payment of his proportionate share of the judgment, where in such agreement there was a reservation of a right to enforce the judgment against the other debtors.

3. Equity will not relieve a joint debtor under a judgment in tort from levy of execution to enforce his agreement to pay a certain sum on the judgment in consideration of his release therefrom, thereby assisting him to violate his express agreement.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by John Kolb against the National Surety Company and others. From a judgment of the Appellate Division (76 N. Y. Supp. 1018) affirming a judgment for defendants, entered on a dismissal of the complaint, plaintiff appeals. Affirmed.

In December, 1897, Frank Smith recovered a judgment against this plaintiff and the defendants Theodore G. Smith and Stephen W. Adwen for \$1,125.13, in an action to recover damages for wrongful and malicious conduct. Adwen appealed, and gave an undertaking, with this respondent, the National Surety Company, as surety. Subsequently his appeal was dismissed, and the judgment was affirmed. This plaintiff, Kolb, and Theodore Smith, defendants in the action, also appealed, and without undertaking; but pending the appeal Kolb settled with Frank Smith,

the judgment creditor, by an agreement to pay \$400 in any and all events, which sum, at the election of Smith, was payable before or upon the final determination of the action, and upon payment whereof he was to be released. The agreement reserved Smith's claim against Adwen to the extent of at least one-third of the judgment. Eventually all appeals were dismissed, whereupon Smith, the judgment creditor, in September, 1898, in lieu of enforcing his judgment by execution, commenced an action against the surety company to recover the whole amount of his judgment, and in that action had a judgment, in February, 1899, for \$1,362.58 damages and costs. Subsequently, upon application of the defendant the surety company, it was ordered that upon its payment to Smith of the full amount of his judgment it should be subrogated to all of his rights under the judgment against Kolb and the other original judgment debtors, and to all securities, including his contract with Kolb. Smith complied with the order, assigned his judgments and his contract, and received payment in full of what was due him. Thereupon the surety company, being possessed of Smith's judgment, issued execution to the sheriff directing him to collect from Kolb \$400 and from Theodore Smith \$648.30. Adwen, the other judgment debtor, had paid the surety company \$593.13, upon its agreement not to enforce the judgment further against him. That agreement also reserved to the company the right to collect the balance due on the judgment against the other judgment debtors. Theodore Smith was insolvent, and the amount named in the execution against him represented the balance remaining unpaid upon the judgment after deducting the sum of \$400 agreed to be paid by Kolb, and the sum of \$593.13 paid by Adwen. Upon the issuance of the execution, Kolb at once commenced this action against the surety company and the others to restrain the enforcement by the surety company of the judgment through the execution, and to compel the discharge of the judgment. At the Special Term the defendant the surety company was held to be entitled to enforce the judgment assigned to it by Frank Smith, and the plaintiff's complaint was dismissed upon the merits. The judgment entered upon that determination was affirmed by the Appellate Division in the Fourth Department, and the plaintiff, Kolb, has appealed to this court.

Charles Van Voorhis, for appellant. Nathaniel Foote, for respondents.

GRAY, J. (after stating the facts). The appellant argues that when the surety company paid the judgment recovered by Smith the effect was the same as though Adwen, for whom it was surety, had paid the judgment against him and his codefendants; that, as a judgment recovered in tort, it was extinguished by the payment, and that no

right of contribution against this plaintiff or Theodore Smith, who were joint tortfeasors with Adwen, survived or existed. The general proposition is true that there is no right of contribution as between wrongdoers which can be enforced; for a court of equity, which alone would have jurisdiction of such an action, will refuse to lend its aid to those who have been guilty of illegal conduct, or who do not come before it with clean hands. The legal principle upon which contribution among those jointly indebted rests is as just when wrongdoers are concerned as in other cases where it is allowed, and the refusal of a court to entertain an action to compel it is based upon considerations of the nature of the complainant's liability and the association of the parties who incurred it. That this doctrine of equity would or should exclude from relief a surety who, like this respondent, has been decreed by the court to be entitled to be subrogated to the rights and remedies of the judgment creditor, and is, in effect, in the position of a purchaser from the latter of the judgment, I do not believe. If there is a precedent, I do not find it, for such extreme application of the doctrine. In the first place, a surety who pays a debt is, by the well-settled law of the land, entitled to stand in the shoes of the creditor, or to be subrogated to all of his rights, remedies, and securities with respect to any fund or lien; not upon any contractual basis, but upon established principles of equity, or, as said by Chancellor Kent in *Cheesebrough v. Millard*, 1 Johns. Ch. 412, "on mere equity and benevolence." In the second place, the surety in this case does not come within the reprobation of the court in any aspect; for, the principle of equal contribution being a just one, even as between wrongdoers, and the denial of its recognition resting upon especial grounds, which would be peculiar to the complainant in the bill for equitable relief, this surety is not embarrassed by asking for that which the court had, in the Adwen proceeding, accorded to it. It is innocent of any wrongdoing. That it has paid an indebtedness, arising upon a judgment in tort against several, for one of the judgment debtors, should not, as a matter of natural justice, deprive it of the right, approved as it is by a decree of the court, to compel the joint debtors to contribute proportionately to the payment of the judgment now its property. The right of subrogation is founded in natural justice, and it should be given effect upon purely equitable considerations.

But, if my conclusion in this respect were incorrect, there is the further aspect of this case that this surety, as against this plaintiff, was seeking to compel payment by him of the proportion of a judgment which he, by his agreement, had promised to pay in any event, and had recognized as a debt. The surety is acting most equitably, and, whether it be regarded as standing for Ad-

wen or not, it is demanding only that which the agreement of the appellant provided for. Both in that agreement as in that with Adwen the reservation of the surety's rights to hold the other debtors prevented a payment upon the judgment by either from operating to discharge it as against the others equally liable therein. See *Gilbert v. Finch*, 173 N. Y. 455, 66 N. E. 133.

But there is another conclusive objection to the maintenance of this action, and that is that this appellant does not commend himself to the equitable consideration of the court. As a joint tortfeasor, he is subject to the operation of the rule that a court of equity will not listen to one seeking to be relieved of his liability under a joint judgment in tort. He has no more right to demand equitable intervention in his behalf than if the judgment creditor had assigned his judgment to some stranger to the parties, and the purchaser was enforcing it as against him as one of the judgment debtors. How can the appellant come into a court of equity and ask that he be relieved from paying a proportion of the judgment which he had agreed to pay, and which, in fact, is less than what might be exacted from him as his proportion? His position is highly inequitable whether he be regarded as one of several joint tortfeasors seeking immunity from contribution, or whether he be regarded as violating his express agreement and as seeking to escape the liability he had recognized as existing under the judgment against him.

I think the judgment appealed from is right, and that it should be affirmed, with costs.

PARKER, C. J., and HAIGHT, VANN, and WERNER, JJ. (and CULLEN, J., on last ground), concur. MARTIN, J., absent.

Judgment affirmed.

(176 N. Y. 213)

In re BROOKLYN UNION ELEVATED R. CO. et al.

(Court of Appeals of New York. Oct. 13, 1903.)

EMINENT DOMAIN—PROCEDURE—COSTS TO LANDOWNER.

1. A landowner is entitled to recover the same amount of costs that a defendant may recover under Code Civ. Proc. § 3251—\$10 for the proceedings before notice of trial, \$15 after such notice, and \$30 costs for trial of an issue of fact, and \$10 for trial exceeding two days—where the compensation awarded by the commissioners under Code Civ. Proc. § 3372, exceeds the amount offered by the corporation seeking to condemn the land, with interest from the time the offer was made, when he has prevailed in the Supreme Court after trial.

Appeal from Supreme Court, Appellate Division, Second Department.

In the matter of the petition of the Brooklyn Union Elevated Railroad Company to ac-

quire a right of way. From an order of the Appellate Division (81 N. Y. Supp. 527) reversing an order of the Special Term retaxing a bill of costs, Theodore B. Case appeals. Reversed.

Cyrus V. Washburn, for appellant. Alexander S. Lyman and George D. Yeomans, for respondent.

BARTLETT, J. This appeal is certified by the Appellate Division, and three questions are submitted for the consideration of this court. This is a proceeding under the condemnation law of the Code of Civil Procedure, brought by the plaintiff railroad company to acquire title to the easements or property rights appurtenant to the premises of the defendant owner. An offer to the defendant was made by the plaintiff company as permitted by the condemnation law. No answer was interposed, commissioners were appointed, and the proceedings were conducted thereafter under section 3372 of the Code of Civil Procedure. The commissioners awarded nearly seven times the amount as compensation for the easements or property rights taken as that named in the offer. The court, on confirming the report of the commissioners, granted the defendant costs to be taxed in pursuance of section 3372. The defendant presented to the clerk for taxation a bill as follows: Before notice of trial, \$10; after notice of trial, \$15; trial fee, \$30; trial occupied more than two days, \$10; total, \$65. The clerk disallowed all of these items, and the defendant moved for a retaxation, which was granted; the Special Term allowing all the items thus rejected by the clerk. The plaintiff appealed to the Appellate Division, where the order of the Special Term was reversed, the court holding that the defendant was not entitled to any statutory costs. The learned court opens its opinion with this statement: "If the question presented by this appeal were a new one, it might well be held that, under section 3372 of the Code of Civil Procedure, a landowner who is awarded for his property more than was offered to him by the party seeking to condemn it is entitled to recover costs as though a trial had been had. But a different view has been so often taken by courts of concurrent jurisdiction that we deem a contrary rule to be established by authority." This statement is followed by the citation of three authorities, which will be presently examined.

It will be profitable to consider at the outset, briefly, the scheme of the condemnation law as to trials before the court and the commissioners. A proceeding under this statute is instituted by a petition, which is to be taken as a complaint. Section 3360. Upon presentation of the petition the owner of the property may appear and interpose an answer. Section 3365. The issues raised by the petition and answer may be tried by the court or sent to a referee. Section 3367.

After such trial, judgment shall be entered pursuant to the direction of the court or referee, and, if in favor of the defendant, the petition shall be dismissed, with costs, to be taxed by the clerk at the same rates as are allowed, of course, to the defendant prevailing in an action in the Supreme Court, including allowances for proceedings before and after notice of trial. Section 3369. It is to be observed that the foregoing practice applies exclusively to the conduct of a case where the defendant serves an answer. Section 3372 regulates the practice where no answer is interposed, but an offer is either made or not made. This section opens with the following language: "In all cases where the owner is a resident and not under legal disability to convey title of real property, the plaintiff, before service of his petition and notice, may make a written offer to purchase the property at a specified price, which must within ten days thereafter be filed in the office of the clerk of the county where the property is situated; and which cannot be given in evidence before the commissioners, or considered by them. The owner may, at the time of the presentation of the petition, or at any time previously, serve notice in writing of the acceptance of plaintiff's offer, and thereupon the plaintiff may, upon filing the petition, with proof of the making of the offer and its acceptance, enter an order that upon payment of the compensation agreed upon, he may enter into possession of the real property described in the petition, and take and hold it for the public use therein specified; if the order is not accepted, and the compensation awarded by the commissioners does not exceed the amount of the offer, with interest from the time it was made, no costs shall be allowed to either party." We now come to that portion of the section applicable to the case at bar: "If the compensation awarded shall exceed the amount of the offer, with interest from the time it was made, or if no offer was made, the court shall, in the final order, direct that the defendant recover of the plaintiff the costs of the proceeding, to be taxed by the clerk at the same rate as is allowed, of course, to the defendant when he is the prevailing party in an action in the Supreme Court, including the allowances for proceedings before and after notice of trial, and the court may also grant an additional allowance of costs, not exceeding five percentum upon the amount awarded." The remainder of the section has no bearing upon this discussion. The defendant's case falls precisely within the letter and spirit of the provision last quoted. The petitioner served an offer, which defendant did not accept, but, on the contrary, recovered nearly seven times the amount thereof.

As before pointed out, the condemnation law provides for two forms of trial. If an answer is served, the trial is before the court or a referee, and the defendant, if success-

ful, is allowed costs as of course in an action. If there is no answer interposed, no offer made, or, if made, not accepted, and the defendant recovers a larger sum than the amount named therein, or recovers in absence of offer, he is allowed costs "to be taxed by the clerk at the same rate as is allowed, of course, to the defendant when he is the prevailing party in an action in the Supreme Court, including the allowances for proceedings before and after notice of trial, and the court may also grant an additional allowance of costs, not exceeding five percentum upon the amount awarded."

The authorities cited by the learned Appellate Division are as follows: *Manhattan Railway Co. v. Kent*, 80 Hun, 559, 30 N. Y. Supp. 939; affirmed in 145 N. Y. 595, 40 N. E. 164, without opinion. An inspection of the record in the above case shows that the proceeding was not governed by the provisions of section 3372. As already pointed out, that section applies only where the owner is a resident, and not under any legal disability to convey title to real property. The record shows, by the petition instituting the proceedings, that there were certain persons and classes of persons not in being, who upon their coming into being would have interests in the property sought to be condemned, and, upon the presentation of the petition, application was made to the court for the appointment of an attorney to represent such persons and classes of persons in the proceedings. Such attorney was duly appointed, and he interposed an answer on behalf of the possible infants not in being. After issue was joined, a referee was duly appointed to determine the truth of the allegations contained in the petition. Thereupon a trial was duly had under section 3367 of the Code. Thereafter commissioners were appointed to ascertain the compensation to be made to the defendants therein. The defendants were unsuccessful in their efforts to tax the costs of an action in the proceeding before the commissioners, the courts holding that under the circumstances it was a mere assessment of damages. No part of this proceeding was under section 3372 of the Code. The trial, as already pointed out, was under section 3367, and the proceedings before the commissioners were a mere assessment of damages at the foot of the judgment entered at the trial. The next case cited is *City of Johnstown v. Frederick*, 35 App. Div. 44, 54 N. Y. Supp. 412. In that case, upon the presentation of the petition of plaintiff for the condemnation of the real estate therein described, the defendants interposed an answer. A trial was had before a referee, and on his report judgment was entered in favor of the plaintiff. It was there held that the assessment of damages before the commissioners after this judgment did not entitle defendants to costs as in the trial of an action. The trial was under section 3367 of the Code. The last case cited is *Vil-*

lage of *St. Johnsville v. Cronk*, 55 App. Div. 633, 67 N. Y. Supp. 419. In that case no answer was served, and no offer was made by the petitioner. The absence of an offer distinguishes it from the case at bar. The able dissenting opinion of Mr. Justice Kellogg, however, makes it clear that the case was governed by section 3372, and was improperly decided. The foregoing cases are distinguishable from the one at bar. We are not dealing at this time with proceedings before the commissioners where the case has proceeded to judgment after answer under section 3367, or where no offer is made by plaintiff under section 3372. The provisions of section 3372 are very clearly expressed, and there is no occasion for construction. The appellant was entitled to have his costs taxed at \$65, made up of the items allowed by the Special Term.

The following questions have been certified to us, all of which we answer in the affirmative:

"First. Did the Legislature, in enacting title 1 of chapter 23 of the Code of Civil Procedure, and the acts amendatory thereof and supplementary thereto, intend to grant a defendant, entitled to costs under section 3372 of said chapter, the same amount as costs as a defendant is entitled to under section 3251 of the Code when he has prevailed in an action in the Supreme Court after a trial?

"Second. Is the defendant, under the facts in this case, entitled to ten dollars costs as for proceedings before notice of trial, and fifteen dollars after notice of trial?

"Third. Is the defendant, under the facts in this case, entitled to thirty dollars costs as for a trial of an issue of fact, and ten dollars as for a trial occupying more than two days?"

The order of the Appellate Division should be reversed, and that of the Special Term affirmed, with costs.

PARKER, C. J., and O'BRIEN, MARTIN, VANN, CULLEN, and WERNER, JJ., concur.

Order reversed, etc.

(176 N. Y. 194)

PEOPLE ex rel. SMITH v. WEEKS, Town Clerk.

(Court of Appeals of New York. Oct. 8, 1903.)

TOWN OFFICERS—EXTENSION OF TERMS—RESOLUTION OF COUNTY SUPERVISORS—VALIDITY.

1. Laws 1901, p. 1063, c. 391, relating to election of town officers, did not take effect until April 17, 1901, and related to town officers "hereafter elected," and to cases where the resolutions changing the town meetings were "thereafter" adopted. Held not to authorize a resolution, passed by the board of supervisors of a county on April 9, 1901, that town meetings in said county in the year 1903 and thereafter should be held on the first Tuesday after the first Monday of November.

2. A resolution passed by board of supervisors of a county attempting to extend the term of town officers then in office beyond the period of two years, the term fixed for such officers by Laws 1901, p. 433, c. 191, was in violation of Const. art. 3, § 26, providing that members of board of supervisors shall be elected in such manner and for such period as may be provided by law, there being at the time of the passage of such resolution no statute authorizing such extension.

Appeal from Supreme Court, Appellate Division, Second Department.

Application by the state, on the relation of Charles Smith, against H. Luther Weeks, town clerk of the town of Hempstead, for writ of mandamus. Judgment for defendant was affirmed by the Appellate Division (84 N. Y. Supp. 16), and relator appeals. Affirmed.

Fred. Ingraham and Henry A. Monfort, for appellant. Edgar Jackson, for respondent. John Vincent, for intervener Jones. Halstead Scudder, for intervener Brower. George Wallace, for intervener Seaman.

PARKER, C. J. The county of Nassau came into existence January 1, 1899, by chapter 588, p. 1339, Laws 1898, section 5 of which provided that the first meeting of the board of supervisors should be held January 3, 1899. During such session the board passed an act pursuant to statute (chapter 481, p. 610, Laws 1897) fixing the first Tuesday in April as the time when biennial town meetings should be held. Such an election was held April 2, 1901, and seven days later the board of supervisors the members of which had been elected at that meeting passed a resolution providing that the biennial town meetings in the year 1903 and thereafter should be held on the first Tuesday after the first Monday in November. The authority for this resolution was deemed by the board to be furnished by an amendment (chapter 191, p. 433, Laws 1901) to section 13 of the town law, which for the first time permitted boards of supervisors to change the time of holding biennial town meetings to the fall. But for the passage of this resolution, the biennial election would have been in April, 1903, in pursuance of the provision of the resolution first adopted. The operation of the statute upon the resolution first adopted fixed the term of office for which the supervisors were elected in 1901 at two years. One of the results accomplished by the resolution of April 9, 1901, if it was a valid resolution, was to extend the term of office of those supervisors several months. In March, 1903, and upon the last day fixed by the statute for filing certificates for independent nominations for town officers at a spring election, certificates of nomination for the offices of supervisor, town clerk, and all other town offices were duly presented to the town clerks of the several towns of the county of Nassau. The clerks refusing to receive such certificates, Mr. Justice Gaynor

made an order directing said town clerks to receive such certificates, and to call an election in the several towns, which was done, an election held, and the successful candidates inducted into office. That order was affirmed by the Appellate Division of the Second Department, and an appeal taken to this court; but it was not heard, because, the election having passed, and the candidates having taken possession of their offices, the question had become purely an academic one. August 3, 1903, relator demanded of the clerk of the town of Hempstead that he make and transmit to the county clerk a notice stating each town officer to be voted for at a biennial town meeting to be held on the first Tuesday after the first Monday in November, 1903, pursuant to the resolution of the board of supervisors, *supra*. The town clerk refused, and relator applied for an order compelling him to make and file such a list. The application was denied. After affirmation by the Second Appellate Division an appeal was taken to this court.

The leading question presented is whether the resolution of April 9, 1901, was in all things valid; for, if it was, the order to compel an election in April, 1903, should not have been granted, and the proper time for the election will be on the first Tuesday after the first Monday in November, 1903. The necessity for a prompt decision, in order that the officials charged with the responsibility of the local election machinery may be advised of their duty in the premises, prevents us from doing much more than presenting briefly the conclusion at which we have arrived, which is that there was no statutory authority for the passage of a resolution like the one in question extending the term of office of the officials affected. The resolution of April 9, 1901, is not supported by chapter 391, p. 1063, Laws 1901, because (1) such act did not become a law until April 17, 1901, eight days after the passage of the resolution; and (2) an examination shows the statute was not intended to be retroactive in its effect, for its provisions are in terms limited to town officers "hereafter elected," and to cases where the resolution changing the town meeting is "thereafter" adopted. The April 9th resolution, therefore, must find its support, if at all, in prior statutes. The first act authorizing boards of supervisors to provide for the holding of town meetings at the time of general elections in the fall is chapter 374, p. 879, Laws 1900. The next and only other statute on the subject prior to the resolution in question is chapter 191, p. 433, Laws 1901. It was possible under these acts to have provided for a change of town elections from spring to fall without offending against article 3, § 26, of the Constitution, which provides that members of boards of supervisors shall be "elected in such manner and for such period as is or may be provided by law." This could have been accomplished

by a resolution in the form suggested by respondent's counsel, to wit: "The biennial town meetings in the several towns of the county of Nassau in the year 1903 shall be held in April, pursuant to the resolution passed by this board January 3, 1899: At said town meeting there shall be elected a supervisor, town clerk, et al. (comprising list of town officers), whose term of office shall begin at the expiration of the term of their predecessors, and shall end at midnight on December 31, 1905. A town meeting to elect the successors to the said town officers shall be held on the first Tuesday after the first Monday in November, 1905, and the town officers elected thereat shall take office on January 1, 1906. Thereafter town meetings shall be held on the first Tuesday after the first Monday in November." A resolution in that form would have been fully authorized by the statutes referred to, and would not have offended against any provision of the Constitution. The resolution adopted, however, attempted to extend the time of the town officers then in office beyond the period of two years authorized by chapter 191, p. 433, Laws 1901, for which term they had been elected, and hence was not only without statutory authority in its support, but was in violation of it. The resolution, therefore, was without authority, and void, and the decision below should be affirmed, without costs.

O'BRIEN, BARTLETT, MARTIN, VANN, CULLEN, and WERNER, JJ., concur.

Order affirmed.

(176 N. Y. 178)

RUSSELL v. PRUDENTIAL INS. CO. OF AMERICA.

(Court of Appeals of New York. Oct. 6, 1903.)

INSURANCE—CONDITIONS—PAYMENT OF PREMIUM—WAIVER BY AGENT.

1. A written application for life insurance provided that the application should become a part of the contract of insurance, and that the policy should be accepted subject to the conditions and agreements contained in the application, and that it should not take effect until it was issued and delivered by the company and the first premium paid thereon in full. The provision was carried into the policy. *Held*, that the applicant must be presumed, in the absence of fraud, to have read, or have had read to him, the application, and to have known that the policy could not take effect until the premium was paid, so that the policy would not be binding until such payment, and was chargeable with notice that the agent could not, without express authority, waive such payment.

2. Where, in an action brought on a policy of insurance, providing that it should be invalid until payment of the first premium was made in full, it appeared that when the policy was delivered to the insured a general agent of the company extended the time of payment for 30 days from delivery, stating that the insurance would go into effect at once, and before the premium was paid, and within four days the insured died, the beneficiary cannot recover

without proof of the agent's express authority to waive the payment.

Haight, J., dissenting.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by Amelia Russell against the Prudential Insurance Company of America. From a judgment of the Appellate Division (76 N. Y. Supp. 1029) affirming a judgment for plaintiff, defendant appeals. Reversed.

D. Raymond Cobb, for appellant. Frederick A. Kuntzsch, for respondent.

BARTLETT, J. The defendant is an insurance corporation organized in New Jersey, conducting two classes of insurance, one known as the "Industrial" and the other "ordinary" insurance. Under the former plan small policies are issued, upon which weekly payments are paid; under the latter larger policies are issued, the premiums being payable annually, semiannually, or quarterly. The plaintiff sued to recover on a policy issued on the life of her deceased husband under the "ordinary" plan. The defendant was represented in this state by one Charles H. Tennant as general agent at Syracuse. Tennant's district consisted of the counties of Onondaga, Oswego, and Cortland. It appears that at the time negotiations were opened for the policy sued on the insured held a policy for a like amount in the defendant company, which was duly paid. The complaint alleges that on the 30th day of December, 1899, the defendant issued the policy in suit; that on the 6th day of January, 1900, the defendant waived the payment of the first premium, and extended same for a period of thirty days; that on the 10th day of January—four days thereafter—the insured was killed by an explosion. The answer is a general denial, and also contained an affirmative defense to the effect that defendant had not insured the plaintiff's life, and that the policy alleged in the complaint never had an inception, the plaintiff not having paid the annual premium thereon, or complied with the preliminaries necessary to give it validity. The issues were tried at the Onondaga Trial Term, and the jury rendered a verdict in favor of the plaintiff. The Appellate Division affirmed the judgment entered upon the verdict. No prevailing opinion was handed down, but Justice Hiscock wrote a dissenting opinion, Justice Williams concurring.

The facts are as follows: On the 26th day of December, 1899, the plaintiff made a written application for the policy in suit. The material portions of that application read: "I hereby declare and warrant that all the statements and answers to the above questions, as well as those made or to be made to the company's medical examiner, are or shall be complete and true, and that they, together with this declaration, shall form the basis and become a part of the

contract of insurance hereby applied for. And it is further agreed that the policy herein applied for shall be accepted subject to the conditions and agreements therein contained, and said policy shall not take effect until the same shall be issued and delivered by the said company and the first premium paid thereon in full," etc. This application was signed by the applicant, and duly witnessed. Upon receipt of the application the policy was sent to the general agent at Syracuse. On January 6, 1900, the general agent, in company with a subagent, went to the house of the deceased, and had an interview with him. Plaintiff swears, in substance, that after her husband had stated his inability to pay the first premium at that time, the general agent informed him that he might have 30 days additional time in which to pay the first premium, and that the insurance would go into immediate effect. The general agent and the subagent denied this conversation in toto, and say that deceased was distinctly informed that the policy, as stated therein, would not go into effect until the first premium was paid in full. The receipt for the first premium was thereupon signed by the general agent and delivered to the insured, and by him handed to the subagent, who was to hold it until the payment was actually made. This transaction as to the receipt is not disputed. The policy contained the following, among other, provisions: It is headed, "Regarding Agents." "No agent has power in behalf of the company to make or modify this or any contract of insurance, to extend time for paying the premium, to waive any forfeiture, or to bind the company by making any terms, or making or receiving any representation or information. These powers can be exercised only by the president, one of the vice-presidents or the secretary, and will not be delegated. Modifications, etc. No provision of this policy can be modified or waived in any case except by indorsement hereon signed by the president, one of the vice-presidents or the secretary." The general agent was appointed to his position under a written contract, which is in evidence, and contains this provision, among others: "4th. It is understood and agreed that said general agent has no authority on behalf of the Prudential Insurance Company of America, to make, alter or destroy any contract, to waive forfeitures, nor to receive any moneys due or to become due to said company, except on policies or renewal receipts signed by the President, Secretary or Manager of the Ordinary Branch and sent to him for collection."

These facts constituted, substantially, the plaintiff's case, and the defendant thereupon moved for a nonsuit on the ground that the plaintiff had failed to make out a cause of action. The court denied the motion. The defendant swore the general agent and subagent as witnesses, and each positively

denied that the conversation testified to by plaintiff ever occurred between the general agent and the insured. At the close of the evidence the defendant again moved for a nonsuit and for a directed verdict, specifying, among others, the ground that upon the plaintiff's own evidence, and upon the uncontradicted evidence in the case, the general agent had no authority to make or modify the contract of insurance as testified by plaintiff. The learned trial judge, in denying this motion, said: "I deny the motion, and give you an exception. The one question I am going to submit to the jury is this: Whether, on January 6, 1900, Mr. Tennant, at the time he delivered the policy to Mr. Russell, agreed that the time for payment of the premium should be extended, as is claimed by plaintiff, and that the policy could, in the meantime, remain in force. That is the only question I am going to submit to the jury. If they find in favor of the plaintiff upon that state of facts, the verdict will be for plaintiff. If they find for defendant upon that proposition, the verdict will be for the defendant." To this limitation the defendant excepted. The trial judge, in one of his rulings, said: "I hold as matter of law that, if Mr. Tennant did what plaintiff claims he did on the 6th of January, then there can be a recovery in this case." To this ruling the defendant excepted. The defendant contended that, if there was any evidence that Tennant had apparent authority to put the policy in force and waive its express conditions, and any evidence of estoppel, the questions were for the jury, but the court adhered to its view that it was a question of law upon the contract of insurance.

The important question presented in this case therefore is, can an insurance company so draw the various papers constituting its contract of insurance as to prevent general and local agents from exercising powers to the detriment of the company, when the substantial provisions of that contract are brought home to the insured prior to the alleged delivery of the policy? This case may be regarded as a test one on the point, as it is apparent that the contract of insurance now before the court is as strong in favor of the company as language can make it.

In considering the law of this case, we are met at the outset by the contention of the respondent that the case of *Stewart v. Union Mutual Life Ins. Co.*, 155 N. Y. 257, 49 N. E. 876, 42 L. R. A. 147, is controlling. In that case it was held that the right of insurance companies to restrict their liabilities for acts of their agents by inserting clauses in the application and policy restricting the powers of agents must be recognized, unless by so doing their contracts would become tainted with fraud, and in such case it will be presumed that the waiver was intended, rather than fraud. In that case it was distinctly held that to have decided it in favor of the company would have worked a fraud upon

the insured under the undisputed facts. The defendant in the case cited was a Maine corporation. It is true that the application and policy were quite similar to the case at bar. The application provided that "It will constitute no contract of insurance until a policy shall have first been issued and delivered by the company and the first premium thereon paid during the life of the party proposed for insurance in the same condition of health as described in the application." The policy provided that: "All premiums are due at the office of the company in the city of Portland, Maine, at the date named in the policy, but at the pleasure of the company suitable persons may be authorized to receive such payments at other places, but only on the production of the company's receipt thereof, signed by the president, secretary or assistant secretary. Any payments made to any person except in exchange for such receipt will not be recognized by the company, or be deemed by either party as a valid payment. No agent, nor any other person, except the president, or secretary, in writing has power to alter or change in any way the terms of this contract, or to waive forfeiture." One Crane was the manager of the defendant's business in the state of New York. The precise powers of the manager do not appear, and we are therefore not advised whether he was clothed with more ample authority than the general agent in the case at bar. The policy was issued on the 19th day of April, 1890, on the life of the plaintiff's husband. The manager delivered the policy to the insured, taking a note for \$123.10, being the amount of the first year's premium, which note became due and payable on May 31, 1890. On August 9, 1890, a check for the amount of this note, which had been given by the insured to the manager in response to a letter from the cashier of the company, dated four or five days before the note fell due, calling the insured's attention to the due date, was deposited for collection, but returned by the bank marked "Not good." The insured was notified of the nonpayment of this check August 9th. On August 12th the insured notified the manager he was ill, but would arrange for the payment of the check the last of that week. The insured died two days later. We thus have the manager for the state of New York taking a note for the first year's premium, which was not paid at maturity, and accepting a check for the amount of the note, which was not paid on presentation two or three months after it was given. It is thus rendered clear by inevitable inference that the home office in Maine must have been advised of this departure from the strict rule in regard to the payment of premium at the time the policy was issued, and had ratified the action of its manager. It cannot be fairly assumed that a policy taking effect the latter part of April had not been reported to the home office by the following August. This view was evidently en-

tertained by the court, as appears in Judge Haight's opinion, at the bottom of page 266, 155 N. Y., page 878, 49 N. E., 42 L. R. A. 147, as follows: "There is still another theory upon which, we think, the plaintiff established a cause of action, at least sufficient to make it a question of fact for the jury. It is apparent that Crane represented to Stewart that he had an insurance, and that Stewart supposed himself to be insured from the letters, expressions, and acts to which we have referred. It is also apparent that the contract was that Stewart was to have credit. This may be clearly inferred from Crane's first letter. The rule is that the knowledge of the agent is the knowledge of the principal, and it will be presumed that the company knew the terms of the contract entered into by its agent, and either waived the provisions of the policy for immediate payment of the premium or held itself estopped from setting it up, for to hold otherwise would impute to it a fraudulent intent to deliver and receive pay for an invalid instrument." In the case at bar we have no such situation. The policy was delivered on the 6th day of January, and the insured was accidentally killed four days thereafter, so that there can be no presumption of ratification of the act of the general agent in delivering the policy without collecting the premium as required by the rules of the company. It follows that the case cited is distinguishable from the one at bar, and offers no obstacle to our disposing of the latter on its peculiar facts.

In the case before us we have a contract that distinguishes it from a large number of cases which hold that the provision of the policy to the effect that only certain officers of the company can waive payment of premiums when due, and that agents cannot do so, does not apply to the initial premium. This distinguishing feature is found in the fact that the application, which is made a part of the policy, contains the express condition that the policy shall not take effect until the same shall have been issued and delivered by the company and the first premium paid thereon in full. In this connection it is to be observed that not only is the application made a part of the policy by its terms, but the policy opens with this provision: "In consideration of the application for this policy, which is hereby made part of this contract, and of the quarterly annual premium of seven and $\frac{2}{100}$ dollars, which it is agreed shall be paid to the company in exchange for its receipt on the delivery of this policy," etc. The above quotation from the policy gives added significance to the manner in which the receipt was treated at the interview between the agents and the insured, to which reference has already been made. The policy states that it is to be given in exchange for the receipt, and it rests upon the undisputed evidence that the receipt was left in the custody of the subagent, not

to be surrendered until the first premium was paid. In many of the cases cited, where insurance companies were held liable, the agent having waived the payment of the first premium contrary to the provisions of the policy and without authority from the company, the decision was based upon the fact that the policy had never been delivered to the insured, and, consequently, he could not be charged with notice of its contents at the time of the agent's waiver of payment. It was argued that to hold otherwise would practically permit the company, through its agent, to work a fraud upon the insured by leading him to believe that he had secured insurance when such was not the fact.

We have been cited to a multitude of cases by the respondent, which it is quite impossible to review in detail within the limits of an ordinary opinion. Many of these are within the class to which reference has already been made in regard to waiving the payment of the initial premium, and others deal with waiver in various forms, such as resting on the general course of business with the insured, knowledge of the agent before issuing the policy that property was subject to mortgage or other lien, that the title was in a third person, that there was other and undisclosed insurance, or various conditions which would render the policy void, by its terms, if the company were not chargeable with the knowledge of its agent by reason of information imparted to him by the insured during the preliminary negotiations. In the case at bar there is no evidence of a course of business between the company and the insured, nor was it shown that the general agent had power to waive payment of the first premium. On the contrary, the plaintiff put in evidence the contract between the company and its general agent, which showed affirmatively that he possessed no such power.

We thus come to the important and controlling question in this case—whether the insured is to be charged with notice of the contents of the written application, which he executed, making the same a part of the contract of insurance. The legal presumption is, in the absence of fraud, that the insured read or had read to him the application before signing it. This being so, he was advised that the policy could not issue or take effect until the first premium was paid thereon in full. The legal effect is that the insured covenanted with the company directly, and not through its agent, that the policy was not to be binding upon the company until the first premium was paid in full. Is this contract to be enforced as clearly written, or is it to be ignored for the reason that men enter into contracts without reading them, and assume that a vague and unproven custom exists permitting a local agent to give life and validity to the policy without reference to the terms of the contract of in-

insurance? The question may be put in another form: Can an insurance company enter into a contract with a person applying for insurance, which can so fix the precise conditions under which the policy shall issue that the agent, in the absence of express authority, cannot abrogate it? It would seem that the mere statement of the foregoing questions would compel an answer in favor of the company without argument. An insurance company is entitled to have its contract enforced by the courts as written, unless, as has been stated in many cases, to strictly construe it as against the insured would work a fraud upon him. As already pointed out, this might be the case in reference to the payment of the initial premium, where the only provisions in regard to the same are contained in the policy. It cannot be said in this case, in the teeth of the express covenant of the insured contained in his application and carried into the policy with due reference to the same, that he would be subjected to a fraud if the waiver of the agent, made without authority, is held not to abrogate the contract between him and the company, of which he is chargeable with full notice.

We are of opinion that it was error for the learned trial judge to instruct the jury that, if they found that at the interview between the agents and the insured the general agent delivered the policy to the insured, and agreed with him that the time of the payment of the first premium should be extended, and that in the meantime the policy should be in force, their verdict should be for the plaintiff.

The order and judgment appealed from should be reversed, and a new trial ordered, with costs to abide the event.

HAIGHT, J. (dissenting). This action was brought to recover the amount of an insurance policy issued upon the life of Robert J. Russell, and payable to the plaintiff, his widow. Charles H. Tennant was the general agent of the defendant in charge of its office in Syracuse, and James F. O'Donnell was the subagent and a solicitor of insurance under him. Russell had made application for insurance through O'Donnell, and the policy had been issued by the company, and sent to its general agent, Tennant. On the 6th day of January, 1900 Tennant and O'Donnell called upon Russell at his residence with the policy of insurance, and asked Russell if he wanted to pay the premium. He was not ready to pay at that time, and Tennant then said to him that he could have 30 days in which to make the payment. He thereupon handed Russell the policy, and gave him a receipt for the first payment, saying to him that the policy was in force from that time on. He then suggested that Russell had better let O'Donnell hold the receipt until he paid the premium. Thereupon Russell handed the receipt to O'Donnell, and then they went

away. On the 10th day of January, thereafter Russell was killed by the explosion of an engine in the rapid transit power house. Both O'Donnell and Tennant deny the statement of the plaintiff to the effect that Tennant stated to Russell at the time he delivered the policy to him that it should be in force from that date on, thus raising a question of fact between the parties which was submitted to the jury, who found a verdict in favor of the plaintiff, thus settling that question of fact in accordance with the testimony of the plaintiff.

It is now contended that there can be no recovery upon this policy, for the reason that the application of insurance contained a clause to the effect that the policy shall not take effect until the same shall be issued and delivered by the company, and the first premium paid thereon in full. Upon the back of the policy there was printed the following: "No agent has power on behalf of the company to make or modify this or any contract of insurance, to extend the time for paying a premium, to waive any forfeiture, or to bind the company by making any promise, or making or receiving any representation or information. These powers can be exercised only by the president, one of the vice-presidents or the secretary, and will not be delegated." I had supposed that a general agent of an insurance company could waive a condition of the policy requiring prepayment of premium in order to make the policy binding, and that this proposition was settled so firmly by judicial authority as to be beyond question. In *Sheldon v. Atlantic Fire & Marine Insurance Company*, 26 N. Y. 460, 84 Am. Dec. 231, it was held that a general agent of the insurer may waive a condition in the policy that no insurance should be considered as binding until actual payment of the premium. Emott, J., in delivering the opinion of the court, says with reference thereto: "There can be no dispute that Lewis could waive the actual prepayment of the premium. He was a general agent of this company, and, whatever may have been his secret instructions, the insurer had a right to rely upon his act. His principals were bound as well by a waiver on his part of the condition of prepayment of the premium as by his contracts of insurance." In *Wood v. Poughkeepsie Mutual Insurance Company*, 32 N. Y. 619, Porter, J., says: "Boggs was a general agent of the company. If he had waived the condition of prepayment, the insurers would have been bound by his act, though it was in violation of their private instructions. The law would have implied such waiver if the policy had been delivered by the agent without requiring payment of the premium, and had been accepted by the plaintiff as a complete and executed contract. The company would have been held to its engagement, and the assured would have been liable for the premium, notwithstanding the acknowledgment of payment on the face of the

paper." In *Boehen v. Williamsburgh City Insurance Company*, 35 N. Y. 131, 90 Am. Dec. 787, it was held that: "Although, by the printed terms of the policy, it is stated that no policy will be considered binding until the premium is paid, yet the agent may waive such condition and give short credit. The delivery of a policy without requiring payment raises a presumption that a short credit is intended." See, also, *McNeilly v. Continental Life Insurance Co.*, 66 N. Y. 23; *Marcus v. St. Louis Mutual Life Ins. Co.*, 68 N. Y. 625; *Palmer v. Phoenix Mutual Life Ins. Co.*, 84 N. Y. 63-70; *Ruggles v. American Central Ins. Co.*, 114 N. Y. 415, 21 N. E. 1000, 11 Am. St. Rep. 621; *May on Ins.* (4th Ed.) vol. 2, § 360b; 19 Am. & Eng. Ency. of Law (2d Ed.) p. 55.

But it is now claimed that a way has been discovered by which the settled law upon this subject can be evaded and annulled, and that is by printing upon the back of the policy issued a clause which seemingly deprives their agents of any power to give any information, make any representation, or to extend the time for the payment of the premium for a single day. It is not pretended that this condition printed upon the back of the policy was ever called to the attention of Russell, or that he knew of its existence in his lifetime. It did not appear upon his application, and nothing was said with reference to it at the time of the interview in which the policy was delivered to him by the general agent of the company. He had no opportunity to read over and post himself with reference to the printed conditions upon the back of the policy until the agents had taken their departure. He does not, however, appear to have read it then, for immediately after the agents had left he handed it over to his wife, the plaintiff in this action, who since that time appears to have had the custody thereof.

It has been intimated that there was some merit in the defense to this action; that the jurors should have believed the agents instead of the plaintiff. But this question has, as I have already stated, been settled by the jury, and, I have no doubt, upon ample evidence to sustain the verdict. Indeed, the testimony of the agents is inconsistent with their conceded acts. They admit that the general agent, at the time and place stated by the plaintiff, delivered the policy to Russell, and left it with him, and that he gave him time within which to make the payment. If the policy was not to be in force in the meantime, why was it delivered? Had it been held by the general agent until the money was paid, no one could have been deceived with reference to its force and effect. The very fact of its delivery, under the authorities to which we have referred, carries the presumption that it was in effect, and that any provision in the policy to the contrary was deemed waived. There is but one answer to the action of the agents, and that is

that which the law implies. By the delivery of the policy to Russell and the inducing of him to accept it, he thereby became bound to pay the premium from that day, together with the interest accruing thereon, and the same could be enforced in a court of law; whereas, by holding the policy for one month without delivering it to the insured, would prevent its earning any premium during that month which lawfully could be collected, and the company would thus be deprived of one-third of its first quarterly premium. What, then, is the position of this defendant as disclosed by the record? It maintains an office in the city of Syracuse, presided over by a general agent of the company, who has the supervision of numerous subagents; but these agents cannot give any information, make any representation or promise on behalf of the company. The only power, apparently, given to the general agent is to deliver policies and collect premiums due thereon, but he has no power to extend the time for the payment or to make delivery of policies until the premiums are actually paid in cash. And yet this agent, having the power to deliver policies, delivered this policy without the payment of the premium, in violation of his instructions, arranging with the insured to give him 30 days within which to pay the premium, and to induce him to accept the policy represented to him that it was then in force. At the same time this agent knew that the policy contained the provisions alluded to, and that it would not be in force or binding upon the company, although Russell, by his acceptance, had become bound to pay the premium. To sustain the company's position in this transaction is, to my mind, the permitting of it to practice a fraud, through its general agent, upon the insured. The general agent was acting within the scope of his employment in delivering the policy. Russell, in the absence of knowledge as to the instructions given the agent in the manual, and of the condition to which we have referred, had the right to rely and act upon the statements of the agents made at the time of the delivery of the policy; and, he having accepted the same, the company became bound by the contract. To hold otherwise would permit the company to deceive its customers by the false and fraudulent representations of its general agent, and at the same time avoid responsibility therefor. Parties to contracts, including insurance companies, cannot be permitted to avail themselves of their own fraud in order to escape liability for failure to perform their contracts. *Broom's Legal Maxims*, 320.

The case of *Stewart v. Union Mutual Life Insurance Company*, 155 N. Y. 257, 49 N. E. 876, 42 L. R. A. 147, while distinguishable from the case under consideration as to the facts, is not, in my judgment, distinguishable as to the questions of law involved.

Under the view taken by me of this case,

the exceptions appearing upon the record present no error calling for a reversal.

The judgment should be affirmed, with costs.

PARKER, C. J., and GRAY, O'BRIEN, and MARTIN, JJ., concur with BARTLETT, J. HAIGHT, J., reads dissenting opinion. VANN, J., not voting.

Order and judgment reversed, etc.

(176 N. Y. 219)

PEOPLE v. MONTGOMERY.

(Court of Appeals of New York. Oct. 13, 1903.)

HOMICIDE—EVIDENCE—REVERSIBLE ERROR—ARGUMENT OF COUNSEL.

1. On trial for murder of a wife specific acts, declarations, conduct, and occurrences bearing upon his relations with another woman, were properly received in evidence on the question of motive, but evidence as to the character of such woman was incompetent.

2. Where improper evidence was received of the character of a woman on trial of a husband for the murder of his wife in connection with evidence of the relations existing between the husband and such woman, its reception was reversible error, and was not technical or unsubstantial under Code Cr. Proc. § 542.

3. On a prosecution of a husband for murder of his wife, where the theory was that he had assaulted her with a wooden stick after a quarrel, and fractured her skull, and had shot her to prevent exposure, and a stick found in the room where her body lay was admitted in evidence, but there was no proof to support the theory of the prosecution, it was error to refuse to charge, on the request of the defendant's counsel, that there was no evidence that the stick had been used by defendant in an assault prior to the shooting, and to allow the counsel for the prosecution to argue in support of such theory.

Appeal from Supreme Court, Trial Term, Delaware County.

Harvey D. Montgomery was convicted of murder, and appeals. Reversed.

Robert M. Moore, for appellant. George A. Fisher, Dist. Atty. (Edwin D. Wagner, of counsel), for the People.

WERNER, J. The gruesome tragedy out of which this appeal arises took place in the town of Hobart, Delaware county, on the 30th day of March, 1901, when Amelia B. Montgomery came to her death by means of a bullet wound inflicted by her husband, the defendant, who was subsequently tried and convicted upon the charge of murder in the first degree. The death and its cause having been established beyond controversy, the dominating issue of the trial was whether the act of the defendant proceeded from a conscious, sane, responsible mind, or whether it was an accident due to a seizure, said to be epileptic in its nature, as a result of which the defendant unconsciously or involuntarily caused his wife's death. Much evidence was adduced upon this issue. The prosecution

presented a case which tended to invest the defendant's act with the elements of motive, premeditation, deliberation, and sanity. The defense sought to establish the irresponsibility of the defendant, but, as the sequel shows, without success. If, therefore, the sole question presented by this record were whether the verdict is supported by the weight of the evidence, we could not reverse the judgment without invading the province of the jury, for there was competent evidence upon every branch of the case, which raised a substantial issue of fact. There are presented for our consideration, however, many exceptions taken by the defense to the rulings of the learned trial court, and after a careful examination of them all we have arrived at the conclusion that two of these rulings appear to be so seriously erroneous as to necessitate a new trial. In view of this fact, and of the concession of the defense that the killing of Amelia B. Montgomery was the act of the defendant, we may safely and materially shorten the discussion of the case by confining our review to the matters which bear upon these two rulings.

The proof as to motive or motives proceeded along several distinct lines. Upon one branch of this question the prosecution produced evidence showing that during nearly the whole of the interval between the death of defendant's first wife in June, 1896, and his subsequent marriage in March, 1900, one Harriet Wood had lived with him as his housekeeper. She remained in his employ until the early autumn of 1900, or several months after his second marriage. It was contended for the prosecution that during this interval, between 1896 and 1900, the defendant had formed an illicit alliance with Harriet Wood, which, if not actually continued after defendant's second marriage, was covertly cherished by him, causing discord between him and his second wife, and creating one of the motives which inspired the commission of the crime charged in the indictment. In support of this theory the prosecution adduced evidence showing that in the spring of 1900 the defendant, with three hired men and Harriet Wood, went to the Kaaterskill Mountains, where the defendant had a contract to supply certain hotels and cottages with dairy products during the summer season, and lived there together for three or four days before the defendant went back to Hobart for his wife. These hired men testified that they slept upstairs but that the defendant and Harriet Wood did not sleep there; that they did not know where they slept, and that there was only one bed downstairs that they knew of. One of the men (Haynor) testified to a conversation with the defendant, in which the latter took him to task for talking about Harriet Wood at the neighboring hamlet of Jewett Center, and said: "There is no use of going to my wife and reporting anything concerning anything

¶ 1. See Homicide, vol. 26, Cent. Dig. § 326.

that has been or what is done. What a woman doesn't know never made her head ache, and such little things won't come out very well." This witness also testified that on one occasion when he was near the barn and Harriet Wood was outside of the house, the defendant called to her from a window, where he stood with his body nude as far down as the chest; that she went to the window, and there the two conversed while he stood thus exposed. He also referred to a conversation between the defendant and his wife disclosing some difference of opinion between the latter and Harriet Wood, as to which one should deliver cream and butter to Mrs. Surgraft, and he stated that defendant sometimes sent his wife away with cream and butter in the evening so that she did not return until the following morning. Another witness (Hollicus), who worked for the defendant from February to the latter part of May in 1900, testified to a conversation between the defendant and Harriet Wood shortly before the latter left the former. This witness stated that the defendant came into the barn at milking time, when Harriet Wood said to him: "Harvey, I didn't think you would give me up in this way, or as easy as that," and he burst out crying, and called her in one end of the barn, and went talking to her. I could not hear what he said. After they got out there, I don't know how long they talked; should think fifteen or twenty minutes, half an hour, or something like that. She went away next day. Harvey Montgomery took her away. They went in the morning. He came back next day. Was gone over night." This witness also testified that Mrs. Montgomery objected to Harriet Wood's driving her horse. Another hired man (Gray) testified that defendant requested him to ask Harriet Wood to stay with defendant when she was talking of leaving. There was also evidence to the effect that in the January preceding the homicide the defendant went several times to a Mrs. Clark, in Hobart, to ascertain if she did not want a good girl for housework, with the result that Harriet Wood commenced work at Clark's on February 1, 1901. This was closely followed by another visit from the defendant, at which he arranged with Mrs. Clark to furnish her with milk, and continued to do so until after the homicide. During this period defendant called at Clark's a number of times, and usually saw Harriet Wood. It was further shown that on the day of the homicide there was a conversation between the defendant and one Stevens, in which the former asked the latter and his wife to go up and take charge of the Kaaterskill contract, and, when Stevens demurred on the ground of his incompetency, the defendant said he would write a letter to Harriet Wood, and get her to go with them, to which Stevens replied that his wife would not go with her. Several witnesses also testified that immediately after the homicide

Harriet Wood and the doctor were the only persons whom the defendant requested to have sent for.

To offset the force and effect of the foregoing circumstances upon the question of motive, the defense invoked a number of explanations and facts which appear in the record. We shall refer to only a few of them. The defendant was a man 59 years of age. He was a farmer extensively engaged in raising hogs, and conducted a dairy in the Catskills. These enterprises required hired men, some of whom boarded with him. He became a widower in 1896, and until his marriage in 1900 he needed a housekeeper. In these conditions he secured the services of Harriet Wood, who remained with him for a number of years. Members of defendant's family, and others who had worked for him, testified that they had never witnessed any improper conduct between him and Harriet Wood. From these and other matters which bore upon the relations of the defendant and Harriet Wood the defense argued that, even admitting all that was testified to in this behalf by the witnesses for the prosecution, nothing had been shown that was at all inconsistent with such an innocent and respectable intimacy as would be the natural outcome of a long period of constant association between a man and woman under the same roof in a rural community. The specific facts and circumstances thus presented by the prosecution and defense, respectively, to throw light upon the relations of the defendant and Harriet Wood, raised a legitimate issue upon the question of motive, which it was proper to submit for the consideration of the jury.

But the prosecution, not content with seeking to establish specific improprieties between the defendant and Harriet Wood, went further, and threw into the balance the latter's reputation for unchastity. Six witnesses testified that her reputation in that regard was bad. That this evidence seems to have been based largely, if not entirely, upon her association with the defendant, is not without significance; for if the speech of people in that community, as reflected in the testimony of disinterested witnesses, characterized that association as sinister or meretricious, it is readily perceivable that it may have exercised a commanding influence upon the jury in reaching a determination upon the question of motive. The evidence of Harriet Wood's reputation for unchastity was directed to the question of motive, and to no other. That question obviously bore a very intimate relation to the defendant's plea of irresponsibility, and it seems to be reasonably clear that, if it was error to admit the evidence of Harriet Wood's reputation, it cannot be assumed to have been harmless to the defendant. We address ourselves, then, to the question whether the evidence of Harriet Wood's reputation for unchastity was competent. It is the settled

law of this state that upon a trial for the murder of a husband or wife the improper relations of the accused survivor with persons of the opposite sex may be given in evidence upon the subject of motive. *People v. Hendrickson*, 8 How. Prac. 404; *People v. Wileman*, 44 Hun, 187; *Stephens v. People*, 19 N. Y. 549; *People v. Stout*, 4 Parker, Cr. Cas. 71; *Pierson v. People*, 79 N. Y. 424, 35 Am. Rep. 524; *People v. Harris*, 136 N. Y. 423, 33 N. E. 65; *People v. Benham*, 160 N. Y. 402, 55 N. E. 11; *People v. Scott*, 153 N. Y. 40, 46 N. E. 1028; *People v. Buchanan*, 145 N. Y. 1, 39 N. E. 846. The same rule obtains in many other states. *State v. Watkins*, 9 Conn. 47, 21 Am. Dec. 712; *Hall v. State*, 40 Ala. 698; *Johnson v. State*, 94 Ala. 35, 10 South. 667; *O'Brien v. Commonwealth*, 89 Ky. 354, 12 S. W. 471; *State v. Duestrow*, 137 Mo. 44, 38 S. W. 554, 39 S. W. 266; *Duncan v. State*, 88 Ala. 31, 7 South. 104; *Pettit v. State*, 135 Ind. 393, 84 N. E. 1118; *St. Louis v. State*, 8 Neb. 405, 1 N. W. 371; *Stricklin v. Commonwealth*, 83 Ky. 566; and *People v. Brown*, 130 Cal. 591, 62 Pac. 1072. It is supported in such text-works as *Lawson on Presumptive Ev.* (page 495); *Wills on Cir. Ev.* (6th Am. Ed. p. 41); *Burrill on Cir. Ev.* (p. 285); *Underhill on Crim. Ev.* (§ 323); and is doubtless the law wherever the principles of the common law prevail. The reason of the rule has been stated in great variety of language, but the substance of it is that evidence of this character tends to repel the presumption of love and affection that arises out of the marital relation, and to establish a motive for the desire to get rid of one who, under normal conditions, would be the natural object of kindness and protection. Thus, as we have said, the facts and inferences which were based upon specific occurrences bearing upon the relations of the defendant and Harriet Wood were properly received in evidence. Some of them, it is true, might have been discarded by the jury as of too little probative weight and force, but they were, nevertheless, competent for what they were worth.

The prosecution seeks to justify the evidence of Harriet Wood's reputation for unchastity under the rule above referred to, but it is important to note that not a single case has been cited by counsel, nor brought to light by the research of the court, which holds that such evidence is competent. Counsel for the prosecution cite the Cases of *Harris*, *Buchanan*, *Scott*, and *Benham*, supra, to sustain their contention, but none of them go further than to declare the well-established general rule that specific acts, declarations, conduct, and occurrences tending to show improper relations with a person of the other sex are admissible evidence against one accused of the murder of husband or wife. The fact that the reported cases and the text-books are, at this late day, barren of any discussion upon the admissibility of evidence as to the reputation for un-

chastity of the paramour of one accused of wife murder, is in itself a cogent argument for the inadmissibility of such evidence.

It would serve no good purpose, and would tend to undue prolixity, to attempt a statement of the different classes of cases in which evidence of personal reputation is admissible. It is enough to say that it is only competent where character is in issue. Since character (which is what a man is) cannot be proven, the law makes a virtue of necessity, and resorts to proof of reputation, or what people say of a man, as the next best thing. Evidence of reputation is one of the exceptions to the rule excluding hearsay evidence, and, in common with all the exceptions to that rule, is resorted to only because more direct evidence is not obtainable. To this very general statement it may be added that usually the only character or reputation that can ever be in issue is that of a party or a witness. There are a few exceptions not germane to this discussion. In the case at bar Harriet Wood was neither a party nor a witness. Her character was not in issue. Proof of her reputation for unchastity served no purpose except, possibly, to prejudice and inflame the minds of the jury against the defendant. All the facts and circumstances bearing upon the relations of the defendant and Harriet Wood were in evidence. If they pointed with reasonable certainty to a guilty alliance between the two, it added nothing to their weight and cogency to go further and prove the woman's reputation for unchastity. If, on the other hand, these facts and circumstances, standing alone, might have been regarded by the jury as entirely consistent with an innocent and respectable intercourse between this man and woman, it must follow that they furnished no evidence of a motive for murder without being supplemented by proof of the woman's bad reputation. In either event this evidence had a tendency to create a prejudice against the defendant, and to injure him, without proving a single fact against him. The specific occurrences in which Harriet Wood and the defendant were shown to have figured together after the latter's second marriage were competent evidence against him, but the former's reputation was not a legitimate issue in the case. Even if it had been, there was no evidence that the defendant knew of it, and that of itself was a sufficient reason why it should not have been used against him. It is to be observed, moreover, that this evidence of Harriet Wood's reputation, which was not limited to the period succeeding defendant's marriage to the deceased, related, in part at least, to a period as to which evidence of specific acts of intimacy between Harriet Wood and the defendant would have been incompetent against the latter under the rule in *People v. Strait*, 148 N. Y. 570, 42 N. E. 1045, where it was held that it was not competent to prove defendant's relations with his alleged paramour during his

separation from his first wife, from whom he was afterwards divorced, for the purpose of showing a motive to kill his second wife, whom he married after the occurrences proved. So much might be said against the competency of this evidence of Harriet Wood's reputation that it is more difficult to choose than to find reasons for condemning it, and we shall leave the discussion of this branch of the case with the statement that we regard it as utterly incompetent. Since several possible motives were assigned for the alleged murder, we are unable to say which particular one, if any, the jury may have regarded as the true one, but we cannot doubt that, if they looked for a motive in the relations of the defendant and Harriet Wood, the evidence of her reputation proved a controlling factor in the finding of the verdict of guilty. Thus we are driven to the conclusion that the error in receiving this improper evidence is not one that we can overlook as technical or unsubstantial under the powers conferred upon us by section 542 of the Code of Criminal Procedure.

We think it was error, also, for the trial court to refuse to charge, upon the request of counsel for the defense, that there was no evidence that a certain wooden stick or bludgeon or rolling pin, as it has been variously described, had been used by the defendant in the commission of an assault upon the deceased prior to the shooting. The force of this ruling becomes apparent upon a brief recital of the facts relating to that part of the case. The deceased was found in bed, with a severe fracture of the skull surrounding a bullet wound which entered the head at the right temple bone and had its exit behind and below the ear near the occipital bone. Her eyes were closed, the bedclothes were tucked under her left side and shoulder, and her hair, contrary to her usual custom upon retiring, was coiled about her head in the same manner as she was wont to wear it during the day. Her face, hair, and the pillow upon which she lay were badly scorched. The stick of wood in question was found lying upon a bureau in the room. As there were no eyewitnesses to the shooting, and there was no superficially apparent motive for it, the prosecution naturally seized upon every theory that might give a clue to the inspiration for the deed. One of the theories evolved by the prosecution was that the defendant and his wife had a quarrel over the Kaaterskill contract, a renewal of which had been obtained by the defendant on that day; that in the heat of passion engendered by this quarrel the defendant had assaulted his wife with the stick of wood or bludgeon, thus fracturing her skull, and that when the defendant realized the serious consequences of his assault he decided to kill his wife to escape exposure. The difficulty with this theory is that, beyond the existence of the stick, the renewal of the Kaaterskill contract, and the manner in which deceased

wore her hair, there is not a fragment of evidence to sustain it. The stick of wood bore no evidence of having been used in the commission of an assault, and was shown to have been an instrument used in the pressing of the sleeves of women's garments. The physicians who performed the autopsy, and who were called as witnesses for the prosecution, testified that there was no such abrasion or discoloration of the inner skin surface as would be found in case of severe external violence from a stick or club, and that the entrance of a bullet fired at such close range as to scorch and burn the face and hair of the deceased and the bed clothing, was a sufficient cause for the fracture of the skull. There was nothing to show that there had been a quarrel between the defendant and his wife, and, in a word, there was an utter failure of evidence to support the theory that the defendant had committed an assault upon his wife before he shot her. It is argued for the prosecution that they were entitled to lay before the jury all the circumstances connected with the homicide, and therefore it was competent to put in evidence the stick of wood found in the room where it occurred. That is true to the extent that the stick of wood, in and of itself, was no more and no less competent than any of the other physical surroundings of the alleged crime. It was in the use of this particular thing for a purpose not justified by the evidence that error was committed.

We do not coincide with the views of counsel for the defense that, because the indictment charged murder by means of a gunshot wound, it was error for the court to receive the stick of wood in evidence, or to permit counsel for the prosecution in his opening to present to the jury the theory that the defendant had assaulted and injured the deceased before he shot her; on the contrary, we think it was proper for the court to allow counsel to exploit that theory upon the assumption that it would be followed by evidence to support it, and in that view of the case the stick of wood was, in the first instance, properly received in evidence. But when the proofs had been closed, and there had been a palpable failure to prove the theory of assault, the court should have sharply directed the attention of the jury to that fact, and have restrained counsel for the prosecution, in his summary to the jury, from commenting upon a theory that had collapsed for want of evidence; and then the court should have charged, as requested by defendant's counsel, that there was no evidence that the stick of wood had been used upon the deceased. None of these things were done. There was no admonition to the jury to disregard the opening statement of counsel for the prosecution upon the theory of assault. The court refused to charge as requested by defendant's counsel. In his summary to the jury counsel for the prosecution was permitted to say: "It may be, gentle-

men, that this bludgeon was used in the argument not with the intent or purpose of taking her life, but it was used and the woman became unconscious, and this man, believing that he had killed his wife, had resort to the gun to finish the job. * * * Where is the evidence to show that they did not have an altercation there before she went to bed? It is a fair inquiry to say where is the evidence to show they did not. Where is the evidence to show they did? The dead woman, with her head crushed, there in bed, is evidence that at some time during that night there was a disturbance and a breach of friendliness between them. With her there in her blood, some one is called upon to explain it to show what the relations were which immediately preceded this thing they called an accident. Where is the explanation? Gentlemen, where is it? Why, never a witness has testified to it." These remarks of counsel were supplemented by the following language of the court in the course of the charge: "In the discussion of this case another motive has been suggested by the counsel for the people, and that is that the crime of murder was committed to conceal another crime. The theory of the prosecution is that Montgomery, in the heat of passion, or for some other cause, struck the deceased on the head with a rolling pin which was found on the bureau at the foot of the bed after the tragedy; that the depression or indentation on the left side of the forehead was made with a blow from the instrument; and that, to conceal this assault, she was afterwards placed in bed by him, and shot through the head. In support of this theory evidence has been given tending to show that it was a habit of the deceased to take down her hair and braid it before retiring, and that this night her hair was not down, but in a coil near the top of her head. The prosecution claims that this fact and the fact that the bedclothes were carefully tucked under her side, that they were not back on the side occupied by the defendant, but drawn up nearly to the pillow, as well as the position of the body, the position of the arms crossed on the abdomen, and the fact that the skull was broken and indented, shows that an assault was made before the shot was fired and before she was placed in bed. It is true that one of the physicians has testified that, in his opinion, the dent or depression in the forehead was caused by the bullet, but you are not bound to accept his opinion as true. You should give to this evidence such weight as you think it is entitled to in view of all the evidence in the case. As I said before, when an expert states a scientific fact, his opinion is speculative and theoretical, and he states only his belief, or where some other theory is equally consistent with the facts. If you are convinced beyond a reasonable doubt, from all the evidence in the case, that the crime of assault was made by the defendant upon the

deceased, you will then determine whether it was the moving power that impelled the defendant to shoot the deceased, and if you are convinced beyond a reasonable doubt that this was the motive that induced the act, you will give it such force and effect as you think it entitled to, no matter what the opinion of the physician may be as to the cause of the indentation." We cannot say that the conduct of the trial in this regard did not affect the result. The refusal to instruct the jury that there was no evidence of an assault prior to the homicide, followed by the impassioned appeal of counsel and the solemn words of the court, which tended to dignify this theoretical assault into a reality, may well have been potent in shaping the verdict.

The judgment herein should be reversed, and a new trial ordered.

PARKER, C. J., and HAIGHT, MARTIN, VANN, and CULLEN, JJ. (and GRAY, J., on first ground of error discussed), concur.

Judgment of conviction reversed, etc.

(161 Ind. 689)

SOUTHERN INDIANA RY. CO. v. HARBELL.¹

(Supreme Court of Indiana. Oct. 9, 1903.)

MASTER AND SERVANT—PERSONAL INJURIES —EMPLOYERS' LIABILITY ACT—VICE PRINCIPAL—FOREMAN—FELLOW SERVANTS—ASSUMED RISK—SAFE PLACE.

1. Where defendant reserves a general exception to the overruling of his demurrer to a complaint having several paragraphs, he cannot question severally the ruling as to each paragraph.

2. At an interval when there happened to be nothing for plaintiff to do in the construction of a railroad bridge on which he was employed, and while he was sitting down, he was injured by a stone raised by a derrick being swung against him by reason of the person in charge negligently ordering the stone raised while a train was passing which struck the derrick or chain. *Held*, that Employers' Liability Act, § 1, subd. 2 (Burns' Rev. St. 1901, § 7083), declaring a railroad company liable for injury to a servant resulting from the negligence of any person in the service of such corporation to whose order the injured employé was bound to conform and did conform, did not apply.

3. The person in charge being merely a workman like plaintiff and others engaged thereon, in the giving of the general order to raise the stone he was acting as a foreman, and not as a vice principal.

4. Risk of injury from negligence of a foreman was an assumed risk, in the absence of negligence by the master in selecting him for such position.

5. Where plaintiff was engaged with others in the general work of constructing a bridge, and chose his own position while a portion of the work was going on, it was not the master's duty to have a representative present to see that such place was safe.

Appeal from Circuit Court, Greene County; O. B. Harris, Judge.

¹ See Master and Servant, vol. 34, Cent. Dig. §§ 567, 570.

² Rehearing denied.

Action by Jackson H. Harrell against the Southern Indiana Railway Company. From a judgment of the Appellate Court (66 N. E. 1016) affirming a judgment for plaintiff, defendant appeals. Reversed.

F. M. Trissal, Brooks & Brooks, and Emerson Short, for appellant. East & East and McHenry Owen, for appellee.

GILLETT, J. This was an action for an injury to the person of appellee. He recovered in the trial court, and the judgment was affirmed by the Second Division of the Appellate Court. Appellant appeals to this court under the third subdivision of section 1337j, Burns' Rev. St. 1901, and assigns as error here that said division erred in affirming the judgment of the trial court. We proceed to a consideration of such assignments of error in the Appellate Court as were not subsequently waived.

There were seven paragraphs of complaint, and appellant demurred to each of them. Its demurrer was overruled, and it reserved a general exception to the ruling. Although appellant sought on appeal to question severally said ruling as to each of said paragraphs, yet, as the exception was in gross, we are compelled to hold that such assignments of error present no question for our consideration. Noonan v. Bell, 159 Ind. 329, 64 N. E. 909, and cases there cited.

Appellant further assigned as error that the Greene circuit court erred in overruling its motion for a new trial. Among other grounds for a new trial, appellant assigned in said motion that the verdict was contrary to the evidence, and, further, that the verdict was contrary to law.

The evidence showed the following state of facts: On July 5, 1899, appellant, a railroad corporation, was engaged in the construction of a railroad bridge over White river, in the county of Greene. A temporary work or bridge had been built over the river, on which a track had been laid. A stone pier was being built under the structure, and a number of men, including appellee, were engaged in its construction, under one John Gratzner. The necessary stone were unloaded from cars, and were placed in position by means of a derrick, which was erected upon a platform a few feet north of the track. The derrick's mast was so stayed as to give the top a slight inclination toward the south, with the result that in handling a heavy stone it had a tendency to swing toward the pier and track. There was evidence that the derrick was purposely so constructed, with a view to its greater utility; but whether it can be said to have been defective or no, by reason of being so constructed, it appears that appellee, whose principal business was to arrange the tackle about the stone and lower it from the cars, knew of such tendency, and had helped to hold a rope in keeping the boom and sus-

pended stone from swinging over the track. There had never been an attempt to handle a stone when the portion of the track that was adjacent was occupied by a moving locomotive or cars. Near the close of working hours on the day in question a locomotive and two or three flat cars stood near the east end of said temporary bridge. A heavy stone, which had just been unloaded from one of said flat cars, lay upon the pier, occupying its intended place in the top course. A short distance to the west there were several flat cars, and still further on, and near the west end of the bridge, were a portable pile driver and its car. Appellee, who testified that there was nothing for him to do at that time, was seated upon a projecting bent. He had not received a command as to what place he should occupy. The conductor of the train said to Gratzner, "John, are you going in with us?" The latter answered that he and his men were going to set the stone and return on a hand car. After about two minutes, occupied by the men in charge of the train in coupling the flat cars and the pile driver and its car together, the train, as thus made up, started east, and, before the pile driver reached the pier, the train was moving at a speed of from three to six miles an hour. In the meantime Gratzner ordered one of the men to signal the stationary engineer to raise the stone a little, it being necessary to make a mortar bed under it. The signal was given, and the stone was raised about two feet before the pile driver had passed. Three men, Courtney, Clemmons, and Pollard, were holding the stone away from the track, by means of a rope, after the stone was raised above the course in which it had rested. Clemmons and Pollard let go of the rope, Clemmons going to get his trowel and Pollard going to get mortar. Courtney was thus left to hold the stone alone, and, as it proved too heavy for him, he abandoned the rope, and sought a place of safety. The boom then swung around, and the chain which held the suspended stone caught on the running board of the pile driver. This caused the stone to swing east, and as it swung back it struck appellee, crushing one of his feet and injuring the other. It seems to have been but a brief interval after the stone swung clear until the chain caught on the running board, as a number of appellee's witnesses in effect testified. Appellee's witness Helms, who was on the third or fourth car east of the pile driver, testified that the stone was not suspended as he passed the derrick, and that he was looking to see that all fall lines were clear. Gratzner had exclusive charge of the stonework. He directed the men and worked himself.

The various paragraphs of complaint rest on various theories. Negligence is charged against appellant in the construction of the derrick, and also against Gratzner and the conductor and the engineer severally. There

is no charge that appellant did not exercise due care in the selection of said employes. Appellee's counsel say of the complaint: "The first five paragraphs minutely describe all the conditions and concurring causes of the injury. The sixth paragraph is intended to be pleaded under the second subdivision of section 1 of the employers' liability act. The seventh paragraph charges negligence against the engineer of the train and the conductor, and also against Gratzner, charging them all as vice principals under the fourth subdivision of the act." There was not a scintilla of evidence supporting the theory that either the conductor or the engineer was negligent. Neither of them is shown to have known that the stone was suspended or to have had any reason to apprehend that it was. The manner in which the derrick was constructed does not appear to have been the proximate cause of the accident. The derrick possessed a particular utility when constructed as it was, and it was ordinarily safe so long as it was used in accordance with the established custom that the evidence shows had before obtained. It was a master's duty to have the derrick properly constructed and maintained, but appellant was not bound to apprehend that its servant might put the same to a negligent use—a use wholly contrary to the custom that had obtained before the accident. See, on the subject of proximate cause, *Enochs v. Pittsburgh, etc., R. Co.*, 145 Ind. 635, 44 N. E. 658; 1 Thompson, Commentaries Law of Neg. § 43 et seq.

This brings us to the question as to whether appellant was responsible for the negligence of Gratzner, assuming that he, as well as Clemmons and Polland, was guilty of negligence. As to the Employers' Liability Act (section 7083 et seq., Burns' Rev. St. 1901), it is evident that appellant is not liable under the second subdivision of the first section. That subdivision was not intended to create a liability based on an order or direction, where such order or direction was as broad as the whole service, and where the injured servant, without the compulsion of an order or direction from one whose order or direction he was required to obey, was at the time governing himself according to his own judgment as to what was proper. In so far as the fourth subdivision of said section is concerned, it does not appear that Gratzner belonged to any of the classes of servants particularly mentioned therein. The latter part of said subdivision is not any broader than the common law upon the subject; so we may as well consider the remaining question as to liability from that standpoint.

Assuming that Gratzner was negligent, as we have before done, it would follow that appellant might have been liable to a stranger, under the rule of respondeat superior, had he been in appellee's place. But in appellee's case negligence could not be predicated on his injury if it was a result of one of the

risks of the service, because as to those risks which the servant assumes there is no duty. *American Rolling Mill Co. v. Hullinger* (at last term) 87 N. E. 986; *Fitzgerald v. Connecticut River Paper Co.*, 155 Mass. 155, 29 N. E. 464, 31 Am. St. Rep. 537.

When the contract of service is entered into the master impliedly contracts that he will exercise ordinary care in the selection and retention of the employe's co-servants, and such employe impliedly contracts that this requirement complied with, he will assume, as one of the risks of the service, the perils of injury from the negligence of such co-servants. If appellee has made out a case, it must appear that in giving the order to raise the stone Gratzner was acting as a vice principal, and not as a mere fellow servant. The controlling consideration in determining whether an employe is a vice principal is, not his comparative rank, not his authority to command, and not his authority to employ and discharge, but whether he is the representative of the master in respect to those duties which the master cannot escape by a delegation of them. *Indiana Car Co. v. Parker*, 100 Ind. 181; *New Pittsburgh, etc., Co. v. Peterson*, 136 Ind. 398, 35 N. E. 7, 43 Am. St. Rep. 327; *Robertson v. Chicago, etc., R. Co.*, 146 Ind. 486, 45 N. E. 655; *Southern Indiana R. Co. v. Martin* (Ind. Sup.) 66 N. E. 886; and see further monographic note, *Lafayette Bridge Co. v. Olsen*, 54 L. R. A. 1. One of the leading duties of a master, except in instances when it can be said that the complaining servant has assumed the particular risk, is to use ordinary care to keep the place where such servant is employed in as safe a condition as the nature of the employment fairly admits of. To make the above statement certain requires a consideration of the meaning of the word "place." If by this it is meant that the master, by himself or representative, must be always present to ward off every transient peril that may menace the servant in the particular spot or place that he may chance to occupy while engaged in the performance of his work, then it must be affirmed that the rule of law devolves upon the master a duty that in many instances it would be wholly impracticable to discharge. A railroad company could scarcely employ vice principals enough to make it sufficiently argus-eyed to guard its servants to that extent. Furthermore, it is to be observed that in some lines of business, like the operation of a railroad, many servants are employed whose respective duties are so correlated that in the very forwarding of the master's business they are protecting the lives and limbs of their co-servants; and if some limitation be not put upon the word "place," as respects transient dangers in the conducting of the details of the business, then every one of such servants becomes, for some purposes, a vice principal, and the integrity of the co-servant rule is destroyed.

In *Fraser v. Red River Lumber Co.*, 45

Minn. 235, 47 N. W. 785, it was said: "While we have no disposition to impinge upon the just and salutary rule that makes it the primary duty of the master to furnish to his servants safe instrumentalities and places for work, yet we are satisfied that in many cases the courts, by indulging in too much refined and artificial reasoning, have carried the rule altogether too far, and have often held the master liable in cases where the untutored minds of laymen, in the exercise merely of common sense, would unhesitatingly say that the master had not been derelict in the performance of any duty towards his servants. When it is considered that, where numerous employes are all engaged in prosecuting the same general object, there is hardly one of them whose duties do not, in part at least, in some way relate to or affect the safety of the instrumentalities with which, or of the places in which, the others work, it is easy to see that the rule referred to may be, as it often has been, carried so far as to practically abrogate the whole doctrine of 'common employment.' We shall not attempt to do what no court has yet been able to do, *viz.*, to formulate a statement of the rule that will furnish a test by which to determine every case; but we may suggest that, in our opinion, an important consideration, often overlooked, is whether the structure, appliance, or instrumentality is one which has been furnished for the work in which the servants are to be engaged, or whether the furnishing and preparation of it is itself part of the work which they are employed to perform. If it be the latter, then, as it is well settled by our decisions, the master is not liable."

In *Perry v. Rogers*, 157 N. Y. 251, 51 N. E. 1021, Parker, C. J., observes that, "under the guise of an application of the rule requiring a master to furnish a reasonably safe place for his servants to work in, other attempts, before this, have been made to deprive a defendant of the benefit of another equally well-settled and just rule of the law of negligence, that a party shall not be held responsible to a servant for an injury occasioned by the negligence of a competent co-employee."

As was said in the decision of *Butler v. Townsend*, 126 N. Y. 105, 26 N. E. 1017: "A place, in its broad sense, is never safe in which an accident happens, and an accident always happens in some place, and so the master might almost become an insurer."

In line with the above observations are the following expressions from the decision of *Hermann v. Port Blakely Mill Co.* (D. C.) 71 Fed. 853: "The word 'place,' in my judgment, means the premises where the work is being done, and does not comprehend the negligent acts of fellow servants, by reason of which the place is rendered unsafe or dangerous. The fact that the negligent act of a fellow servant renders a place of work un-

safe is no sure and safe test of the master's duty and liability in this respect, for it may well be said that any negligence which results in damage to some one makes a particular spot or place dangerous or unsafe. To so hold would virtually be making the master responsible for any negligence of a fellow servant which renders a place of work unsafe or dangerous. It would be doing the very thing which it is the policy and object of the general rule not to do. It would create a liability which the master could not avoid by the exercise of any degree of foresight or care." To the same effect, see *Armour v. Hahn*, 111 U. S. 313, 4 Sup. Ct. 433, 28 L. Ed. 440; *Baird v. Reddy*, 92 Fed. 884, 35 C. C. A. 78; *Cleveland, etc., R. Co. v. Brown*, 73 Fed. 970, 20 C. C. A. 147; *City of Minneapolis v. Lundin*, 58 Fed. 525, 7 C. C. A. 344.

"The test of liability," said the court in *Sofield v. Guggenheim Smelting Co.*, 64 N. J. Law, 605, 46 Atl. 711, 50 L. R. A. 417: "is not the safety of the place or appliance at the instant of injury, but the character of the duty the negligent performance of which caused the injury." In the case of *The Queen* (D. C.) 40 Fed. 694, we find the following language: "It would be absurd to say that the owners owed a duty to the seamen that too long a hawser should never be used, or that signals in a fog should be properly given by their own vessel. These details belong to the ordinary work of navigation, and to the men employed to conduct it. As to this work, the owners owe no duty to the officers or seamen to see it properly performed."

In the endeavor to so correlate the deep-rooted doctrines relative to the master's duty to his servant and the servant's assumption of risk with respect to his co-employees as to maintain such doctrines in a proper relation, we find it stated by the courts that the master is not liable to his servant for the negligence of his co-servants in respect to the details of the work (*Central R. Co. v. Keegan*, 160 U. S. 259, 16 Sup. Ct. 269, 40 L. Ed. 418; *Southern Indiana R. Co. v. Martin* [Ind. Sup.] 66 N. E. 886; *O'Brien v. American Dredging Co.*, 53 N. J. Law, 291, 21 Atl. 324; *Baird v. Reilly*, 92 Fed. 884, 35 C. C. A. 78; *Hussey v. Cogger*, 112 N. Y. 614, 20 N. E. 556, 3 L. R. A. 559, 8 Am. St. Rep. 787; *Geoghegan v. Atlas S. S. Co.* [Com. Pl.] 22 N. Y. Supp. 749); that he is not bound to protect his servant against the mere transitory perils that the execution of the work occasions (*Whittaker v. Bent*, 167 Mass. 588, 46 N. E. 121; *Meehan v. Speirs Mfg. Co.*, 172 Mass. 375, 52 N. E. 518); and that he is not liable merely because a co-servant negligently handles appliances in such a way as to occasion injury to an employe (*Howard v. Denver, etc., R. Co.* [C. C.] 26 Fed. 837; *St. Louis, etc., R. Co. v. Needham*, 63 Fed. 107, 11 C. C. A. 56, 25 L. R. A. 833; *Snow v. Housatonic R. Co.*, 8 Allen, 441, 85 Am. Dec. 720; *Jones v.*

Granite Mills, 126 Mass. 84, 30 Am. Rep. 661; *Baron v. Detroit, etc.*, Nav. Co., 91 Mich. 585, 52 N. W. 22).

In *Hodges v. Standard Wheel Co.*, 152 Ind. 680, 52 N. E. 393, it was said: "That appellee did not owe to appellant, as its employé, under the circumstances, the legal duty to support the rims in question by the hands of some one of its agents or representatives, in the manner as Huey was doing just previous to the accident, is certainly evident. If it could be said to be charged with that duty, then every corporation engaged in the same line of business as it was would, in legal contemplation, be required to be present at all times at its factory when lumber, timber, or iron, or other heavy material of like character, was being handled or moved by some of its employés, and by the hands of such agents or representatives prevent such iron, timber, or lumber, or other material connected therewith, from slipping or falling upon said employés, and thereby injuring them."

It has been said that the boundary line between the act of the master and the act of an employé is sometimes quite vague and shadowy. *Vitto v. Farley* (Sup.) 44 N. Y. Supp. 1; *Hankins v. New York, etc., R. Co.*, 142 N. Y. 416, 37 N. E. 466, 25 L. R. A. 396, 40 Am. St. Rep. 616. We realize, as was in effect stated in *Island Coal Co. v. Swaggerty*, 159 Ind. 664, 62 N. E. 1103, 65 N. E. 1026, that the duty of the master is a continuing one, and that until the agent selected by the master acts up to the limit of the duty of the master to act the master's duty is not done. We further realize that any one of many circumstances may become the basis for the governing principle with regard to the extent of the master's duty, but after all we think that there is but one test by which the master's liability to a servant in such cases is to be determined, and that is the one already suggested—was it a master's duty that was neglected?

Granting that for some purposes the man Gratzner was a vice principal, we are unable to perceive that he was acting in that capacity at the time that he gave the alleged negligent order. The risk of injury from the negligence of a foreman is as much within the servant's assumption as is the risk that he may be injured by the act of any other co-servant. *Southern Indiana R. Co. v. Martin* (Ind. Sup.) 66 N. E. 886; *Kerner v. Baltimore, etc., R. Co.*, 149 Ind. 21, 48 N. E. 364; *Central R. Co. v. Keegan*, 160 U. S. 259, 16 Sup. Ct. 269, 40 L. Ed. 418; *O'Brien v. American Dredging Co.*, 53 N. J. Law, 291, 21 Atl. 324. An employé of the master may act in a dual capacity—as his representative and as his servant. *Southern Indiana R. Co. v. Martin*, supra; *Kerner v. Baltimore, etc., R. Co.*, supra; *National Fertilizer Co. v. Travis*, 102 Tenn. 16, 49 S. W. 832; *Cumberland, etc., R. Co. v. State*, 44 Md. 283. The evidence in this case shows that Gratzner took part in the physical work of setting stone in the construction

of the pier, and he was working as a servant when he gave the order looking to the setting of the stone which injured appellee.

To sum up the question as to the claim of a common-law liability: The appellant was not bound to have a representative present at every moment to keep the place that appellee might chance to occupy safe, as against the possible negligence of a co-employé. The man Gratzner was engaged at the time of his alleged negligence as a servant in forwarding the work. Appellee and Gratzner were co-servants, and, as it is not alleged or proved that appellant did not exercise due care in the selection and retention of such foreman, it follows that appellant is not liable for his negligence in the particular instance.

The judgments of the Greene circuit court and the Appellate Court are reversed, and the former court is directed to award appellant a new trial.

(161 Ind. 228)

BALTIMORE & O. R. CO. v. TOWN OF WHITING.

(Supreme Court of Indiana. Oct. 6, 1903.)

MUNICIPAL CORPORATIONS—ORDINANCES—VALIDITY—POWER OF TOWN TRUSTEES—TOWN CLERK—JUDICIAL POWER—STATUTE—CONSTITUTIONALITY.

1. *Burns' Rev. St. 1901*, § 4404, conferring on trustees of incorporated towns the exclusive power over the streets, alleys, highways, and bridges within the towns, and section 4357, cls. 4, 6, 9, 16, empowering the trustees to declare what shall constitute a nuisance, to regulate things tending to endanger persons and property, and to adopt ordinances to carry into effect the provisions of the act, authorize the trustees to regulate the speed of trains in the corporate limits.

2. *Acts 1901*, p. 57, c. 45 (*Burns' Rev. St. 1901*, §§ 4346-4346d), "An act concerning town officers," which relates to the election of town officers, and which confers on the town clerk the powers of justices of the peace, and which prescribes the procedure in trials before him, is not in conflict with Const. art. 4, § 19, providing that every act shall embrace but one subject, which must be expressed in the title.

3. *Acts 1901*, p. 57, c. 45 (*Burns' Rev. St. 1901*, §§ 4346-4346d), conferring the powers of a justice of the peace on the town clerk, an officer required by *Burns' Rev. St. 1894*, § 4346, to keep the records of the board of trustees, to attend the meetings and record the proceedings of the board, and to perform all other duties appertaining to the office and required by law, is not in conflict with Const. art. 3, providing for three departments of the government, and prohibiting a person charged with official duties under one department from exercising any function of any other department, the provision being applicable only to the state government.

4. *Acts 1901*, p. 57, c. 45 (*Burns' Rev. St. 1901*, §§ 4346-4346d), conferring on the town clerk all the powers of a justice of the peace, making him a conservator of the peace, giving him exclusive jurisdiction of all prosecutions for violations of the town ordinances, defining his jurisdiction and powers, providing for a change of venue, prescribing the rules of procedure, providing for an appeal, fixing his bond, directing the manner of accounting for the fines, etc., collected by him, requiring him to keep a

¶ 1. See *Municipal Corporations*, vol. 28, Cent. Dig. § 1263.

docket as justices of the peace do, empowering him to administer oaths, requiring him to procure and use a seal, and making the marshal the officer who shall serve all process issued by him, constitutes the town clerk a court.

Appeal from Circuit Court, Lake County; W. C. McMahon, Judge.

Action by the town of Whiting against the Baltimore & Ohio Railroad Company. From a judgment of the circuit court affirming a judgment rendered by the town clerk in favor of plaintiff, defendant appeals. Affirmed.

Thomas J. Wood, for appellant. Charles Greenwald and Ibach & Ibach, for appellee.

MONKS, C. J. In 1902 the board of trustees of the town of Whiting passed an ordinance regulating the speed of railroad trains within the corporate limits of said town, and fixing penalties for its violation. An action was commenced before the clerk of said town by appellee against appellant to collect said penalties for an alleged violation of said ordinance. A trial of said cause resulted in a judgment against appellant. On appeal to the court below, a trial again resulted in a judgment against appellant.

Appellant insists (1) that said ordinance is not valid, because "there is no statute authorizing incorporated towns to regulate the speed of trains in the corporate limits"; (2) that said town clerk had no jurisdiction to try said cause, for the reason that the act approved February 28, 1901, Acts 1901, p. 57, c. 45, being sections 4346-4346d, Burns' Rev. St. 1901, so far as it attempts to confer judicial powers upon clerks of incorporated towns, is unconstitutional and void.

It is evident that under section 4404, and clauses 4, 6, 9, and 16 of section 4357, Burns' Rev. St. 1901, incorporated towns have the power to pass reasonable ordinances regulating the speed of railroad trains within their corporate limits. *Scudder v. Hinshaw*, 134 Ind. 56, 58-60, 33 N. E. 791; *Nealls v. Hayward*, 48 Ind. 19; *Pittsburgh, etc., Ry. Co. v. Town of Crown Point*, 146 Ind. 421, 423-427, 45 N. E. 587, 35 L. R. A. 146; 1 *Dillon's Mun. Corp.* (4th Ed.) §§ 315, 393; 2 *Smith's Mod. Law of Mun. Corp.* § 1309, pp. 1356, 1357; *Elliott's Roads & Streets*, §§ 452, 807; 3 *Elliott on Railroads*, § 1082, p. 1624. Moreover, the Legislature, in sections 2299, 5307, Burns' Rev. St. 1901 (sections 2178, 4020, Rev. St. 1881, and *Horner's Rev. St.* 1901), expressly recognized the power of incorporated towns to pass such ordinances.

Appellant's first contention, under its second point, is that the part of said act conferring judicial power on town clerks is unconstitutional, because the title of the act, "An act concerning town officers," is insufficient to include the grant of such power. Section 19 of article 4 of the Constitution provides that "every act shall embrace but one subject and matters properly connected therewith, which subject must be expressed in the title. But if any subject shall be em-

braced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title." The act in question is about town officers. No other subject is mentioned. The question is therefore whether or not the granting of judicial power to a town officer, the clerk, is a matter properly connected with such subject. Naturally, among the matters that would be looked for under the head of town officers, would be eligibility, appointment or election, qualifying and induction into office, term of office, rights, powers, duties, liabilities, fees, and compensation. These matters are properly connected with the subject. In the first section of the act in question the matters mentioned are the election and term of town officers. The second section relates to the powers and duties of town clerk. It is provided in said section, among other things, that "It shall be his duty to see that the laws of the state and the ordinances of the town are faithfully executed within his jurisdiction. He shall possess all the powers of a justice of the peace, as defined by law. He shall hold court every day (Sunday excepted) at a place to be named by the town trustees. He shall be a conservator of the peace, and as such shall have, within the town limits and within the township or townships within which such town is situated, the powers conferred upon justices of the peace for all purposes. While sitting as a court he shall have exclusive jurisdiction of all prosecutions for violation of the ordinances of the town; and he shall have within the limits of such township or townships, the jurisdiction and powers of a justice of the peace in all matters, civil and criminal, arising under the laws of this state; and for crimes and misdemeanors his jurisdiction shall be coextensive with the county or counties in which such town is situated: provided, that in trials before him he shall have equal but not higher powers than those of a justice of the peace. In all actions before a town clerk either party may have a trial by jury, a change of venue to a justice of the peace, and an appeal to the court of superior jurisdiction, under the same restrictions and in the same manner as is provided for appeals from justices' courts. The same rules of pleading and practice shall be observed by such town clerk in all trials as are provided by law for the court of a justice of the peace. The town clerk shall give bond payable to the state of Indiana in a sum to be fixed by the town board at not less than two thousand dollars (\$2,000), the bond to be approved by the clerk of the circuit court, with freehold surety, conditioned for the faithful performance of his duties as town clerk, and of all other duties he may be required to perform, and shall file the same with the clerk of the circuit court within the time provided by law for the qualification of justices of the peace. All fines and

penalties collected by him shall be paid to the treasurer of the town within one month after the same have been received by him except when otherwise directed by the acts defining the duties and powers of justices of the peace, in which case he shall pay all fines and forfeitures collected by him for violations of the penal laws of the state in the same manner and under the same conditions that justices of the peace are required by law to do." The third section provides that "the town clerk shall keep a docket, as justices of the peace are required by law to do. He shall be entitled to the same fees in criminal and other cases, and for all his official acts, as are given by law to justices of the peace. In case of a vacancy in the office of town clerk by death, resignation or otherwise, the town trustee shall immediately elect a successor, who shall, upon taking the oath and on giving bond, take charge of the town clerk's docket and other papers and records, and serve until the next town election." The fourth section confers the power to administer oaths, take depositions, and the acknowledgment of instruments required by law to be acknowledged. The fifth requires the town clerk to procure and use an official seal. The sixth relates simply to the duties of town marshal. It is clear that each provision of said act relates to matters properly connected with the subject, "town officers."

As was said in *Bright v. McCullough*, 27 Ind. 223, 227, and reaffirmed in *Shoemaker v. Smith*, 37 Ind. 122, 133: "The Constitution does not assume to divide the general scope of legislation and classify the parts under particular heads or subjects, but of necessity has left that power to be exercised by the Legislature as it, in its wisdom and discretion, shall deem proper. The Constitution assumes that different subjects of legislation do exist, and requires that each shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title. The purposes of the provision, in view of the evils intended to be guarded against, can only be effected by requiring that the subject expressed should be reasonably specific, or, in other words, should be such as to indicate some particular branch of legislation, as a head under which the particular provisions of the act might be reasonably looked for."

The Constitution does not require that the title of the act shall specify each particular or detail or feature of the matter contained in the act, or that it shall contain an index thereto or an abstract thereof. *Maule Coal Co. v. Partenhimer*, 155 Ind. 100, 105-107, 55 N. E. 751, 57 N. E. 710; *Chicago, etc., R. Co. v. State*, 153 Ind. 134, 142, 51 N. E. 924; *Lewis v. State*, 148 Ind. 346, 47 N. E. 675; *State v. Gerhardt*, 145 Ind. 439, 459, 44 N. E. 469, 33 L. R. A. 313, and cases cited; *Central Co. v. Febring*, 146 Ind. 189, 191, 45 N. E. 64; *State v. Arnold*, 140 Ind. 628, 38 N. E.

820; *State ex rel. v. Kolsem*, 130 Ind. 434, 144, 29 N. E. 593, 14 L. R. A. 566; *Benson v. Christian*, 129 Ind. 535, 538, 539, 29 N. E. 26; *City of Indianapolis v. Huegele*, 115 Ind. 581, 590, 18 N. E. 172; *Barnett v. Harshbarger*, 105 Ind. 410, 411, 5 N. E. 718; *Warren v. Britton*, 84 Ind. 14, 23; *Shoemaker v. Smith*, 37 Ind. 122; *Bright v. McCullough*, 27 Ind. 223; *Walker v. Dunham*, 17 Ind. 483. Acts have been passed conferring judicial powers upon mayors of cities, since the adoption of the present Constitution, under titles no more comprehensive than the one under consideration. 1 Rev. St. 1852, pp. 203, 206, 207, c. 17; Acts 1857, pp. 42, 46, 47, c. 33; 1 Gav. & H. St. pp. 218, 219, c. 28; Acts 1867, pp. 33, 37, 38, c. 15.

Appellant next insists that that part of said act conferring judicial powers upon town clerks is unconstitutional, because it is an attempt to confer judicial power upon an administrative officer, which is a violation of article 3 of the Constitution, which provides that "the powers of the government are divided into three separate departments, the legislative, the executive, including the administrative, and the judicial, and no person charged with official duties under one of these departments shall exercise any of the functions of another, except as in this Constitution provided."

This provision of the Constitution relates solely to the state government and officers charged with duties under one of the separate departments of the state, and not to municipal governments and officers. The executive and administrative duties of mayors of cities and clerks of towns and cities are not such as come within the executive and administrative department of the state government. *Waldo v. Wallace*, 12 Ind. 569, 571-585; *City of Terre Haute v. Evansville, etc., R. Co.*, 149 Ind. 174, 181-186, 46 N. E. 77, 37 L. R. A. 189; *State ex rel. v. Kirk*, 44 Ind. 401, 15 Am. Rep. 239; *Mohan v. Jackson*, 52 Ind. 599; *Uridias v. Morrill*, 22 Cal. 473, 477, 478; *People v. Provines*, 34 Cal. 538; *Santo v. State*, 2 Iowa, 165, 220, 63 Am. Dec. 487, 516; *Gray v. Delaware*, 2 Har. 76; *State v. Wilmington*, 3 Har. 294; *People v. Wilson*, 15 Ill. 388; *Hutchins v. Scott*, 9 N. J. Law, 218.

This court held in *Waldo v. Wallace*, supra, that the mayor of a city, under the act of 1857, p. 46, c. 33, § 18, possessed executive, administrative, and judicial powers, but that his executive and administrative duties were not within the executive and administrative departments of the state government, and that he might discharge such executive, administrative, and judicial duties without violating said article of the Constitution. This court said at page 578: "If all the official duties with which he was charged are to be classed within the one or the other of those departments, then it is too clear, it appears to us, to require argument, that he had the right to exercise official duties in but one of the departments, and any attempt to require him to discharge duties, at the same time, in another

of the departments of the government, would be inoperative. In other words, if he was, as averred, elected to the office of mayor, the legal and appropriate duties of which are within one of these great departments, and of an executive and administrative character, and he should be required by statute, whilst acting in that capacity, in the discharge of those duties, to exercise functions of a character falling within the judicial department, such statute would be simply invalid—one that he might and should disregard—just as an officer in the judicial department of the state might disregard any attempt to charge him with official duties of the legislative department. But if the executive and administrative duties with which he was officially charged should not be considered as within either of the departments of the state government, because he was merely, in that respect, an officer of a municipal corporation, in that case he might appropriately discharge all those duties at the same time. After much consideration, we are of opinion that the executive and administrative duties of Wallace were not such as come within those departments of the state government, as established by the Constitution, and that he was, consequently, left free to be charged with official duties under either of the other departments: that he was so charged with, and took upon himself, the duties of a judicial character before referred to, not as incidental to his office of mayor, but as separate and independent duties; and that during the term for which he undertook thus to discharge judicial functions he was ineligible to the office of sheriff."

In *State ex rel. v. Kirk*, 44 Ind. 401, 15 Am. Rep. 239, at page 406, this court said: "The office of councilman is an office purely and wholly municipal in its character. He has no duties to perform under the general laws of the state. The state has enacted a law applicable to all cities which may organize under it. The inhabitants of the particular locality, after having taken the other necessary steps for an organization, elect the designated number of councilmen, who have the power to enact by-laws, and do such other acts and perform such other duties as pertain to their office in the municipality. These powers and duties of councilmen are beyond and in addition to any acts, powers, and duties performed by officers provided for under the state government. As was said by Perkins, J., in *Waldo v. Wallace*, 12 Ind. 569: 'The powers which are exercised by a city government are, it thus appears, superadded to those exercised by the state in the same locality.'"

In *Mohan v. Jackson*, 52 Ind. 599, the question was whether one who had been elected and qualified as a justice of the peace was eligible to the office of city clerk under section 16, art. 7, of the state Constitution. This court said, at page 600: "We are of the opinion that the office of city clerk is not an office, within the meaning of this section."

In *Uridias v. Morrill*, 22 Cal. 473, 477, under

a Constitution containing substantially the same provision as article 3 of the Constitution of this state, it was held that there was nothing in the state Constitution that prohibited the Legislature from declaring the mayor of a city to be ex officio a justice of the peace, and that under such a law the same person may constitutionally exercise the functions both of mayor and justice of the peace. In *Re Guerrero*, 69 Cal. 88, 100, it was said: "The fact that the same person officiated as mayor, and, as mayor, presided in the local legislative body which passed the ordinances, did not divest him of his authority under the charter to act as the judicial officer of the court. The provisions of the charter which made the mayor of the city a component part of the council and ex officio city judge are not in conflict with the Constitution."

In *Santo v. State*, 2 Iowa, 165, 220, 63 Am. Dec. 487, 516, the court said: "The objection intended is that the mayor is an executive officer, and that judicial authority is conferred upon him, in conflict with that provision of the Constitution which says that no person charged with the exercise of powers properly belonging to one of these departments—the executive, the legislative, or the judicial—shall exercise any function appertaining to either of the others. These 'departments' are the departments of the government of the state of Iowa. The mayor of the city of Keokuk is not a part of the government of Iowa. He exercises none of the functions belonging to that department. Whatever executive offices he may perform pertain to him only as an officer of that corporation. * * * Similar provisions exist in the Constitutions of all, or nearly all, the other states, and yet from time immemorial similar powers have been conferred upon the mayors of cities."

The duties of town clerks at the time the act was passed were prescribed by statute as follows: The clerk of such town shall have custody of the records, books, and papers of the board of trustees, and shall attend all meetings and record the proceedings of said board, and shall perform all other duties appertaining to his office and required of him by law. Section 4346, Burns' Rev. St. 1894 (section 3324, Rev. St. 1881; Horner's Rev. St. 1897). What executive or legislative duty or function is the clerk charged with under this section or under the act in controversy here that appertains or belongs to the executive or legislative department of the state? If there is no such duty, then the Legislature has the authority to confer upon town clerks judicial power, as provided in said act of February 28, 1901 (Acts 1901, p. 57).

In *City of Terre Haute v. Evansville, etc.*, R. Co., 149 Ind. 174, 46 N. E. 77, 37 L. R. A. 189, this court, after reviewing the various acts conferring upon the judges of circuit courts powers that were not judicial, said, at page 185: "While the powers conferred by the foregoing acts of the Legislature upon

the judges of this state are not strictly judicial, yet they are not such as belong to either the executive or legislative departments of the state government, and are not, therefore, within the inhibition of article 3 of the Constitution."

The Constitution of 1816 contained substantially the same provisions as section 1 of article 3, *supra*. Rev. St. 1843, p. 44, art. 2. The Legislatures of the state, under said Constitution of 1816 and the present Constitution, have passed many acts conferring upon presidents of towns, and mayors, recorders, and marshals of towns and cities, judicial powers. Lafayette, president, Acts 1834, p. 144, c. 67, § 12; Newport, president, Loc. Acts 1835, p. 136, c. 39, § 10; Leavenworth, president, Loc. Acts 1835, p. 120, c. 36, § 14; Rome, president, Loc. Acts 1836, p. 29, c. 4, § 11; Vincennes, president, Loc. Acts 1836, p. 36, c. 5, § 13; New Albany, recorder, Loc. Acts 1836, p. 82, c. 13, § 19; Evansville, president, Loc. Acts 1836, p. 89, c. 14, § 15; Bloomfield, president, Acts 1837, p. 24, § 14; Rockport, president, Acts 1838, p. 92, § 11; Logansport, city, mayor, Acts 1838, p. 114, § 19; Terre Haute, town, mayor, Acts 1838, p. 36, § 18; Indianapolis, town, president, Acts 1838, p. 28, § 8; Jeffersonville, town, mayor, Acts 1838, p. 20, § 17; Mount Vernon, town, president, Loc. Acts 1847, pp. 197, 204, c. 97, § 27; Point Commerce, town, marshal, Loc. Acts 1847, pp. 337, 338, c. 269, § 5; Peru, town, mayor, Loc. Acts 1848, pp. 10, 12, c. 2, § 7; Rising Sun, city, mayor, Loc. Acts 1848, pp. 77, 78, c. 52, § 4; Madison, city, mayor, Loc. Acts 1848, pp. 89, 102, c. 56, § 20; Washington, town, mayor, Loc. Acts 1848, pp. 361, 362, c. 282, § 4; Clinton, town, president, Loc. Acts 1848, pp. 285, 291, c. 196, § 23; Huntington, town, mayor, Loc. Acts 1848, pp. 487, 489, c. 383, § 4; 1 Rev. St. 1852, p. 206, c. 17, § 18; Acts 1857, p. 46, c. 33, § 18; 1 Gav. & H. St. p. 219, c. 28, § 18, being section 17 of the act of 1867 (Acts 1867, p. 37, c. 15); Acts 1893, pp. 223-225, c. 115, § 45.

Under the doctrine of practical construction, it would seem that the question presented concerning the power of the Legislature to confer judicial power upon town and city officers not charged with any duties under the executive or legislative departments of the state government should be regarded as settled. *City of Terre Haute v. Evansville, etc.*, R. Co., 149 Ind. 174, 189, 46 N. E. 77, 37 L. R. A. 189, and cases cited.

The Legislature having conferred upon town clerks powers which are unquestionably judicial in their nature, and having invested them with the paraphernalia of a court, they have created a court, although they have not in terms said so.

Appellant contends that the act does not create the town clerk a court. Neither do the acts of the Legislature conferring judicial power upon mayors of cities designate or declare in terms that they are courts, but under such acts they have been held by this

court to be courts. *Waldo v. Wallace*, 12 Ind. 569, 578-584; *Gulick v. New*, 14 Ind. 93, 98-100, 104, 77 Am. Dec. 49.

In *Waldo v. Wallace*, *supra*, at page 583, Perkins, J., said: "So the mayor is made, by the law, a judicial officer of the state and of the city; and, if this can be done legally, then Wallace was, while mayor, a judicial officer of the state, and ineligible to the office of sheriff. The Constitution provides that the judicial power of the state shall be vested in such courts as the Legislature shall create, of which the supreme and circuit courts shall be two, and it further provides that justices of the peace shall be elected, but not that they shall exercise judicial power. It will be observed that the judicial power is vested in courts, not in officers. An officer may not necessarily be a court. A justice of the peace is not necessarily a court. He is not a court when elected, simply by virtue of his election, and is not vested, by his election simply, with judicial power. But if the Legislature, after or before his election, vest judicial power in that officer, as such, the exercise of which is made the chief and permanent duty of his office, he thus becomes a court. A court is a tribunal charged, as a substantive duty, with the exercise of judicial power, and a judicial officer is the person appointed to exercise that power. These definitions may not be, and it is admitted are, probably, not complete. But they are sufficiently so for the purposes of this case. A judge will be none the less a judicial officer because some duties he may have to perform are administrative in their character, nor will an administrative become a judicial officer simply because some acts which he may be required to perform may be, to some extent, judicial in their character. The duties of Wallace, as a state officer, were substantially, indeed were entirely, judicial, were continuous for his official term, were discharged in the form and with the effect of judicial proceedings in the other courts of the state. A word as to the mode in which the city court is created. The Constitution, as we have seen, gives the Legislature unrestricted power in the creation of courts, and points out no mode of filling them with officers, except as to three, viz., the supreme and circuit courts, and justices of the peace. Others the Legislature may create in such mode, and vest with such portion of the judicial power as, within the provisions of the Constitution, is deemed advisable. The judges of these courts may be created by election or otherwise, and the judges in such courts will be judicial officers, under the disabilities of the Constitution. In this case Wallace was a judicial officer under the state—was elected in a manner which, under the unrestricted power of creating courts conferred by the Constitution, the Legislature might adopt."

True, said act of 1901 does not say the

clerk is a court, but it confers upon him "all the powers of a justice of the peace, as defined by law"; makes him a conservator of the peace, as other judicial officers of the state; gives him exclusive jurisdiction of all prosecutions for violations of the ordinances of the town; defines his jurisdiction and powers in both civil and criminal matters; provides for a change of venue; gives the rules of procedure, pleading, and practice; provides for an appeal; fixes his bond; says how he shall account for the fines, penalties, and forfeitures collected; requires him to keep a docket as justices of the peace do; gives him the same fees as a justice of the peace; empowers him to administer oaths; requires him to procure, possess, and use a seal; and makes the marshal the officer who shall serve all writs and processes issued by him. What more is needed to constitute a court? As was said in *Steamboat Northern Indiana v. Milliken*, 7 Ohio St. 383: "The acts of legislation do not designate mayors of cities as 'courts,' nor specifically declare them to be 'established' as such, but they create the office, provide for the election of the officer, and confer on him judicial powers and functions; and, if the act be passed in conformity with the provisions of the Constitution, authorizing the establishment of 'other courts,' it is enough."

In *Malone v. Murphy*, 2 Kan. 250, the jurisdiction of the mayor was objected to for the reason that the statute attempted to confer judicial powers without in terms creating a court. The court there said: "The mayor may use all the machinery necessary to hold an offender to bail that may be employed by a justice of the peace. The provisions of the Code of Criminal Procedure apply, in terms, to both. The mayor is authorized to administer oaths, hear complaints, issue process, subpoena witnesses, take testimony, and hold to bail, and yet we are asked to say that such a tribunal is not a court because the act of the Legislature does not in terms style it a court. We think we cannot adopt such a construction without sacrificing substance to technicality. When the mayor is sitting for the examination of an offender against the laws of the state, the tribunal is a court. In the case at bar the mayor had jurisdiction of the subject-matter, had power to proceed in it, and the proceeding was a prosecution."

In *Prell v. McDonald*, 7 Kan. 426, 447, 12 Am. Rep. 423, it is said: "It is not necessary that the Legislature, in order to create a court, or to confer judicial power, should first in terms create a court. Whenever the Legislature confers upon any board or officer powers which are unquestionably judicial in their nature, and when they also invest such board or officer with all the instruments and paraphernalia of a court, they undoubtedly create a court, although they do not in terms say so."

It is clear that the act of February 28,

1901, Acts 1901, p. 57 (sections 4346-4346d, Burns' Rev. St. 1901), created a court. The Legislature having by said act created a court, it is evident that *Shoults v. McPheeters*, 79 Ind. 373, *Gregory v. State*, 94 Ind. 384, 48 Am. Rep. 162, *State ex rel. French v. Johnson*, 105 Ind. 463, 5 N. E. 553, *State ex rel. Hovey v. Noble*, 118 Ind. 350, 21 N. E. 244, 4 L. R. A. 101, 10 Am. St. Rep. 143, and cases of that class, holding that judicial power can only be conferred upon courts, have no application here.

Judgment affirmed.

(161 Ind. 648)

WAIT et al. v. WESTFALL.*

(Supreme Court of Indiana. Oct. 7, 1903.)

WILLS—TESTAMENTARY CAPACITY—EVIDENCE—SUFFICIENCY—VOLUNTARY DISMISSAL—RES JUDICATA—APPEAL—ASSIGNMENT OF ERRORS—MATTERS OF FACT.

1. Under Burns' Rev. St. 1901, § 2768, authorizing a contest of a will within three years after it has been offered for probate, the voluntary dismissal of a contest does not preclude the contestant from renewing the contest within the time prescribed on payment of the costs.

2. Under Burns' Rev. St. 1901, § 667, directing that the assignments of error shall relate to matters of law only, an assignment of error in a will contest cannot present questions of fact involving the consideration of the evidence, though section 2775 authorizes assignments of error on matters of fact and law on appeal in will contests, as the former section controls.

3. In a will contest, the evidence considered, and held insufficient to show a want of testamentary capacity to execute the instrument.

4. Where a will is attacked for want of testamentary capacity, the burden of establishing it is not sustained by showing a delusion of the testator, without proof that the delusion controlled or effected the execution.

Appeal from Circuit Court, Marion County; H. C. Allen, Judge.

Action by Harriet Westfall against Joseph A. Wait and others, contesting the validity of the will of Clark Wait, deceased. From a judgment for plaintiff, defendants appeal. Reversed.

Samuel Ashby and Lex J. Kirkpatrick, for appellants. W. V. Rooker, for appellee.

HADLEY, J. On September 30, 1886, Clark Wait had living his second (childless) wife, Nancy, and three children of a former marriage, namely, Joseph Wait, Martha Offenbacher, and Minerva Dotteror. The three children were married, and had families of their own. A son, William, had deceased, leaving a widow and one child, Harriet Westfall, surviving him. He was also the owner of personal property and two tracts of real estate of 80 acres each. On the date above mentioned Wait executed his will, by which he bequeathed to his wife, Nancy, a life estate in the home 80, with remainder over in fee to his daughter Martha Offenbacher, and to his son Joseph Wait the rents and profits of the other 80-acre tract for and during the life of his wife, Nancy, with remainder over

* Rehearing denied. See 68 N. E. 1009; 73 N. E. 1089.

in fee to his daughter Minerva Dotteror. The fifth item of his will is as follows: "I give and devise to my son Joseph Wait, in addition to the rents named above, all my personal property, not taken by the widow, including notes and accounts of all kinds whatsoever, except the notes and accounts I hold against the estate of my son William, deceased; these I order my son Joseph, to deliver to the family of my said son William." More than 11 years after the execution of this will, to wit, January 28, 1898, the testator died, leaving as his only heirs at law the beneficiaries named in the will and his said granddaughter, Harriet Westfall, who is the appellee in this appeal. The will was duly admitted to probate, and letters testamentary issued to appellant Charles Negley. Appellee, on June 8, 1898, brought an action in due form in the Marion circuit court against these appellants to contest the validity of said will, which action she voluntarily dismissed on the 2d day of February, 1899, and on January 25, 1900, filed another complaint against the same parties to contest, assigning the same grounds as in the former suit, namely, undue execution, duress, and unsoundness of mind of the testator. The defendants answered in four paragraphs, the first a general denial. The other three pleaded in bar set up in various forms that the plaintiff on the 8th day of June, 1898, commenced in said court an action to contest said will against the identical parties, and for the identical causes; that the parties (these defendants) all employed counsel at great expense, and appeared to said action, and filed answer, and the cause was put at issue and set for trial, and, to avoid a hearing and determination by the court, the plaintiff, failing to prosecute in accordance with the condition of her bond, on February 2, 1899, before the day set for trial, voluntarily dismissed her said complaint, and suffered judgment for costs; that the plaintiff has fully enjoyed her statutory right to contest; that there is no merit in her complaint, and the same is brought to further annoy, harass, and vex the defendants. Trial; verdict and judgment for the contestant.

1. A demurrer to each of the affirmative answers was sustained, and these several rulings present, in the concrete, the single question, did the voluntary dismissal of her former action preclude appellee from renewing it within the limitation provided by the statute? The statute is that any person may contest the validity of any will at any time within three years after the same has been offered for probate. Section 2766, Burns' Rev. St. 1901. The institution of a suit and its voluntary dismissal without a trial is not a contest. A contest implies a trial and a final judgment; such a hearing as will amount to an adjudication of the validity of a will. The statute creating the right of contest prescribes the period in which the action may

be brought. It does not pretend to regulate the number of suits that may be instituted. Neither does it provide any special penalty for the voluntary dismissal of a proceeding to contest a will, which has been untimely or improvidently brought. A period of three years is given a plaintiff for investigation and decision. He may begin at any time within the period, and carry the proceeding forward to final judgment even after the period has expired. And we find nothing in the statute, or in the nature of the action, to prevent him from dismissing his suit, as any other plaintiff, without prejudice, if before trial he becomes convinced that the facts or witnesses relied upon are untrustworthy, or insufficient to entitle him to recover. Nor do we find anything in the statute to prevent him from renewing the same at any time within the statutory period, if, from the discovery of new facts or witnesses, he desires to do so. The only penalty we know of for the bringing and the voluntary dismissal of a civil action, including one of this class, is that the plaintiff shall pay all costs he has occasioned. This, generally, he must do before he is authorized to renew his suit. While the costs of a dismissed action remain unpaid, the commencement of a subsequent suit for the same matter will be presumed to be vexatious, and will be stayed by the court upon a proper application until paid, unless the plaintiff shows affirmatively that the second action is not vexatious, but excusable, and in good faith. *Kitts v. Willson*, 89 Ind. 95; *Harless v. Petty*, 98 Ind. 53, 56; *Clemans v. Buffenbarger*, 106 Ind. 16, 5 N. E. 548; *Cashman v. Brownlee*, 128 Ind. 268, 27 N. E. 560; *Carrothers v. Carrothers*, 107 Ind. 530, 8 N. E. 563; *Eigenman v. Eastin*, 17 Ind. App. 580, 45 N. E. 795. Therefore, since the answers do not seek a stay of the cause until the plaintiff has paid the costs of his former suit, but go in bar of appellee's right to renew the contest, though but one year had elapsed since the will was offered for probate, they are insufficient. To sustain them would be, in effect, to hold that a voluntary dismissal of a pending suit to contest a will is equivalent to a contest within the meaning of the statute; and this we cannot do. The demurrer to each of the answers was properly sustained.

2. Appellants have assigned as error the action of the court in adjudging the will invalid upon the verdict of the jury, upon the ground that it was not sustained by the evidence, they claiming the right, under section 2775, Burns' Rev. St. 1901, to assign, on appeal to this court, error on questions of fact as well as of law for our consideration and decision from the field of the evidence. The argument is that section 2775 prescribes a rule of procedure in the special proceeding to contest a will, and the practice in this court on appeal is not, therefore, governed by section 667, Burns' Rev. St. 1901, of the Civil Code. The question has long since been de-

cided against the position here assumed, and we have not been persuaded that the previous ruling is incorrect, or should be modified. *Coffman v. Reeves*, 62 Ind. 334; *Eckert v. Binkley*, 134 Ind. 620, 33 N. E. 619, 34 N. E. 441. It may be considered as thoroughly settled, under the existing code of practice, that in all cases triable by jury this court will not undertake to determine questions of fact from the weight of the evidence.

3. It is earnestly insisted by appellants that their motion for a new trial should have been sustained because the verdict of the jury was not sustained by sufficient evidence. At the proper time the court directed the jury that they should return their verdict for the defendants, unless they should find from a preponderance of the evidence that Clark Wait, at the time he executed the will, was of unsound mind. There is no complaint by appellee of this instruction, and no claim that her case was made out on any other theory. The case will therefore be treated as if the want of testamentary capacity is the only ground of contest relied upon. The evidence upon this issue is very voluminous, covering more than 1,400 typewritten pages. There is substantially no conflict to be found in the evidence, and absolutely none on any important question of fact. The verdict rests upon the following: The testator in early life was prostrated with heat, and carried to the house in an unconscious condition. Ever after that event he was distressed by the hot sun, frequently complained of severe pains in the head, died at 85, and during the last 20 years of his life was afflicted with disease of the kidneys and bladder, and occasionally with neuralgia and rheumatism. On September 30, 1886, when at the age of 73, he called at the house of his neighbor, a justice of the peace, and an acquaintance of 80 years, and requested the justice to prepare his will. He expressed the desire that the business be privately transacted, and that no one else be admitted to the room, and upon his suggestion the justice locked the door. At the time he had living his childless second wife, three children, and two grandchildren, the children of his deceased son William. In directing the justice as to the provisions of his will he made no mention of his grandchildren, nor of their deceased father's family, whereupon the justice inquired what he was going to do, if anything, for William's family, and he remarked, "Nothing"; that "he had given William all he intended, and did not propose to give the children anything." Upon being advised that it would be at least safer to mention them in his will, he directed a provision that certain notes and accounts, amounting to about \$1,000, he held against William's estate, be turned over to his family. There was no estrangement between the testator and his grandchildren, and he frequently manifested affection for them. At one time, accompanied by his little grandchild, he got lost, and wandered for some

time in his own woods pasture while hunting his cows in the daytime. At another time in the evening, accompanied by his wife, he became bewildered and lost in his own field, less than a quarter of a mile from his house, and had to be extricated and conducted to his house by a third person, and was found to be greatly perturbed, and crying. In 1880 he failed for some time to recognize a relative of his wife whom he had known for several years. Later on he failed to recognize, when first addressed, one of his debtors, whom he had known for a long time, and who had called to pay a note. For 30 years prior to his death the testator was imbued with the belief, which he expressed to some of his friends and acquaintances, that he possessed the power to locate hidden treasure, and that his farm and other farms in the neighborhood contained treasure which had been concealed there by the Indians. He asserted that the hidden money was enchanted; that it was controlled by some mysterious force that would withdraw it further into the earth when disturbed by unusual noises. His method of procedure in locating treasure was by the use of a small mineral ball, top shaped, which he carried swinging from his hand by a fine string, and which directed him by its vibrations, and final whirling around when the spot was reached. In the 20 years prior to the execution of the will he made frequent efforts to find the hidden treasure; sometimes on his own farm, and sometimes on the farms of others; sometimes alone, and sometimes in company with others, and in both day and night time. Always, while engaged in digging for it, he would himself observe, and would enjoin upon others, absolute silence, assigning as a reason that a word spoken, or any confusion created, would break the charm, and the money would pass on into the earth. He claimed the money was in a pot. On one occasion when the pot had been reached it began to move away, and the digger struck at the pot with his pick, and broke the bale off. On another occasion, while engaged in digging, he heard a great noise, and upon looking up he beheld a herd of wild cattle rushing towards him, and when they arrived at the fence they hurled the rails 30 feet into the air. He fled, and the cattle, having reached his digging, stopped, bellowed, and soon departed. The effect of the cattle's presence was to break the charm, and permit the money to escape. On another occasion he claimed that wild horses approaching with the noise of distant thunder prevented his recovery of the money; on another that a great storm came up and drove him away with a deluge of water that engulfed everything, but the next morning the place was perfectly dry. On another occasion, while engaged in digging, the hole suddenly darkened, and on looking up he beheld a huge millstone suspended above him by a thread, and a giant negro standing by with

scissors ready to cut the thread and cause the stone to fall upon him. Another time he ascribed his failure to the want of snake oil, and endeavored to find some. He also fashioned an iron spear 3 or 4 feet long, which he would sometimes cause to be driven into the ground at the spot indicated by his metallic ball, to fasten the money, and then direct others to dig around the spear to its bottom.

On the other hand, the defendants proved without any contradiction that the testator was born in Ohio in 1813, and, being poor, left home early in life to make his own way in the world. He had a meager education, was married at 24, and had by his first wife eight children, four of whom died in youth, and four—two boys and two girls—lived to man and womanhood. His first wife having died, he was married again, in 1854, to Nancy, who, childless, now survives him. In 1837 he settled on a farm in Hancock county, where he resided until 1854, when he purchased and moved to the 80 acres where he continued to reside with his family until his death which occurred January 21, 1898. He supported his family in comfort; gave his children a common-school education, and by his industry, frugality, and business ability was able to pay for his farm, and accumulate money and property, with which he purchased another farm of eighty acres, in 1864, and loaned to his children, to wit, William, \$920, in 1864 to 1879; Joseph, \$410, in 1873 to 1878; and Martha, \$300, in 1882, none of which seems to have been repaid, and at his death left a personal estate, chiefly notes and accounts, appraised at \$4,477.69. Up to the time of his death he had, and always had, the active and absolute control of all his farming operations; made repairs, constructed fences, drains, and buildings; kept his improvements in good condition, his crops rotated, and his barnyard, fields, pastures, and fence corners clean and free from weeds; made and settled all contracts with his tenants and others; fed, bred, and sold his stock; listed his property for taxation; paid his taxes, and never, in a single instance, suffered a delinquency. He provided liberally for his family; was kind and courteous to others; exchanged frequent visits with his neighbors; was a regular attendant upon his church and lodge (Masonic); promptly paid his quarterage and dues, and contributed to his political party. During the period inquired of, he was called on many times as an appraiser of property in the settlement of decedent's estates. In the same year the will was executed he was chosen as the leader and spokesman for a delegation of citizens of his community to appear before the county board of commissioners in advocacy of the straightening of a certain highway, about which a spirited neighborhood controversy existed. He presented his side clearly and logically in a 15-minutes address, and won the judgment of the commissioners to

his side. In the same year he was selected by two of his neighbors as a referee of a business controversy, and upon affidavits of the parties and witnesses decided their case to the contentment of both parties. In 1885 he was appointed by the Marion superior court, and again in the spring of 1886—but four months before he executed his will—by the Marion circuit court, upon the recommendation of the parties in interest, as a commissioner to make partition of large tracts of land, and in each instance took an active and leading part in the business; and was appointed and acted as a commissioner in partition in 1892, six years after he made his will. In the last 25 years of his life he loaned sums of money on personal surety, in all making more than 100 such loans, and never lost a dollar from insufficient surety. Except in a few instances, for cause, he wrote his own notes, and invariably counted the money, and computed the interest. In the execution of his will he furnished the scrivener from memory a correct description of his real estate, the general description and value of his personal property, and dictated every provision of the instrument. His conversation was always intelligent and connected. The scrivener and subscribing witnesses are clear and emphatic that he was of sound mind when he executed the will, and of his neighbors 21 expressed a similar opinion, while, on the other hand, only one—the plaintiff's mother—who had not visited the testator for 16 years before his death, and had not seen him for more than a year prior to the making of the will, nor for several years subsequent thereto, entertained the opposite opinion.

Except his weird fancy concerning the hidden treasure, and the happenings attending the search for it, and there is not in all this mass of testimony a trustworthy sentence inconsistent with sanity. We may assume from the scope of the testimony that the contestant has scanned the testator's 85 years of life, and looked into every nook and corner for an unusual or unnatural act or speech, and that that which she presents us is the sum total of the indicia of mental unsoundness. What does it show? Our attention is first called to the fact that while engaged in making his will the testator expressed the desire that his business avoid publicity. We cannot accept this circumstance as of the slightest importance in characterizing the condition of his mind. The wish expressed to have others excluded from the room during the preparation of the instrument was in accord with the usual conduct of men. We deem it common knowledge that ordinarily persons of unquestionable sanity, when engaged in the solemn act of making a testamentary distribution of their property which means a distribution contrary to the rules of descent, endeavor to withhold the act from public gossip. The two incidents of the testator becoming lost

we find to be of the same character, if not even more frivolous, when we examine them in the light of their own facts. It is shown that 5 or 6 years after making the will, and when 78 or 79 years of age, and of greatly impaired vision, he went one evening, attended by his little grandson, into his thick woods pasture to drive up the cows; and while engaged in wandering through the bushes searching for the cows he became turned around—that is, the points of the compass became reversed in his mind—and he kept going in the wrong direction until he arrived at a fence, where he beheld and recognized a neighbor's house near by. He promptly righted things in his mind, and then went to the house, told, laughed, and joked about getting lost in his own woods, and after a 20-minutes visit, during which time divers things were talked about, he departed for his home, three-fourths of a mile distant, accompanied by no one but his six year old grandson, and according to the testimony of Mrs. McConnell, who had lived by him and known him intimately for 50 years, "he just came like he always did, when he came to our house, laughing and joking, and appeared as well as I ever saw him." The other incident occurred in the spring before he died, and 12 years after the will was made. The testator and his wife went one evening at nightfall to the creek, fishing, with a tenant who resided on the farm. At the time the testator was in his eighty-fifth year and his wife in her eighty-sixth. The testator made the most successful catch of the trio. At 9 or 10 o'clock at night the party left for home. There was no moon, and but little light from the stars. The old people carried a lantern, and their progress was so slow that when they arrived at their field, about a fourth of a mile from their house, the tenant left them, and went directly home. Later, and when they should have been at home, the tenant observed a light wandering about in the field, and upon going down found the two arm in arm, lost, and in a spirited controversy over the right way to go. As said by the witness, "The old man was frustrated and aggravated because his wife would not go the way he wanted her to, and he cried a little." When assistance reached them, they proceeded to the house with composure, the testator asserting to the tenant that "he need not ask him again to go fishing after night." When we consider the time of life, the physical strength, the impaired vision, the susceptibility of most persons to become erroneously impressed as to directions, the impossibility in the first case to see beyond the bushes immediately about him, and in the other beyond the sweep of the lantern he carried over the trackless field in the dark, the incidents become commonplace and natural, and afford not the slightest evidence of a deranged mind. The same may also be said of the failure of the testator to recognize

his wife's kinsman, whom he seldom saw, who lived 16 miles away, and who drove up to the gate and from a distance inquired if two travelers could have breakfast. The recognition was prompt and cordial when the name was announced. Nor is the failure to recognize his debtor, when first addressed by him, which was 10 years after the will was executed, of any greater importance. He was also promptly recognized when he came within the testator's range of vision. Such things are but ordinary and common happenings among the aged, and unworthy of consideration as evidence of a want of testamentary capacity. His belief concerning the hidden treasure was not wholly a delusion. In large part it was a belief founded on false evidence. For a long time before he moved into the neighborhood there prevailed there a tradition that a vast treasure was concealed by the Indians somewhere in the vicinity. Many local residents believed it, and had searched for the money, and parties had been and came there afterwards from Indianapolis, Kentucky, Anderson, Fortville, and other places to hunt for it. One witness testified that the seekers dug so many holes in his woods they became a nuisance, and he had to stop it. At least one other man in the vicinity claimed the power to locate the treasure by the use of a metallic ball such as the testator used, and one other claimed the power by the use of a divining rod. Wait claimed that some others could successfully use his ball, and others could not, and as to this one witness testified that he tried it, and it would not work. Another testified that, being at Wait's home house, inspecting the ball, the testator went into another room, and, returning, informed the witness that he had concealed under the carpet a silver dollar. Witness took the ball, suspended it from his hand, as directed, and went into the other room to determine whether the ball would locate the silver dollar for him. He wandered slowly about the room for some time swinging the ball near the floor, when at last the ball began to vibrate, and, following in the direction of the vibration when he reached a certain point without any apparent cause, the ball began to revolve rapidly. He then approached the spot from other directions, with the same result, and upon lifting the carpet he found the dollar immediately below. This witness found the action of the ball exactly as claimed for it by the testator.

What tribunal occupied by finite beings is qualified to adjudge false, asserted forces of attraction and magnetism, or the phenomena of mind, because incapable of demonstration? Or that certain supernatural powers and influences do not exist because not in accord with an assumed standard of mental action? In all ages of the world instruments and devices have been employed in locating minerals in the earth. The fact is notorious that there are many intelligent,

conservative persons who claim the power of locating water in the earth by the use of a forked stick, and thousands of wells located by them have been dug, and are still being dug. It is equally a matter of common report that such a stick will point downward at particular places in the hands of some men, and not in the hands of others. Many scholars and successful business men sincerely believe in spiritualism, and of being able, not by all, but through the instrumentality of a particular few naturally qualified persons, called "mediums," to converse with and be advised by the spirits of departed friends, and believe they recognize the voices and handwriting of the dead. Mental phenomena is as various as the hues of an autumnal forest. In Chaffin's Will, 32 Wis. 564, it is said: "Dr. Carver, a very intelligent medical witness, who had been in the Western mines, testified: 'I have seen hundreds of men in the mountains who came there on dreams, including lawyers, doctors, and priests. Business men here in Monroe have been and searched for minerals under the direction of clairvoyants.'" Others believe in Christian Science; other in clairvoyancy; others in the transmigration of souls; and others in witchcraft. To affirm or deny the truth of these things proves nothing, and demonstrates the individual to be neither a sage nor a fool. Who shall be the judge whether the mind that accepts or rejects them is the truly sane mind? If we affirm that witches do not ride broomsticks, and practice their evil arts upon us, and that there are no witches, then we have Blackstone, the father of our common law, Chief Justice Matthew Hale, Coke, Sir Francis Bacon, Richard Baxter, John Wesley, Martin Luther, Kepler, Cotton Mather, and a host of other eminent jurists and savants, against us. Encyclopedias; Nevin's Witchcraft in Salem Village; Upham's Salem Witchcraft; Campbell's Lives of the Chief Justices, vol. 2. Early in the history of our jurisprudence much difficulty, for the reason above suggested, was experienced by the courts in fixing a standard of intellect by which testamentary capacity could be determined; and legislative bodies were not inclined to relieve the courts of their embarrassment. For instance, our statute for more than a half century has provided that all persons, except infants and persons of unsound mind, may make a will. Similar statutes have long prevailed in other states of the Union and in England. In construing these statutes, the courts of both this country and England were at first disposed to hold that any mind possessed of an eccentricity, aberration, or erratic trend, such as amounted to an insane delusion, was not a sound mind, within the meaning of the statute, and hence incapable. This doctrine, however, has long since been repudiated by the courts of England, and for the most part, at least, by the courts of this country; certainly by this

state since *Teegarden v. Lewis*, 145 Ind. 98, 40 N. E. 1047, 44 N. E. 9. Under the law as now settled, capacity is not determined by what one believes, nor by the character of the horrid tales he can tell. The test is, putting aside all perversion, peculiarities, and hallucinations of the mind, does there remain in the subject an untrammelled intellect, sufficiently strong and rational to know the value and extent of his property, the number and names of those who are the natural objects of his bounty, their deserts with reference to their conduct and treatment towards him, and memory sufficient to carry these things in mind long enough to have his will prepared and executed. See cases collected in *Teegarden v. Lewis*, 145 Ind. 98, 40 N. E. 1047, 44 N. E. 9 (at page 103, 145 Ind., page 1048, 40 N. E.). If a testator has mind enough to rationally grasp the subject and details of the testamentary act, it makes little difference what he believes and tells concerning hidden treasure, spirits, spooks, and supernatural things. Mental capacity, therefore, is to be measured by its relations to the subject of the will. Delusions or monomania relating to subjects foreign to the testament, and to the persons affected thereby, involve no more likelihood of actual incapacity than many other latent causes; and when associated with uncontradicted proof, as in this case, that the acts of the testator in the conduct of his business affairs, and in his social and domestic relations, were uniformly intelligent, rational and reasonable, proof of strange and unreasonable beliefs, and of wild and absurd stories, standing alone, cannot be termed evidence of a want of testamentary capacity. A belief in witchcraft, and that the disinherited children were witches, and practiced their infernal arts upon the testator, of itself is not sufficient evidence of mental incapacity to make a will. *Addington v. Wilson*, 5 Ind. 137, 61 Am. Dec. 81. In *Thompson v. Thompson*, 21 Barb. 107, the testator had a rod with which he claimed to be able to locate hidden treasure. He asserted that another took the rod in his hand, found the treasure, struck a crowbar in it, and commenced digging. Just as he broke the ground, an immense black and white bull, apparently as large as a mountain, came running over the hill, lashing his tail in the air; stopped at the digging, pawed and hooked the earth, and then departed. While this was going on about 1,000 other cattle ran over an opposite hill, acting as the bull. He failed to get the money because the spell was broken by the cattle. At times he would fall down and cry out in great agony, and declare he was being hugged by a ghost. His housekeeper having dreamed that horses which had cost him \$250 would run away and kill him, he traded them off the next day for one horse worth but \$10. He affirmed that there were spirits in the air, that they tormented him in sickness, and that he had seen the devil in the form of a bull. The

General Term, in affirming the opinion of the surrogate sustaining the will that gave a \$300,000 estate to charities and away from grandchildren, except \$15,000, said: "Erroneous, foolish, and even absurd opinions upon certain subjects do not show insanity when the person entertaining them still continues in possession of his faculties, discreetly conducting not only his own affairs, but the business of others." In *Bonard's Will*, 18 Abb. Prac. (N. S.) 128, the testator believed that at death the souls of men pass into brutes, and, to better provide for the comfort of his soul, bequeathed his entire estate of \$50,000 to the Society for Prevention of Cruelty to Animals. In sustaining the will the surrogate held that this opinion and act, though eccentric, was not evidence of insanity or incapacity. In *Smith's Will*, 52 Wis. 543, 8 N. W. 618, 9 N. W. 665, 38 Am. Rep. 756, the testator disinherited his children, and bequeathed all his property to his childless second wife. He was an ardent spiritualist; married his beneficiary, as he claimed, on advice received from his dead wife. He often consulted spirits, and acted upon their advice in his business affairs and in his inventions. In *Matter of Vedder*, 6 Dem. Sur. 92, the testatrix willed all her property to her husband. She frequently talked to her neighbors about hidden treasure, and how to find it; would put irons in the cream to make the butter come; could not keep her horses fat because witches rode them at night; saw a headless horseman ride across her field; could see lights over certain spots on her farm, where, if one would dig at midnight, he would find gold; advised her neighbor to put live coals and a red garter under her churn to speed the butter; took her nephew to dig for gold on the farm, and had him carry a red rooster under his arm for luck; saw the Lord Jesus with a sword, and the angels about him. See similar cases collected by the learned surrogate in the latter case. See, also, *Chaffin's Will*, 32 Wis. 557; *In re Brush's Will* (Sur.) 72 N. Y. Supp. 421; *Brown v. Ward*, 53 Md. 376, 36 Am. Rep. 422; *Middleditch v. Williams*, 45 N. J. Eq. 726, 17 Atl. 826, 4 L. R. A. 738; *Otto v. Doty*, 61 Iowa, 23, 15 N. W. 578; *Lee's Heirs v. Lee's Ex'rs*, 4 McCord, 183, 17 Am. Dec. 722; *Turner v. Hand*, 3 Wall. Jr., 88, 120, Fed. Cas. No. 14,257. The will in each of these cases was sustained on the ground that it appeared the testator, notwithstanding delusion, aberration, and eccentricity in certain matters of belief and speculation, was able and did manage with intelligence and discretion the ordinary business affairs of life, including the acquisition and disposition of property, and it was not shown that such peculiar and erratic beliefs in any way affected the testament; and in each the doctrine is maintained that, if such eccentric or deranged attribute of the mind keeps aloof, and does not enter into the usual concerns of life, and does not affect the relations of the testator to the

natural objects of his bounty, nor his sense of duty towards them, nor the distribution of his property to them, it is not even evidence of general insanity, or of a want of testamentary capacity.

In this case, therefore, while evidence that the testator had an insane delusion in respect to hidden treasure was competent on the general subject of incapacity, yet, however sufficient, it falls short of entitling the contestant to the verdict. She has undertaken to establish the invalidity of Clark Wait's will for want of testamentary capacity. The burden is upon her to prove that which she affirms. The task is not performed by establishing the delusion, for the testator may have both the delusion and testamentary capacity, and she must go further, and prove that the delusion controlled or in some manner affected the execution of the will, before her evidence is sufficient. *Young v. Miller*, 145 Ind. 652, 44 N. E. 757; *Roller v. Kling*, 150 Ind. 159, 49 N. E. 948. This latter the contestant has not attempted to do. In all this volume of testimony there is not a trace anywhere to be found that the belief or weird fancies of Clark Wait concerning the hidden treasure affected his relations with his family, or any part of his will. No member of his family ever opposed or assisted him in his belief or enterprise; nor criticised or sympathized with him therein, so far as this record discloses. There is no question of conflict in the evidence before us. It is shown that he was kind and indulgent to all his children; quite as much so to William and his family as to others. As with others of his children, he loaned money to William at divers times through a series of years, which appears to remain unpaid. In 1882, when William and his wife were both severely ill, he took both and their two children into his family, and cared for them for three months. After the death of his son, his grandchildren visited him frequently, and at no time did he manifest or profess a want of affection for them. He is also shown to have been a man of more than average intelligence; industrious, sagacious, and successful in the conduct of his farming affairs; discreet and accurate in loaning his money; chosen by his neighbors and the courts as many as four times in the same year in which the will was executed to act on behalf of others, to present for them a public question to the commissioners, to settle a business controversy between neighbors, and to make partition of real property. Undoubtedly he enjoyed the use of his faculties, and was of sufficient understanding to manage his affairs and transact his business with usual shrewdness to the day of his death. It is also manifest that his neighbors who had lived by him and associated with him for 25 to 50 years, and knew him best, had confidence, not only in his sanity, but in his fairness and good judgment. He was thus trusted by the people and the courts both before and after the execution of the

will, to settle disputed rights among neighbors, and to appraise and divide the property of others, and we perceive from this record no ground for denying him the right to dispose of his own property as he pleases. We therefore hold that the verdict of the jury was contrary to law, and appellant's motion for a new trial should have been sustained.

Judgment reversed, and cause remanded, with instructions to grant appellants' motion for a new trial.

(162 Ind. 34)

SCOTT et al. v. CITY OF LA PORTE et al.*

(Supreme Court of Indiana. Oct. 8, 1903.)

MUNICIPAL CORPORATIONS—ORDINANCES—SUPPLYING WATER—ULTRA VIRES—PROMOTING PRIVATE ENTERPRISE—INJUNCTION.

1. Where an item of documentary evidence has been set out in the bill of exceptions, it is sufficient, if the document is again read in evidence, to describe the item by words of a general description, and refer to it as exhibited in the bill.

2. Under Burns' Rev. St. 1901. § 3541, subd. 26, authorizing a city to construct works for furnishing the city with wholesome water, or empower a private corporation to construct them, a city may construct works to obtain water for the use of its inhabitants in connection with procuring it for public purposes.

3. A municipal ordinance empowering a private water company to construct and maintain a system of waterworks for supplying water to the city and its inhabitants, and undertaking to bind the city, in addition to furnishing the power to transport the water, to pay a large sum for 21 years as water rentals, which amount is to be paid to the trustees of the company's bondholders, assuming to hypothecate the water plant of the city and pledging the city's power of taxation to meet such fixed charges, whereby the city becomes a guarantor of the entire transaction, is ultra vires, as employing its credit in the promotion of a private enterprise.

4. Where a municipal ordinance authorizing a private corporation to furnish the city and its inhabitants with water and pledging the taxing power to sustain the enterprise is invalid, the city will be enjoined at the instance of taxpayers from receiving water under the ordinance and from making payment to the company out of its revenues.

Appeal from Circuit Court, La Porte County; A. C. Capron, Special Judge.

Suit by Emmet H. Scott and others against the city of La Porte and others. A decree was entered refusing an injunction, and from an order overruling a motion for a new trial plaintiffs appeal. Reversed.

Daniel Noyes and W. B. Biddle, for appellants. E. D. Saulsbury, W. C. Ransburg, Weir, Weir & Darrow, C. H. Truesdale, M. R. Sutherland, and H. S. Oakley, for appellees.

GILLETT, J. Appellants, as taxpayers of the city of La Porte, commenced this action to enjoin the taking of certain steps by said city looking to the procuring of an additional water supply for its purposes and for the use of its inhabitants. Upon a final hearing an injunction was refused. A motion for a new

trial was filed, assigning as grounds therefor that the decision of said court was not sustained by sufficient evidence and was contrary to law. This motion was overruled, and an exception duly reserved by appellants, and said ruling is assigned as error.

Answering a preliminary contention of appellee's counsel, where a copy of an item of documentary evidence has been once set out in the bill of exceptions, it is sufficient, if a copy of the document is again read in evidence in another connection, to describe such item by words of general description, and show by an appropriate cross-reference where it is exhibited in the bill. Miller v. Coulter, 156 Ind. 290, 59 N. E. 853; Henry v. Thomas, 118 Ind. 23, 20 N. E. 519; McFadden v. Wilson, 96 Ind. 253; Cooley v. State, 75 Ind. 511; Smith v. Lisher, 23 Ind. 500. There is no question involved as to the opinion of the reporter that the instrument before copied and the one afterwards referred to are identical. The effective certification as to what the evidence was is that of the judge. Hauger v. Benua, 153 Ind. 642, 53 N. E. 942. If the clerk may pursue a like course in the preparation of his transcript, as our cases assert, much more ought it to be held that the trial judge may refer in a bill of exceptions to a prior portion of such bill. As the original bill of exceptions is before us, thus preserving the original paging, there can be no element of uncertainty occasioned by the practice pursued in this instance. The material facts in this case are substantially as follows: The city of La Porte is incorporated under the general law for the incorporation of cities, and it had a population of a little less than 8,000 prior to the year 1900. In 1898, and for many years theretofore, the city had owned a waterworks system, two lakes being the source of supply. In August, 1898, the legal voters of said city had submitted to them a proposition to seek a water supply elsewhere, and the proposition was carried. Plans and specifications were thereupon prepared, calling for the building of a plant whereby the necessary water could be pumped and transported from a contemplated new source of supply to a reservoir that the city was to build adjacent to the pumping station of said city. On July 24, 1899, the city, pursuant to advertisement, received bids for such plant, the lowest bid being \$97,850, submitted by W. H. Wheeler. The valuation of the property in the city for taxation in the year 1899 was \$3,972,169. Its total indebtedness at that time (not counting streets assessment warrants, which would afterwards be retired by the sale of bonds, which would be liens against the abutting property) was \$45,359.40. On each \$100 of valuation the city tax levy for the year 1899 was \$1.05, 20 cents of which levy was designated as on account of "new waterworks fund," and the balance was levied for other purposes. The bid aforesaid was brought to the attention of the common council through the report of

§ 1 See Exceptions, Bill of, vol. 21, Cent. Dig. § 15.

* Rehearing denied, 69 N. E. 675.

a committee, and was made subject to acceptance "up to and until Tuesday, July 25, 1899, and not afterwards." The committee recommended that the common council "accept the proposition of W. H. Wheeler, of Beloit, Wisconsin, asking for a franchise," and that certain designated members of said council be appointed as a special committee "to draft a franchise in accordance with this report to a company to be named 'The La Porte Water Supply Company,' to construct a waterworks plant in accordance with the plans and specifications and profiles on file in the office of the city clerk." A resolution was thereupon adopted, appointing a special committee "to draft a franchise in favor of W. H. Wheeler and Company to construct a water supply plant" in accordance with such plans and specifications. August 5, 1899, articles of association were filed for the organization under the laws of Indiana of a corporation to be known as the "La Porte Water Supply Company." The capital stock of the corporation was fixed at \$75,000, divided into 750 shares of the par value of \$100 each. The incorporators were W. H. Wheeler, E. P. Wheeler, and George M. Allen, whose subscriptions to said capital stock aggregated \$40,000. It may be stated in this connection that \$5,000 of said stock was not subscribed at any time. On August 7, 1899, said common council adopted an ordinance entitled "An ordinance granting to the La Porte Water Supply Company the right to construct and maintain a system of waterworks for the purpose of furnishing water to the city of La Porte and its inhabitants." Said ordinance provided that said company should have the right and privilege to erect, maintain, and operate a waterworks system in accordance with said plans and specifications for the period of 21 years from and after the passage of the ordinance. It was further provided therein that the city would purchase of said company at least 80,000,000 gallons of water per month, to be delivered in said proposed reservoir, to be paid for semiannually at the rate of three cents per 1,000 gallons, but the city was not to pay for any water not actually furnished. The ordinance also provided that the city would furnish said company the necessary live steam, delivered at sufficient pressure, to operate the machinery and pumps of said company to their full capacity. Section 5 of said ordinance contains the following provision: "The city of La Porte hereby pledges the income and revenue of its waterworks system for the payment of water rentals accruing hereunder, and in addition it agrees to annually, in due time, manner and season, levy a tax sufficient to amply supplement said income and revenue, so that at all times the said water rentals shall be promptly paid. In the event that the company shall issue bonds, the city of La Porte agrees to pay the rentals herein provided for to the trustees for said bonds, as may be directed by the company." On August 14, 1899, the common

council adopted a resolution providing for the employment of an engineer and assistants to supervise the construction of said waterworks system by said company. On the same date said council provided for the sale of bonds by the city to the amount of \$30,000, the proceeds to be used in the purchase from said company of 300 shares of its capital stock, which the mayor and city clerk were authorized to subscribe for. On August 21, 1899, said stockholders, Wheeler, Wheeler, and Allen, signed and delivered to said city a writing, purporting to be a contract between said city and said stockholders, providing, first, that the stock subscription of said city of \$30,000 should be paid to a trustee, to be expended on orders given during the construction of said plant, and for that purpose, after said other stockholders had expended a like sum in its construction; and, second, that said other stockholders should deposit their stock in said company with said trustee, and indorse the certificates therefor in blank, and authorize said trustee to deliver said certificates to the clerk of said city upon the payment to said trustee, for the use of said stockholders, within one year thereafter, of the sum of \$10,000. On August 28, 1899, said company filed its written acceptance of said ordinance of August 7, 1899. On the same date said Wheeler, Wheeler, and Allen contracted with the company that they would construct said plant for \$30,000 cash, 350 shares of the stock of said company, and the mortgage bonds of said company to the amount of \$60,000. There was a change made afterwards, by which, in consideration of delays and extras, the contractors were to receive \$5,000 additional, payable in the bonds of the company, and \$5,000 additional, payable in the stock of said company. The sale of said city bonds and the investment of the proceeds thereof, as provided by said ordinance of August 14th, was reported to the council September 25, 1899. On the next day a bond issue of the company to the amount of \$65,000 was authorized by the stockholders and directors thereof, secured by a mortgage on the proposed plant of said company and by an assignment of its contract with the city of La Porte. At the same time the issue of bonds of said company was reported sold by the said Wheeler, Wheeler, and Allen to third parties, the proceeds to be paid to them, the said contractors. The plant was built under the supervision of an engineer employed by the city. On May 2, 1900, a special committee of the council reported that the plant was completed, and on the same date said council accepted a proposition of said Wheeler, Wheeler, and Allen to purchase 398 of their said shares of stock for \$9,950. On June 11, 1900, a special committee of the council reported that it had consummated said transaction, and it appears that the remaining two shares of stock that were held by said contractors were turned over by them to certain citizens of La Porte, pre-

sumably for the benefit of the city. It appears that said water company has never possessed any property other than such property as was vested in it by the transactions with it above recited. The defense offered testimony tending to show that there was no agreement among the members of the common council that the option of August 21, 1899, should be accepted by the city, and it further offered testimony to the effect that three cents a thousand gallons was a reasonable price to pay for water under the circumstances.

This action was commenced August 28, 1899, and on October 18, 1900, a supplemental complaint was filed. It is unnecessary to make a detailed statement of the averments of these pleadings. The La Porte Water Supply Company was made a defendant, but the holders of the \$30,000 issue of bonds by the city and of the water company bonds were not made parties. It is contended by counsel for appellants that the evidence shows that the transaction as a whole was but an attempted evasion of article 13 of the Indiana Constitution, relative to municipal indebtedness, and should therefore be condemned; citing *Mayor of Baltimore v. Gill*, 81 Md. 375; *Brown v. City of Corry*, 175 Pa. 528, 34 Atl. 854; *Ironwood Waterworks Co. v. City of Ironwood*, 99 Mich. 454, 58 N. W. 371; *Earles v. Wells*, 94 Wis. 285, 68 N. W. 964, 59 Am. St. Rep. 886; *Newell v. People*, 7 N. Y. 9; *Culbertson v. City of Fulton*, 127 Ill. 30, 18 N. E. 781; *Hebard v. Ashland Co.*, 55 Wis. 145, 12 N. W. 437; *City of Joliet v. Alexander*, 194 Ill. 457, 62 N. E. 861; *State of Montana ex rel. v. Waterworks Co.*, 24 Mont. 521, 63 Pac. 99, 81 Am. St. Rep. 453; *Browne v. City of Boston*, 179 Mass. 321, 60 N. E. 934; *City of Springfield v. Edwards*, 84 Ill. 626; *City of Ottumwa v. City Water Supply Co.*, 119 Fed. 315, 56 C. C. A. 219, 59 L. R. A. 604. The city practically owns the corporation that owns the addition to the waterworks, subject to a bonded indebtedness of \$65,000, and to obtain this equity the city has been compelled to invest \$39,950, \$30,000 of which was raised by a sale of the city's bonds. If the plant shall be finally paid for, it will cost the city \$104,950, aside from interest. It is true that the city has not engaged to pay the \$65,000 bonded indebtedness of the water company—that is, *eo nomine*—but the ordinance of August 7, 1899, assumes to bind the city, in addition to furnishing the energy to pump and transport the water, to pay \$10,800 per year for 21 years as water rentals, which amount is to be paid to the trustees of the bondholders of the company, and, in addition, the ordinance assumes to hypothecate the water plant of the city and pledge the city's power of taxation that such fixed charges shall be met. We are not at liberty, however, to view the transaction entirely from the standpoint of the city. A corporation has in fact been created, which has negotiated its se-

curities, and it is not alleged that the purchasers or the holders of such securities had any notice of the option agreement of August 21, 1899, which it is to be borne in mind was not of record. We shall therefore assume that, whatever the city was endeavoring to do in the use that it was making of the La Porte Water Supply Company, those who invested in the bonds of the city or the bonds of the water company had no notice of such purpose.

It is provided by statute that a city in the general class may become a part stockholder in a waterworks corporation by subscribing to its capital stock, and may borrow money to pay its stock subscription. Section 3614, and subdivision 26, § 3541, Burns' Rev. St. 1901. Counsel for appellants do not assail this statute, and therefore we assume its validity. Moreover, we find that the supplemental complaint proceeds on the theory that the \$30,000 bond issue of the city is valid, since it charges that upon the sale of said bonds "the said city became indebted to the full amount of two per cent. of its taxable property, as ascertained by the last assessment for state and county taxes prior to the sale of said bonds." We may assume that the \$65,000 bond issue is a charge upon the physical property of the La Porte Water Supply Company, in view of the state of the record, but we may properly examine the claim that the city is bound to perform the terms of its ordinance respecting the quantity of water to be purchased from the company, since all persons must take notice of the limitations upon the power of a municipality to contract that arise by virtue of the general law. *Platter v. Elkhart County*, 103 Ind. 360, 2 N. E. 544; *Shea v. City of Muncie*, 148 Ind. 14, 46 N. W. 133, and cases there cited. The powers conferred upon municipalities must be construed with reference to the object of their creation, namely, as agencies of the state in local government. "A municipal corporation," says Mr. Justice Bradley, "is a subordinate branch of the domestic government of the state. It is instituted for public purposes only, and has none of the peculiar qualities of a trading corporation, instituted for the purposes of private gain, except that of acting in a corporate capacity. Its objects, its responsibilities, and its powers are different. As a local governmental institution, it exists for the benefit of the people within its corporate limits. The legislature invests it with such powers as it deems adequate to the ends to be accomplished." *Mayor v. Ray*, 19 Wall. 475, 22 L. Ed. 164. See *Schneck v. City of Jeffersonville*, 152 Ind. 204, 52 N. E. 212. The statute under which a municipal corporation is created is its organic act. Such a corporation can only exercise the following powers: First, those granted in express words; second, those necessarily implied in or incident to the powers expressly granted; and, third, those essential to the declared

objects and purposes of the corporation, not simply convenient, but indispensable. *Dillon, Mun. Corp.* § 89, and cases there cited; *Muncie Nat. Gas Co., v. City of Muncie* (at last term) 66 N. E. 436, 60 L. R. A. 822; *Pittsburgh, etc., R. Co. v. Town of Crown Point*, 146 Ind. 421, 45 N. E. 587, 35 L. R. A. 684; *Kyle v. Mallin*, 8 Ind. 34; *Smith v. City of Madison*, 7 Ind. 86. In *Spaulding v. Lowell*, 23 Pick. 71, Shaw, C. J., speaking for the court, said: "In aggregate corporations, as a general rule, the act and will of a majority is deemed in law the act and will of the whole—as the act of the corporate body. The consequence is that a minority must be bound not only without, but against, their consent. Such an obligation may extend to every onerous duty—to pay money to an unlimited amount, to perform services, to surrender lands, and the like. It is obvious, therefore, that if this liability were to extend to unlimited and indefinite objects, the citizen, by being a member of a corporation, might be deprived of his most valuable personal rights and liberties. The security against this danger is in a steady adherence to the principle stated, viz., that corporations can only exercise their powers over their respective members, for the accomplishment of limited and defined objects." The presumption is that any power has been withheld that is not expressed or fairly to be implied, and therefore all reasonable doubts as to the existence of a power in a municipality must be resolved against it. *Smith v. City of Madison*, supra; *Kyle v. Mallin*, supra; *Pittsburgh, etc., R. Co. v. Town of Crown Point*, supra; *Lake County, etc., Co. v. Walsh* (Ind. Sup.) 65 N. E. 530; *State v. Indianapolis Union R. Co.* (at last term) 66 N. E. 163, 60 L. R. A. 831; *Ravenna v. Pennsylvania Co.*, 45 Ohio St. 118, 12 N. E. 445; *Detroit, etc., R. Co. v. Detroit*, 110 Mich. 384, 68 N. W. 804, 35 L. R. A. 859, 64 Am. St. Rep. 850; *City of Corvallis v. Carlile*, 10 Or. 139, 45 Am. Rep. 134; *Dillon, Mun. Corp.* § 89; *Smith, Mun. Corp.* § 673; *Cooley, Const. Llm.* 231; 20 Am. & Eng. Ency. of Law, 1140. The general disposition of the courts of this country has been to apply to these corporations substantially the same rule that is applied to charters of private corporations. *Cooley, Const. Llm.* 231; *Smith, Mun. Corp.* § 673.

Even general and indefinite grants of power are subject to be controlled by the nature of the charter and the particular powers granted. *Winchester v. Redmond*, 93 Va. 711, 25 S. E. 1001, 57 Am. St. Rep. 822; *Leesburg v. Putnam*, 103 Ga. 110, 29 S. E. 602, 68 Am. St. Rep. 80; *Cook County v. McCrea*, 93 Ill. 236. And see, by way of illustration, *City of Logansport v. Humphrey*, 84 Ind. 467. The following is a quotation from *Cook County v. McCrea*, supra: "But it is contended that there is an implied power to that end embraced in the provision conferring upon county boards power to man-

age county funds and county business, except as otherwise specifically provided. This cannot be understood to give to county boards the absolute and unlimited power of management of county funds, where there is the absence of any specific provision of law to the contrary. It hardly means more, we think, than a power to manage the county funds and county business according to law." In *Rothrock v. Carr*, 55 Ind. 334—a case involving the construction of a statute relative to the powers of boards of county commissioners—this court said: "The words to 'make allowances at their discretion,' as used in the above section, mean to make allowances, according to law, at their discretion." If an act that is done on behalf of a municipality cannot be justified when tested by a consideration of the general nature of the charter and the particular powers granted, no argument of advantage, or even of necessity, in the particular instance, will suffice to beguile the court into becoming a party to the usurpation. To make considerations of this kind the basis for a judicial recognition of power "would lead" (to adopt the language of the Supreme Court of Massachusetts) "to a latitude of construction in regard to corporate powers and duties which would be in a high degree dangerous." *Anthony v. Adams*, 1 Metc. 234. The powers that are implied because they are essential to the declared objects and purposes of a municipal corporation are ordinarily few in number, and need not engage our attention here.

It is also clear that under the Indiana act relating to cities of the general class, where specific grants of authority have well marked the path of corporate privilege, there is little, if any, opportunity for difficulty in determining what is an authorized corporate end. Many perplexing questions arise, however, as to the means that municipalities may adopt to effectuate their grants of power. We think that it may be laid down generally, however, that an implied power must be directly and immediately appropriate to the exercise of the principal authority. *Smith, Mun. Corp.* § 673. If there are two ways of attaining an authorized municipal end, and both of such ways are proper, the governing body has a choice as to which of such means it will select; but where the means selected has not been directly authorized, such means must be reasonable, and the exercise of the discretion on the part of the governing body is in such cases subject to review by the courts on the point of reasonableness. *Champer v. City of Greencastle*, 138 Ind. 339, 35 N. E. 14, 24 L. R. A. 768, 46 Am. St. Rep. 390. Within the scope of authorized municipal purposes the courts will be careful to accord to municipalities authority enough to fully accomplish their granted powers, but it is enough to condemn a course that has been selected, where not plainly authorized by the Legislature, that it involves a wide and unnecessary departure from mu-

municipal usage. For the purpose of illustrating this point, we quote the following from the case of *Spaulding v. Inhabitants of Peabody*, 153 Mass. 129, 26 N. E. 421, 10 L. R. A. 397: "Under the special acts whereby Boston was authorized to maintain street lamps, it could not have been held that the town or city was authorized to engage in the whale fisheries for the purpose of procuring oil. The intention was that the oil for the lamps should be bought as persons generally bought oil used for lights. Towns are authorized to raise money for the support and employment of the poor; but it could not reasonably be held that it was intended that towns should at public expense erect and maintain factories for the manufacture of all of the clothing which the poor might wear, or all of the implements which they might use. Towns are authorized to raise money for carrying pupils to and from the public schools, but this could not be held to authorize towns to maintain a street railway or railroad. Towns are authorized to maintain public libraries, but this does not mean that they can maintain paper mills and printing establishments for making books for the libraries. These are undoubtedly extreme examples, but they illustrate the necessity of a strict construction of the statutes relating to the powers of towns." Subdivision 26 of section 3541, Burns' Rev. St. 1901, authorizes a city to construct works for furnishing the city with wholesome water, and the subdivision further provides that the common council may authorize a private corporation to construct such works. This subdivision, when taken in connection with some of the more general grants of power in other subdivisions of the same section, would authorize the city to obtain an element of such primal necessity as water for the use of its inhabitants. *City of Crawfordsville v. Braden*, 130 Ind. 149, 28 N. E. 849, 14 L. R. A. 268, 30 Am. St. Rep. 214; *Rushville Gas Co. v. City of Rushville*, 121 Ind. 206, 23 N. E. 72, 6 L. R. A. 315, 16 Am. St. Rep. 388.

Was the ordinance of August 7, 1890, above mentioned, a reasonable one? It in part purported to be a contract for the purchasing of water by the city for a period of 21 years, in quantities of at least 30,000,000 gallons per month, a large part of which, as we judicially know, it would have to sell again if it was disposed of at all, and this surplus the city undertook to pay for whether it exceeded the needs of the city and its inhabitants or not. This element, together with the furnishing of energy by the city to pump and transport the water, and the undertaking to pay the rental to the trustees of the bondholders, make it apparent, upon the whole, that there was in effect an undertaking on the part of the city to stand sponsor for the whole transaction. Moreover, we find that in its practical working this plan will enable the water company, within the period of the contract, to retire a bonded in-

debtedness of \$65,000. Of course, it is to be presumed that a private business corporation is established with the expectation that it will yield an adequate return upon the money invested in it, but it would not ordinarily be expected that a third person would guaranty the expectation. Such transactions may not be unknown to the mercantile world, but the assumed underwriting of a financial project by a municipal corporation on behalf of a private corporation, in the absence of a statute clearly authorizing it, would certainly be *ultra vires*. A municipality cannot loan its credit to purely private undertakings. *Clark v. Des Moines*, 19 Iowa, 224, 87 Am. Dec. 423; *Cooley*, Const. Lim. 262. Not only is the Legislature wanting in power to delegate authority to municipal corporations except for public purposes, but the foundation idea of taxation is that the purpose is public, and a taking for any other purpose would at best be but a disguised form of confiscation. *City of Ottawa v. Carey*, 108 U. S. 110, 2 Sup. Ct. 361, 27 L. Ed. 669; *Loan Ass'n v. Topeka*, 20 Wall. 655, 22 L. Ed. 455; *Cole v. La Grange*, 113 U. S. 1, 5 Sup. Ct. 416, 28 L. Ed. 896; *Opinion of the Justices*, 150 Mass. 592, 24 N. E. 1084, 8 L. R. A. 487; *Opinion of the Justices*, 155 Mass. 598, 30 N. E. 1142, 15 L. R. A. 809; *Sharpless v. Mayor*, 21 Pa. 167, 59 Am. Dec. 759; *State v. Osawkee Tp.*, 14 Kan. 418, 19 Am. Rep. 99; *Mather v. City of Ottawa*, 114 Ill. 659, 3 N. E. 216; *Attorney General v. Eau Claire*, 37 Wis. 400; *State v. Eau Claire*, 40 Wis. 533; *Hanson v. Vernon*, 27 Iowa, 28, 1 Am. Rep. 215; *Opinion of the Justices*, 58 Me. 590; *Allen v. Jay*, 60 Me. 124, 11 Am. Rep. 185. As said by *Appelton, C. J.*, in the case last cited: "All security of private rights—all protection of private property—is at an end when one is compelled to raise money to loan at the will of others for their own use and benefit, when the power is given to a majority to lend or give away the property of a minority." The mere fact that a city makes an authorized contract with a private corporation that incidentally increases the latter's credit will not condemn the transaction. Here, however, the foundation of the transaction was illegal, and as it started in a step aside from corporate privilege, the extensive credit sought to be given, since it led in the direction of such divergence, only illustrates how far from the path marked out by the Legislature the city has proceeded.

We do not doubt that the procuring of water for the use of the inhabitants generally of a city is a public service, although the service affects the inhabitants in their individual, rather than in their collective, capacity, and, as stated above, we do not doubt the power of cities under existing legislation in this state to furnish water to their inhabitants, at least in connection with the procuring of a supply of water for purely public purposes. We would not be un-

derstood either as intimating that with legislative authority a city might not reasonably aid a private corporation to enable it to furnish water to the city and its inhabitants. In a doubtful case much deference would be paid to a legislative declaration that a use is public, but it is not to be lightly implied that such a power has been granted to the cities of the state. As there is nothing in the statutes to lead to the conclusion that the grant necessary to uphold the act in question has been made, we need not consider the legislative authority; for, as was observed by Mr. Chief Justice Waite in *City of Ottawa v. Carey*, supra, "no matter how much authority there may be in the Legislature to grant a particular power, if the grant has not been made, the city cannot act under it." It is no answer to the objections that we have pointed out that the city of La Porte is the owner of practically all of the stock of the private corporation. The latter has in form executed an assignment of the city's undertaking of August 7, 1899, to the trustees of the company's bondholders, as well as of all else that it owns, by way of security, and, as a result of a sale on foreclosure, such undertaking, if valid, might, with the other property of the company, pass into the hands of a stranger, leaving the city, while bound to perform its contract, possessed of no property of the La Porte Water Supply Company except its corporate shell. It may be further suggested in this connection that the city was not the owner of even a majority of the stock in the water company at the time the ordinance was enacted, and it was denied upon the trial that it was intended at the time the option agreement was delivered that the city should purchase the balance of the stock. If the ordinance of August 7, 1899, was not valid when made, it is not valid now, and we cannot treat it as valid now unless we are prepared to admit that, if the city had not elected to exercise the option that it afterwards received, the ordinance would still have been valid.

It is our conclusion that the city was not bound to take water from the water company under the terms of said ordinance. The court below should have enjoined the city from receiving water under said ordinance, and should have further enjoined the city from making payments out of its own revenues on account of said undertaking.

Following the line of argument of appellant's counsel, the constitutional question suggested during the course of this opinion should have been first decided. As it is our duty, however, to avoid the consideration of a constitutional question where another ground is perceived on which the decision may rest, we have put our decision on the ground that the city exceeded its chartered powers in the particular mentioned.

Judgment reversed, and a new trial ordered.

(163 Ind. 471)

BOLTON v. CLARK.¹

(Supreme Court of Indiana. Oct. 10, 1903.)

ELECTIONS—CONTESTS—APPEAL—FINDINGS OF FACT—REVIEW—SUFFICIENCY OF FINDINGS—PRESUMPTION.

1. Where, on appeal in an election contest, the findings of fact by the trial court consist merely of statements that certain ballots were cast, protested, and counted for one of the candidates, and the ballots are introduced into the special findings by attaching the original ballots to the findings and calling them "exhibits," but no facts are stated in regard to the ballots, there is no evidence before the appellate court whereby it can reach a decision as to whether the ballots were legal or illegal, or as to whom they should be counted for.

2. In an election contest, the burden of the issue being on contestor, and on appeal by him the findings of fact being insufficient to present any evidence whereby the appellate court could determine the question as to the legality of the ballots, and who they should be counted for, it will be presumed that the determination of the lower court adversely to contestor was warranted.

Appeal from Circuit Court, Parke County; Joseph M. Rabb, Special Judge.

Election contest by James M. Bolton against William Clark to determine the rights of the parties to the office of treasurer of Vigo county. From a judgment in favor of defendant, the contestor appeals. Affirmed.

Puett & McFadden, George M. Crane, Homer A. Taylor, and Sam'l R. Hamill, for appellant. Stimson & Condit, John O. Piety, Barcus & Tichenor, Higgins & Cavins, and Duvall & Whitaker, for appellee.

DOWLING, J. The appellant, Bolton, and the appellee, Clark, were opposing candidates for the office of treasurer of Vigo county at the general election held November 6, 1900. The board of canvassers, after a comparison and examination of the papers intrusted to it, and a count and tabulation of the vote of the county, declared the appellee as the person having the highest number of votes given for the office of county treasurer, duly elected to that office, and certified this statement in the manner prescribed by the statute. The appellant thereupon commenced proceedings to contest the election of the appellee. A trial before the board of commissioners of the county resulted in a finding and judgment that the appellant, Bolton, had received the highest number of legal votes, and that he was entitled to the office. From this judgment the appellee, Clark, appealed to the Vigo circuit court. Upon the application of the appellant, a change of venue was ordered, and the cause was sent to the Parke circuit court. A change of judge being demanded in that court, Hon. J. M. Rabb, the judge of the Twenty-First Judicial Circuit, was appointed to try the cause. The issues were submitted to the court for trial without a jury, and at the request of the parties a special finding of the facts was made, with a statement of the conclusions of law thereon. These conclu-

¹ Rehearing denied.

sions were in favor of the appellee, and judgment was rendered accordingly. Bolton appealed to this court.

The errors assigned are upon each conclusion of law and the denial of a motion by the appellant for a modification of the judgment. No motion was made for a new trial, and the appellant does not question the sufficiency of the evidence to sustain the several findings of fact. No objection was made by the appellant to the form or substance of the special finding, and there was no motion for a venire de novo. All we have to determine is whether the facts found by the court authorized the conclusions of law. The court found that the contestor and contestee were residents of Vigo county, voters therein, and eligible to the office of county treasurer of that county; that each was nominated in due form for such office by a political party, and became its candidate for county treasurer of said county; that the name of each was printed upon the official ballots under the proper party device; that upon a canvass of the votes cast at said election in said county the board of canvassers tabulated the vote, and declared that the appellant, Bolton, had received 7,581 votes for the said office, and that the appellee, Clark, had received 7,656 for said office; that one Hollingsworth had received 209 votes, and one Hart 136 votes; that the said board of canvassers declared the appellee, Clark, duly elected to the said office. The court further found that in making the canvass of said votes the board excluded the election returns from Precincts A and B of Linton township and of precinct C of Fayette township, and counted no votes cast in either of said precincts; that all necessary steps (specifying them) had been taken for the purpose of conducting the election in these three precincts; that 239 votes were cast and counted in said Precinct A of Linton township, of which 127 were for the appellant, Bolton, 91 for the appellee, Clark, and 7 for Hart; that 201 votes were polled in said Precinct B of Linton township, of which the appellant, Bolton, received 117, the appellee, Clark, 69, and Hart 10; that 156 votes were polled in said Precinct C of Fayette township, of which the appellant, Bolton, received 95 votes, and the contestee, Clark, 57 votes. The finding sets out certain irregularities which occurred in holding the election in each of these precincts, but none of them was such as to cause the appellee to be declared elected when he had not received the highest number of legal votes. The court next found that three votes were cast for the appellee, Clark, by persons who did not possess the qualifications of legal voters; and that one ballot was not counted because, by a mistake of the inspector, it had been placed in the wrong ballot box. It was further found by the court that 36 ballots were protested by different members of the election boards, and were not counted for either candidate.

The form of the finding as to each of these ballots, omitting the particulars of each indicated by the blanks, was substantially as follows: "The court further finds that there was cast in Precinct — in the — of said county, at said election, one ballot, marked 'Exhibit —, Court's Finding,' and made a part of this finding; that said ballot was protested by said election board, and not counted." The court also found that one ballot was voted for the appellant, Bolton, was protested and counted; and that eight ballots were cast for the appellee, Clark, were protested and counted for him. The form of each of these findings omitting the description of the precinct, the number of the exhibit, and the name of the candidate for whom the ballot was cast, was this: "The court further finds that there was voted in Precinct — in the — of said county, at said election, one ballot, which is marked 'Exhibit — Court's Finding,' and made a part of this finding, which said ballot was protested by members of said election board, and was counted for the —."

The conclusions of law were 40 in number, and their substance only need be set out. The first declared that Bolton was entitled to have counted for him, in addition to the votes counted for him by the board of canvassers, 127 votes in Precinct A of Linton township, and that Clark was entitled to have counted for him, in addition to the votes counted for him by said board, 91 votes cast in said Precinct A of Linton township. The second stated that Bolton was entitled to have 117 additional votes counted for him cast in Precinct B of said Linton township, and that Clark was entitled to have counted for him 69 additional votes which were cast in said Precinct B of Linton township. The third is that Bolton is entitled to have 97 additional votes counted for him which were cast in Precinct C of Fayette township, and that Clark is entitled to have 57 additional votes counted for him which were cast in said Precinct C of Fayette township. The fourth, fifth, and sixth conclusions are to the effect that 3 votes cast and counted for Clark were illegal, and should be deducted from the votes counted for him. The seventh conclusion is that the ballot placed by mistake in the wrong ballot box, and for that reason destroyed, was a legal ballot, and should have been counted for Bolton. The eighth, ninth, tenth, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, and nineteenth conclusions were that the ballots named in them, 14 in number, being ballots protested and not counted, were legal votes, and should be counted for Bolton. The twenty-third, twenty-fourth, twenty-fifth, twenty-sixth, twenty-seventh, twenty-eighth, twenty-ninth, thirtieth, thirty-first, thirty-second, thirty-third, thirty-fourth, thirty-fifth, thirty-sixth, and thirty-seventh conclusions were that the ballots named in them, 23 in all, were legal votes, and should

have been counted for Clark. The eleventh, twentieth, twenty-first, twenty-second, thirtieth and one-half, and thirty-eighth conclusions were that of the ballots named in them (9 in number) 7 were illegal votes, 6 of which were cast for Clark and 1 for Bolton, and that 2 of them were legal votes, which were properly counted for Clark. The fortieth conclusion of law is as follows: "The court further concludes that the contestor, James Bolton, did not receive a plurality of all the legal votes cast for the office of county treasurer, and was not duly elected to the office of county treasurer of Vigo county, Indiana."

The result of these findings and conclusions of law may be stated as follows:

Number of votes for Bolton, as returned by board of canvassers.....	7,531
Votes cast for Bolton in Precinct A of Linton township.....	127
Votes cast for Bolton in Precinct B of Linton township.....	117
Votes cast for Bolton in Precinct C of Fayette township.....	97
Ballot for Bolton improperly destroyed.....	1
Ballots protested and not counted, but which were legal votes for Bolton.....	14
	<hr/> 7,887
Deduct illegal vote.....	1
Total vote for Bolton.....	<hr/> 7,886
Number of votes for Clark returned by board of canvassers.....	7,656
Votes cast for Clark in Precinct A, Linton township.....	91
Votes cast for Clark in Precinct B, Linton township.....	69
Votes cast for Clark in Precinct C, Fayette township.....	57
Ballots protested and not counted, but which were legal votes for Clark.....	23
	<hr/> 7,896
Deduct illegal votes.....	9
Total vote for Clark.....	<hr/> 7,887

The rules previously announced by this court in many cases compel us to disregard and lay out of the special finding the 14 ballots which were protested and not counted for either candidate by the board of canvassers, but which the trial court held should be counted for the appellant; the 1 vote found by the trial court to have been cast for the appellant, and to have been illegal; the 23 ballots which were protested and not counted for either candidate by the board of canvassers, but which the trial court held should be counted for the appellee; and the 9 votes, 6 of which the court found were cast for the appellee and the remaining 3 not counted. None of the findings concerning these ballots states a single fact from which this court can determine the validity of the ballot, or for whom it should be counted. The trial court attempted to make the original ballots parts of the several special findings, and referred to them as exhibits. No one will assert that the ballots were anything more than evidence in the cause. They were written instruments, which might or might not prove certain ultimate facts on which the legality or illegality of a vote depended. But they could not be made to take the place of that finding of facts which the law requires. They were neither the ultimate

facts nor the inferential facts to be proved. There may be cases where it is proper to make a copy of a written instrument a part of a special finding—as, where the instrument itself is the ultimate or inferential fact to be established by the evidence—but this is not such a case. *Brunson v. Henry*, 152 Ind. 310, 313, 52 N. E. 407. Here the question in each instance was whether extrinsic circumstances rendered the ballot legal or illegal. The copies of the forms of the special findings set out in this opinion show that the trial court failed to find any fact whatever from which we could decide whether the ballots were legal or illegal, or whether they should have been counted for the appellant or for the appellee, or for neither of them. The court says in its findings that certain ballots were cast at certain precincts at said election; that they were protested, and were counted for one or the other of the candidates. And these are the only facts found. Had these ballots distinguishing marks on them? If so, what were they? Did the voter stamp the ballot at the proper place or places, or did he put the stamp where it was not lawful to do so? Were the ballots official ballots, or were they privately printed or written? Were they regular in form, and complete in all respects in those particulars designated by the statute? These and similar inquiries indicate what were the ultimate facts which the court should have found, but which it entirely and in every instance failed to find. The evidence is not before us, and we have no means of determining what the facts were. We cannot look to the fragments of evidence improperly introduced into the special findings by attaching the original ballots to the findings and calling them "exhibits." In *Cottrell v. Nixon*, 109 Ind. 378, 381, 382, 10 N. E. 122, 124, the court, by Mitchell, J., stated the law in such cases thus: "Instead of finding facts, the special finding simply sets out certain letters, which, it said, were written by the parties respectively. The letters thus written, if transmitted to and received by the parties to whom they purport to have been written, may have been competent evidence to prove the fact of a sale and guaranty. But the distinction between finding the evidence and the facts which the evidence may prove or tend to prove cannot be disregarded. *Kealing v. Van Sickle*, 74 Ind. 529, 39 Am. Rep. 101; *Hessong v. Pressley*, 88 Ind. 555; *Shanon v. Hay*, 106 Ind. 589, 7 N. E. 376. * * * In respect to all the material facts in issue the special finding wholly fails to make any response, except to set out some inconclusive evidence, which may or may not have proved the facts in question." The same subject is considered, and the rule again recognized, in *Perkins v. Hayward*, 124 Ind. 445, 450, 451, 24 N. E. 1033, 1034, Elliott, J., speaking for the court, in these words: "It is well settled that a special verdict must find the facts and state neither conclusions

of law nor mere matters of evidence; and, as we have seen, what is true of a special verdict is true of a special finding. * * * It is the office of a special verdict to find the inferential facts, not mere evidentiary facts. * * * The ultimate facts must be stated, and not the evidence by which they are established." Omitting the ballots concerning which there are no sufficient findings of fact to sustain the conclusions of the trial court, the votes cast for the appellant and appellee, and which, according to the conclusions of the court, should be counted, are as follows:

Number of votes for appellant, Bolton, as returned by board of canvassers.....	7,531
Votes cast for appellant in Precinct A. of Linton township	127
Votes cast for appellant in Precinct B of Linton township	117
Votes cast for appellant in Precinct C of Fayette township	97
Ballot for appellant improvidently destroyed....	1
	7,873
Number of votes for appellee, Clark, returned by board of canvassers.....	7,656
Votes cast for Clark in Precinct A of Linton township	91
Votes cast for Clark in Precinct B of Linton township	69
Votes cast for Clark in Precinct C of Fayette township	57
	7,873

We do not feel called upon to decide whether the one ballot improperly destroyed, and counted for appellant, should have been so counted; but see *Weakley v. Wolf*, 148 Ind. 208, 215-219, 47 N. E. 466.

The special finding, it will be observed, by reason of its indefiniteness, is silent as to the legality of a large number of ballots. Other facts are found on which conclusions of law are properly stated. "In such a case," as was said in *Cottrell v. Nixon*, 109 Ind. 378, 382, 10 N. E. 122, 124, "it will be presumed that the issuable facts upon which the verdict is silent were not proved. The party having the burden of the issue will be deemed to have failed in respect to the facts upon which the special finding fails to speak." The issue in this case was whether the appellant received the highest number of legal votes cast at the election in Vigo county in the year 1900 for county treasurer. By his complaint he asserted that he did. This was denied. The burden of this issue was upon appellant, and, as the special finding does not show that he did receive the highest number of legal votes cast for either of the candidates for county treasurer, the conclusion of the court that he was not entitled to that office was correct.

As we have before stated, the sufficiency of the findings in form or substance was not questioned by the appellant, and there was no motion for a venire de novo. The conclusions of the court upon the facts found, so far as the finding is sufficient, were correct, and the judgment was properly rendered upon the conclusions of law. There was no ground for any modification of the judgment, and the motion for such modification was properly overruled.

Cross-errors were assigned by the appellee, but, in view of the conclusion we have reached, it will be unnecessary to consider them.

We find no error in the record. Judgment affirmed.

(161 Ind. 288)

SHARP v. STATE.

(Supreme Court of Indiana. Oct. 14, 1903.)

CRIMINAL LAW — DEFENSE OF INSANITY — QUESTION FOR JURY—SUFFICIENCY OF EVIDENCE—BILL OF EXCEPTIONS—REVIEW.

1. The giving and refusing of instructions cannot be reviewed on appeal where they are not made a part of the record by proper bill of exceptions.

2. Instructions are not properly in the record where it is attempted to incorporate them into the bill of exceptions and to certify them to the Supreme Court in the same manner as the long-hand evidence is certified.

3. Though the evidence on the issue of insanity of the accused in a criminal case may be weak, nevertheless, if it is of such a character that the jury may have reasonably inferred sanity, the question of sanity cannot be reviewed on appeal.

4. Evidence in a prosecution for crime held to warrant a finding that accused was not insane at the time he perpetrated the offense.

Appeal from Circuit Court, Gibson County; Henry A. Yeager, Judge.

Edward Sharp was convicted of sodomy, and he appeals. Affirmed.

Jno. Q. A. Goodman and Clarence A. Buskirk, for appellant. C. W. Miller, Atty. Gen., Wm. Espenscheid, L. G. Rothschild, W. O. Geake, and C. C. Hadley, for the State.

JORDAN, J. Appellant was charged by indictment with having committed the crime of sodomy, by violating the provisions of section 2092, Burns' Rev. St. 1901 (section 2005, Horner's Rev. St.). To the accusation he pleaded not guilty, and, in addition to this, interposed a written plea averring that at the date of the commission of the alleged offense he was a person of unsound mind. He was tried by a jury and found guilty, and, over his motion for a new trial, was sentenced to be imprisoned in the State's Prison for not over 14, nor less than 2, years. The sole insistence of his counsel in this appeal is that the court erred in giving and in refusing certain instructions, and that the evidence is not sufficient to warrant the jury in finding against him upon the issue of his sanity. The instructions given and refused are not made a part of the record by a proper bill of exceptions. Consequently no question which appellant's counsel attempt to present on the rulings of the court, in either giving instructions or in denying those requested, is before us for review. It is true that an effort has been made to make the instructions a part of the original bill of exceptions embracing the longhand manuscript of the evidence, but it has been set-

¶ 1. See Criminal Law, vol. 15, Cent. Dig. § 2940.

tied by repeated holdings of this court that this method is not available for making instructions given or refused by the trial court a part of the record on appeal to either the Supreme or Appellate Court. *Carlson v. State*, 145 Ind. 650, 44 N. E. 650; *Adams v. State*, 156 Ind. 596, 59 N. E. 24, and cases cited.

The evidence shows beyond controversy that appellant committed what the statute properly declares to be "the abominable and detestable crime against nature," by having carnal knowledge of a beast, viz., a female Shetland pony. Numerous witnesses testified for and against the accused upon the question of his insanity at the time he perpetrated the alleged offense, and his counsel earnestly insist that upon this, under the evidence in the case, the jury ought to have found in his favor, and acquitted him of the crime charged. Counsel, however, seemingly overlooked the rule established by many decisions of this court that the jurors in a criminal cause are not only the exclusive judges of the facts proven on the trial, but are also the exclusive judges of all inferences that may be drawn therefrom. The fact of appellant's insanity, when put in issue by the method prescribed by our Criminal Code, is to be considered and determined by the jury in like manner as any other material fact in the case, and on appeal is governed by the same rule, which forbids us to weigh the evidence upon any question of fact determined by the jury or court trying the case. Although the evidence upon the issue of the insanity of the accused party in a criminal case may be weak and possess but little weight, still if it is of such a character that the jury may have reasonably inferred therefrom that he was, within the contemplation of law, of sound mind at the time he committed the offense, then the question of his insanity, upon the evidence, under the circumstances is not one open to review by this court on appeal. *Lee v. State*, 156 Ind. 541, 60 N. E. 299; *Blume v. State*, 154 Ind. 343, 56 N. E. 771; *Rinkard v. State*, 157 Ind. 534, 62 N. E. 14; *Braxton v. State*, 157 Ind. 213, 61 N. E. 195.

The evidence shows that the accused was a man 36 years of age, and that immediately previous to the commission of the offense charged he had been employed for some time as a clerk in a grocery store in the city of Princeton, engaged in selling groceries and in delivering them to customers throughout the city. Some of the witnesses testified that he was a bright man, and very polite, except when he was drunk. When he was discovered by persons in the commission of the crime of which he was convicted, it is shown that he said to them, "Don't say anything about it to any one, and I won't do so any more." To other persons he gave as an explanation or excuse for the act committed that he was drunk at the time, and full of cocaine, and did not know what he

was doing. One of the witnesses testified that, when he caught him having intercourse with the beast in the stable, he "hollered" at him, and that thereupon the accused jumped down and ceased to continue the degrading act. It is shown that after the commission of the offense he said to another person, who said to him that by the act in question he had committed a penitentiary crime, that, if nothing was said about the matter, he "would never be caught doing anything like it again." We merely note the above facts, which, with other facts and circumstances in the case, certainly cannot be said to be inconsistent with appellant's sanity. It is true that there is evidence to show that he had been an excessive user of intoxicating liquors for about 15 years, and for several years had also been addicted to the "drug habit," by using cocaine and morphine, and apparently had reached a stage that, when under the influence of intoxicating liquors or drugs, he was devoid of all self-respect. It is shown that soon after he committed the crime herein charged he was prosecuted and convicted of being intoxicated in a public place, and was about to be committed to the county jail for the nonpayment of his fine. He seemingly recognized that he would be disgraced, and appealed to one of his neighbors to stay the fine, stating to him that he never had been, and did not want to disgrace himself and family by being, committed to jail. In criminal jurisprudence, persons who indulge in the excessive use of intoxicants, and thereby become degraded and depraved in their morals, are not necessarily for that reason alone to be considered insane, so as to absolve them from responsibility for a crime committed. If a man whose appetite controls his mind and will can commit crime with impunity, because by the excessive use of intoxicants his moral nature has thereby been degraded and depraved, then under such circumstances the law would certainly be open to a merited reproach. Such, however, is not the law as recognized by the decisions of this court. *Goodwin v. State*, 96 Ind. 550. As there is evidence to warrant the finding of the jury, we cannot disturb the judgment below upon the question of its sufficiency.

Judgment affirmed.

(161 Ind. 276)

BLOCH v. STATE.

(Supreme Court of Indiana. Oct. 13, 1903.)

ATTEMPTED LARCENY—SUFFICIENCY OF INFORMATION—SUFFICIENCY OF EVIDENCE—FAILURE TO OBJECT TO EVIDENCE—REVIEW OF ADMISSIBILITY.

1. It is not necessary, in an information for attempted larceny, under Burns' Rev. St. 1901, § 2003, to specifically describe the property which it is charged defendant attempted to steal, nor to allege that it had any value.

2. Where, in a prosecution for attempted larceny, defendant fails to specifically object to

the exhibition to the jury of articles found on his person, such action will not be reviewed.

3. Evidence held sufficient to sustain conviction of an attempt to steal.

Appeal from Circuit Court, Huntington County; Jas. C. Branyan, Judge.

Lawrence Bloch was convicted of attempted larceny, and appeals. Affirmed.

Jas. M. Hatfield, for appellant. C. W. Miller, Atty. Gen., and C. T. Jackman, L. G. Rothschild, C. C. Hadley, and W. C. Geake, for the State.

MONKS, C. J. Appellant was charged by affidavit and information with entering in the daytime the dwelling house of one Albert Alstadter and attempting to commit the crime of larceny, in violation of section 2003, Burns' Rev. St. 1901 (section 1930, Rev. St. 1881; section 1930, Horner's Rev. St. 1901). A trial by jury resulted in a verdict of guilty, and, over a motion for a new trial and a motion in arrest, judgment was rendered thereon.

The errors assigned call in question the action of the court in overruling the motion to quash the affidavit and information, and in overruling the motion for a new trial and the motion in arrest of judgment.

The only objections urged to the affidavit and information are (1) that there is no specific description of the property which it is charged appellant attempted to steal; and (2) it is not alleged that said property had any value. Such allegations are not necessary in a prosecution for a violation of said section 2003 (1930) supra. *Com. v. McDonald*, 5 Cush. 305; *Reg. v. Johnson*, 10 Cox, C. C. 13; *Burrows v. State*, 84 Ind. 529; *Barnhart v. State*, 154 Ind. 177, 180, 56 N. E. 212; *People v. Ah Ye*, 31 Cal. 451; *State v. Hughes*, 76 Mo. 323; *State v. Utley*, 82 N. C. 556; *People v. Moran*, 123 N. Y. 254, 25 N. E. 412, 10 L. R. A. 109, 20 Am. St. Rep. 732, and cases cited; *People v. Jones*, 46 Mich. 441, 9 N. W. 486; *State v. Wilson*, 30 Conn. 500; 2 Bishop's Crim. Proc. § 87; 1 Bishop's New Crim. Law, §§ 743, 744; 1 Wharton's Crim. Law (10th Ed.) §§ 186, 191. In *Reg. v. Johnson*, supra, Pollock, C. B., said: "Where there is only an attempt, it is not always possible to say what property the would-be thief meant to steal." It is clear from the authorities cited that such allegations are not necessary.

During the progress of the trial, certain articles of property found on the person of appellant were exhibited to the jury by a witness on behalf of the state. This is assigned as a cause for a new trial by appellant, but, as he made no specific objection thereto, no question is presented by said assignment for our consideration. *Bass v. State*, 136 Ind. 165, 170, 171, 36 N. E. 124; *Lankford v. State*, 144 Ind. 428, 432-434, 43 N. E. 444; *Noe v. State*, 92 Ind. 92, 95.

It is insisted by appellant that the verdict

is contrary to the evidence and contrary to law, because there is no evidence of an "attempt to steal." The evidence on this subject shows without contradiction that appellant, a stranger from Chicago, was discovered by one Albert Alstadter in his dwelling house, about the noon hour, "going through the drawers of a bookcase." The drawers of a dresser in the same room were open. The drawers in the bookcase and dresser were closed at the time Alstadter left his room in the morning. After the appellant was discovered, he attempted to escape by the back way of the building, and was arrested. At the time of the alleged commission of said offense, said dwelling house was not occupied by any one except said Alstadter. The evidence of the attempt to steal was much stronger in this case than in *Burrows v. State*, 84 Ind. 529, where it was held sufficient. See, also, *People v. Moran*, 123 N. Y. 254, 25 N. E. 412, 10 L. R. A. 109, 20 Am. St. Rep. 732, and cases cited; 1 Wharton's Crim. Law, § 186.

Judgment affirmed.

(161 Ind. 278)

**FIRST NAT. BANK OF SEYMOUR v.
ISAACS, County Treasurer.**

(Supreme Court of Indiana. Oct. 14, 1903.)

TAX ASSESSMENT—APPEAL FROM COUNTY BOARD—STATE BOARD'S ORDER—DEFINITENESS—AMENDMENT BY COUNTY AUDITOR—CORRECTION BY STATE BOARD—UNAUTHORIZED MEETING—CURATIVE STATUTE.

1. A county board of review fixed a bank's assessment at \$2,520 for the realty, \$4,095 for the improvements, and \$136,495 for personalty. The bank had returned \$20,000 worth of realty to the assessor. The bank appealed from the board's action, and the State Board of Tax Commissioners ordered that "the valuation of said property be fixed at \$127,110 in addition to the assessed value of the real estate." Held, that the state board's order was sufficiently definite, as indicating a total assessment of \$133,725.

2. Under Burns' Rev. St. 1901, § 8543, providing that the State Board of Tax Commissioners shall, on appeal from an assessment, assess the property in controversy, and the State Auditor shall certify to the county auditor the changes made, and the amounts assessed by the state board shall be by the county auditor extended on the tax duplicates in lieu of the amounts fixed by the township or county officials, etc., the county auditor has no power to revise or change the valuations made by the state board.

3. Under Burns' Rev. St. 1901, § 8543, providing that on receiving notice of an appeal from the county board of review the county auditor shall make out a written statement showing the substance of the complaint made, if any, and the action of the board thereon, which shall be transmitted to the State Auditor, to be laid before the State Board of Tax Commissioners, the county auditor has no authority to include in the record a certificate explanatory of the action of the county board, and stating that it had overlooked certain real estate.

4. The State Board of Tax Commissioners may correct errors or omissions in its record at any subsequent meeting.

5. The Legislature may constitutionally legalize special meetings of the State Board of

Tax Commissioners not authorized by the statute creating the board, and hence Acts 1901, p. 129 (Burns' Rev. St. 1901, § 8550), doing so, is valid.

Appeal from Circuit Court, Jackson County; Thos. B. Buskirk, Judge.

Suit by the First National Bank of Seymour against William W. Isaacs, county treasurer. Judgment for defendant, and plaintiff appeals. Reversed.

O. H. Montgomery, for appellant. Carl E. Wood, for appellee.

DOWLING, J. The allegations of the complaint in this case material to a correct decision of the question presented by the assignment of errors are substantially as follows: The appellant is a national banking association, incorporated under the act of Congress known as the "National Bank Act," and is, and for many years has been, engaged in business in the city of Seymour, in Jackson township, Jackson county, Ind., and the appellee is the treasurer of said county. Between the 1st day of April and the 1st day of June, 1899, the president of the appellant, acting on its behalf, pursuant to the requirements of the tax law, made a statement in writing, in duplicate, showing the number of the shares of the capital stock of said bank, and the name and residence of each shareholder, with the number of shares owned by him. He affixed what he deemed the true cash value of such shares, and also the true cash value of the entire capital stock of said bank on the 1st day of April, 1899, and he delivered one of the said statements to the township assessor of said Jackson township, and one to the county auditor of said county. Thereupon the said capital stock was duly listed for taxation, assessed, and returned by said assessor as other like property was returned for taxation. On July 12, 1899, after due notice, the county board of review revised the said assessment, and assessed the appellant, its capital stock and property, at the aggregate sum of \$143,110. The bank appealed from the assessment so made to the State Board of Tax Commissioners, and on August 19, 1899, said state board, having duly obtained jurisdiction of the said matter, granted the appeal, and finally assessed the appellant, its capital stock and property, at the aggregate sum of \$133,110. Subsequently, the minutes of the proceedings of the said board being found indefinite, they were on January 2, 1901, corrected and made certain. A certified copy of such proceedings so corrected was issued to the auditor of said Jackson county, but, notwithstanding such reduction and final assessment by the state board, the auditor of said county entered the appellant's name upon the tax duplicate of said county for the year 1899, and charged it with property for taxation of the aggregate value of \$143,110, and computed and extended taxes thereon at the rate of \$1.68 per each \$100 of the said amount.

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Said auditor thereupon turned over to the county treasurer of said county the said duplicate, with the excessive valuation of \$10,000, and the taxes thereon, for the collection of said taxes. The appellant paid all taxes charged against it upon the said valuation of \$133,110 as fixed by said state board, but refused to pay the taxes upon the additional and excessive amount of \$10,000 so included by the said auditor. The said treasurer threatens to collect the said taxes on the said \$10,000 so added to said assessment by levy upon and sale of the property of the appellant, unless enjoined. Prayer for a perpetual injunction. This complaint was sustained by this court in *First Nat'l Bank v. Greger*, 157 Ind. 479, 62 N. E. 21. Appellee filed an answer in denial. The cause was tried by the court, and a finding was made in favor of the appellee. A motion for a new trial on the grounds that the finding was not sustained by sufficient evidence and was contrary to law was overruled, and judgment was rendered for appellee.

The evidence, which is very brief, is brought here by bill of exceptions, and clearly establishes all the material facts of the complaint.

Counsel for appellee contends that the order of the State Board of Tax Commissioners authorized the county auditor to add the \$10,000 as a part of the value of the real estate owned by said bank. He also claims that the action of the State Board of Tax Commissioners on January 2, 1901, in causing an entry to be made upon its records correcting the entry of August 19, 1899, was unauthorized and void. To this proposition, counsel for appellant answers that by an act of the General Assembly of March 7, 1901 (Acts 1901, p. 129), all special meetings of the State Board of Tax Commissioners previously held, and all proceedings at such special meetings, were expressly recognized and declared valid. In response to this proposition, counsel for appellee insists that the act of March 7, 1901, supra, was invalid, for the reasons that the proceedings attempted to be legalized were void for want of jurisdiction in the board, and because "the act settled a pending lawsuit" (sic).

It appears from the proof that the property owned by the appellant, April 1, 1899, was duly listed and returned by the proper officer of the bank to the township assessor:

Capital stock, 1,000 shares, \$100	
per share	\$100,000 00
Value of shares, \$128.80	\$128,800 00
Amount of all deposits April 1, 1899	\$282,591 92
Amount of individual profits on hand April 1, 1899	3,111 18
Amount of surplus fund April 1, 1899	40,000 00
Assessed value of real estate	20,310 00

At the meeting of the Jackson county board of review, held June 19, 1899, the appellant was ordered to appear on July 1, 1899, and

submit a statement of its property for revision, correction, or the assessment of omitted property. The bank appeared as it was required to do, and submitted its sworn statement. On July 10, 1899, the county board made the following order:

"The board of review, having under consideration the corporation statement and schedule of the real estate and personal property of the First National Bank, when, on motion, it was ordered by the board that in order to equalize the values with that of other property of like kind in Jackson county, Indiana, that the following assessments be made on real estate, improvements, and personal property, as follows:

The real estate is assessed at.....	\$ 2,520
The improvements are assessed at....	4,095
The personal property is assessed at	136,495

Total assessment \$143,100"

The bank was dissatisfied with the action of the county board of review, and appealed from its order of assessment to the State Board of Tax Commissioners. Upon the hearing of this appeal, the state board granted the petition of the appellant for a reduction of its assessment, and the following order was thereupon entered on its minutes: "In the matter of the appeal of the First National Bank of Seymour, Indiana, from the decision of the county board of review of Jackson county, fixing the valuation of the property of said bank, as set out in the appeal, it is ordered that the prayer of the appeal is granted, and that the valuation of said property be fixed at \$127,110, in addition to the assessed value of the real estate of said bank." A certified copy of this order was sent to the auditor of Jackson county, and that officer, instead of obeying the mandate of the state board, made and entered on the tax duplicate an assessment against the appellant as follows:

Personal property	\$120,950
Real estate, city of Seymour.....	5,860
Real estate in Jackson township.....	16,300

Total \$143,110

On January 2, 1901, the State Board of Tax Commissioners, at a special meeting of the board, on the suggestion of the First National Bank that its order of August 19, 1899, was uncertain and had been misunderstood by the auditor of Jackson county, caused the following further entry to be made in explanation of its former proceedings: "Ordered that the prayer of the appeal be granted, and that the capital stock of the First National Bank be, and the same is hereby, valued and assessed at the sum of \$133,110 for the year 1899, which shall constitute its total assessment, and include all its property, real and personal. And it is ordered that this action of the board be duly certified by the Auditor of State to the county auditor of Jackson county. It is expressly understood that the said order does in no way

change the assessment as originally fixed by the board, but it is made for the purpose of more clearly and expressly defining the said original assessments." The bank paid in full all taxes upon the said valuation and assessment of \$133,110, but refused to pay upon the \$10,000 which had been added to that valuation of its property by the county auditor.

The original order of the state board on the appeal of the bank, made August 19, 1899, is sufficiently certain to indicate the intention of the board. The valuation of the real estate and improvements belonging to the bank in the order of the county board of review was \$6,615. The valuation of the personal property was \$136,495. The state board decided that the valuation of the personal property was unequal and too high, and reduced it to \$127,110, to which it declared "the assessed value of the real estate of the bank" should be added. By this the board could have meant nothing else than the valuation of \$6,615 made by the county board of review, this being a part of the assessment appealed from, and the only valuation of the real estate of the bank of which the state board had knowledge. According to this order, the total assessment and valuation of the property of the bank was as follows:

Real estate	\$ 2,520
Improvements	4,095
Valuation of personal property.....	127,110
	<u>\$133,725</u>

When this order of the State Board of Tax Commissioners was certified to the auditor of Jackson county, it was the duty of that officer to enter the valuation of the property of the bank just as the state board directed him to do, and he had no power to revise or change the valuations made by that board. "Such State Board of Tax Commissioners shall, upon appeal from an assessment by the party aggrieved, assess the property in controversy. The Auditor of State shall certify to the auditors of the several counties, all such changes made by said State Board of Tax Commissioners, showing in the first column the assessment made by the county or township officials, and in the second column the assessment as made by the State Board of Tax Commissioners, which latter amounts shall be by said auditor extended on the tax duplicates in lieu of the amounts fixed by said township or county officials, or by said county board of review." Burns' Rev. St. 1901, § 8543.

It is said in the brief for appellee that "The auditor of the county, in making the transcript of the appeal, sent a certificate along with the papers which showed that the county board had overlooked this real estate." The land referred to seems to have been a tract or tracts situated in Jackson township, outside the corporate limits of the city of Seymour. We have not been referred

to any provision of the statute which empowers a county auditor to make such a certificate, or to advise the state board of his views of the proceedings of the county board of review. The statute very clearly defines his official duty in these words: "Upon receiving notice of such appeal, the auditor of the county shall forthwith make out a statement in writing showing, concisely, the substance of the complaint made, if any, and the action of the board thereon, and shall transmit the same by mail to the Auditor of State, who shall lay the same, for its action, before the State Board of Tax Commissioners when it shall convene." Burns' Rev. St. 1901, § 8543. The state board properly disregarded the unauthorized certificate of the county auditor, and proceeded to "assess the property in controversy," as the law required. Besides, it appears that the lands outside of the city of Seymour were in fact before the county board of review, the bank having listed and returned the whole of its real estate at a valuation of \$20,000. The county board of review, with this list and return before it, placed a valuation of \$6,615 on all the real estate of the bank, with its improvements. There is no evidence that the bank held any other real estate, or that it was of any greater value than that fixed in the order of the county board.

The result of the evidence, so far as we have now considered it, is this: The county board of review fixed the assessment and valuation of the appellant at \$143,110. On appeal the State Board of Tax Commissioners reduced this valuation to \$133,725. The county auditor, instead of extending the amounts of the assessments as fixed by the state board, made an assessment of his own, which corresponded neither with the original assessment made by the county board, nor with that ordered by the state board. This proceeding was unauthorized and illegal. The appellant paid all taxes assessed against it, except those computed upon the \$10,000 added to the valuation made by the state board. This amount was wrongfully included in the valuation of the property of the appellant, first, because it was not authorized by the original order of the state board; and, second, for the reason that the county auditor had no power to increase the valuation of the property in the manner disclosed by the proof.

Suppose, however, that the order first made by the state board was ambiguous, or that its terms, as they stood, apparently authorized the county auditor to add to the total valuation made by the state board the assessed value of any and all real estate owned by the appellant on April 1, 1899, which the county auditor might have imagined was not taken into account by the state board; had the state board the right at a special session, held January 2, 1901, to amend its record, and declare the meaning of its original order; and, if not, were the proceedings

at the special meeting of January 2, 1901, legalized and confirmed by the act of 1901, supra? The act creating the State Board of Tax Commissioners fixed the times at which the board should sit, and limited the sessions thereof. The State Board of Tax Commissioners is not a court, and the rules governing the proceedings, judgments, and records of courts do not apply to it. The duties of this branch of the government service are executive and administrative only, and relate exclusively to matters connected with the public revenues. It is composed of the chief executive and administrative officers of the state, with two other persons appointed by the Governor. It cannot, as now constituted by the statute, under the Constitution, exercise any judicial functions, and its proceedings and decisions are in no proper sense judicial. It is required to keep a record, but that record is always under the control of the board, and the principal duty of that body with reference to it is to see that the proceedings are clearly and correctly entered. If, in a case like this, omissions or errors are discovered in such records, the board not only has the legal right to supply the omissions and to correct the errors at any subsequent meeting, but it is its duty to do so. The state is always presumed to be present at the meetings of such board, and, so far as any representation may be necessary, it represents all other governmental agencies of the state, such as counties and townships, which are interested in the levying, assessment, and collection of taxes. Its powers and duties are circumscribed and definite, but, within the sphere of administrative duty assigned to it, its decisions are final, except where by law they may be appealed from or reviewed by the courts. If special sessions of the state board had been held at which business was transacted, and if these special sessions were not authorized by the statute creating the board, nothing in the Constitution prohibited the Legislature from legalizing these meetings and proceedings. The act of 1901 (Acts 1901, p. 129; Burns' Rev. St. 1901, § 8550) is valid. *Everett v. Deal*, 148 Ind. 92, 47 N. E. 219; *City of Logansport v. Crockett*, 64 Ind. 319. The action of the state board in holding a special session January 2, 1901, if unauthorized, was legalized and confirmed by the act of 1901, supra. The amended record removed all doubt and uncertainty in regard to the action of the state board on the appeal of the bank, and fixed the total valuation of the property of the bank for taxation at \$133,110.

It will be observed, upon a comparison of the various orders and entries referred to, that there are many discrepancies and inaccuracies in the figures and amounts, but they are probably clerical, and in any event they do not affect the conclusion to which we have been led.

Upon the evidence, the finding should have been for the appellant, and the court erred

in overruling the motion for a new trial. The judgment is therefore reversed, with instructions to the court to sustain the motion for a new trial, and for further proceedings in conformity to this opinion.

(161 Ind. 270)

SHEAF v. DODGE.

(Supreme Court of Indiana. Oct. 13, 1903.)

ATTORNEY AND CLIENT—COLLECTIONS—FAILURE TO PAY OVER—ACTIONS—LIMITATIONS—TRUSTS.

1. Plaintiff alleged that in 1886 defendant, while employed as plaintiff's attorney to collect a certain claim, received \$5,000 in settlement of the claim, agreeing to pay plaintiff \$3,000, retain \$750 for compensation, and pay \$1,250 to other attorneys who assisted; that defendant paid plaintiff only \$2,500; and that he paid nothing to said assisting attorneys. Held, that plaintiff's claims against the defendant, both for the \$500, and the \$1,250 which defendant had promised to pay over to the other parties, were not trusts, but were money claims, for which action at law might have been brought on demand within reasonable time, and were therefore barred by the six-year statute of limitations.

2. Where a demand for performance is a condition precedent to an action, the reasonable time within which the demand must be made is the period of the statute of limitations.

Appeal from Circuit Court, Elkhart County; Jos. D. Ferrall, Judge.

Action by George W. Sheaf against Henry C. Dodge. Judgment for defendant, and plaintiff appeals. Affirmed.

Jas. D. Osborne, for appellant. J. S. Dodge and J. W. Van Fleet, for appellee.

HADLEY, J. Suit by appellant against appellee to recover money received by him as appellant's attorney, and not paid over or accounted for. The complaint was filed September 12, 1901. Appellant charges therein that the defendant is a regular, practicing attorney at law, and as such the plaintiff employed him to institute and prosecute against a railroad company an action for personal injuries, for an agreed fee, equal to one-half of the sum recovered. Pending the trial, upon the defendant's request, the plaintiff employed Johnson & Herr, practicing attorneys at law, to assist the defendant in said trial, and in consideration of which employment the defendant was to forego one-half of his stipulated fee, for the payment of Johnson & Herr. With the assistance of his said attorneys, the plaintiff in December, 1884, recovered a judgment against the railroad company for \$10,000. Pending an appeal to the Supreme Court, an offer of settlement was made by the company, by which it proposed to pay \$5,000 cash in full discharge of the plaintiff's said judgment. To induce the plaintiff, and whereby he did induce him, to accept said offer, the defendant agreed that the plaintiff should have \$3,000 of said \$5,000,

and that he would pay Johnson & Herr \$1,250, and accept the balance in full of his fee. Pursuant to said agreement the defendant did on December 6, 1886, as the plaintiff's attorney, receive and accept of the railroad company \$5,000 in satisfaction of the plaintiff's judgment, and did thereafter pay to the plaintiff \$2,500 of said money, but failed and neglected to pay the plaintiff the further sum of \$500, as he had agreed, and the same remains unpaid. Moreover, the defendant has never paid Johnson & Herr any part of their attorney's fees so agreed upon, but has kept the same. For 10 years after the defendant so received said money, he was and continued to be the attorney and business manager and confidential agent of the plaintiff, and transacted confidential business for him, and was relied upon by plaintiff for advice and counsel, and during all said time the defendant failed to inform the plaintiff that he had not paid Johnson & Herr as he had agreed. Among other things, a money judgment is prayed. The defendant's third answer pleaded the six-year statute of limitations to so much of the complaint as seeks to recover a money judgment. The plaintiff's demurrer to this answer was overruled, and this action of the court presents the only question before us.

The averments of the complaint concerning the business relations that arose and continued between the parties after the contract of employment sued on had been fully completed and terminated refer to a feature and theory of the case independent of appellant's claim and demand for a money judgment. They are not, therefore, within the issue before us, and will receive no further notice.

The question may be stated thus: Does the cause of action stated in the complaint present a demand for money, subject to the statute of limitation? This question must be answered in the affirmative unless the averments of the complaint make out such a trust as falls within the exclusive jurisdiction of a court of chancery. The trusts that are exempt from the operation of the statute are such only as have been created by express contract or judicial order or decree, and must be open and running in accordance with the provisions of the original compact or order at the time the action is commenced. "The trusts coming within this rule," said this court in *Raymond v. Simonson*, 4 Blackf. 81, "are direct trusts; technical and continuing trusts, which are not cognizable at law, but are mere creatures of a court of equity. * * * So long as such a trust as that is continuing as a trust, acknowledged or acted upon by the parties, the statute cannot apply." "But," continues the court, "there are numerous eventual and possible trusts, that are raised by implication of law, and otherwise that fall within the control of the statute. Every deposit is a trust; every person who holds money to be paid to an-

¶ 2. See Limitation of Actions, vol. 22, Cent. Dig. § 373.

other, or to be applied to any particular or specific purpose, is a trustee, and may be sued either at law or in equity; * * * and the sound rule is that the trusts not reached or affected by the statute of limitations are technical and continuing trusts, of which courts of law have no cognizance." To same effect, see *Parks v. Satterthwaite*, 132 Ind. 411, 32 N. E. 82; *Jones v. Henderson*, 149 Ind. 458, 49 N. E. 443, and cases cited; *Newsom v. County of Bartholomew*, 103 Ind. 526, 3 N. E. 163; *Stanley's Estate v. Pence* (Ind. Sup.) 66 N. E. 51 (at last term).

There is no averment of fraud, and we must treat the case as one into which no element of that kind enters.

The allegations of the complaint are to the effect that the plaintiff employed the defendant as his attorney to institute and prosecute against the railroad company a certain action for damages. The employment alleged was not a general employment to perform all services required for an indefinite or for a definite period, but to perform a single and particular service, namely, the prosecution of the plaintiff's suit to final judgment. When final judgment was rendered, the contract of employment was at an end, and the trust complete. See authorities collated in *American Digest*, vol. 5, p. 1571, § 130. As an incident of the employment, the defendant might properly receive payment from the judgment debtor, and, having done so, in the absence of an express contract that he should hold it to the plaintiff's use, his possession was that of an agent holding money due his principal, and in which case a cause of action enforceable at law arose upon an implied contract, or for money had and received, for whatever amount of it was withheld from the client. *Parks v. Satterthwaite*, 132 Ind. 413, 32 N. E. 82. "The liability of an attorney for money of his client," says an eminent author, "which has come to his hands, in the absence of fraud, is simply that of an agent or factor, and creates a simple-contract debt only." *Wood on Limitation*, § 18. Then conceding it to be the law that a statute of limitation does not begin to run until a right of action has accrued, and conceding further that, under the rule adopted in this state, an action will not lie against an attorney for money collected by him until after a demand and refusal (*Claypool v. Gish*, 108 Ind. 424, 9 N. E. 382), still there confronts, to the appellant, a more serious rule, namely, that, in all cases where a right of action depends solely upon a demand for performance, such demand must be made within a reasonable time; and a reasonable time has been adjudged to be the period of the statute of limitation. *High v. Board*, 92 Ind. 580; *Newsom v. County of Bartholomew*, 103 Ind. 526, 3 N. E. 163. It is averred in the complaint that appellee received the \$5,000 from the railroad company on December 6, 1886, and thereafter paid appellant \$2,500 thereof, but

failed and neglected to pay him the additional \$500 as he had agreed. By appellant's own averments, he knew that appellee had received from the railroad company the amount agreed upon in satisfaction of his judgment, of which amount \$3,200 was coming to him, and when he received the \$2,500 he knew that appellee had in his hands and withheld \$500 more due him pursuant to his employment and agreement, and which he might have upon the instant demanded, and set the statute of limitations going. If he failed to make the demand at that time, and stood by for 14 years, or for any period beyond 6 years, without making it, he thereby became estopped from making it at all, and a demand subsequently made would be unavailing in entitling him to an action. The answer, therefore, setting up that the action did not accrue within 6 years, exhibited a sufficient defense to the claim for \$500.

With respect to appellee's undertaking to pay Johnson & Herr \$1,250 of the money received, appellant is in no better situation to recover. Appellee made the promise after the money had been received from the railroad company, and, while in the act of accounting with appellant, agreed, without any new consideration, and upon the request and direction of appellant, to deliver \$1,250 of the money to Johnson & Herr in payment of appellant's debt. The promise was purely voluntary, and, until accepted by Johnson & Herr, was subject to be repudiated, or rescinded by either party. Under the averments of the complaint, the money was never paid to Johnson & Herr; neither did the latter ever accept appellee's promise. It was therefore at all times within the power of appellant to have annulled the arrangement to pay to Johnson & Herr, and demanded payment to himself, and thus have completed his right to sue at law and recover it of appellee as for money had and received. *Johnson v. Central Trust Co.*, 159 Ind. 605, 610, 65 N. E. 1028, and cases cited. Appellant cannot exonerate himself of laches by pleading and proving ignorance of nonpayment. No want of knowledge will excuse him that was not induced by appellee's false representations or concealment. There is no claim that false representations were made. The averment is that "during all said time the defendant failed to inform the plaintiff that he had not paid said money over to Johnson & Herr." We will assume, because not alleged to the contrary, that appellee was not at any time asked to give information upon the subject, and his failure to volunteer it was not concealment. Hence, as to the \$1,250 item, appellant, having failed to demand payment to himself within the period of six years after he might have perfected his right of action by so doing, subjects his claim to the interposition of the six-year statute of limitation, and the demurrer to the third answer was properly overruled.

Judgment affirmed.

(161 Ind. 292)

GINN v. STATE.

(Supreme Court of Indiana. Oct. 15, 1903.)

HOMICIDE—CONFESSIONS—HARMLESS ERROR—
TRIAL—INSTRUCTIONS—EVIDENCE—
TIME FOR OBJECTION.

1. Error assigned in the giving of instructions as an entirety is ineffective unless all the instructions were erroneous.

2. It is not error to refuse instructions the substance of which is embodied in instructions given by the court of its own motion.

3. Under Burns' Rev. St. 1901, § 1871 (Horner's Rev. St. 1901, § 1802), providing that the confession of a defendant, made under inducement, with all the circumstances, may be given in evidence against him, except when made under the influence of fear produced by threats, a confession voluntarily made by defendant in a private conversation with one not an officer, after defendant was arrested and taken before a justice of the peace, was admissible.

4. Objections to evidence not made until after the questions asked the witness were answered were too late.

5. Where evidence is admitted without objection, a subsequent motion to strike it out is too late.

6. Where, on trial for murder, evidence tending to prove premeditation and malice was erroneously admitted, but malice was established by other competent evidence, and defendant was convicted of murder in the second degree only, the error was harmless.

Appeal from Circuit Court, Henry County; Wm. O. Barnard, Judge.

Vincent Ginn was convicted of murder in the second degree, and appeals. Affirmed.

William A. Brown, for appellant. Ed Jackson, Pros. Atty., C. W. Miller, Atty. Gen., W. C. Geake, C. C. Hadley, and L. G. Rothschild, for the State.

MONKS, C. J. Appellant was charged by indictment with the crime of murder in the first degree. A trial of said cause resulted in a verdict of murder in the second degree, and over a motion for a new trial final judgment was rendered thereon. The only errors assigned and not waived call in question the action of the court in overruling appellant's motion for a new trial. Counsel for appellant insist that two instructions given by the court were erroneous, while the correctness of the other instructions given is not questioned in their brief. The motion for a new trial challenged the correctness of all the instructions given by the court as an entirety, the same as in Crawford v. State, 155 Ind. 692, 696, 57 N. E. 931. It has been uniformly held by this court that, unless all the instructions so challenged were erroneous, such an assignment is not effective, and must fail. Crawford v. State, 155 Ind. 692, 696, 57 N. E. 931; Masterson v. State, 144 Ind. 240, 246, 43 N. E. 138, and cases cited; Conrad v. State, 144 Ind. 290, 297, 43 N. E. 221; Hannan v. State, 149 Ind. 81, 47 N. E. 623. Said cause for a new trial must therefore fail.

It is urged that the court erred in refusing to give instruction No. 2 requested by ap-

pellant. As the substance of said instruction was given by the court of its own motion in its own language, it is well settled that no available error was committed in refusing to give the same. Rains v. State, 137 Ind. 83, 91, 36 N. E. 532, and cases cited; Delaney v. State, 115 Ind. 499, 501, 18 N. E. 49, and cases cited; Stephenson v. State, 110 Ind. 358, 374, 11 N. E. 360, 59 Am. Rep. 216, and cases cited; Musser v. State, 157 Ind. 423, 446, 61 N. E. 1, and cases cited.

After the arrest of the appellant he was taken before a justice of the peace, where, in a private conversation with one Doyle, a person not in authority, he made a confession. At the trial in the court below, the state was permitted by the court, over the objection of the appellant, to give this conversation in evidence. Appellant insists that said ruling of the court was erroneous. It is provided by statute that "the confession of a defendant made under inducement, with all the circumstances, may be given in evidence against him, except when made under the influence of fear, produced by threats; but a confession made under inducement is not sufficient to warrant a conviction without corroborating testimony." Section 1871, Burns' Rev. St. 1901 (section 1802, Rev. St. 1881; section 1802, Horner's Rev. St. 1901). There was no evidence that the confession made by appellant to said Doyle was made under the influence of fear or threats. On the contrary, it appeared that the confession was voluntary. It is clear that said confession was admissible. Gillett's Crim. Law (2d Ed.) §§ 852-804; Walker v. State, 136 Ind. 663, 36 N. E. 356; Palmer v. State, 136 Ind. 393, 397, 36 N. E. 130; Hauk v. State, 148 Ind. 238, 251, 252, 46 N. E. 127, 47 N. E. 465, and cases cited. In Hauk v. State, 148 Ind. 252, 46 N. E. 131, this court said: "A confession by a person accused of a crime is presumed to be voluntarily made until the contrary is shown."

Appellant urges that the court erred in permitting the state to prove "that as much or more than one hour after the transaction, and in the absence of the appellant, that the water valve out in the millyard, some distance away from the mill, had been so turned as to shut off the supply of water from the boilers in the mill," because "not a part of the res gestae." Counsel for appellant, in compliance with rule 22 of this court (55 N. E. v.), have set out in their brief what purports to be a copy of that part of the bill of exceptions containing said testimony, and the objections and exceptions of appellant thereto, and the ruling of the court thereon. It appears therefrom that the only specific objections to said testimony urged on the appeal were made after the questions propounded to the witness had been answered. The objections, not being seasonably made, present no question. Afterwards the court overruled appellant's motion to strike out said testimony. It has been uniformly held

¶ 5. See Criminal Law, vol. 14, Cent. Dig. § 1640.

by this court that, when evidence is admitted without objection, it is not error to overrule a subsequent motion to strike it out, for the reason that such motion comes too late. *Lake Shore, etc., R. R. Co. v. McIntosh*, 140 Ind. 261, 280, 38 N. E. 476; *Gurley v. Park*, 135 Ind. 440, 443, 35 N. E. 279; *Brown v. Owens*, 94 Ind. 31, 34; *Bingham v. Walk*, 128 Ind. 164, 173, 27 N. E. 483; *Chicago, etc., R. R. Co. v. Champion*, 9 Ind. App. 510, 525, 36 N. E. 221, 37 N. E. 21, 53 Am. St. Rep. 357. If said evidence was admissible, it was only on the theory that it tended to prove the allegations of premeditation and malice contained in the indictment. As the appellant was acquitted of the charge of murder in the first degree, and there was other undisputed evidence which clearly established the allegation of malice, it is evident that, even if said objections had been seasonably made, the error, if any, in admitting the evidence was harmless, and did not constitute reversible error. *Pigg v. State*, 145 Ind. 560, 564, 565, 566, 43 N. E. 309, and cases cited; *Shields v. State*, 149 Ind. 395, 404, 49 N. E. 351; *Hart v. State*, 149 Ind. 585, 49 N. E. 580; *Robbins v. Masteller*, 147 Ind. 122, 125, 46 N. E. 330; *Naugle v. State*, 101 Ind. 284, 286; *Citizens' State Bank v. Adams*, 91 Ind. 280, 288; *Holliday v. Thomas*, 90 Ind. 398, 402; *Stumph v. Miller*, 142 Ind. 442, 444, 445, 41 N. E. 812; *Parmlee v. Sloan*, 37 Ind. 469; *Snell v. Maddux*, 20 Ind. App. 169, 172, 173, 49 N. E. 856.

Upon a careful examination of the evidence we are satisfied that the verdict was clearly right, that a correct result was reached, and that no reasons exist for a reversal of the judgment. Judgment affirmed.

(162 Ind. 580)

STATE ex rel. MOORE v. BOARD OF
COM'RS OF CLINTON COUNTY
et al.¹

(Supreme Court of Indiana. Oct. 15, 1903.)

MANDAMUS—RAILROADS—ENFORCEMENT OF
PUBLIC AID—PARTIES ON APPEAL—PROPRIETY
OF REMEDY—RES JUDICATA—JUDGMENT
—VARIANCE IN PLEADING—NATURE OF AID
—RIGHT OF RECOVERY—CONCLUSIVENESS
OF JUDGMENT—SCOPE OF ISSUES.

1. On appeal in mandamus against a board of county commissioners it is not necessary to serve with process and make parties to the appeal new incumbents of the office of commissioner; *Burns' Rev. St. 1901, § 1182*, authorizing mandamus against any inferior tribunal, "board," etc.

2. A taxpayer petitioned the board of county commissioners to cancel aid previously voted to a railroad. Another taxpayer filed a cross-petition asking that the levy be enforced. On appeal the circuit court entered judgment refusing petitioner's relief, adjudging the railroad entitled to the appropriation, directing the board to order the treasurer to enforce the levy, and directing the treasurer and auditor to collect the tax. On appeal to the Supreme Court, that body, while affirming the judgment generally, and in its opinion recognizing the order fixing the taxpayers' liability for the tax, held that the directions to the board and county officers were void, because they were not parties

to the cross-petition. Subsequently, in suits between other parties, this decision was reversed. *Held* that, though the erroneous decision still remained the law of the case, it would be regarded as affecting only the orders for the collection of the tax, and therefore, the right to the aid having been generally affirmed, mandamus might be resorted to to compel the board to collect the tax.

3. It is not a variance that in pleading a judgment portions are omitted which have been vacated on appeal.

4. One who is a taxpayer at the time of commencing mandamus to enforce the collection of a railroad aid tax has sufficient interest to maintain the action.

5. Where a railroad's right to receive a tax in aid thereof previously voted and levied has been judicially determined on petition to the board of county commissioners and appeal therefrom, a taxpayer seeking to enforce the collection of the tax is not required to again petition the board, and appeal from its decision if adverse, but may institute mandamus.

6. A petition to a board of county commissioners for an election to vote railroad aid specified a "donation or a taking of stock." The board ordered an election on the subject of "appropriating" a certain sum. The notice of election stated the vote was to be taken on aiding the railroad by "donating" money. The order of the board for the collection of the tax recited that a majority had voted in favor of "an appropriation." *Held*, that the fact that the people voted on the question of a donation settled the form of the aid to be extended, and the aid was properly pleaded as a donation.

7. After a judicial decision favorably determining a railroad's right to receive aid previously voted, the board of county commissioners made an order directing the collection of the suspended tax. About a year later it made another order setting aside the first, which operated in fact to prevent the auditor from proceeding with the collection. *Held*, that mandamus would lie to compel the entry of a new order directing the collection of the tax, and relator was not reduced to the alternative of either appealing from the second order or else ignoring it, and relying on the first as still in force.

8. The burden of showing any other orders still more recent was on the board, as a matter peculiarly within its own knowledge.

9. The decision of a board of county commissioners on petitions of taxpayers was adverse to a railroad's right to receive aid previously voted. On appeal this was reversed, and the railroad's right favorably determined, no issue having been raised that former adjudications by the board had exhausted its jurisdiction. *Held*, that the judgment of reversal was conclusive of such issue, and could not be collaterally attacked as coram non judice.

10. In an opinion affirming a judgment favorable to a railroad's right to receive public aid previously voted, and for which a tax had been levied, the Supreme Court remarked that it was not necessary to sustain the judgment that it should appear that the company had expended a sum equal to the donation in construction within the township. *Held*, that this was merely a determination that the burden on that issue was on the taxpayers who had originally petitioned for a cancellation of the tax, rather than on cross-petitioners, who had asked its enforcement; and did not amount to a determination that the judgment in favor of the letter was invalid.

11. Taxpayers petitioned a board of county commissioners to cancel a railroad aid tax. Others filed cross-petitions asking its enforcement. On appeal from the board's decision judgment was rendered against the original petitioners and in favor of the cross-petitioners.

¹ See *Mandamus*, vol. 23, Cent. Dig. §§ 55, 56.

² Rehearing denied, 70 N. E. 373, 984.

Held, that criticisms of the latter judgment as not supported by the cross-petition were futile, the judgment against the original petitioners having settled the company's right.

12. After a railroad's right to receive public aid previously voted, and for which a tax had been levied, has been judicially determined, no issues are open on mandamus to compel collection of the tax, except as to the form of the proceedings which shall be directed.

Appeal from Circuit Court, Montgomery County; Jere West, Judge.

Mandamus by the state of Indiana, on the relation of William R. Moore, against the board of commissioners of Clinton county and others. Judgment for defendants, and relator appeals. Reversed.

Wm. R. Moore, A. W. Hatch, F. Winter, and Clarence Winter, for appellant. Martin A. Morrison, Crane & Anderson, and Gavin & Davis, for appellees.

GILLETT, J. Action by way of mandate to compel the board of commissioners of Clinton county to order the placing upon the duplicate of a tax that had theretofore been levied in aid of a railroad company, but which had been suspended until the completion of the railroad. March 5, 1878, a petition was filed before the board of commissioners of said county for the submission to the voters of Center township therein of a proposition to aid the Frankfort & State Line Railroad Company. Such proceedings were afterwards had that pursuant to an election a tax was levied by said board. April 29, 1886, one David P. Barner, a freeholder, and more than 25 other freeholders of said township, filed with said board a petition asking that the aid so voted be canceled, for the reason "that said railroad company had not within five years expended in the construction of said road in said township an amount equal to the aid so voted." Due notice of said petition was given, and on June 16, 1886, one Samuel O. Bayless, a resident taxpayer of said township, appeared, and filed a cross-petition in said proceeding, alleging, in substance, the voting of said aid; that said railroad company, within the time required, had done an amount of work in the construction of said railroad in said township equal to the amount of the aid so voted, and had fully completed its entire line in said township and county. His petition concluded with a prayer that said board order said tax collected as if the collection thereof had never been suspended. Both said Bayless and said railroad company filed an answer to the petition of Barner and his associates, and they joined issue with said Bayless upon his cross-petition. A trial before the board resulted in a judgment canceling said tax and aid, and from said judgment Bayless and the railroad company appealed. Pending the appeal the Western Construction Company was made a party on its own application, and filed an intervening petition. The case was ultimately sent on change of venue to the White circuit

court, and said court, after a trial, rendered judgment that the petitioners Barner et al., were not entitled to any relief; that said railroad company, by expending a sum of money in excess of \$20,000, had "according to law, earned said sum of twenty thousand dollars local aid voted by the taxpayers of said Center township in favor of said railroad company"; that said construction company had acquired the right to said appropriation by assignment; and directing that the board of commissioners of said county of Clinton enter upon its records an order requiring that said tax be immediately collected by the treasurer of said county, as though the same had never been suspended. Further orders were made in said judgment upon the auditor and treasurer of said county as to the steps they were respectively required to take to collect and pay over said aid. From said judgment said petitioners prosecuted an appeal to this court, where said judgment was affirmed. *Barner v. Bayless*, 134 Ind. 600, 33 N. E. 907, 34 N. E. 502. In the course of the opinion in that case it was said: "Many of the questions discussed by counsel in their briefs, when applied to this case, are of no importance whatever. The board of commissioners of Clinton county was not a party to the cross-complaint of Bayless, nor was the county auditor or county treasurer such party. They were not parties to this suit in any sense. It is plain, therefore, that any order the court may have made in this case in relation to the collection of the tax in controversy was a mere nullity, for the reason that no party was before the court upon whom such an order could operate. Such order could not affect the appellants, because they had no power to execute it; nor were any orders made by the court affecting them beyond fixing their liability for the tax which they were seeking to avoid. Nor does the order of the court directing that the tax, when collected, be paid over to the appellee, the Western Construction Company, in any manner affect the appellants. If they are compelled to pay the tax in controversy, it is immaterial to them whether it is paid over to the railroad company or to the construction company which performed the labor of constructing the railroad. Stripped of these immaterial matters, we reach the controlling question in the case, and that is the question as to whether the railroad company had expended, in Center township, in the actual construction of its road, a sum equal to the donation voted by the township. This was the question for trial before the circuit court. As a question of fact, it was hotly contested, and the evidence relating to it was conflicting. The court hearing the evidence reached the conclusion that the company had expended, in the actual construction of its road in Center township, a sum largely in excess of the amount of the donation in controversy. With this conclusion we have neither the power nor the inclination to interfere."

After said case was disposed of on appeal to this court, said Bayless and the Western Construction Company instituted contempt proceedings against the members of said board and the auditor and the treasurer of said county in the White circuit court, charging that said officers had failed to carry out the provisions of said judgment after a certified copy of the same had been served upon them. Upon a hearing said officers were committed by said court, and they appealed to this court, and here secured a reversal of said judgment. *McKinney v. Frankfort & State Line Co.*, 140 Ind. 95, 38 N. E. 170, 39 N. E. 500; *Davis v. Bayless*, 140 Ind. 700, 38 N. E. 400. The ground of reversal, as expressed in the *McKinney* Case, seems to have been that the officers were not subject to proceedings for contempt in failing to obey the directions of a judgment to which they were not parties; but it was stated by this court in ruling on the petition for a rehearing in said cause, that, "If the appellant refused to discharge a duty enjoined upon him by law, a proper remedy was provided to compel him, upon his failure, to show sufficient cause for his refusal." Subsequent to the disposition of said causes, the relator herein commenced a proceeding by way of mandate against the auditor and treasurer of said county to compel them to proceed to collect the tax. A demurrer was addressed by the defendants in said action to the application and alternative writ. The demurrer was sustained, and final judgment rendered against said relator. The latter appealed to this court, but the judgment was affirmed. *State ex rel. Moore v. Burgett*, 151 Ind. 94, 51 N. E. 139. In the latter case a somewhat different view seems to have been taken from that expressed in *Barner v. Bayless*, supra, as to the effect of the judgment against the board of commissioners; but the rulings or statements of this court in the *Barner* Case were not pleaded in the *Burgett* Case, and this court held that it could not take judicial notice of said decision. As neither the taxpayers nor the appellee herein were parties to the *Burgett* Case, the rulings of this court in the opinion therein rendered have not become the law of the case, but, as they accord with our present view, we quote the following from the opinion therein rendered: "Under the provisions of section 7865, Burns' Rev. St. 1894 (section 5778, Hörner's Rev. St. 1897), the White circuit court was authorized to make a final determination of the proceedings appealed from, and cause the same to be executed; or it had the power to send the same down to the board with orders how to proceed, and require such board to comply with the final determination made by the court in the premises. The White circuit court found that the railroad company had, within the proper time, expended in the construction of its road in said township more than the amount of the aid voted, and had

fully complied with all the requirements of the statute; and said court was fully authorized to render final judgment ordering 'that said tax be collected at once, the same as though the same had never been suspended.' It is not alleged, however, in the application or alternative writs, that the White circuit court rendered such judgment; but, on the contrary, it is alleged that said court rendered judgment that 'the board of commissioners of said county of Clinton, in the state of Indiana, shall enter upon its record an order requiring that said tax be immediately collected by the treasurer of said county as though the same had never been suspended.' It, in effect, as it was fully empowered to do, sent the same down to the board of commissioners of said county, with orders that such board enter such final order and judgment. This order was binding on the board of commissioners of Clinton county as a judicial body, and they were required to make and enter such order and judgment as directed, the same as a circuit court is required to perform and execute the orders and mandates of this court made in a case appealed from such court. It is not necessary, in order to bind an inferior court in a case appealed from it, that the member or members thereof should be made parties to the case on appeal. Until said order of the White circuit court is entered by the board of commissioners of Clinton county on its records, appellant cannot claim or assert any rights thereunder against appellees. It is not averred that the board of commissioners of Clinton county ever entered said order on its records. Such allegation was necessary to render the application and alternative writ sufficient to withstand the demurrer."

As to the pleadings in this case, they consisted of four paragraphs of petition, with accompanying alternative writs, the general denial, the 15 years statute of limitations, and a reply thereto. Upon the conclusion of appellant's evidence, the court directed a verdict against it, and upon the return of said verdict rendered final judgment thereon. We have set out the greater part of the evidence above, and in connection with such further statements as to the evidence as hereinafter appear a sufficient understanding of the facts can be had. The question as to the propriety of the court's instruction is duly presented, and it is also assigned as error that the court overruled the demurrer to appellee's plea of the statute of limitations.

A preliminary question has been presented by a motion to dismiss the appeal, assigning as a reason that appellant has failed to make parties to this appeal, and to serve with process, the individual members of the board of commissioners who were inducted into office subsequent to the rendition of the judgment in the court below. An affidavit was filed in support of said motion. It is contended on behalf of appellant that the board, in its

collective capacity, was the sole defendant below and appellee here, and that the members thereof were only mentioned as showing the officers against whom the writ was to run. We incline to this view, but, if this be wrong, it does not follow that the appeal should be dismissed. If the individual members of the board had been the sole defendants in the case, there would have been a fair basis for the argument that upon an appeal from a judgment in their favor, which would, in effect, be a judgment in favor of the officers, their successors should have been served with process, if not made parties appellee. *Schrader v. State ex rel.* (Ind. Sup.) 61 N. E. 721; *Elliott, Appellate Procedure*, § 153. While it may be true that for most purposes there is wanting authority under section 7820, Burns' Rev. St. 1901, to sue a board of county commissioners, except concerning a matter pertaining to its corporate affairs, or for an act done in its corporate capacity, yet it is provided by statute that writs of mandate may be issued to any inferior tribunal, corporation, board, or person to compel the performance of any act which the law specially enjoins, or a duty resulting from an office, trust, or station (section 1182, Burns' Rev. St. 1901); and this, we think, in view of the practice that existed before the enactment of the statute, warrants the conclusion that it was the legislative purpose to authorize the issuing of writs of mandate against boards of commissioners to compel the performance of ministerial duties generally. It was sufficient, in our opinion, to make either the board, as such, or all of the members thereof, parties. *Wren v. Indianapolis*, 96 Ind. 206. As the board was a party defendant below and is an appellee here, and has been served with process, it is evident that it is in a position to urge every available ground that may exist in support of the judgment below. If the individual members of the board in their official capacities can be said to have been parties below, it is clear that the assignment of errors continues them as parties here. The judgment was in favor of the officers, rather than in favor of the individual incumbents of the offices. *Wolfe v. Peirce*, 23 Ind. App. 591, 55 N. E. 872. While it is true that the new members of the board have not been served with process, yet, as the board in its collective capacity is a party, and can offer all available grounds of defense, we think that to dismiss the appeal on the ground suggested would be to pursue a technicality beyond the vanishing point. In any possible view as to who were made parties below or here, it appears that this court has jurisdiction authorizing it to adjudicate every question presented on this appeal between all the parties, and this is sufficient. *Wren v. City of Indianapolis*, supra; *Wolfe v. Peirce*, supra. The motion to dismiss the appeal is overruled.

We now proceed to a consideration of the

principal case. Accepting the view of counsel for appellant that the duty herein sought to be enforced is a duty that has its origin in the judgment of the White circuit court, and that the statute could not begin to run until the disposition of said case in this court, we think, nevertheless, that the plea of the 15-year statute of limitations was sufficient. Whether said plea would be borne out by the facts is a question that is not presented.

Taking up the question as to whether the facts alleged and proved by appellant stated and showed a cause of action, we have first to observe that the theory on which the alternative writs in this case proceed is that the appellee board is charged with a duty to order the collection of the suspended tax by reason of what was adjudicated by the White circuit court. That court having decided the meritorious questions involved, and its judgment having been affirmed by this court, it would seem, upon superficial consideration at least, that the award of the White circuit court should be performed; but, as appellee's counsel have suggested many reasons which appeal to them as sufficient to uphold the result below, we regard ourselves as called upon not only to decide all of said points, but to particularly express our views as to a majority of them.

After a consideration of the objections urged against said proceedings, but before writing upon them, we may say that it is our judgment that but one serious question can exist as to the effect of said judgment as res adjudicata, and that question grows out of the declaration of this court, upon appeal from such judgment, that the board of commissioners was not bound thereby, because it was not a party thereto. The correct view upon this subject is expressed in *State ex rel. Moore v. Burgett*, supra. The declaration in the *Barner Case*, although incorrect, remains the law of the case, from which the parties cannot now escape; but we should not extend an erroneous declaration of the law beyond what is required. It is true that the opinion in said case declared that the orders made in relation to the collection of the tax were nullities for the assigned reason that the officers were not before the court, and therefore there was no one upon whom such orders could operate; but this court, in the opinion mentioned, recognized and did not disturb the orders made by the White circuit court against the petitioners, "fixing their liability for the tax." It is also to be considered that the opinion was followed by a general judgment of affirmance. Most questions were therefore settled against the appellants to that appeal, and the decision of such questions has also become the law of the case. Giving to the erroneous declaration of law the narrowest limits necessary to fairly comport with its language, and it results that it must be held that it was, in effect, declared and settled that all questions of de-

tail with reference to the enforcement and collection of the tax were still open. The judgment not only settled the question of performance on the part of the railroad company, but also the question as to the right to have steps taken to enforce and collect the necessary tax. Provision is made by statute for a public notice of the pendency of a proceeding to cancel an aid voted by a township, and we think that the result of a proceeding under such a statute is to conclude all persons in interest as to questions which might have been properly litigated under the issues tendered by the petitioners. Persons brought in under the notice provided by statute in such a case may file a cross-petition setting up matters germane to the original petition, and obtain affirmative relief. See *Stoner v. Rice*, 121 Ind. 51, 22 N. E. 968, 6 L. R. A. 387. The conditions of the appropriation having been shown to have been performed by the railroad company, the suspended tax ought to have been ordered collected; and as the same statute that provides for the hearing of the application to cancel has also provided that upon performance the commissioners are to order the collection, we think that the granting of such relief upon a cross-petition was clearly authorized. As the result in the circuit court was one that might have been reached under the issues, and as it concluded all persons having an interest as to the right to have the tax ordered collected, we are unwilling to hold that the board of commissioners—the mere tribunal or agency to effectuate a proper result—can contend concerning questions that are settled against all of the taxpayers. It is our view that by reason of the former decision there only remains open the question as to the provisions that should be made for the collection and paying over of the tax. It may be admitted that under our ruling but routine matters remain to be determined, and that, with all else settled, the duty of the board in the premises is clear; but the fact that this result is obtained ought not to lead us to accord any broader operation to a wrong decision. In our opinion, as the judgment of the White circuit court has settled the question as to the right to have a tax levied against the township, and as that court is now prevented from enforcing its judgment by reason of a declaration of this court on appeal that rendered the provision made nugatory, there is sufficient reason for holding that such judgment as it now stands creates a duty upon the part of the board that can be enforced by writ of mandate. The taxpayers are concluded on all points except as to the orders against the officers by the result of the *Barner Case*, and to the extent that the taxpayers are concluded it must be held that the board cannot refigt the old battle. Upon the points upon which the decision in said case remained *res adjudicata*, after the disposition thereof in this court, it must still so remain, and from the

establishment of such facts by an adjudication that binds all interested parties flows the privilege of enforcing the right as against the board whose lawful duty it is to accord such right.

It is claimed by counsel for appellee that there is a variance between the allegations of the various paragraphs of the writ and the judgment rendered. There is no such variance between the fourth paragraph and the transcript of the judgment offered in evidence. Whatever is omitted from the judgment as alleged in said paragraph is what appellee's counsel contend was subtracted from the judgment by the declaration of this court on appeal. It is not a variance, however, that the judgment as rendered contained further provisions than those pleaded. The description of the judgment in the writ was correct as far as it went. Whether there was a variance between the evidence and any other paragraph of writ, and whether appellee could be heard to urge the question as to a variance here, are questions that it is not necessary to decide.

We do not think that the judgment of the White circuit court that was pleaded and proved was without the issue. Even if the money was spent on an extension of the road within the township, yet it was a question of law for the White circuit court whether this was a performance within the issues; and, besides, it was adjudged on appeal to this court from said judgment that, independently of said question, the finding of the White circuit court was right. It must also be borne in mind that the finding and judgment of the White circuit court was against the petitioners upon their petition, and this amounts to an affirmance of the converse of the allegations of said petition as to the failure to spend an amount of money equal to the appropriation in the construction of the road in the township within the time provided by law.

As to the claim that relator was without interest, earlier decisions have settled the proposition that the question is one between the taxpayers. *Board of Com'rs Crawford Co. v. Louisville, etc., R. Co.*, 39 Ind. 192; *Sankey v. Terre Haute, etc., R. Co.*, 42 Ind. 402; *Jager v. Doherty*, 61 Ind. 528. It is our view that such tax as is collected should be collected from the entire property of the township as of the date when the board makes the order sought to be enforced in this proceeding, and it is therefore sufficient if the relator be a taxpayer at the time of the institution of the action. The Legislature evidently did not contemplate that a case would arise where there would be unnecessary delay in the collection of the tax. This consideration explains some of the provisions of section 5369, *Burns' Rev. St.* 1901, but it is evident from the whole course of the enactments that it was intended that whenever such a tax was collected it was to be from the whole body of the township, and not as

special assessments. See *Lake Shore, etc., R. Co. v. Smith*, 131 Ind. 512, 31 N. E. 196.

After the judgment was recovered in the original action, relator was not obliged to refile the demand for the collection of the tax before the board, and to appeal in case it decided adversely. The proceeding originally was judicial in its nature, but, after all questions having in them the element of judicial discretion had been eliminated by the adjudication against the taxpayers, there remained but a ministerial duty for the board to perform; that is, to order the suspended tax collected. *Carroll v. Board of Police*, 28 Miss. 38; *McKinney v. Frankfort & State Line Co.*, supra.

It is contended that the writ alleges that there was a donation of stock to the railroad company, while the petition which was filed before the board provided for a donation or a taking of stock. Waiving the question as to the effect of the former adjudication, we proceed to examine the point made. The petition was in form as stated: The board ordered an election "for the purpose of taking the votes of the legal voters of said township upon the subject of appropriating twenty thousand dollars in money by said township for the purpose of aiding in the construction of the Frankfort and State Line Railroad, as prayed in the foregoing petition." The notice of the holding of the election stated that the vote was to be taken "upon the subject of said township aiding the Frankfort and State Line Railroad Company in the construction of a railroad into said township by donating money to said company to the amount of twenty thousand dollars, as provided by an act," etc. The sheriff's notice was to the same effect. The subsequent order of the board for the collection of the tax recited that a majority of the legal voters of the township voted in favor of "an appropriation," and ordered the collection of a tax for the purpose of aiding said railroad company. In a case of this kind, where the petition and the commissioners' order are ambiguous, but the people vote on the distinctive proposition to make a donation, we think that their vote settles the nature of the aid to be extended. *Faris v. Reynolds*, 70 Ind. 359; *Lafayette, etc., R. Co. v. Geiger*, 34 Ind. 185. As said in the former case: "The people of a township, who vote this tax upon themselves, should have the right, and, as we think, have the right, under the law, to determine by their vote the manner in which the money shall be used—whether by donation of the money or by taking stock in the company. They may be supposed to know what their interests in the matter may be quite as well as the board of commissioners of the county."

It appears that after the judgment was rendered by the White circuit court in the main case, the board met, and ordered the suspended tax collected, and that about a year later it made an order setting aside said

former order and declaring it void. It is now insisted by appellee that, if the latter order was entered without jurisdiction, it did not affect the prior order, while, if there was jurisdiction to make the subsequent order, appellant should have appealed therefrom. Appellee's last order, as the record in this case shows, practically operated to prevent the auditor from putting the tax on the duplicate, and it is hardly conscionable for appellee to insist upon the invalidity of such order, as it is not willing to concede that the former order is still operative. In point of law it is probable that the second order was void, but we hold that, as the record stands, relator had a right to require the entering of a new order.

The conduct of the board when demand was made of it, as well as the long course of litigation, warranted the inference that it had not made any other order concerning the collection of the tax except as above mentioned. If it had, we think that, as a matter peculiarly within its own knowledge, it should have offered affirmative evidence upon the subject, instead of insisting that relator should prove negatively that no order had been made for the collection of the tax after the making of the entry last mentioned. See *Shearer v. State*, 7 Blackf. 99; *Stevenson v. State*, 63 Ind. 409.

It is claimed that the record introduced in evidence shows that prior to the proceedings on which the judgment in the White circuit court was based there had been two adjudications by said board against the right to have the tax collected, and that, therefore, the board had exhausted its power to further consider said claim. Waiving all question as to the issues here, it is a sufficient answer to this proposition that no such issue was tendered in said former case, and, as the question as to the right to have the tax collected was determined against the taxpayers therein, the relator here is entitled to the benefit of the later adjudication. We cannot sanction the view that a judgment is to be regarded as a nullity for the reason suggested in a case where the board was acting judicially, with jurisdiction over the parties and over the class of actions to which the particular case belongs, where nothing appears in the record to suggest any defect of jurisdiction.

We think that the record does not bear out the claim that the Carroll circuit court did not grant a new trial to the cross-complainants. The record shows that the court "grants a new trial herein." The claim that a new trial was granted to the defendants, and not to them as cross-complainants, is also contradicted by the further proceedings in the cause.

We think that the court erred in directing a verdict in appellee's favor.

We now proceed to a consideration of the cross-errors assigned by appellee respecting the rulings below on the pleadings. We are

of the opinion that the various paragraphs of alternative writ were sufficient for reasons heretofore expressed. There was no available error in the sustaining of a demurrer to appellee's paragraphs of answer numbered from 2 to 23, both inclusive. The matters pleaded in certain of said paragraphs would have been admissible under the general denial. Upon only two points do we feel justified in further expressing ourselves. The fact that this court stated in its opinion on the petition for a rehearing in the Barner Case that it was not necessary to sustain the judgment that it should appear that the railroad company had expended a sum equal to the donation in the construction of its road in the township, does not amount to a determination that the adjudication in favor of Bayless was invalid. Barner and his copetitioners were alleging in substance that the railroad company had not expended a sum of money in the construction of its road in said township equal to the donation within the time required by law. Bayless affirmed the contrary in his cross-petition. This court merely held in that particular that the burden was on the original petitioners.

In a number of paragraphs of answer appellee alleges as facts matters which were adjudicated to the contrary by the judgment of the White circuit court. Counsel for appellee attempt to dissect that judgment in the effort to show that it does not respond to the averments of the cross-complaint, forgetting, apparently, the force of the adjudication against the taxpayers under the petition to cancel. Nor are we the more impressed with the effort to now bring forward matters of defense that were not made grounds of defense in the former case. As to what may be termed the direct defenses, at least, if a party holds them back when he is sued, he is not at liberty to assert them afterwards. *Faught v. Faught*, 98 Ind. 470; 24 Am. & Eng. Ency. of Law, 781, 782.

In concluding this opinion we quote, as much in point, so far as principle is concerned, the following from the opinion of the Supreme Court of the United States in the case of *County Court of Ralls County v. United States*, 105 U. S. 733, 26 L. Ed. 1220: "In the return to the alternative writ many defenses were set up which related to the validity of the coupons on which the judgment had been obtained, as obligations of the county. As to all these defenses it is sufficient to say it was conclusively settled by the judgment which lies at the foundation of the present suit that the coupons were binding obligations of the county, duly created under the authority of the charter of the railroad company, and as such entitled to payment out of any fund that could lawfully be raised. It has been, in effect, so decided by the Supreme Court of Missouri in *State v. Rainey*, 74 Mo. 229, and the principle on which the decision rests is elementary. The present suit is in the nature of an execution,

and its object is to enforce the payment, in some way provided by law, of the judgment which has been recovered. The only defenses that can be considered are those which may be presented in the proper course of judicial procedure against the collection of valid coupons executed under the authority of law and reduced to judgment. While the coupons are merged in the judgment, they carried with them into the judgment all the remedies which in law formed a part of their contract obligations, and these remedies may still be enforced in all appropriate ways, notwithstanding the change in the form of the debt." The above case, in substance, expresses our view here. This action is in the nature of an action to obtain what might be termed an execution on the judgment of the White circuit court, and it is only as to matters that relate to the question as to the form of the execution that are longer open to controversy.

We find no available error against appellee, but because of the overruling of appellant's motion for a new trial the final judgment will have to be reversed, with a direction to grant a new trial. It is so ordered.

MONKS, C. J., concurs in the result.

(31 Ind. App. 405)

LINCOLN SCHOOL TP. v. AMERICAN SCHOOL FURNITURE CO.

(Appellate Court of Indiana, Division No. 2.
Oct. 8, 1903.)

SCHOOLS—TRUSTEES—CONTRACTS—STATUTES —REPEAL—IMPLICATION.

1. Act Feb. 27, 1899 (Acts 1899, p. 150, c. 105), creating a township board to act in an advisory capacity with the township trustee, on estimates furnished by him, and declaring that he shall not create a debt not embraced in the annual estimates without special authority given by the board at a special meeting called by him, was not repealed by implication by Act March 4, 1899 (Acts 1899, p. 424, c. 192), providing that township trustees shall take charge of the educational affairs of the township, employ teachers, and provide furniture, apparatus, etc.; therefore there could be no recovery on a contract by a trustee for apparatus made without authority of the board.

2. Where two statutes on the same subject were enacted on different dates, but by the same Legislature, the presumption is that they should both be operative unless irreconcilable.

3. In determining whether a statute was impliedly repealed by a later act, the court may consider the fact that a third and still later act amended the first act, as indicating that the Legislature did not intend the repeal of the first act by the second.

Appeal from Circuit Court, Hendricks County; T. J. Cofer, Judge.

Action by the American School Furniture Company against the Lincoln School Township. From a judgment for plaintiff, defendant appeals. Reversed.

Brill & Harvey and McBride & Denny, for appellant. Hogate & Clark, for appellee.

WILEY, J. This was an action by appellee against appellant to recover for certain furniture and apparatus furnished appellant. Complaint in four paragraphs. Demurrer to each paragraph for want of facts overruled. Plea in abatement in two paragraphs. Demurrer to each paragraph sustained. Answer in general denial and two affirmative paragraphs. Demurrer to each affirmative paragraph sustained. Trial by court. Judgment for appellee. Motion for a new trial overruled. Exceptions reserved to and error assigned on each adverse ruling.

The substantial averments of the first and second paragraphs of complaint, with the exception of the exhibits and the descriptions of the property, are identical, and are in substance as follows: That on September 10, 1900, the said school township, through its duly authorized, elected, and acting trustee, John F. Lingeman, contracted in writing with the plaintiff to purchase of plaintiff, for cash to said plaintiff, the following articles of furniture and apparatus for said school township, to wit (here follows description of property), all for the agreed price of — dollars. That said furniture, as contracted for, and as above set out, was furnished and delivered to said school township in accordance with the terms and conditions of said contract, and the same is now in use in the High School building of said Lincoln township, Hendricks county, Indiana. A copy of said contract is filed herewith, and made a part of this paragraph, and marked "Exhibit —" (Exhibit A, a contract for desks and chairs, made a part of the first paragraph, and Exhibit B, a contract for a bell and 28 maps, made a part of the second paragraph). Plaintiff also says that before said contract was made and said goods contracted for the said trustee of said township advertised, as by law provided, for bids for said articles of apparatus, and the bid of the plaintiff was the lowest and best bid received, and the advisory board of said township accepted said bids, and made an entry on their records authorizing and directing the said trustee to purchase of the plaintiff the apparatus and furniture above set out. That the pay for said school apparatus and furniture as contracted for and delivered as aforesaid has long since become due, and payment has often been demanded, but the defendant has refused and still refuses to pay the same. Wherefore, etc. The third and fourth paragraphs of the complaint are not dissimilar in substance, and allege, in effect: That on September 10, 1900, the school township, through its duly and legally authorized, elected, and acting trustee, John F. Lingeman, entered into a contract in writing with the plaintiff, which contract is in the words and figures following, to wit (here follows a copy of the contract), by which contract the defendant agreed to purchase of the plaintiff the articles and property therein named, to wit (here follows an enumeration of the desks and chairs in the third paragraph; and the bell and maps in the

fourth paragraph), all for the agreed price of — dollars. That said items so set out were for the use of the defendant, and were useful, suitable, and necessary for the benefit of the schools of defendant, and were of the reasonable value of — dollars, the amount agreed to be paid for the same. That plaintiff, in pursuance of his contract as above set out, delivered said school furniture to the defendant, and defendant received the same, and has occupied, used, and appropriated the same for the benefit of its said schools, and is now using said furniture. That the pay for the school furniture as contracted for and delivered as aforesaid was demanded of the defendant immediately after the same was delivered, but the defendant refused and still refuses to pay for the same. Wherefore, etc. In these two paragraphs recovery is sought upon the quantum meruit. From the view we have taken of the law applicable to the facts disclosed by the complaint, it is unnecessary to set out or consider the answer.

The question of controlling influence, as presented by the record, arises upon the action of the trial court in overruling the demurrer to each paragraph of the complaint. If either paragraph of the complaint, tested by the demurrer, does not state a cause of action, it is unnecessary to consider subsequent rulings as affecting other pleadings. It is essential to the determination of the sufficiency of the complaint to consider some of the statutory provisions relating to the power and prescribing the duties of township trustees as defined by the act of 1899, commonly known and designated as the "Township Reform Law," and the subsequent act of 1901. The act of 1899 (Acts 1899, p. 150 et seq., c. 105) provides for the appointment and subsequent election of a township advisory board, and prescribes their duties. The board is to act in an advisory capacity with the township trustee in fixing the rate of taxation, in determining township expenditures upon estimates furnished by the trustee, and clothes the board with certain authority in specific matters. At the annual meeting of the advisory board, among other things, section 4 requires that the trustee shall present to the board "a detailed and itemized statement in writing * * * of all the property or supplies on hand, whether in use or in store, for road, school, and other purposes; * * * and the items of school supplies necessary for each school." Section 6 of the act provides that "in no event shall a debt of the township, not embraced in the annual estimates fixed and allowed, be created without such special authority, and any payment of such unauthorized debt from the public funds shall be recoverable upon the bond of the trustee," etc. The term "special authority," as above used, refers to authority given by the board at a special meeting of the board upon call of the trustee to determine whether an emergency exists for the expenditure of any sums not included in the existing estimates and levy as fixed at the annual

meeting. Section 9 of the act provides that "if he [the trustee] desires to purchase any school furniture, fixtures, maps, charts, or other school supplies excepting fuel," etc., "in such amounts as may be authorized by the advisory board, in any year, he shall make an estimate of the kinds and amounts, itemized particularly to be used by bidders therefor." The same section also provides that: "When a bid is accepted, a proper contract shall then be reduced to writing, * * * and be signed by the successful bidder and the trustee, who shall require the bidder to give bond with security," etc. Section 11 of the act provides that "all contracts made in violation of this act shall be null and void." All the provisions of this act were in force when the contracts in suit were made, unless, as contended by appellee, certain of them were repealed by the act of March 4, 1899 (Acts 1899, p. 424, c. 192). It is urged with much force and vigor that the latter act repealed the act of February 27, supra, in so far as the former law related to and controlled township trustees in the management of the affairs of the school township. The rulings of the trial court upon the demurrers to the various pleadings seem to indicate that it proceeded upon the theory that the latter act repealed the former in so far as it related to the powers and duties of the school township. Counsel for appellant concede, in argument, that if, in relation to the affairs of the school township, the trustee is not governed by the provisions of the "reform law" (Act February 27, 1899), then the rulings of the trial court were right, and the judgment should be affirmed. The act of March 4, 1899, contains three sections, aside from the repealing and emergency clauses. Section 1 provides that township trustees shall take charge of the educational affairs of their respective townships. It empowers them to employ teachers, to locate conveniently a sufficient number of schools, to build or provide houses, furniture, apparatus, etc.; also provides that a trustee may establish and maintain in his township at least one graded high school; that the school trustees of two or more school corporations may establish and maintain joint graded high schools; that a trustee, instead of establishing a graded high school, may pay the tuition of his pupils competent to enter such school to another school corporation, such payment to be made out of the special school revenue; and that no such graded high school shall be built unless there are at least 15 common-school graduates of school age residing in the county. Section 2 fixes the duration of the term of school in each township, and empowers the trustee to "authorize a local tuition levy sufficient to conduct a six months term of school each year based on estimates and receipts from all sources for the previous year: * * * provided, such levy shall not exceed the limit now provided by law." Section 3 provides that the "school trustees shall have the care and management of all property, real and personal, belonging

to their respective corporations for common-school purposes, except the congressional township school lands, which lands shall be under the care and management of the trustee of the civil township," etc. Opposing counsel agree that the latter act is substantially a re-enactment of other statutes then in force, and, as section 4 repeals "all laws and parts of laws inconsistent with this act," the present important question is to determine whether there are any provisions of the act of February 27, 1899, inconsistent with the act of March 4th.

There are some general rules applicable to the repeal of statutes that may be briefly noted: (1) Repeals by implication are not favored. (2) Repeals by implication are recognized only when the earlier and later acts are repugnant to, or are irreconcilable with, each other. In such case, if the two acts, by a fair and reasonable interpretation, can be made to operate in harmony, both will be upheld, and the latter one will not be regarded as repealing the former by construction or intendment. (3) Where two statutes relating to the same subject-matter are enacted at different dates, but during the same session of the Legislature, the presumption is that the lawmaking body intended that both would be operative and should be construed together. (4) The subsequent action of the Legislature with reference to the subject-matter may be looked to and considered in determining the legislative intent as to a particular act. By the act of March 4, supra, it is evident there was no direct or express repeal of that part of the township reform law pertaining to the duties of school trustees. An express or direct repeal is where the repealed act is specifically designated in the repealing act. It follows that, if the former act was repealed, it was by implication, unless the two acts are repugnant to or irreconcilable with each other. It has been declared that, where a new statute covers the whole subject-matter of an old one, adds new provisions, and makes changes, and where such new law, whether it be in the form of an amendment or otherwise, is evidently intended to be a revision, and to take the place of the old, it repeals the old law by implication. *Nichols v. State*, 27 Ind. App. 444, 61 N. E. 694; *Thomas v. Town of Butler*, 139 Ind. 245, 38 N. E. 808; *Warford v. Sullivan*, 147 Ind. 14, 46 N. E. 27. The act of March 4th, supra, does not pretend to cover the whole subject-matter of the act of February 27th. It does not make any changes, and it is evident that it was not intended to be a revision, or to take its place. Giving to it the most liberal construction, we do not see where it is repugnant to or irreconcilable with it.

The two acts under consideration were passed by the same Legislature, and only five days elapsed between their passage. It is too well understood to admit of debate or conjecture why the reform law was passed. It is sufficient to say that it was to correct

evils which had grown up under previous laws, and to prevent unwarranted raids upon township treasuries. It is common history of the state, and hence courts take notice of it, that many of the evils with which the people and the Legislature were confronted grew out of the unlimited authority which township trustees assumed, under the old law, pertaining to their duties in the management and control of the common schools. It was to curtail and limit that authority in large measure that caused the Legislature to pass the township reform law. If the act of March 4th, *supra*, repealed that law, as contended by appellee, we would have to conclude that the Legislature, after having enacted a law looking to the better protection of the interests of the people in the management and control of township business, deliberately attempted to undo its good work by passing the act of March 4th, by placing the affairs of the townships, so far as they pertain to the management and control of the common schools, in the exclusive control of the trustees, where they rested prior to the passage of the reform law. This would be inconsistent and unreasonable, and we cannot impute to a co-ordinate branch of the government either inconsistency or unreasonableness. To determine the intent of the Legislature courts may look to subsequent legislation pertaining to like subject-matters.

By the act of March 11, 1901 (Acts 1901, p. 415, c. 185), the Legislature amended sections 6 and 8 of the act of February 27, 1899, *supra*. The amended section 6 contains a special provision relating to the construction of school buildings. If the Legislature intended by the act of March 4, 1899, *supra*, to repeal the act of February 27, 1899, *supra*, that pertained to the duties of township trustees in the management and control of schools, it would not have subsequently amended the law it so intended to repeal, by injecting into it provisions which pertain to the duties of township trustees relating to the expenditure of money for the common schools. As above stated, the act of March 4, 1899, *supra*, was a substantial re-enactment of former existing laws. It cannot be said with any pretense of reason that, if the Legislature had not passed the act of March 4, 1899, township trustees would not have been subject to all the provisions of the township reform law. It follows that the re-enactment of the pre-existing laws did not affect their duties or extend their powers in respect to the reform law.

That courts may look to subsequent legislation in determining legislative intent, see *Sutherland on Statutory Constructions*, § 311; *Doggett v. Walter*, 15 Fla. 355; *Bigelow v. Forrest*, 9 Wall. 399, 19 L. Ed. 696; *Stout v. Board*, etc., 107 Ind. 343, 8 N. E. 222; *May v. Hoover et al.*, 112 Ind. 455, 14 N. E. 472; *Hunt v. Lake Shore*, etc., R. Co., 112 Ind. 69, 13 N. E. 263. It will be presumed that the Legislature, in enacting the latter statute, did

not intend to interfere with or repeal a former law relating to the same subject-matter, unless the repugnancy between the two is irreconcilable. *Sutherland on Stat. Con.* § 152; *State v. Smith*, 59 Ind. 179; *State v. Wills*, 112 Ind. 237, 13 N. E. 722. The two statutes under consideration were enacted on different dates, but at the same session of the Legislature, and both relate to the duties of township trustees in relation to their respective school townships. Under such conditions and facts the presumption will be indulged that they should both be operative, and should be considered together. *Sutherland, Stat. Con.* § 283; *Indiana, etc., Co. v. State*, 53 Ind. 575; *Shea et al. v. City of Muncie*, 148 Ind. 14, 46 N. E. 138; *State v. Rackley*, 2 Blkf. 249; *Wright v. Board*, etc., 82 Ind. 335; *Indiana Central Coal Co. v. State*, 53 Ind. 576.

Counsel for appellee have not pointed out any satisfactory reason why the two acts are repugnant to or irreconcilable with each other, and we are unable to see any. While the latter act prescribes certain duties, and clothes township trustees with certain powers, which existed under former laws, the reform law prescribes methods and places upon such officers wholesome limitations. These two statutes may well stand together, and, this being true, it is our duty to construe them in *pari materia*. *Board of Commissioners, etc., v. Marion Trust Co.* (Ind. App.) 65 N. E. 589; *Shea v. City of Muncie*, *supra*, and authorities there cited.

Having reached the conclusion that the latter did not repeal the former act, the law as applied to the facts disclosed by the complaint is settled by the cases of *Peck-Williamson, etc., Co. v. Steen School Township*, etc. (Ind. App.) 66 N. E. 909, and *Moss v. Sugar Ridge Township*, etc. (Ind. App.) 67 N. E. 460.

The complaint fails to show a compliance with the provisions of the statute, and by express language of section 11 of the act the contract for the purchase of the supplies is "null and void." That which the statute declares to be "null and void" cannot be made valid by judicial construction or decision. The contract being void, title to the property did not pass to appellant, and whatever remedy appellee has is made clear by the case last cited.

Judgment reversed, and the court below is directed to sustain the demurrer to each paragraph of the complaint.

(31 Ind. App. 464)

FT. WAYNE TRACTION CO. v. MORVILIUS.

(Appellate Court of Indiana, Division No. 1.
Oct. 13, 1903.)

**STREET RAILROADS—PASSENGERS—INJURIES
WHILE ALIGHTING FROM CARS—EXCAVATIONS
IN STREET—NEGLIGENCE.**

1. A street car company operating its cars on streets in which the city had made excavations

¶ 1. See *Carriers*, vol. 9, Cent. Dig. § 1231.

was guilty of actionable negligence in stopping its cars opposite such excavations for the purpose of letting off passengers without properly guarding the passengers alighting, or warning them of the danger, of which they were ignorant, but of which the company knew or was bound to know.

Appeal from Circuit Court, Adams County; D. K. Erwin, Judge.

Action by Frank Morvilius against the Ft. Wayne Traction Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Barrett & Morris, for appellant. Henry Colerick, for appellee.

BLACK, J. The appellee recovered judgment against the appellant for damages for a personal injury. The complaint showed at length and with particularity that the appellee was a passenger on the car of the appellant, which was propelled by electricity westward on Main street, and had paid his fare, and had received from the conductor a transfer ticket entitling him to be carried on another car on Calhoun street northward from its intersection with Main street, between 9 and 10 o'clock at night. The car stopped on Main street, on the east line of Calhoun street, and the appellee descended for the purpose of taking the other car, then waiting for passengers so transferred. Main street, at that place, between the car track thereon and the curb of the sidewalk, upon each side of the street, had been dug down and excavated more than 18 inches, leaving the foundation or bed of the street at that place 3 feet below the nearest step of the car. The appellee had not been in that part of the city for many months, and did not know of such condition of the street. The night was dark, and the shadow of the car from the lights on Calhoun street covered the excavation at the place of the steps. The appellee left his seat and went to the car step, to leave the car. He placed his left foot on the lowest step, and reached with his right foot for the ground, and discovered that he could only reach it with his toe; and, having the whole of his weight placed upon his left foot, he could not remove it in order to jump, when by reason of such condition his body became overbalanced, and he fell to the ground from the step, upon his face and right hand, striking the ground violently, and then rolled on his back, when, upon attempting to arise, he found that his right hand and arm were useless and helpless by reason of the fall. It was alleged that the appellant knew, and ought to have known, that the street had been so excavated at the point where it stopped its car for its passengers to alight, but that the appellant, knowing of such dangerous condition of the street at that point, and knowing, as it did, that it was dangerous for passengers to alight from the car at that point, carelessly and negligently stopped at that point for its

passengers to leave the car, knowing of the danger as aforesaid, and carelessly and negligently did so without providing any light or other warning to its passengers, and that its conductor and those operating its car negligently and carelessly omitted and failed to warn the appellee or any of its other passengers on that car of such dangerous condition of the street at that point to those attempting to leave the car there. The complaint contained other averments relating to the appellee's injury, and concerning the amount of damages.

Counsel for appellant have discussed the complaint and the evidence, and an instruction which the court refused to give to the jury. The substance of the whole discussion is thus stated in the appellant's brief: "The record in this case presents clearly and cleanly for decision this question: Where an electric [company] operates its cars on tracks in a city, and excavations are made by the city on parts of the street adjacent to such track, is it the duty of the servants of the railway to notify passengers alighting from the cars of such excavation, when the cars are stopped to let off passengers immediately opposite such excavation? We insist not." The case to which counsel have called our attention, in which the person complaining of the common carrier of passengers was injured by reason of the defectiveness of the street after having alighted from the conveyance, and while proceeding along or across the street, and where, therefore, the relation of carrier and passenger had wholly terminated, is not in point in the case at bar. The strict obligation of the carrier of passengers continues not merely while the passenger is being received and being carried, but also while he is leaving or alighting from the carriage or car under such circumstances that it may properly be said of him that he is being so discharged or so landed by the carrier. The relation of carrier and passenger had not ceased when the appellee received his injury under the circumstances detailed in the complaint. The action does not proceed upon the theory of responsibility of the appellant for the excavated and dangerous condition of the street. The plaintiff does not rely upon the theory of the actionable wrong of a person or corporation in producing or maintaining such a condition of the street, resulting in injury as stated in the complaint; but the case proceeds upon the theory of the responsibility of the carrier for discharging its passengers at such a dangerous place, of whose dangerous character it knew or was bound to take notice, without properly guarding him from injury, or warning him of the danger of which he was ignorant, and concerning which, under the circumstances, he was not bound to take notice. The suggestion of the appellant concerning the nature of the action is palpably erroneous. The appellant, through its servants in charge of the car, having knowledge

of the condition which rendered the alighting in the dark from the car dangerous for passengers who were ignorant of the excavation, owed the passenger the duty of taking reasonable precautions or giving reasonable warning for the protection of the passenger. Common carriers of passengers, including street railway companies, are bound to exercise the highest degree of care and skill and the utmost foresight in the performance of their duty as carriers, in receiving, transporting, and discharging their passengers, and are responsible for any injury to a passenger through neglect of any reasonable precaution for the prevention of such injury. *Citizens' St. R. Co. v. Twiname*, 111 Ind. 587, 13 N. E. 55.

Judgment affirmed.

(32 Ind. App. 442)

CHAMBERLAIN et al. v. WAYMIRE.*

(Appellate Court of Indiana, Division No. 1.
Oct. 13, 1903.)

MASTER AND SERVANT—DEATH OF SERVANT—PLEADING—COMPLAINT—DEFECTIVE APPLIANCES—STATUTORY DUTY TO GUARD MACHINERY—SPECIAL VERDICT—NEGLIGENCE.

1. A complaint by a servant against his master for injuries caused by unsafe appliances, which does not allege knowledge on the part of the master and want of knowledge on the servant's part of the defects charged, is insufficient.

2. A complaint in an action for the death of a servant alleged that a vat used in the master's business was allowed by the master, while filled with boiling water, to remain open, without any railing or safeguard; that deceased, while handling logs in the vicinity of the vat, was furnished with a defective hook; that the hook slipped from a log handled by him, causing him to be thrown into the vat of boiling water, negligently left open and unguarded. *Held*, that the negligence relied on to fix the master's liability consisted in his failing to guard the vat as required by Burns' Rev. St. 1901, § 7087i.

3. A complaint in an action for the death of a servant which alleges that the servant fell into a vat of boiling water, and that the master failed to guard the vat as required by Burns' Rev. St. 1901, § 7087i, declaring that all vats, etc., shall be guarded, is not defective for failing to negative the exceptions stated in a subsequent clause, it not being intended by the statute that there should be any exception to the proper guarding of vats.

4. A special verdict in an action for the death of a servant, caused by his falling into a vat of boiling water while at work, that there was a safe way to do the work, that the safe way was the customary way, that decedent knew such way, and that, if he had done the work in the customary way, he could not have fallen into the vat, shows that decedent was guilty of contributory negligence, precluding a recovery notwithstanding the general verdict in favor of plaintiff.

Appeal from Circuit Court, Miami County; J. F. Cox, Judge.

Action by Louisa Waymire, administratrix of the estate of William E. Waymire, deceased, against George R. Chamberlain and others.

From a judgment for plaintiff, defendants appeal. Reversed.

Mitchell & McClintic and Nott N. Antrim, for appellants. Reasoner & O'Hara and Loveland & Loveland, for appellee.

HENLEY, J. This was an action for damages, commenced by appellee against appellants, on account of the alleged death, by wrongful act of appellants, of appellee's husband, one William E. Waymire, and of whose estate appellee is the administratrix. The complaint, which the trial court held sufficient upon demurrer for want of sufficient facts, was in one paragraph. Appellants' answer was a general denial. There was a trial by jury, and a verdict and judgment in favor of appellee. The assignment of errors presents to the court for review the action of the trial court in overruling appellants' demurrer to the complaint, in overruling the motion for judgment upon the answers to the interrogatories returned by the jury with the general verdict, and in overruling the motion for a new trial.

The substantial averments of the complaint are that appellants are partners engaged in the manufacture of baskets; that a part of the work of making baskets consists of stripping logs of their bark after submerging them in a vat of boiling water, from which vat they are passed to a veneering machine; "that on the 18th day of August, 1898, the large vat so used as aforesaid consisted of a basin about six feet in depth, with the top projecting about six inches from the surface of the surrounding ground, and that upon said date the said defendants [appellants] wrongfully, carelessly, and in criminal violation of the statute of the state of Indiana, suffered and permitted said vat, while filled with boiling water, to be and remain open and exposed, without any railing or safeguard or protection surrounding the same, to serve as a warning or protection to their employes and others who came into the vicinity thereof in the course of their business and employment." It is further averred that the said decedent was at the time of his death in the employ of appellants, and while so employed was engaged, in the line of his duty, under such employment, in handling logs in the immediate vicinity of the vat of boiling water, and was using for such purpose a log hook, furnished by the appellants as a suitable and necessary tool for that purpose; that it was necessary that such tool, so furnished, should be firm, and should have a keen, sharp point, in order that the person using it could grasp the log firmly and move it with certainty and precision; that on the said date the appellants wrongfully, carelessly, and negligently put into the hands of decedent a log hook made of a round bar of iron, five-eighths of an inch in diameter, and curved at one end, with the end of the hook dressed to a point,

* 1. See *Master and Servant*, vol. 24, Cent. Dig. §§ 122, 552.

* Rehearing denied, 70 N. E. 31.

but that said point had been by appellants negligently suffered to become and remain so blunt and dull that it would not grasp a log, but would slip when applied, and by reason of the lightness and weakness of the bar from which it was made, the hook would bend and straighten under the weight of the logs, in handling them; that while appellee was so employed in handling logs near the vat, and by reason of the defective log hook, the said hook slipped from a log being handled by him, and he was thrown into the vat of boiling water so negligently left open and unguarded, in consequence of which he lost his life.

If the complaint was drawn upon the theory that the decedent's death was the proximate result of the defective log hook, it would be insufficient, because it wholly fails to allege knowledge on the part of appellants, and the want of knowledge on the part of decedent, of the defects charged. *Creamery Package Co. v. Hotsenpiller*, 24 Ind. App. 122, 58 N. E. 250, and cases cited. We construe the complaint, however, upon the theory that the negligence relied upon to fix appellant's liability consisted of the violation of a positive statute, in failing to protect or guard the vat of boiling water. The pleader manifestly so intended. Our statute provides (see section 70871, Burns' Rev. St. 1901), " * * * All vats, pans, saws," etc., "and machinery of every description shall be properly guarded, and no person shall remove or make ineffective any safe-guard around or attached to any planer, saw, belting, shafting or other machinery, or around any vat or pan, while the same is in use, unless for the purpose of immediately making repairs thereto, and all such safe-guards shall be promptly replaced." It is contended by counsel that the complaint is insufficient because it does not in terms negative the exception in the statute. Our Supreme Court, in *Cleveland, etc., Ry. Co. v. Gray*, 148 Ind. 266, 46 N. E. 675, declared the law to be that "where a breach of a statutory declaration of duty is alleged, and exceptions are found in the statutory declaration of duty, the pleader must show that the breach is not included in the exception. But if the exception is stated in a subsequent clause or section of the statute, then such exception shall be shown by way of defense to the action." The objection to the complaint in this case is therefore not tenable, because the exception is stated in a subsequent clause, and it is not intended by the statute that there shall be any exception to the proper guarding of the vats, etc., named in the statute, but the exception refers to the removal of the guards after the same have been placed for the purpose of repairing the guarded vats, machinery, etc.

The jury found, by answers to interrogatories returned with the general verdict, that there was a straight iron bar, about three feet long, which was sound and strong,

provided by appellants, and which was used by the employes in moving logs on the platform, and that there was nothing to have prevented decedent from standing on the north side of the log and pulling the west end of the log away from the vat, and that if decedent had stood on the north side of the log, and pulled it to the north and east, he could not have fallen into the vat, even if the hook had slipped off the log. It is contended that these findings show that decedent was guilty of negligence contributing to his injury, and that the trial court erred in overruling appellants' motion for judgment in their favor. We think it proper in this connection to describe the situation of the vats and other machinery, and the usual manner of performing the work in which decedent was engaged, as the same was found by the jury. There were two vats, in size 22 feet north and south, 12 feet 4 inches east and west, and 8 feet deep. These vats were filled with boiling water, and were separated by a partition running north and south. In these vats the logs were submerged prior to being stripped of their bark and passed to the veneering room. These vats were immediately west of the veneering room, and separated from it only by a narrow walk. There was a platform 9 feet 3 inches wide immediately north of and adjoining the vats, which extended east into the room where the veneering machine was located. The top of the vats was 11 inches higher than the platform. In the process of converting the logs into baskets, it was the custom to draw the logs from the vats onto that portion of the platform which was located immediately west of and adjoining the building in which the veneering machine was located, and there strip the logs of their bark before passing them to the veneering room. It was the custom and practice to strip the bark from the logs after they were drawn out, and while the logs lay in a north and south direction, and practically parallel with the building containing the veneering machine. The decedent knew of the custom of doing this work at the time he received the injury from which he died, but, contrary to this custom, he himself had placed the log so that it was lying in an easterly and westerly direction, parallel with the vats, and in trying to move it with the hook, with his back to the vats, the hook slipped off, and he fell into the boiling water. Decedent was a man 30 years old, active and intelligent, and possessed of all his faculties. Appellants having violated the statute, the doctrine of assumed risk has no application to the case made by appellee's complaint. *Island Coal Co. v. Swaggerty* (Ind. Sup.) 62 N. E. 1103; *Monteith v. Kokomo, etc., Co.* (Ind. Sup.) 64 N. E. 610, 58 L. R. A. 944.

But the question remains, do the facts found show the decedent was guilty of negligence contributing to his injury? The negligence of appellants in failing to properly

guard the vat is established both by the general verdict and by the special findings. The general verdict necessarily establishes decedent's freedom from fault, but the jury clearly and conclusively found by the interrogatories and answers that there was an absolutely safe way to do the work, that the safe way was the customary way, and that decedent knew this safe and customary way. It seems to us that the facts found place this case squarely within the rule announced in *Consolidated Stone Co. v. Redmon*, 23 Ind. App. 319, 55 N. E. 454, in which case this court said: "We take it to be the law that if there are two ways of performing an act, one of which is attended with peril or danger, and the other is absolutely safe from danger, and the person performing the act upon his own volition chooses the dangerous way and is injured, he cannot call upon his employers to respond in damages."

The trial court ought to have sustained appellants' motion for judgment in their favor. The judgment is reversed, with instructions to the trial court to sustain appellants' motion for judgment upon the facts found by the jury by way of answers to interrogatories.

(31 Ind. App. 441)

BALTIMORE & O. S. W. R. CO. v. HENDERSON.

(Appellate Court of Indiana, Division No. 2
Oct. 13, 1903.)

MASTER AND SERVANT—NEGLIGENCE—PROXIMATE CAUSE OF INJURY—FINDINGS—SUFFICIENCY OF EVIDENCE—APPEAL—BILL OF EXCEPTIONS—SIGNATURE OF JUDGE.

1. Where the bill of exceptions containing the evidence was filed, as appears by an order-book entry, on the day following that on which, according to its face, it was signed, it sufficiently appears that the bill was filed after being signed by the trial judge.

2. Gangs of men in the employment of a railroad, engaged in the same work, and returning from their day's labor on different hand cars, are fellow servants.

3. Where, in an action for injuries sustained by a section hand while riding on a hand car, owing to another hand car having run into the one on which he was riding, the complaint alleged that the negligence of the master consisted in failing to provide the colliding car with a proper brake, the question whether such negligence was the proximate cause of the injury was one of fact.

4. A section hand was riding on a hand car, when he was injured owing to it being run into by another hand car which had been following it; and in an action for the injuries the evidence showed that the second car had several times during the journey run into the car on which plaintiff was riding, and it was not shown that any effort had been made to avoid so doing by the use of a brake or otherwise. *Held*, that the negligence of those in charge of the second car, and not the master's failure to equip the second car with a sufficient brake, was the proximate cause of the injury.

Appeal from Circuit Court, Jackson County; Thomas B. Buskirk, Judge.

Action by James F. Henderson against the Baltimore & Ohio Southwestern Railroad

Company. From a judgment for plaintiff, defendant appeals. Reversed.

McMullen & McMullens and O. H. Montgomery, for appellant. Burrell & Prince and S. A. Barnes, for appellee.

ROBY, J. This action was brought to recover damages on account of personal injuries. There was a verdict for \$2,000, with answers to interrogatories. Judgment on the verdict.

The appellee was, as shown by the evidence, on April 19th in the employment of appellant, working along its right of way, and at about 8:20 p. m. of said day started from a point six miles east of Seymour to go to said town. He and five others similarly engaged put a hand car on the track, and propelled it west toward their destination, the day's work having been prolonged beyond the usual hours. A second hand car was placed upon the track behind, and in a short time followed the first one. The second car was larger and faster than the first one. Its crew consisted of from eight to twelve men. The second car caught up with the first one a little while after they started. It made one stop before the accident. The first car made none. The evidence as to the rate of speed at which the cars were running at that time varies greatly. Witnesses testifying for appellee placed the rate of speed as low as five miles an hour. One witness testified that the cars were "running as fast as they could." The appellee testified in substance as follows: "When we started out, we were not more than a rail's length apart. We had gone about half a mile or a quarter, I expect, when they caught up and bumped into us. We didn't stop when they bumped into us; just kept going on. We ran about the length of a T rail with the two cars against each other. Then they slacked up when they struck that car. Then we went on about a quarter before they struck us the next time. They kept running in and bumping onto us after we got across Mutton creek for about a mile. They had bumped into us before we got to Mutton creek, three different times, and after we got about a mile. They bumped into us about half a dozen times before we got to Mutton creek, and going the next mile they bumped into us. The next time when they bumped into us the two cars left the track. Both cars went off the track together when they bumped into us. They bumped into us while my car was going, and we were going pretty fast. We were going about 15 miles an hour—15 or 20 miles an hour. I couldn't tell exactly, but near 15 or 20 miles an hour; that is my best judgment. The car following us caused our car to be derailed, and both came off together. Just as they struck our car, we both went off together. I suppose the other car knocked us off the track. They had bumped into us, and about the twelfth

time they bumped into us they knocked us off the track. When they knocked us off I was helping to propel the car, working the lever, and was facing the west. The first I knew that they were coming, my back was toward them, and I heard them holler, 'Get out of the way!' The first I knew of their coming was when the car struck ours, except that I heard them say, 'Get out of the way!' The two cars locked together and raised the front end of our car, I think, over the rails. The two cars have handholds on each end, and they came together with such force they stuck these together. The handholds are near the center. They are fastened underneath, fastened on the arm of the car. They are of wood, and stick out about eight or ten inches. There are two on each end of the car. They are probably two inches through and about a foot from the side of the car. I couldn't say whether Teepe's car run on the top or at the side of our car, but his car bore down on the rear end of ours and raised the front end up. The front wheels of the car went off first, and left the hind wheels of my car between the rails; two of the wheels of my car were outside the rails, one front wheel and one hind wheel. I was thrown in front of the car." The evidence further shows that those operating the second car knew the condition of the brake thereon; that they stopped the car by reversing the handles. No attempt was made to use the brake in order to avoid the collision. The foreman in charge of the second car, testifying for appellant, said that the brake was in fair condition, and that he could have stopped the car, at the rate it was running, within 10 feet. Other evidence tends to show that the brake was not in good repair, and that the car could not be stopped by its use.

The paragraphs of complaint upon which the cause was tried contained two specific charges of negligence: First. "And that the appellant had carelessly and negligently failed to equip said hand car so following the one upon which the appellee was riding with proper and sufficient brakes to regulate and control its speed, and had permitted the brake on said car which was following the one on which the appellee was riding to become worn and out of repair, so that it would and could not regulate the movement of the car. And that at a certain place on the road where the descent was steep that the car following the one on which the appellee was riding became unmanageable and uncontrollable on account of the unsafe, insufficient, worn-out, and defective brake, and that it run against the one on which appellee was riding with such force that the car was derailed, and thus he received his injuries." Second. That appellee's hand car was defective by reason of a bent axle. The jury, in answer to interrogatories, found the nonexistence of the last alleged defect. The finding is in accord with the evidence, and

this specification of negligence does not, in view thereof, require further consideration. The effect of the general verdict is to find that the defective brake was the proximate cause of the injury complained of as alleged. The interrogatories are answered to that effect.

Before taking up the merits of the respective contentions, appellee's point that the evidence is not in the record is entitled to consideration. The bill containing the evidence was signed, as appears upon its face, on April 28, 1902. It was filed, as is shown by an order-book entry, on the following day, April 29th. It does therefore sufficiently appear that the bill was filed after being signed by the trial judge. *Oster v. Broe*, 64 N. E. 918.

The "gangs" of men upon the two hand cars were in the employment of the same master in the same work. The day's labor was ended, and they were, with the section foreman, going home. They were, within all the authorities, fellow servants. *Capper v. Louisville, etc., R. Co.*, 103 Ind. 305, 2 N. E. 749; *Peirce v. Oliver*, 18 Ind. App. 87, 47 N. E. 485; *Hodges v. Wheel Co.*, 152 Ind. 680, 52 N. E. 391, 54 N. E. 383; *Justice v. Penn. Co.*, 130 Ind. 321, 30 N. E. 303. In order to fix liability upon appellant, it devolved upon appellee to establish the truth of that averment contained in his complaint to the effect that its negligence, as specified, caused the injury complained of; in other words, that the defective brake was its proximate cause. This was a question of fact. *Railroad Co. v. Martin* (Ind. App.) 65 N. E. 591. There is no room for other inference than that those operating the second car caused the collision and the resulting injury to plaintiff by the reckless manner in which the same was run. They knew the condition of the brake. In the absence of the testimony to the effect that it was said, when the stop before referred to was made, that the brake was not good, it is apparent that those using a hand car not only can see and know the condition of its brakes, but would find it difficult to avoid knowing it. Taking the car as it was, it became their duty to so manage it as not to inflict injury upon others. Their recklessness in running at the rate of speed and in such proximity to the first car as they did is wholly inexcusable. The rear car "bumped" the forward one repeatedly. It does not appear that any effort was made to avoid so doing. It did not, probably, occur to them that running against the more slowly moving car would derail it. That it did so is an essential element to appellee's recovery. It appears that there was neither inclination nor attempt to use the brake before the collision. The appellant's total failure to equip its car with a brake would not, therefore, seem to be even a remote cause of the collision. It might, with more plausibility, be argued that appellant should respond in damages for having furnished its

reckless employ es with a hand car geared to a speed faster than the one ahead of them, thereby making it possible for them to overtake the first car, than that it be held liable for furnishing a defective brake which they did not try to use. The alleged defect was not the proximate cause of the injury. *Clarke v. Penn. Co.*, 132 Ind. 199, 31 N. E. 808, 17 L. R. A. 811; *Neutz v. Coal Co.*, 139 Ind. 411, 38 N. E. 324, 39 N. E. 147. This conclusion requires a reversal of the judgment, and renders the decision of other questions unnecessary.

Judgment reversed. Cause remanded, with instructions to sustain appellee's motion for a new trial, and for further proceedings not inconsistent herewith.

(81 Ind. App. 476)

KING et ux. v. MORRISTOWN FUEL & LIGHT CO. et al.

(Appellate Court of Indiana, Division No. 2. Oct. 15, 1903.)

LEASE—CONSIDERATION—FAILURE TO PAY CASH CONSIDERATION—EFFECT—EXCEPTIONS.

1. A lease gave to the lessee the exclusive right to drill for and operate oil or gas wells on certain lands of the lessor as long as oil or gas should be found in sufficient quantity. It stipulated that the lessor should have gas for domestic purposes from the pipe lines of the lessee, and \$25 per year for the location of a well on a certain tract, payable yearly in advance, whether a well was drilled or not, and \$25 per year for each well drilled on the tract thereafter. *Held*, that the consideration of the lease consisted of the \$25 in money and the use of the gas therein provided for, as an entirety, and while the lessor continued the use of the gas he could not recover possession of the land because of the lessee's failure to pay the cash rent on the dates fixed in the lease.

2. An exception to the court's conclusions of law admits the correctness of the facts found by the court.

Appeal from Circuit Court, Shelby County; Douglas Morris, Judge.

Action by Armstead King and wife against the Morristown Fuel & Light Company and another. From a judgment granting insufficient relief, plaintiffs appeal. Affirmed.

Thos. B. Adams and John F. Walker, for appellants. Hord & Adams and Smith, Cambern & Smith, for appellees.

OOMSTOCK, P. J. This was an action by the appellants, Armstead King and Nancy King, his wife, against the appellees, the Morristown Fuel & Light Company and the Rushville Natural Gas Company, to recover possession of certain real estate, and damages for its detention. The court made a special finding that the appellants were not entitled to recover possession of the land, but that they were entitled to recover rent due therefor, in the sum of \$53.50, and costs, and judgment was rendered in their favor accordingly.

The complaint was in three paragraphs. No question is raised as to the sufficiency of

either. Appellants assign as error the action of the court in overruling their demurrers to the second paragraph of answer and to the second paragraph of answer to the third paragraph of their complaint, respectively, and that the court erred in its first, second, and third conclusions of law, and each of them. The third paragraph of the complaint was filed after appellee had answered the first and second paragraphs of the complaint. The following abstract of the complaint is from the appellants' brief: The first paragraph is for the possession of real estate described in the complaint, and, in substance, complains of the defendants, and says that they were wrongfully and unlawfully in possession of said real estate, and gas well thereon situated, and that they were wrongfully and unlawfully using the plaintiffs' gas, and claiming damages from the defendants for such unlawful detention of real estate and gas well, and for the value of the gas taken from the said well after they wrongfully continued in the possession of the same. The second paragraph is the same in substance as the first. The third was substantially the same as the first, except that it averred that under a contract with the Morristown Fuel & Light Company on the 1st day of September, 1898, the plaintiffs leased one-fourth of an acre in the northeast corner of a 34-acre tract of land described in said complaint, and gave the defendants \$77 for drilling a gas well on said one-fourth acre tract of land; that the defendant the Morristown Fuel & Light Company, in case it found gas in paying quantities, was to furnish gas at appellants' residence, for the plaintiffs to have fuel and light; that said well was drilled by said defendants, and said plaintiffs supplied with gas, which plaintiffs should be entitled to so long as said well yielded gas; that the plaintiffs ever since the digging of said well have been enjoying said gas according to the terms of the contract. The defendants demurred to the sufficiency of these paragraphs of complaint, which demurrers were overruled by the court. The several paragraphs of complaint describe the land leased in five different tracts, one consisting of 84 acres, and one of 4 acres. Substantially said affirmative paragraphs of answer alleged that on the 9th day of January, 1899, the plaintiffs executed a lease to the defendant the Morristown Fuel & Light Company of the real estate described in the complaint, a copy of which lease was filed therewith, and which lease is the same lease mentioned in the complaint. By the terms of the said lease, said lessee was given the exclusive right to drill and operate for oil or gas on the lands described in the complaint, and the right to lay pipes on, along, and across said lands, and to remove pipes, tools, machinery, and fixtures therefrom, at the discretion of the lessee, which lease should continue in force, for the benefit of the lessee or its assigns, as

long as gas or oil should be found in sufficient quantity to market and pipe away, at the discretion of said lessee; that in consideration of said grant it was provided that the lessors were to have gas for domestic purposes in their dwelling house, and two fires and two lights in the tenant house on said premises, which gas was to be taken from the pipe lines of the lessee, and \$25 per year for the location of a well on the four-acre tract in section 4, commencing November 1, 1899, and payable yearly in advance, whether a well was drilled on said four-acre tract or not, and \$25 per year for each well drilled on said land thereafter; that after the execution of said lease said Morristown Fuel & Light Company entered on said four-acre tract of plaintiffs, and drilled a well from which gas flowed in paying quantities, and immediately thereafter the plaintiffs began the use of said gas in their dwelling and tenant house, as provided in said lease, and continued to so use the same continuously up to this time, and are still in full use and enjoyment of said gas, which is of the value of \$100 per year; that on the 11th day of September, 1899, said Morristown Fuel & Light Company sold and assigned said lease to the defendant the Rushville Natural Gas Company, which is now the owner of the same, and that within a few days after the first day of November, 1899, when said \$25 became due as aforesaid, said Rushville Natural Gas Company sent its check to plaintiffs in payment of the same, which check plaintiffs refused to accept, and on the 28th day of December, 1899, said company tendered said sum of \$25 to the plaintiffs in gold, which tender the plaintiffs refused to accept, and the defendant now brings into court with this answer, for the use of the plaintiffs, said \$25 in gold. The defendants further say that the only well located or drilled on plaintiffs' land is the one on the four-acre tract aforesaid, and that no demand for the payment of said \$25 was ever made on defendants, or either of them, prior to the bringing of this suit.

Appellants base their argument against the sufficiency of the answer upon the fact, which appears therein, that appellee failed to pay the \$25 rent provided or in the lease in advance, upon the 1st day of November of each year; that the appellees by this failure forfeited their right under the lease, and appellants became entitled to possession. They base this claim upon section 7094, Burns' Rev. St. 1901 (Horner's Rev. St. 1901, § 5213), which provides that where, by the express terms of a contract, rent is to be paid in advance, and the tenant has entered, and refuses or neglects to pay the rent, no notice to quit is necessary. They cite *McNatt v. Grange Hall Ass'n*, 2 Ind. App. 341, 27 N. E. 325; *Thomas v. Walmer*, 18 Ind. App. 112, 46 N. E. 695. Whether appellant's position is well taken must depend upon the consideration specified in the lease. If the \$25 named

is the sole consideration, then the failure to pay the same according to the terms of the contract would entitle the appellants to possession. But the lease, which is made a part of the answer, but is not made a part of the complaint, makes the consideration for the rights therein given the right to use gas for specific purposes, to be taken from the pipe lines of appellee, and \$25 in money. The answer avers that appellants have, ever since the execution of the lease, continuously used said gas, and that it is of the value of \$100 per year. Appellants insist that, as the complaint shows that the only well drilled was upon the 66-acre tract, and which did not include the 4-acre tract, and that they were to have the use of gas flowing therefrom for heating and illuminating purposes in their dwelling house located on said land, and that they had paid the appellees seventy-seven dollars for drilling the same, the gas from said well, before the lease of 1899 was entered into, belonged to them, and that the \$25 applied solely to the four-acre tract. The lease in question provides for the use of gas in the dwelling house, for drilling further wells, and for the payment of rent whether other wells are drilled or not. It embraces the terms of the first agreement mentioned in the complaint, and contains others in addition. The answer alleges that in the contract set out in the exhibit the contract entered into in 1898 was merged. We are of the opinion that this interpretation may reasonably be put upon it, and that the consideration of the new contract consisted of the \$25 of money, and the use of the gas therein provided for, as an entirety. While the appellants continue in the use of the gas under the lease—a part of the consideration—they ought not to be permitted to recover possession of the leased premises.

The conclusions of law, to each of which exceptions were taken, are as follows: First, the defendant the Rushville Natural Gas Company has not forfeited any right under said lease of January 9, 1899, by reason of its failure to pay said sum of \$25 on November 1, 1899, when it became due and payable; second, the plaintiffs are entitled to a judgment against defendant the Rushville Natural Gas Company in the sum of \$53.50, and to no other relief; third, the plaintiffs are entitled to a judgment against defendants for their costs in this action laid out and expended. The special finding of facts upon which the foregoing conclusions of law are based is substantially as follows: Appellants own the land described in the complaint, on which they reside. That they have resided on said land in a residence. That the said residence is located on the portion which is known by them as the 66-acre tract, and is not on said 4-acre tract. There is, and has been since November 1, 1898, a residence for a tenant on the 4-acre tract. Previous to November, 1898, the Morristown Fuel & Light Company were engaged in drilling

for gas, and conveying it in pipes, and selling gas to its consumers. In the month of November, 1898, the plaintiffs and said Morris-town Company entered into a written contract, by the terms of which said company agreed to drill a gas well on plaintiffs' land aforesaid, and furnish plaintiffs gas for fuel and light in the house in which they resided, so long as gas was produced from said well, and said plaintiffs therein agreed to pay said company \$77. In pursuance of said agreement, in November, 1898, said company drilled a gas well on that portion of said land known as the 66-acre tract, which did not embrace or include said 4-acre tract. That appellees drilled a gas well on this land. That no well on the 4-acre tract has been drilled, and no gas supplied to or demanded for the tenant house. That appellants piped their residence and used gas from this well from November 1, 1898, down to the present time. That the gas so used was of the value of \$72 per year. That said well still continues to produce gas in paying quantities, and appellees have been continually selling gas from this well to the present time. That the value of gas from said well is of the value of \$230 per annum. That appellees have not paid appellants any money since said well was drilled, but on December 28, 1899, appellees tendered appellants \$25, which was refused, and on December 5, 1900, they tendered appellants \$50, which they refused to accept. That on December 28, 1899, there was due appellants, under said lease, \$25.23, as principal and interest, and on December 5, 1900, there was due appellants \$51.79, as principal and interest. An exception to the conclusions of law admits the correctness of the facts found. Upon these findings, the court did not err in its conclusions of law.

Judgment affirmed.

(31 Ind. App. 433)

LA PLANTE v. LA ZEAR.

(Appellate Court of Indiana, Division No. 2.
Oct. 13, 1903.)

LANDLORD AND TENANT—REPAIRS—POSSESSION BY LANDLORD—DEFECTIVE STAIRWAY—PERSONAL INJURY—LIABILITY OF LANDLORD.

1. The owner of a building, with a single stairway leading thereto for common use of the tenants, who leased it to two tenants, was to be deemed as in possession of the stairway, and bound to keep it in repair, and was liable to a tenant for an injury received by the tenant, without his fault, from a defect in the stairway.

2. A judgment will not be disturbed on appeal for want of evidence where there is some evidence in the record to sustain it.

3. It is not error to refuse an instruction stating a correct proposition of law, but which is not applicable to the facts.

Appeal from Circuit Court, Daviess County; M. S. Hastings, Special Judge.

Action by Mary La Zear against Katharine La Plante. Judgment for plaintiff, and defendant appeals. Affirmed.

C. E. Dailey, C. K. Tharp, and John T. Goodman, for appellant. Padgett & Padgett and Cullop & Shaw, for appellee.

WILEY, J. Appellee was a tenant of appellant, and was injured by the breaking of alleged defective steps leading to the house. This action was to recover damages resulting from such injuries. The complaint was in two paragraphs, to each of which a demurrer was overruled. Answer in denial, trial by jury, verdict and judgment for appellee. Errors relied upon for a reversal are the overruling of the demurrers to each paragraph of complaint, and overruling appellant's motion for a new trial.

The amended first paragraph of complaint avers that appellant was the owner of a certain lot upon which was a dwelling house of two apartments; that each of said apartments consisted of three rooms down and one room up stairs; that appellee rented one of the apartments, and was occupying it as a tenant of appellant; that the other apartment was leased to and occupied by another tenant; that said house had front steps, porch door, and a hallway, used in common by both families residing therein, and were for the use of both families; that on the 20th day of June, 1900, while appellee and the other tenant were occupying and using said premises, one of the boards in one of the front steps leading to said house became out of repair; that appellant was notified to repair the same; that she came to examine it, and promised to make the necessary repairs; that said step prior thereto had been out of repair for a long time, and that appellant knew of such fact; that on the 23d day of June, 1900, appellee was desirous of going from the house to the street, and, while descending said steps to the walk below, avoided stepping on the aforesaid broken step, and stepped upon another in the course of steps, which board by her from the top step appeared to be safe and free from defects; that when she stepped upon said step the board broke and gave way suddenly under her weight, whereby she was thrown to the ground and violently and permanently injured; that the board that broke was defective in this: that the underside thereof was decayed and cracked and weak, and on account thereof was unfit for the purpose for which it was used; that, it being on the underside, appellee could not see the defect, which condition she was unable to know by using the same as a means of ingress and egress to and from the common entrance to said house; that appellant knew at the time appellee became her tenant that said step was out of repair, or could have known it by the exercise of ordinary care and diligence; that she was negligent and careless

¶ 1. See *Landlord and Tenant*, vol. 32, Cent. Dig. §§ 629, 633.

in not having the same in good and safe repair for her tenants, who were required to use the same in common as a means of entering and leaving said house; that she was also negligent in failing to repair the same before appellee became her tenant, so that it would have been safe for use; that said steps were inclosed so that one using them could not see the underside of the boards, and hence appellee was unable to know the condition thereof; that said steps were not under the control or dominion of appellee, for the reason that they were used in common by all of appellant's tenants occupying the house, it being a common passageway, and that appellant was still occupying the same under her dominion and possession for and on account of said reason; that by reason of said facts her injury was caused without fault or negligence on her part, but wholly on account of the fault and negligence of the appellant. The second paragraph is not materially different from the first, and it is unnecessary to give even an abstract of it. Both paragraphs proceed upon the theory that appellant rented the house, with different apartments or tenements, to two different tenants, and that she kept possession of and exercised dominion over the steps, etc., as a common passageway for the tenants occupying the premises, and that she was charged with the duty of keeping such common passageway in repair, and safe for use, and that she failed to do so. It is only upon this theory, if at all, the complaint states a cause of action.

Appellant predicates her right to a reversal upon the theory that a landlord is not bound to make repairs in the absence of a covenant to do so, and further that there is no implied warranty or covenant that the demised premises are fit, or shall continue to be so, for the purposes for which they are leased. There is no doubt but that this is the general rule, as applicable to ordinary tenancies, for all of the authorities so hold. We mean by the expression of "ordinary tenancies" where property is leased to a single tenant. In such case the lessee has the exclusive possession of, and exercises absolute dominion over, the entire leased premises, in the absence of any reservation or exceptions expressed in the contract. We need not stop to cite authorities in support of this familiar proposition. The only Indiana case cited by appellant upon the proposition that the complaint was insufficient to withstand a demurrer is *Purcell v. English*, 86 Ind. 34, 44 Am. Rep. 255. That case is not decisive of the question here involved, for two reasons: (1) In that case the injury resulted to the tenant by reason of a temporary covering of snow and ice on a stairway leading to her apartments, which obstruction was open and obvious, and for which the landlord was not in any way responsible. (2) The question here involved was not in issue in that case, and the

court expressly said that it was not decided, and used the following language: "Whether a landlord hiring apartments to many tenants is liable for latent defects, or for fault of construction, or for permanent defects in the common passageways, we do not decide." The facts in the *Purcell-English Case*, supra, were so dissimilar to the facts stated in the complaint before us that the decision there does not necessarily declare the law applicable to the facts here. The authorities are not in harmony, but the weight of them declare the rule to be that where the landlord leases separate portions of the same building to different tenants, and reserves under his control those parts of the building or premises used in common by all the tenants, he is under an implied obligation to use reasonable diligence to keep in a safe condition the parts over which he so reserves control. 18 Am. & Eng. Encyc. of Law (2d Ed.) 220; *Phillips v. Library Co.*, 55 N. J. Law, 307, 27 Atl. 478; *Alperin v. Earle*, 55 Hun, 211, 8 N. Y. Supp. 51; *Rouillon v. Wilson*, 20 App. Div. 307, 51 N. Y. Supp. 430; *Karlson v. Healy*, 38 App. Div. 486, 56 N. Y. Supp. 361; *Blake v. Fox* (Com. Pl.) 17 N. Y. Supp. 508. We quote the following from 18 Am. & Eng. Encyc. of Law, p. 220: "Thus it is held by the weight of authorities that an implied duty is imposed upon the landlord to keep in repair common passageways and approaches retained under his control, and used by the several tenants as the means of access to the portion of the premises demised to them, and that the landlord is liable for injuries received by a tenant because of the landlord's negligence in performing this duty. * * * The character of the liability has been said to be the same as that of any owner of real estate who holds out invitations or inducements to others to use his property to exercise reasonable care and skill to render the premises reasonably fit for the uses which he has invited or induced others to make of them." This is the rule in England, Maine, Massachusetts, New Jersey, New York, Ohio, Pennsylvania, and Missouri. The authorities are all collected and cited in a note following the above extract, and it is useless to cite them here. This court, in the case of *Hamilton et al., Executor, v. Feary*, 8 Ind. App. 615, 35 N. E. 48, 52 Am. St. Rep. 485, discussed fully the general rule of a landlord to keep in repair leased premises, and to what extent he became liable for injury to a tenant by reason of defects, and then said: "To this general rule there are, however, exceptions. Thus the landlord is liable where the premises contain some hidden defect or defects, or are infected with some noxious disease, rendering them dangerous or uninhabitable, and of which dangerous element or defects the landlord had some knowledge or information, but which were not open to the view of the tenant, and of which he was ignorant or uninformed. And so the landlord is answerable where he con-

trols or retains possession of a portion of the premises, or a portion is used in common by two or more tenants, and an injury occurs, through some negligence or fault of the landlord, upon that portion over which he has the control, or which is used in common." In a well-considered case, the Supreme Court of Maine, upon facts similar to those at bar, decided the exact question before us, and held that the owner of several tenements leased to different tenants, with one stairway or passageway for the accommodation of all, and used in common by them, was, in the absence of an express agreement to the contrary, in possession of such passageway, and bound to keep it in repair at his own expense, and was liable to a tenant for an injury happening through a defect therein, where the tenant was without fault. *Sawyer v. McGillicuddy*, 81 Me. 318, 17 Atl. 124, 3 L. R. A. 458, 10 Am. St. Rep. 260. In that case the court said: "He [the landlord] was the owner of the tenements, and kept them for the purpose of profit. But to insure that, there must be some means of access to them. He preferred to make one passageway for all, rather than one for each. This was an invitation, an inducement, for all who needed such accommodation to come and pass over this passageway. It was a way provided for them to pass over, precisely as a man provides a way for his customers to get to his place of business, and the same implied covenant to keep in a safe and convenient repair must exist as much in one case as the other." While there is some conflict in the decisions, real or apparent, the preponderance of authority is in harmony with the rule declared in the Maine case. In Massachusetts the question seems to have been definitely settled in accordance with that ruling. The same principle runs through all the cases—that the obligation to repair, in the absence of any express agreement, depends upon the right of possession, and that an appurtenant attached to and made for the accommodation of several different tenements leased to different tenants remains in the possession of the lessor, though the use of it goes to the lessee. *Sawyer v. McGillicuddy*, supra. The case of *Milford v. Holbrook*, 9 Allen, 17, 85 Am. Dec. 735, was where an awning was made for and attached to a block containing three shops leased to different tenants. It was there held that, though all had the use of the awning, yet the possession remained in the landlord, and he was liable for any defects in it. The case of *Shipley v. Mitty Associates*, 101 Mass. 251, 3 Am. Rep. 346, was where an entire building was leased to different persons in tenements under leases requiring them to make repairs; and yet it was held that the possession of the roof, however necessary to all, was not conveyed to any one of the tenants, nor to all jointly, and was therefore left in the owners, who were liable for new repairs. *Readman v.*

Conway, 126 Mass. 374, is also in point. That was where three tenements, with a platform in front of all, were leased to different persons. It was held that there was no presumption, in the absence of an agreement to that effect, that the tenants were to keep the platform in repair; that neither tenant acquired any exclusive right to use or control the part in front of his shop; and that there was no such leasing of the platform as would exonerate the landlord from responsibility for defects in it. In the case of *Looney v. McLean*, 129 Mass. 33, 37 Am. Rep. 295, it was held that where a landlord lets rooms in a building to different tenants, with a right of way in common over a staircase, he is bound to use reasonable care to keep such staircase in repair, and for failure to do so he became liable for injuries resulting from defects, provided the tenant was in the exercise of due care. In *Coupe v. Platt*, 172 Mass. 458, 52 N. E. 526, 70 Am. St. Rep. 293, it was held that where a landlord maintains outside steps and platform for the use in common of different parts of the building, and a visitor to one of the tenants, expressly invited by the tenant to come on a particular day for a particular purpose, is injured by a defect in the platform while passing over it, the landlord was answerable, for the visitor was using the platform in the tenant's right. The same rule is applied to a stairway which is kept and used in common by different tenants. *Sawyer v. McGillicuddy*, supra. See note to *Lindsey v. Leighton*, 15 Am. St. Rep. 201; notes to *Poor v. Sears*, 26 Am. St. Rep. 278; *Nalley v. Hartford Carpet Co.*, 50 Am. Rep. 53; *Donohue v. Kendall*, 50 N. Y. Super. Ct. 386; *Camp v. Wood*, 76 N. Y. 92, 32 Am. Rep. 282. In the case of *Payne v. Irvin*, 144 Ill. 482, 33 N. E. 756, it was held that the landlord was required to keep in repair that portion of the building over which he retained control for the protection of all persons, including his tenants. Our attention has been called to cases in support of appellant's contention, but they are not sufficient to overcome the authorities of the numerous cases here cited. Some of those cases hinge upon temporary obstructions, such as accumulations of snow, ice, etc., and the principle there involved is not applicable to the facts here pleaded. The better reason and sounder principle are with the cases in support of appellee's contention. Each paragraph of the complaint was sufficient to withstand a demurrer.

Under the motion for a new trial, two questions are discussed, viz.: (1) That the evidence is not sufficient to support the verdict; and (2) that the trial court erred in giving and refusing to give certain instructions. We cannot disturb the judgment upon the evidence, for the reason that there is some evidence in the record to sustain it. The parties each timely tendered to the court written instructions, and requested that they be giv-

en to the jury. To all of the instructions tendered by the appellee, which the court gave, the appellant objected and excepted. To the refusal to give some of the instructions tendered by appellant, she objected and excepted, and to all the instructions given by the court on its own motion, appellant excepted. Out of the numerous instructions so given and refused, counsel have discussed 3 and 6 given by the court on its own motion; 2, 5, and 9 tendered by appellee and given; and 9 and 16 tendered by appellant and refused. All of these instructions, except 9 and 16, are in harmony with the authorities cited and the rule declared in what we have said in holding the complaint sufficient, and were applicable to facts disclosed by the evidence. In giving them the court correctly stated the law, and it is useless to review the authorities in support of them. Instruction No. 9 tendered by appellant was not pertinent to the issues or applicable to the facts, was antagonistic to the rule above declared, and hence it was rightly refused. No. 16, while it may correctly state an abstract proposition of law applicable to ordinary tenancies, does not state the law under the issues and facts in this case, and was properly refused.

Judgment affirmed.

(31 Ind. App. 483)

MCGREGOR et al. v. STATE ex rel. BALLARD, County Superintendent.

(Appellate Court of Indiana, Division No. 2. Oct. 15, 1903.)

SCHOOLS—PAYMENT OF WAGES—INJUNCTION—PERSONS ENTITLED TO SUE—COUNTY SUPERINTENDENTS—ADEQUATE REMEDY AT LAW—COMPLAINT.

1. Burns' Rev. St. 1901, § 5903, provides that the county school superintendent shall have the general superintendence of the county schools, visit them, attend teachers' institutes, and superintend generally the elevation of the standard of teaching. Section 5911 declares that he shall have the right to inspect the official dockets, records, and books of account of the township officers, and, whenever he shall find that any of them have misapplied the school funds or revenues in their possession, he shall institute suit to recover the same. *Held*, that neither of such sections authorized a school superintendent to institute a suit in equity to restrain township school trustees from paying a teacher for services rendered out of the school revenue.

2. A complaint in a suit by a school superintendent to restrain township trustees from paying a school teacher out of the school revenue, on the ground that the teacher had no license to teach in the public schools, which failed to contain any allegations tending to show that relator had no adequate remedy at law, was demurrable.

Appeal from Circuit Court, Gibson County; O. M. Welborn, Judge.

Action by the state, on the relation of John T. Ballard, county superintendent of schools, against James H. McGregor and another. From a judgment in favor of relator, defendants appeal. Reversed.

Lucius C. Emleer and Luther Benson, for appellants. M. W. Medcalf, for appellee.

ROBY, J. This action was brought in the name of the state of Indiana, upon the relation of John T. Ballard, superintendent of public schools of Gibson county, against Geo. W. Smith, trustee of Montgomery school township, and James H. McGregor, a teacher employed by said trustee. It is averred that said trustee is threatening to pay out of the school revenue and that McGregor is threatening to collect pay for his services in teaching a certain school in said township. The teacher is averred to have been without any license to teach in the public schools. To the complaint, McGregor's demurrer was overruled, answer was filed, trial had, and a special finding of facts made, conclusions of law stated, and judgment enjoining the trustee from paying to McGregor any money out of the school fund of Montgomery township for services as teacher for the term beginning September 24, 1900.

The power of the superintendent to maintain the proceeding in the name of the state upon his own relation is challenged by the demurrer, and denied in the argument. There is no attempt to set up any private interest as a taxpayer or citizen, and the first question to be determined is as stated. In appellee's behalf, attention is called to two sections of the statute, under either of which, it is claimed, the action is well brought. In fixing the general duties of the officer, the following language is used, in connection with other provisions: "That the county superintendent shall have the general superintendence of the schools of the county." Section 5903, Burns' Rev. St. 1901. The school, for teaching which the trustee is alleged to be threatening to pay, was concluded before this suit was brought. To superintend, as the word is here used, means to have charge and direction; to regulate the conduct and progress of. The school being no longer in existence, it is not possible to give it further superintendence. The action has for its primary purpose not the supervision of the school, but the protection of the finances of the township. The character of supervision thus directed in general terms is indicated by the following clauses of the statute, from which it appears that visitation of the schools while in progress, attendance at and conduct of teachers' institutes, and generally the elevation of the standard of teaching, were contemplated. The statute does not, either expressly or by implication, confer the right to institute injunction proceedings against trustees. The further provision relied upon has to do with the school fund, and is as follows: "Duty as to School Fund. The official dockets, records and books of account of the clerks of the courts, county auditor, county commissioners, justices of the peace, prosecuting attorneys, mayors of cities, and township trustees, shall be open at all times to inspection of the coun-

¶ 2. See Injunction, vol. 27, Cent. Dig. § 238.

ty superintendent; and whenever he shall find that any of said officers have neglected or refused to collect and pay over interest, fines, forfeitures, licenses or other claims due the school funds and revenues of the state, or have misapplied the school funds or revenues in their possession, he shall be required to institute suit in the name of the state of Indiana for the recovery of the same, for the benefit of the school funds or revenues, and make report of the same to the board of county commissioners and to the state superintendent." Section 5911, Burns' Rev. St. 1901. The superintendent may sue on his own relation, under this section, for the recovery of moneys misapplied by a school trustee, Carr et al. v. State ex rel. Atty. Gen., 81 Ind. 342; Nichols et al. v. State ex rel., 65 Ind. 512. It does not give or purport to give him any general power over the school fund. It does not make it his duty to protect the fund. His connection therewith is limited to the recovery named. The complaint does not contain any allegations tending to show that the remedy at law is not adequate. It is not necessary to the discharge of the duty imposed upon the superintendent by this statute that power on his part to bring injunction proceedings be implied. No other warrant for the action than the sections cited has been claimed, and none is known.

The court therefore erred in overruling the demurrer to the complaint. Judgment reversed, with instructions to sustain such demurrer, and for further consistent proceedings.

(31 Ind. App. 446)

BARRICKLOW v. STEWART.

(Appellate Court of Indiana, Division No. 2.
Oct. 13, 1903.)

EXECUTORS—PETITION FOR REMOVAL—DEMURRER—SUFFICIENCY OF DEMURRER—EXECUTOR'S BOND—SURETY COMPANY—RIGHT TO TRANSACT BUSINESS—STATUTES.

1. The next of kin of a testator filed a petition reciting that the bond filed by the executor was invalid, in that the bonding company had no authority on file in the county showing it authorized to transact such business, and praying that the court appoint a special administrator. The executor filed a demurrer because the petition and objections did not state a cause of action, or entitle the petitioner to the ouster prayed for. *Held*, that a contention that the demurrer should not have been considered, because the petition did not pretend to be a complaint or cause of action, was immaterial, since, by whatever name the paper be called, it asked the removal of the executor.

2. The demurrer having stated a statutory ground—"want of facts sufficient to constitute a cause of action"—fairly applied to the objections set out in the petition.

3. By the express provisions of Burns' Rev. St. 1901, § 2398, the acts of the clerk of the court in vacation in granting letters testamentary should be ratified by the court, unless good cause be shown for vacating such acts.

4. Surety companies being governed by a special statute (Burns' Rev. St. 1901, §§ 5480, 5494), the general law pertaining to foreign corporations is not applicable to them.

5. Though Burns' Rev. St. 1901, § 3453, providing that agents of foreign corporations shall deposit in the clerk's office of the county where they propose doing business the power of attorney under which they act, should be construed as applicable to a foreign surety company, failure of such company's agent to comply with the requirement would not render a bond given by him invalid.

6. The fact that the bond given by an executor is invalid is no ground for his removal on petition, the most that could be required of him being a new bond.

Appeal from Circuit Court, Ohio County; Noah S. Givan, Judge.

Proceedings by Ruth E. Barricklow to have Stephen H. Stewart removed as executor of the Estate of Presley Gregg. From a judgment in favor of the executor, plaintiff appeals. Affirmed.

W. W. Williams, John B. Coles, and Cynthia Coles, for appellant. Davis & Davis and Roberts & Johnson, for appellee.

COMSTOCK, J. Presley Gregg died testate at the city of Rising Sun, Ohio county, on the 9th day of April, 1902. His will was duly probated before the clerk of the Ohio circuit court April 11, 1902. Upon the 15th day of April, 1902, Stephen H. Stewart, who was appointed executor of said will, appeared before the clerk and filed his statement of the probable amount of the estate of said decedent, to wit, \$20,000, and then and there tendered his bond in the sum of \$45,000, with the American Surety Company of New York as surety thereon, and signed by Horace E. Smith, resident vice president, and attested by Earnest V. Clark, resident assistant secretary, which bond was approved and accepted by the clerk of said circuit court, and said Stewart was duly sworn as executor of said estate, and letters testamentary were made out and delivered to him by said clerk. All of said proceedings, affidavits, and statements, with a copy of said bond, and the appointment of said executor, are set forth in the transcript. On May 5, 1902, being the first day of the May term of the said circuit court, the clerk reported to the judge thereof his proceedings in vacation, as above set forth. Appellant filed her petition at said last-named date in said court, reciting the foregoing facts, and in addition that she was the sister and next of kin of the deceased; "that she is informed and believes that said bond so filed by said Stewart is invalid and of no force and effect, in this, to wit: that said bond is purported to have been executed by the American Surety Company, a corporation of the state of New York, but there is no authority on file in this county showing that said American Surety Company is authorized to transact the business of executing surety bonds in the state of Indiana, nor is there any authority on file nor of record in this county showing the authority of Horace E. Smith, the alleged resident vice president

¶ 6. See *Executors and Administrators*, vol. 22, Cent. Dig. §§ 157, 170, 222.

of said American Surety Company, to execute and deliver bonds on behalf of said company, and further that said bond, by reason of the facts aforesaid, is invalid and of no effect in this court, and that said Stewart, having failed to execute a good and sufficient bond in this matter as required by law to do, has forfeited his rights to act as such executor, and the time in which he can file a good and sufficient bond has elapsed. Your petitioner further says that the estate of said Presley is extensive, and there is great danger of its being lost to said estate, and to the injury of this petitioner, who, as stated, is the sister and next of kin to said decedent. She further shows that, as such next of kin to said Presley Gregg, she has commenced a suit in this court to contest the pretended will of said Presley, which action is now pending, and that Bertha May Barricklow, her daughter named in said will as a legatee and devisee, is a complainant; that, in view of the facts herein stated, she now asks the court to order and direct that the appointment of said Stephen H. Stewart as the executor of said pretended last will be set aside and revoked, that a special administrator be appointed to preserve the assets of said estate until the further order of the court herein, and that she be granted such other and further relief as she may be entitled to." To this petition, appellee filed a demurrer "because said petition and objections of said Ruth E. Barricklow, praying the court to revoke the appointment of said executor, does not state facts sufficient to constitute a cause of action, or entitle the said Barricklow to the relief and judgment of ouster prayed for by her therein." The action of the court in sustaining this demurrer is assigned as error.

It is claimed that this demurrer should not have been considered, for the reason that it does not apply to the written objections filed, and does not state a statutory ground for demurrer. The petition asks the revocation of the appointment of the executor. The demurrer alleged a want of facts to constitute a cause of action; but appellant asserts that the petition did not pretend to be a complaint or cause of action, that it only placed the court in possession of facts upon which the law made it the duty of the court to withhold its approval of the clerk's acts, and that it could not be tested by demurrer. It is not material by what name the paper filed is called. It asks the court to revoke the appointment of the executor. The immediate effect of the revocation of that appointment would have been the ouster of the executor. The foregoing objections named are urged against the form of the demurrer. Whether the merits of the petition should have been questioned by motion to reject or to strike out, or by demurrer, we need not determine, if the same results by either course could have been correctly reached. The demurrer, however, does state a statutory ground—

"want of facts sufficient to constitute a cause of action"—and fairly applies to the objections set out in the petition.

But without waiving the objection to the form of the demurrer, it is contended by appellant that the facts stated in the petition were enough to inform the court that appellee's bond was insufficient to protect the estate. The petition avers that appellee "is informed and believes that the bond is invalid because it purports to have been executed by the American Surety Company, a foreign corporation, but that there is no authority on file in Ohio county showing that said company is authorized to execute bonds in the state of Indiana, nor any authority on file nor of record in the county showing the authority of Horace E. Smith, the alleged resident vice president of the company, to execute bonds in behalf of said company." Unless good cause is shown, the acts of the clerk in vacation should be ratified by the court. Burns' Rev. St. 1901, § 2398. Foreign surety companies may be received as sureties on the bonds of executors, etc. Id. § 5494. When such companies are governed by special regulations, the general law pertaining to foreign corporations is not applicable to them. Rhem v. Gorman, etc., 125 Ind. 135, 25 N. E. 173; Security Savings & Loan Co. v. Elbert et al., 153 Ind. 198, 54 N. E. 753. The American Surety Company and like corporations are governed by the special statutes, sections 5480-5494, Burns' Rev. St. 1901. That act does not require the agent to file his certificate in the office of the clerk of the county in which he desires to do business. It is claimed that the surety company was required, under section 5481, Burns' Rev. St. 1901, to file power of attorney appointing the Auditor of State attorney in fact, etc.; by section 3453, supra, to deposit in the clerk's office of the county the power of attorney under and by virtue of which it acts as agent. But even if the law required the filing of the certificate of the agent in the office of the clerk of such county, the failure to comply with that provision would not render the bond invalid. North Mercer Co. v. Smith, 27 Ind. App. 472, 61 N. E. 10, and cases cited. A foreign corporation cannot do business in this state without complying with the provisions of the statutes authorizing it to do such business, and escape liability upon its contract. Phoenix Ins. Co. v. Penn. R. Co., 134 Ind. 215, 33 N. E. 970, 20 L. R. A. 405, and cases cited; Sparks v. Ass'n (C. C.) 73 Fed. 277; Lafayette Ins. Co. v. French, 18 How. 404, 15 L. Ed. 451; Paul v. Virginia, 8 Wall. 169, 19 L. Ed. 357; R. Co. v. Harris, 12 Wall. 65, 20 L. Ed. 354; Foster v. Lumber Co. (S. D.) 58 N. W. 9, 23 L. R. A. 490, 49 Am. St. Rep. 859.

It is proper to add that the executor has complied with the requirements of the law. If, in the opinion of the trial court, the surety company was not authorized to act, appellant could have asked for no more than a

new bond; but the bond was valid, and the court did not err in its ruling upon the demurrer.

Judgment affirmed.

(31 Ind. App. 485)

GISH v. BOARD OF COM'RS OF ST. JOSEPH COUNTY.

(Appellate Court of Indiana, Division No. 1.
Oct. 15, 1903.)

COUNTIES—CONTRACTS—EXPENDITURES—POOR PERSONS—CARE—PHYSICIAN'S SERVICES—APPROPRIATIONS—AUTHORITY OF COMMISSIONERS.

1. Under Burns' Rev. St. 1901, § 5594b1, providing that, except in certain instances specified, no warrant shall be drawn or money paid out of the county treasury unless an appropriation by the county council has been made, which remains unexhausted, a complaint by a physician, who had treated a poor person at the instance of one of the county commissioners, to recover for his services against the county, failing to allege an appropriation for the payment of the claim, or for the payment of a class of claims under which the claim would fall, was insufficient.

2. Under Acts 1899, p. 352, § 27, providing that no court of any county shall have power to bind the county by judgment in a cause where such court has jurisdiction, to any extent beyond the appropriation for the purpose for which the obligation is incurred, and all obligations beyond the existing appropriations shall be absolutely void, a physician who had rendered services to a poor person at the instance of a county commissioner could not recover therefor where no appropriation had been made to pay the same.

3. Under Burns' Rev. St. 1901, § 8166g, providing that, where a county council is organized in any county, the authority to pay for materials and supplies furnished to poor persons should be limited to specific appropriations of money in advance, on estimates furnished, and that no obligation should be incurred on behalf of the county unless it should fall within appropriations specially made, and any undertaking contrary to the provisions of the section should be absolutely void, a county commissioner had no authority to employ a physician to treat a poor person at the expense of a county in which a county council was organized, where no appropriation had been made therefor.

Appeal from Circuit Court, St. Joseph County; W. A. Funk, Judge.

Action by John L. Gish against the board of commissioners of St. Joseph county. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Jos. G. Orr, for appellant. D. D. Bates, for appellee.

HENLEY, J. The trial court in this case held the appellant's complaint insufficient, and out of this action arises the only question presented by the appeal. It is averred in his amended complaint that on the 10th day of December, 1900, appellant was a licensed physician and surgeon of St. Joseph county, Ind.; that at said date and for some years prior thereto he was a specialist in diseases of the eye, and was skilled in the treatment of such diseases; that on said 10th day of December, 1900, one Georgia Brown

was a poor person living in Portage township, in St. Joseph county; that she was afflicted with a certain disease of the eye called "trachoma," and was nearly blind; that, in order to save her eyesight, certain operations and special treatment were necessary; that prior to the 10th of December, 1900, a physician was employed by the board of commissioners as a physician for the poor of Portage township, and that he was in the employ of such board on the 10th of December, 1900; that said physician was not a specialist in diseases of the eye, and was incompetent to render the needed services to Georgia Brown; that on said 10th day of December the trustee of Portage township sent said Georgia Brown to the said physician employed by the board for treatment for her disease, and that said physician failed and refused to render her any treatment, giving as his reason that he was not a specialist, and did not possess the necessary instruments and medicines required in treatment of diseases of the eye, and that said township physician told the trustee that said Georgia Brown should be taken to an eye specialist for treatment; that thereupon the trustee took her to the appellant, and employed appellant to treat her for the disease; that the appellant treated her from the 10th of December, 1900, up to and including the 10th day of May, 1901; that during that time he rendered her professional services of the value of \$227, as shown by the bill of particulars attached to the amended complaint, and that the services were worth \$227; that on the 7th day of October, 1901, appellant presented the claim for the services rendered to the board of commissioners of St. Joseph county; and that said claim was refused and wholly disallowed. The bill of particulars, showing the items and dates of treatment, is attached to this amended complaint. Appellant asks judgment against the board of commissioners of St. Joseph county for \$227.

The complaint is insufficient because it does not aver that the county council of St. Joseph county had appropriated a sum for the payment of this claim, or had appropriated a sum of money for the payment of a class of claims under which the claim in suit would fall. Nor does the claim fall within the class of claims which may be paid out of the county treasury without first having an appropriation made therefor. See section 5594b1, Burns' Rev. St. 1901, *Turner v. Board of Commissioners* (Ind. Sup.) 63 N. E. 210. Under the facts alleged in the complaint, appellee could not allow the claim; neither could the circuit court of St. Joseph county pronounce a valid judgment in appellant's favor against the county. Acts 1899, p. 352, § 27; *Turner v. Board*, supra. By section 8166g, Burns' Rev. St. 1901, the provisions of the poor law of 1901 are expressly controlled by what is commonly known as the "County Reform Law of 1899." The section of the poor law above referred to is as fol-

lows: "Wherever there shall be organized a county council in any county in this state, it is hereby declared that the authority conferred by this act to pay officers and employes of such asylums and to pay for materials and supplies of every sort therefor, shall be and the same is hereby strictly limited to specific appropriations of money made in advance by such county council upon estimates furnished. No obligation or liability of any sort shall be incurred by any officer on behalf of said county unless the same shall fall within the appropriations specifically made for the purpose. Any undertakings or agreements contrary to the provisions of this section are declared to be absolutely void and no action shall be maintained against the county thereon." It seems to us that the statutes in force are directly applicable here, and that the facts averred in the complaint do not state a cause of action.

The judgment is affirmed.

(31 Ind. App. 460)

INDIANA MFG. CO. v. WELLS.

(Appellate Court of Indiana, Division No. 1.
Oct. 13, 1903.)

MASTER AND SERVANT—INJURIES—COMPLAINT —ALLEGATIONS—ISSUES RAISED—GUARDING MACHINERY—STATUTORY DUTY—SUFFICIENCY OF ALLEGATIONS—COMMON-LAW LIABILITY.

1. In an action against a master for injuries to a minor servant, allegations of the complaint that the servant was 15 years old, inexperienced in mechanical labor, and incompetent to judge of the danger incident to the operation of the machinery, did not supply the place of an averment as to failure to instruct the servant.

2. Factory Act April 27, 1899, § 9 (Burns' Rev. St. 1901, § 7087i), enacts that the proprietor of a manufacturing establishment shall furnish belt shifters for throwing on or off belts or pulleys, and shall guard all machinery, in the discretion of the chief inspector. *Held*, that failure of a master to perform his duty under the statute is negligence.

3. An allegation in an action for injuries that defendant failed to properly guard the machinery charges the omission of a statutory duty, and is a sufficient charge of negligence.

4. Mere failure to provide belt shifters does not create a statutory liability, unless such failure is contrary to the inspector's orders.

5. In pleading the statutory liability of a master for failure to comply with the statute as to protecting machinery, it is not necessary to allege that plaintiff had no knowledge of the unguarded condition, or of the absence of a belt shifter, etc.

6. A complaint in an action for injuries to a servant, which fails to allege want of knowledge on the part of the servant of the unguarded condition of the machinery and dangers resulting therefrom, states no cause of action on a common-law liability, and hence does not warrant instructions thereon.

Appeal from Circuit Court, Miami County;
Jaby T. Cox, Judge.

Action by Carl H. Wells against the Indiana Manufacturing Company. From a

¶ 6. See Master and Servant, vol. 34, Cent. Dig. § 253.

judgment for plaintiff, defendant appeals.
Reversed.

Blackledge, Shirley & Wolf and Nott. N. Antrim, for appellant. F. D. Butler and Jno. Stapleton, for appellee.

ROBINSON, C. J. Appellee recovered a judgment for a personal injury received while operating a machine in appellant's factory. He avers in his complaint that he is 15 years of age, inexperienced in mechanical labor and the construction and operation of machinery, and incompetent to judge of the danger incident thereto, which appellant knew; that he was put to work at a machine containing two sets of sharp steel knives or bits which were attached to shafting with belt and pulley attachment, and which were made to revolve with great force and rapidity by steam, over which appellee had no control; that by reason of its construction and gearing the machine was of a dangerous character when in operation; that a part of the duty required of him by appellant was frequently to oil certain parts of the machine; that appellant had negligently and carelessly constructed and placed the machine in such position that, in order to oil it, appellee was compelled to and did reach over the revolving knives across to the opposite side and under the platform while the machine was running; and that appellant had "negligently, wrongfully, and unlawfully failed and neglected to furnish and supply or cause to be furnished and supplied, in connection with said machine, belt shifters or other mechanical contrivances for the purpose of throwing on or off the belts or pulleys, and thereby stopping the movement and action of said knives, chisels, and bits of said machine, and to properly safeguard, or to place any safeguards whatever, about said knives, chisels, and bits"; that while working with the machine, and attempting to oil the same, as above stated, his hand came in contact with the knives, whereby he was injured. The pleading contains no charge of negligence in failing to instruct appellee how to operate the machine and avoid danger. The averments that appellee was 15 years old, inexperienced in mechanical labor, and incapable and incompetent to judge of the danger incident to the operation of such machinery, do not supply the place of an averment of negligent failure to instruct appellee in the use of the machinery. The presumption that appellant did its duty, and did instruct him, is of equal weight with the presumption that it did not instruct him. From the facts averred, the inference does not necessarily follow that appellant negligently failed to instruct appellee. The pleading does not present any issue of negligence because of failure of appellant to instruct appellee in the use of the machinery.

The complaint charges as acts of negligence failure to provide belt shifters for dangerous machinery, and failure to properly

guard the machinery. The action seems to be founded upon section 9 of the factory act, in force April 27, 1899 (Burns' Rev. St. 1901, § 70871). That act makes it the duty of the owner of a manufacturing establishment "to furnish and supply, or cause to be furnished and supplied therein, in the discretion of the chief inspector, where machinery is used, belt shifters or other safe mechanical contrivances for the purpose of throwing on or off belts or pulleys; and whenever possible, machinery therein shall be provided with loose pulleys; all vats, pans, saws, planers, cogs, gearing, belting, shafting, set screws and machinery of every description therein shall be properly guarded. * * * This statute characterizes certain machinery as dangerous, and requires of the employer a certain specific duty. The failure to perform that duty is negligence. The averment that appellant failed to properly guard the machinery charges the omission of a statutory duty, and is, under the statute, a sufficient charge of negligence. *Buehner Chair Co. v. Feulner*, 28 Ind. App. 479, 63 N. E. 239; *Monteith v. Kokomo, etc., Co.* (Ind. Sup.) 64 N. E. 610, 58 L. R. A. 944. The statute provides that certain machinery shall be properly guarded. It does not provide absolutely that belt shifters shall be supplied, but that they shall be supplied "in the discretion of the chief inspector." There is no authority for saying that these words of the statute are meaningless, and may be ignored in its construction. The mere failure to provide belt shifters does not create a statutory liability, but liability under the statute arises when the inspector's order to furnish them has not been complied with. *Knisley v. Pratt*, 148 N. Y. 372, 42 N. E. 986, 32 L. R. A. 367. The doctrine in this case was in part disapproved in *Monteith v. Kokomo, etc., Co.*, supra, but not upon the above point.

Nor does the complaint, in the above particulars, show a common-law liability. In pleading the statutory liability it would not be necessary to aver that appellee had no knowledge of the unguarded condition of the machinery and of the absence of a belt shifter and the dangers resulting therefrom. An averment of failure to perform the statutory duty is sufficient. *Monteith v. Kokomo, etc., Co.*, supra. But in pleading the employer's neglect of a common-law duty such averments are necessary. If the machinery was not properly guarded, and there was no belt shifter, and it was dangerous to operate the machine in that condition, and appellee knew these facts, he assumed the risk. To show a liability at common law, want of knowledge must be averred and proved. The trial court, in the instructions to the jury, proceeded upon the theory that the pleading stated a cause of action under the statute and at common law, but did not keep in view the distinction between neglect of a common-law duty and the neglect of a specific statutory duty. The instructions as to the common-

law liability say nothing as to appellee's knowledge concerning these omissions and the dangers resulting therefrom. The motion for a new trial should have been sustained. Judgment reversed.

(21 Ind. App. 489)

MCCLEARY v. CHIPMAN et al.*

(Appellate Court of Indiana, Division No. 1
Oct. 15, 1903.)

SUBSCRIPTIONS — MANUFACTURING ENTERPRISE—PURCHASE OF LOTS—MARKETABLE TITLE — INCUMBRANCES — DECLARATION OF TRUST—REVOCATION—POWER OF TRUSTEES —DRAWING FOR LOTS—LOTTERY—VALIDITY OF CONTRACT.

1. A subscription to a manufacturing enterprise provided that if the owners of certain premises would procure a factory, and plat into lots the land designated in a previous proposition, the subscribers would each pay a certain sum for a lot. When the two propositions were made, the persons named in the second proposition as the owners were not such owners, but three of them had previously conveyed the land to a trustee. The title was not in such condition that it was impossible for them to carry out the agreement, and they were able to convey to a subscriber a merchantable title in fee to a lot, free from incumbrances. *Held*, that the material facts as to the ownership of the land were not concealed by the promoters of the enterprise, as they were able to fulfill the requirement of the contract to convey to a subscriber his lot by a perfect title, free from incumbrances.

2. A declaration in trust, executed when land was conveyed, provided that the trustee held the land in trust for the grantors, and was to convey the lots to subscribers entitled thereto under their subscription in aid of a factory. The trustee accepted the trust, and knew of the prior subscription contracts. *Held*, that such trustee was not merely a nominal trustee, but had the legal title, with power to convey the lots to the subscribers who complied with the contract.

3. Where a declaration in trust directed the trustees to convey certain lots to various persons who should be entitled to conveyances under a subscription in aid of a factory, and no authority was reserved by the grantors to revoke the power given the trustees, a subsequent writing directing the trustees to make deeds for lots to whomsoever a person named should direct did not affect the declaration of trust previously executed.

4. Trustees were required to distribute lots subscribed for in aid of a factory among the subscribers, by lot, in some fair manner, to be determined by them. In a second proposition the subscribers named a committee "to divide such lots among us, hereby ratifying all that they may do." The method of distribution was determined and carried out by the subscribers themselves at a meeting held for the purpose. The subscribers had agreed to purchase land to be divided into lots, and each was to have a lot at a certain price. The distribution of the lots was by withdrawing an envelope containing a number of a lot from a box, and an envelope containing the name of a subscriber from another box. *Held*, that the subscription was not illegal, on the ground that the lots were to be distributed by means of a lottery, which was against public policy.

5. Under a subscription in aid of a factory, land was to be purchased, divided into lots, and the lots conveyed to the subscribers, on payment of a certain sum, free of incumbrance. The sureties on judgments, which were liens on the land for the purpose of converting it into cash, secured the release of the land from the

*Rehearing denied. Transfer to Supreme Court, denied.

liens, in consideration of which they agreed that all the proceeds of the sale of the land should be applied on the liens, and that its release should not affect their liability on the judgments. *Held*, that the release was conclusive on the judgment creditor, in favor of subsequent purchasers, and the lots were freed from the lien.

6. Subscribers in aid of a factory conferred on trustees the power to collect the subscriptions, and the money was made payable to the trustees for the use of the firm who would erect the factory. Under subsequent contracts, the firm was not to receive any of the money collected, but the collection was indirectly for the benefit of the firm, as it was in fact applied on the price of land purchased by the firm. *Held* that, as the trustees were authorized to collect the subscriptions, they could sue in their own names for the use of the firm.

7. Where a subscription to lots in aid of a factory provides that the vendors shall convey or cause to be conveyed the lots to the subscribers, a subscriber who has not objected to receiving a deed executed by a third person cannot defeat his subscription because he was not required to accept a deed from a third person, but only from his vendors.

8. Where a subscription to lots in aid of a factory entitled a subscriber to a deed when he paid a certain per cent. of the price, and, relying on his promise, the factory has been completed according to the contract, and he has not paid anything, nor repudiated his subscription, nor made reply to frequent demands for payment, he must be held to have acquiesced in the delay, precluding him from claiming the trustees were barred by laches from recovering the subscription.

9. The tender of a merchantable title is a substantial compliance with a subscription for a lot to aid in the erection of a factory, whereby the subscriber is to have conveyed to him the lot by a perfect title, in fee, free from incumbrance, especially when the factory had been erected, and the lot was not the sole consideration for the subscription.

10. Where the tender of a deed is restricted by conditions which were to be performed before the grantee was to be entitled to it, such a conditional tender is valid.

11. Where a subscription to a lot in aid of a factory required the conveyance of a perfect title on payment of a certain sum, and such payment had not been made, that there were liens on the property did not constitute a breach of the contract, as the title was to be good when the deed was made, and the deed was not due until a portion of the subscription was paid.

12. A release by an executor of a judgment which is a lien on realty is valid, where it is not executed without consideration, and no fraud, collusion, or wasting of the assets of the estate is shown.

Appeal from Circuit Court, Kosciusko County; H. S. Biggs, Judge.

Action by Silas W. Chipman and others, trustees, against John C. McCleary, to recover on a contract of subscription. Judgment for plaintiffs, and defendant appealed to the Supreme Court, from which the cause was transferred under Act March 12, 1901. Affirmed.

Edgar Haymond and Marshall, McNaguy & Clugston, for appellant. W. D. Frazer, John D. Widaman, J. R. Frazer, and Odell Oldfather, for appellees.

ROBINSON, C. J. Error is assigned upon the conclusions of law stated upon a finding of facts substantially as follows: In Janu-

68 N.E.—21

ary or February, 1896, appellant and a large number of other persons proposed in writing to one Huffman to purchase from him, at \$100 each, lots for which they subscribed, if Huffman would procure title to a certain tract of land, and erect thereon certain factories, and plat the remainder into city lots. Appellees were named as trustees, authorized to collect the money, and distribute the lots "by lots," in a manner to be determined by them; the subscribers agreeing to accept and pay for such lots as should be set off to them. When 50 per cent. of the price of the lots had been paid, Huffman was to convey the lots to the subscribers by perfect title, in fee simple, free from incumbrances; the subscribers to execute their notes in two payments for the residue. Appellant subscribed for one of the lots. Huffman accepted the proposition, but, before performing his part of the agreement, except making a plat of 350 lots, which plat was not recorded, assigned his interest therein to the firm of Charles & Co., who assumed Huffman's duties, but who did not carry out the agreement. Afterwards, in March, 1896, appellant, with part of the persons who signed the Huffman proposition, with others, signed a second proposition, providing that if the owners of the premises would procure the erection of a factory of certain dimensions and capacity, and would plat into lots the land to have been platted in the Huffman proposition, the subscribers would pay for the lots theretofore subscribed for, the sum so subscribed, to the trustees named in that subscription. The proposition stated that it was made to induce some party to erect the factory on the strength thereof. The subscribers appointed a committee of four to act for them and in their names, and to look after their interests; authorizing them to permit such changes in the details as they might deem necessary, and to divide the lots among the subscribers, thereby ratifying all that they might do. It is further found that among the subscribers to the first and second propositions were ten of the persons designated as the owners of the premises named in the second proposition; that the lands to be platted were in sections 5 and 8; that, when the two propositions were made, the persons named in the second proposition as the owners of the land in section 8 were not such owners, but that 3 of the persons so named had previously conveyed the land to one Oldfather, who did not record his deed until July, 1896. When the propositions were made, the subscribers did not know Oldfather owned the premises, but believed the persons named in the second proposition were such owners. That, contemporaneously with the execution of the deed to him, Oldfather orally agreed that he would hold the land in trust for his grantors, convey the same to persons whom they might designate, and reconvey any portion left, which trust Oldfather has ever since recognized, and now does so. The persons named

in the second proposition as the owners of the land to be platted did own that part in section 5, and on October 31, 1895, they quit-claimed the same to Oldfather, who contemporaneously therewith executed to the grantors a written declaration of trust that the conveyance was made to him as trustee, and that he would convey the lots to the parties entitled to such conveyances under the terms of the subscriptions. The second proposition was accepted by the owners, and, relying thereon, they entered into a contract with the firm of Charles & Co. for the erection of a factory; the firm to be paid the proceeds from the subscriptions. The factory was erected substantially in accordance with the requirements of the two propositions, was in complete running order on July 1, 1895, and since that time has been operated in compliance with and to the capacity required in the two propositions. The subscribers' committee entered upon the discharge of their duties, approved the location of the factory, such changes as were made as to the buildings and their locations, the conveyance of the land to the firm of Charles & Co., the platting of the rest of the land into lots, and sent to the subscribers, including appellant, who received the same, notice of a meeting of the subscribers for the purpose of disposing of the lots, which notice contained in detail a plan for distribution, which was substantially adopted at a meeting of the subscribers held afterwards. The parties named as owners of the land in the second proposition conceived the plan of disposing of the land, prepared and circulated the two subscription papers, were the real parties in interest, claiming to be the owners in interest of the land, and were to receive the profits of the sale, except such part as went to the firm of Charles & Co. On April 16, 1896, Oldfather platted the lands, and recorded the same; his plat differing from the Huffman plat, in not including as much land, by about $4\frac{1}{2}$ acres, which was low, wet land, not valuable for building purposes, and of little value for town lots; in changing the factory site to higher ground, of greater value, and enlarging the same, and omitting a strip 66 by 400 feet of the most valuable land. Otherwise the plats were substantially the same. Of the land to be platted in the Huffman proposition, part was low, wet, and swampy land, which had no value for building purposes, and but little value for any purpose. A depression from 5 to 10 feet deep and 15 to 20 feet wide ran through a portion of it. Much of it lay remote from roads or streets. Part was high, lay near roads and streets, and was well adapted to building purposes. Of the lots in the Oldfather plat, part were low and wet, remote from roads and streets, not valuable for building purposes, and no value for any purpose of more than \$3 to \$15 per lot. That not to exceed 50 of the lots were adapted to building purposes, and had a market value of from \$30 to

\$35 per lot. When the deeds were made to Oldfather, the lands were incumbered with judgment, mortgage, and tax liens of more than \$14,000. On December 20, 1900, the State Bank of Warsaw had become the owner of most of these liens, and on that day released the same. None of the liens held by the bank at the date of the release were paid, and still remain unpaid to the amount of more than \$7,000. The distribution of the lots was made in the following manner: The numbers 1 to 350, representing the lots, were written on separate cards, which were placed in envelopes and sealed. Each of the names of the 350 subscribers was written upon a separate card. The cards containing the names of the subscribers were placed in one box, and the envelopes containing the lot numbers in another. The boxes were thoroughly shaken, a card containing a name drawn, and simultaneously therewith an envelope containing a lot number. If the subscriber thus drawn had paid \$50 on a lot, the envelope was opened, and the number of the lot announced. If the subscriber so drawn had not so paid, the card containing the name and the envelope containing the lot number so drawn were put into a larger envelope and sealed. Appellant was not present, and did not participate in the drawing. Not having paid \$50 on a lot, the card containing his name and the envelope containing a lot number drawn with it were sealed in an envelope, which, when afterwards opened, was found to be lot 271, which was part of section 5. The firm of Charles & Co., appellee Chipman, who performed all the active duties of the trust, and the landowners, approved the manner of distribution. Charles & Co. will not recover any of the money collected in this suit, but the same will be used to apply upon the liens held by the bank and a certain estate. Before this suit was brought, Oldfather tendered to appellant a deed to lot 271, conveying to him a merchantable title in fee, free from incumbrances of all kinds. The lots, streets, and alleys in the plat have not been staked out or marked or identified. Appellant has never taken possession of the lot. About 70 subscribers have paid in full and received deeds, and about 100 others have made partial payments. The amount of appellant's subscription is now \$105, no part of which has been paid. Appellant has never demanded a conveyance of the lot, or an abstract, or possession, and has never rescinded or offered to rescind his subscription. As conclusions of law, the court stated that appellees are entitled to recover \$105 and costs, and that appellant is entitled to the possession of the deed tendered.

It is first argued that the findings show misrepresentations and concealment of material facts on the part of those promoting the enterprise. But the record discloses nothing of this character which would prejudice the rights of appellant, or render the contracts unfair. When the second proposition

was signed, the parties representing themselves to be the owners of the land to be platted, of which lot 271 was a part, were in fact the owners; and three of them owned the other tract, and had previously conveyed it to Oldfather in trust for them. It is not shown that there were any secret equities affecting appellant's rights. At no time was the title to the land in a condition that it was impossible for them to carry out their part of the agreement. Although they might not have had at all times an unconditional, fee-simple title, yet they did at all times hold such title as would enable them to comply with their agreement with appellant. The court very fully stated all the facts showing title, and also stated that the deed tendered to appellant was sufficient to convey to him a merchantable title in fee simple to lot 271, free from incumbrances of all kinds. This, in effect, fulfills the requirement of the contract that the deed should convey to him his lot by a perfect title in fee simple, free from incumbrances of all kinds.

It is argued that the deed from Oldfather conveyed no title. When the grantors conveyed to him that part of the land in section 5, the declaration of trust executed at the same time provided that the trustee held the land in trust for his grantors, and was to convey the lots to the various parties who should be entitled to such conveyances under their subscriptions in aid of the factory; such lots to be conveyed when paid for. The trustee accepted the trust, and it became binding upon him. He had knowledge of the prior subscription contracts. Nothing further was to be done by the grantors. It is true, appellant had not paid for the lot, but when the deed was tendered the last payment was long past due. By the declaration of trust, he was to convey the lots to those entitled to them under their subscriptions in aid of the factory. Under the contract a subscriber was to receive his deed when he had paid half the price, and was to give his notes for the balance. As the declaration of trust was made with reference to the subscription contract, and as equity looks to the intent rather than to the form, when the declaration of trust requires that the trustee shall make the deed when the lot is paid for, it must be held to mean when paid for according to the terms of the subscription. We do not think it can be said that the trustee was merely a nominal trustee, but that, for the purpose of carrying out the terms of the subscription contract, the legal title was conveyed to him by his grantors, and the power vested in him to convey the lots to such subscribers as complied with the contract—among them, lot 271 to appellant. See *Haxton v. McClaren*, 132 Ind. 235, 31 N. E. 48; *Ewing v. Jones*, 130 Ind. 247, 29 N. E. 1057, 15 L. R. A. 75; *Mohn v. Mohn*, 112 Ind. 285, 13 N. E. 859; *Wright v. Moody*, 116 Ind. 175, 18 N. E. 608.

It is also argued that the grantors of the

trustee reserved the power to revoke the trust. But no authority to revoke it is reserved in the instrument creating it. *Burns' Rev. St. 1901, § 3407*. It is true that subsequent to the execution of the deed to the trustee the grantors gave to him a written order to make deeds for lots to whomsoever a person named should direct. But this order could not affect the terms of the written declaration of trust previously executed. It had expressly directed the trustee to convey the lots to certain persons. The trustee knew of the subscription contracts. The declaration of trust refers to these subscriptions, and must be construed with reference to the subscription contracts. He was to convey the lots to the various parties who should be entitled to conveyances under the subscriptions in aid of the factory. No authority was reserved by the grantors to revoke the power given the trustee, and without such reservation the grantors had no such authority.

It is further argued that the contract was illegal in its inception; that the lots were distributed by means of a lottery, which was against public policy, and void. In the second proposition made by the subscribers, they refer to their subscriptions to the first proposition. In the first proposition, which was practically abandoned, the appellees were named as trustees, who were "authorized and required" to distribute the lots among the subscribers "by lots"; the same to be done in some fair and equitable manner, to be determined by them. In the second proposition the subscribers named a committee of four to act for them, and, among other duties, "to divide such lots among us, hereby ratifying all that they may do." Taking the two propositions together as constituting the contract between the parties, it cannot be said that the contract provides that the lots shall be disposed of by some kind of lottery. The method of distribution and the distribution itself were determined and carried out by the subscribers themselves at a meeting held by them for that purpose. The court finds that at no time prior to the distribution, October, 1895, were the details of any plan for the distribution of the lots among the subscribers ever discussed or talked about in any manner or known by any person, but that it was at all times known to the owners and the subscribers that the distribution was to be by means of a lot drawing. It is also found that a notice, which appellant received, was sent to the subscribers to meet at a certain time and place to determine upon a plan of distribution, and to distribute the lots; the notice containing the details of a plan proposed by the subscribers' committee named in the second proposition; that the meeting was held. One of the subscribers, not a vendor, was elected president, and another subscriber, not a vendor, outlined the plan for the distribution which had been set forth in the notice, which plan was voted upon by the subscribers present, and was unanimously adopt-

ed by the meeting. Three of the grantors were present at the meeting, but they were all subscribers, and it does not appear that they took any active part in the meeting. The firm of Charles & Co. were not present when the plan of distribution was determined, but were afterwards present while the distribution was being made. It is true, the court finds that the lots, when platted, were of unequal value. But it is also found that, of the land to be platted in the propositions made by the subscribers, part of it was wet and swampy, and had no value for building purposes, and little value for any purpose, and, on account of depressions, and distance from roads or streets, the several portions of the lands differed greatly in value. It seems that the findings show, in effect, that a number of persons agreed, for a consideration named, to buy a tract of land which was afterwards to be platted into lots. Each purchaser was to have as his part of the land one of these lots, for which he was to pay \$100. The land was platted into lots, and the purchasers afterwards met and determined among themselves the manner in which the lots should be assigned among them. The contract made by each subscriber was one he had a right to make. It is not shown that the promoters did anything for which they would be liable to indictment for conducting a lottery. Before the meeting held to determine the manner of distribution, they had contracted away their interest in the property involved in the transaction. The subscribers were free to act for themselves in any manner they might choose. Induced by a desire to aid an enterprise which they believed would be an advantage to them as citizens, they entered into a lawful contract to buy the land, and afterwards agreed among themselves the manner in which it should be divided. Appellant was not present at this meeting. But he had never rescinded or offered to rescind his subscription, and while his contract was several, and not joint, yet the subscribers were, in a sense, pursuing a common purpose. See *Ft. Wayne, etc., Co. v. Miller*, 131 Ind. 499, 506, 30 N. E. 23, 14 L. R. A. 804. He was notified of the subscribers' meeting, and the purpose for which the meeting would be held. He continued, without objection, to be a subscriber. He knew the meeting was to be held, and entered no objection, and failed to make any response whatever to the notice received. Under all the circumstances, it must be held that he was bound by the result of the meeting. There is nothing to show that any fraud was practiced as to appellant. Taking the transaction as a whole, it cannot be characterized as a lottery, within the meaning of the law. The sale of the lots to the subscribers was not in pursuance of any design to evade the law or promote a lottery. It was not a plan or scheme on the part of the promoters to sell or dispose of the property by lot or chance. It seems to have been fair

and equitable, and we find nothing in it that can be said to be opposed to good morals. See *Washington Glass Co. v. Mosbaugh*, 19 Ind. App. 106, 49 N. E. 178; *Emswiler v. Tyner*, 21 Ind. App. 347, 52 N. E. 459, 69 Am. St. Rep. 360; *Wile v. Rochester Imp. Co.*, 24 Ind. App. 422, 56 N. E. 928; *Chancy Park Land Co. v. Hart*, 104 Iowa, 592, 73 N. W. 1059. In *Lynch v. Rosenthal*, 144 Ind. 86, 42 N. E. 1103, 31 L. R. A. 835, 55 Am. St. Rep. 168, cited by counsel for appellant as controlling in this appeal, it is said, quoting from *Rothrock v. Perkinson*, 61 Ind. 39: "It is well settled in this state that every scheme for the division or disposition of property or money by chance or any game of hazard is prohibited by law, and that every contract or agreement in aid of such a scheme is void as against public policy." In that case, "by the definite language of the contract," the lot which appellee agreed to purchase was to be determined by lot. The appellee had no choice whether he was to pay \$100 or \$300. A prize lot was to be awarded to some one in addition to the lot subscribed for; the prize lot to be awarded to some one by the result of chance. Appellant participated in the drawing, which was conducted according to a plan suggested by him, and not by a plan adopted by the subscribers themselves. In all these particulars that case differs from the case at bar. It cannot be said that the rule declared in the above case would prevent three owners in common of a tract of land from dividing the same into three parcels, and then agreeing among themselves to determine by lot the particular part each should have. Under the laws of this state, the right to certain offices is determined by lot, when there is a tie vote. *Burns' Rev. St. 1901*, §§ 4331, 6292. It is true, in the case at bar, in the first proposition the trustees were authorized to distribute the lots among the subscribers "by lots"; but this proposition was practically abandoned, and in the second proposition a committee of four subscribers was named, "to divide such lots among us, hereby ratifying all that they may do." This subscribers' committee did afterwards suggest a plan of distribution, which was substantially adopted at the subscribers' meeting afterwards held. It is found as a fact that the vendors had nothing to do with suggesting or adopting the plan. In *Chancy Park Land Co. v. Hart*, supra, where the plan of distribution, adopted by the subscribers themselves, was similar to that in the case at bar, the court said, after quoting certain definitions of a lottery: "It thus appears that there must be some plan or scheme, on the part of the promoters of the enterprise alleged to be unlawful, for the sale or distribution of property by lot or chance, before it can be said to have the character of a lottery. If the sale is without the purpose that the property, or any part of it, shall be obtained by the purchaser through chance, and this does not result from the nature of the trans-

action, then it is not so tainted. The sale of the lots to the subscribers in this case was not in pursuance of any design to promote a lottery, or in evasion of the law. Each subscriber contracted, as he had a right to do, for the purchase of one or more of the lots, with the understanding that they should be distributed as the subscribers themselves might determine. Having agreed to buy before the land was platted—induced by a desire to aid an enterprise of anticipated advantage to the city—they concluded, after much discussion, and the proposal of other plans, to make the selection by drawing the number of a lot and a name from different boxes at the same time. We know of no good reason why these purchasers did not have the right to divide their property, or that contracted for, according to their own notions and agreement."

It is further insisted that the findings show appellant's lot was incumbered by valid liens for more than its value. The proposition by the sureties on the judgments made to the State Bank of Warsaw and the Hall estate, and accepted, was that, for the purpose of converting the real estate into cash, and applying the proceeds to the payment of the judgments, the sureties requested the bank and the executor of the Hall estate to release the land from the liens, in consideration of which they agreed that all proceeds for the sale of the land should be applied on the liens, and further agreed that the "release of said real estate shall in no way affect our liability upon said judgments and mortgage notes, and that we and our property will remain bound for the payment thereof, the same as though such release had never been executed." The releases, entered upon the records and properly attested, stated that they were for a valuable consideration. There is no finding that the releases were executed without consideration, and we think the findings show a sufficient consideration. Under the present statute, such a release is conclusive upon the judgment plaintiff, in favor of subsequent purchasers or lienholders in good faith. Burns' Rev. St. 1901, § 590. In Conley v. Dibber, 91 Ind. 413, cited by counsel, a county auditor had released a school-fund mortgage; and it was held, in pleading such release, it was necessary to aver that the mortgage had been paid, because without such payment the auditor had no authority to release the mortgage; that a release without payment did not remove the incumbrance. The auditor can release such a mortgage only as the statute directs. Burns' Rev. St. 1901, § 5818. In Harris v. Boone, 69 Ind. 300, the release was executed upon a condition that it was not to be binding until the delivery of certain notes, which were never delivered.

The complaint avers that the suit is brought for the use and benefit of the firm of Charles & Co., and, as the court found that the firm would not recover and would not be

entitled to recover any part of the money collected in this suit, it is argued that the findings do not sustain the averments of the complaint. By the first contract, appellees were appointed by the subscribers trustees to collect the subscriptions, and pay the money collected to Huffman or his order. Huffman assigned this contract to Charles & Co. By the second contract, the subscribers agreed to pay to the trustees named in the first contract the money to be used to secure the factory. By the contract between the vendors and the firm of Charles & Co., the firm purchased from them a tract of land adjoining the plat, to be paid for in three payments, on which they agreed to erect the factory. The firm ordered these payments to be paid to the vendors out of subscription money, the firm to receive the residue of the subscriptions in consideration of the erection of the factory. The deed to the firm was held in escrow until the purchase price was paid. The vendors, not having received the purchase money in full, agreed to turn the same over to the bank and the Hall estate. And while the finding is that the firm will not receive any of the money collected in this suit, yet the collection of the subscription is indirectly for the benefit of the firm, as it is in fact applied on the purchase price of the land purchased by the firm from the vendors. When this has been paid, they will then receive their deed. The subscribers themselves conferred upon the trustees the power to collect the subscriptions, to be used for a certain purpose. The money was made payable to the trustees for the use of some party who would erect the factory. The firm did erect the factory. As they were authorized to collect the subscriptions, and this authority had not been taken from them by the subscribers, they may sue in their own names. See Wolcott v. Standley, 62 Ind. 198; Musselman v. Cravens, 47 Ind. 1.

It is a general rule that a purchaser is not required to accept a conveyance from a third party, but only from his vendor. But in the case at bar the contract provides that the vendors shall convey or cause to be conveyed the lots to the subscribers. It does not appear that when the deed was tendered to appellant he objected to receiving it because it was executed by Oldfather, nor does it appear that he ever gave any reason for refusing to accept the deed. He had been notified when payment was demanded, prior to the tender of the deed, that the lots had been conveyed to Oldfather so as to facilitate the execution of the deeds. The grantors agreed in writing to indemnify Oldfather for any liability he might incur from executing warranty deeds to the subscribers.

Appellant's counsel also argue that appellees have been guilty of laches that bars their right to recover. Time does not seem to have been of the essence of the contract. Appellant was entitled to a deed when he had paid 50 per cent. of the purchase price.

He had paid nothing. He made no reply to frequent demands for payment. Relying on the subscribers' promise to pay, the factory was completed according to the contract. It is not shown that appellant was ready at all times to perform the conditions required of him. He gave no reason for refusing to accept the deed when tendered. He knew or had means of knowing his rights as a subscriber. He knew by the notices sent him that the other parties to the contract were relying upon his promise. He made no reply to these notices. He did nothing towards repudiating his subscription. His continued silence was inconsistent with its repudiation. He knew the vendors were still asserting their rights under the contract, that they were relying upon the subscribers' promise, and that they were attempting to enforce the contract. Taking all the facts, it must be concluded that appellant acquiesced in the delay, and cannot now be heard to complain. "When a party," says the author in 2 Pomeroy's Eq. Juris. (2d Ed.) § 965, "with full knowledge, or at least with sufficient notice or means of knowledge, of his rights and of all the material facts, freely does what amounts to a recognition of the transaction as existing, or acts in a manner inconsistent with its repudiation, or lies by for a considerable time and knowingly permits the other party to deal with the subject-matter under the belief that the transaction has been recognized, or freely abstains for a considerable length of time from impeaching it, so that the other party is thereby reasonably induced to suppose that it is recognized, there is acquiescence, and the transaction, although originally impeachable, becomes unimpeachable in equity." See, also, 3 Pomeroy's Eq. Juris. (2d Ed.) § 1408; 1 Story's Eq. Juris. § 775; Bennett v. Welch, 25 Ind. 140, 87 Am. Dec. 354; Huff v. Lawlor, 45 Ind. 80; Davis v. Heady, 7 Blackf. 261; Conwell v. Claypool, 8 Blackf. 124.

It is also argued that the title conveyed to appellant is not free from reasonable doubt. It must be remembered, however, that appellant is not in the position, ordinarily, of a person desiring to purchase. The consideration that induced him to subscribe for the lot was the location and erection of the factory. He placed his own estimate upon the value to him of the erection of the factory. The factory was erected in reliance upon his promise to pay his subscription, and for which he agreed his subscription money was to be expended. The lot was not the sole consideration for the subscription. The court found that the deed tendered was sufficient to convey a merchantable title. This may not be, strictly speaking, a perfect title, as required by the letter of the contract. But a merchantable title or a marketable title is a good title, and is a substantial compliance with the contract. No facts are disclosed making the title open to reasonable

objection. In Smith v. Turner, 50 Ind. 387, the court said, "But the courts have gone further, and held that the vendor must be able to make a marketable title." And in Allen v. Atkinson, 21 Mich. 351, Judge Cooley says, "But the vendee had an undoubted right to a good title, and to a deed with proper covenants, * * * and he had a right, also, to insist that the title should be a marketable one—not open to reasonable objection." See, also, 1 Sugden, Vend. (8th Am. Ed.) 510; Freetly v. Barnhart, 51 Pa. 279; Greenblatt v. Hermann, 144 N. Y. 13, 38 N. E. 966.

The findings show that the tender of the deed to appellant was sufficient. The tender was not absolute, but was restricted by certain conditions, which by the terms of the contract were to be performed by appellant before he was entitled to a deed. Such a conditional tender is valid. Bruce v. Smith, 44 Ind. 1; Huff v. Lawlor, 45 Ind. 80; Lynch v. Jennings, 43 Ind. 276. When the suit was commenced, the deed was deposited with the clerk of the court, to be disposed of as ordered by the court. Goodwine v. Morey, 111 Ind. 68, 12 N. E. 82. In Vawter v. Bacon, 89 Ind. 535, the vendor demanded notes containing provisions in excess of the agreement between the parties. In King v. Finch, 60 Ind. 420, a tender of the amount due on a note was made at its maturity to a person who had possession of the note, but who stated that he was instructed not to receive the money. Held, that the tender was invalid, that equity cannot supply a defect in a tender, and that the maker was liable for interest after maturity.

The fact that there were liens upon the property did not constitute a breach of the contract between the parties. The property was incumbered when the subscriptions were made, but it does not appear that appellant made any objection until after suit was brought. The title was to be good when the deed was made, and the deed was not due until 50 per cent. of the subscription was paid, which appellant neither paid nor tendered. See Oakley v. Cook, 41 N. J. Eq. 350, 7 Atl. 495.

The executor of the Hall estate had authority to release the Hall judgment. There is no finding that it was executed without consideration. It is not shown there was any fraud or collusion or wasting of the assets of the estate. "The executor," said the court in Underwood v. Sample, 70 Ind. 446, "has, in this state, a general, and in many respects an absolute, power over the debts due the estate of his testator. When done without fraud or collusion, he may assign or release such debts, and may exercise general acts of ownership over them in regard to their security or collection, subject only to his liability on his bond for any loss which may occur by reason of his mismanagement of such debts." See, also, Latta v. Miller;

109 Ind. 302, 10 N. E. 100; Hamrick v. Cra-
ven, 39 Ind. 241; Weyer v. Second Nat. Bank,
57 Ind. 198.

Judgment affirmed.

(31 Ind. App. 473)

OLD WAYNE MUT. LIFE ASS'N v.
FLYNN.

(Appellate Court of Indiana, Oct. 14, 1903.)

JUDGMENTS—ACTION ON FOREIGN JUDGMENT
—JURISDICTION OF COURT—STATUTES—SER-
VICE OF PROCESS—FOREIGN CORPORATIONS.

1. In an action on a judgment of a sister state, the complaint alleging that the court was one of record and of general jurisdiction, it is to be presumed that it had jurisdiction of both the subject-matter and of the parties.

2. In an action on a judgment of a sister state the jurisdiction of the court in which the judgment was rendered may be questioned, notwithstanding the record.

3. In an action on a judgment of a sister state the presumption of jurisdiction does not arise where the record shows the facts on which it depends, but the record will be taken as expressive of the entire truth.

4. In an action on a judgment of a sister state the presumption of jurisdiction does not arise where the pleading shows the facts on which jurisdiction depends.

5. Courts do not take judicial notice of the statutes of another state.

6. In an action on a judgment rendered in another state against an insurance company foreign thereto, the complaint alleged that the writ was personally served on a certain person, who was deputy insurance commissioner, "lawfully authorized to receive service," and the "lawful representative" of defendant, and the statute pleaded provided that no foreign insurance company should do business within the state until it should have stipulated that any process might be served on the insurance commissioner, on the party designated by him, or the agent specified by the company to receive service. It was not alleged that service was made on the insurance commissioner, on any one designated by him, or on any agent appointed by defendant. Held, that the allegations that the deputy insurance commissioner was "legally authorized," etc., were mere conclusions, and the complaint was insufficient to show jurisdiction.

Appeal from Superior Court, Marion County; J. M. Leathers, Judge.

Action by Enos Flynn against the Old Wayne Mutual Life Association. From a judgment in favor of plaintiff, defendant appeals. Reversed.

See 66 N. E. 57.

C. E. Averill and McBride & Denny, for appellant. Hiram Teter, Benj. F. Watson, and H. W. Bullock, for appellee.

ROBY, J. This action is founded upon a judgment alleged to have been rendered in favor of appellee and against appellant by the common pleas court of Lackawanna county, Pa. Whether the judgment is valid depends upon whether the Pennsylvania court is shown to have had jurisdiction of the person of appellant. The suit therein brought was one to recover upon a policy of insurance issued by appellant, an Indiana

corporation, by its agents in Pennsylvania, to a citizen of that state, upon the life of another citizen thereof. The court is averred to have been one of record and of general jurisdiction as the name implies. The presumption therefore is that it had jurisdiction of both the subject-matter and all the parties. *Gates v. Newman*, 18 Ind. App. 392, 46 N. E. 654; *Galpin v. Page*, 18 Wall. 350, 21 L. Ed. 959. Such jurisdiction may be questioned in this state notwithstanding the record. The jurisdiction of a foreign court is always open to inquiry, and a court of another state in this respect is regarded as foreign. *Pond v. Simmons*, 17 Ind. App. 84, 45 N. E. 48, 46 N. E. 153; *Grover, etc., Co. v. Radcliffe*, 137 U. S. 287, 11 Sup. Ct. 92, 34 L. Ed. 670. The distinction between collateral and direct attacks as applicable to judgments rendered in this state is not, therefore, of controlling importance. The presumption of jurisdiction does not arise when the record shows the facts upon which it depends, but the record will be taken as expressive of the entire truth. The same proposition applies to a pleading in which averments relative to jurisdictional facts are contained. *Coan v. Clow*, 83 Ind. 417; *Galpin v. Page*, supra; *Pressley v. Harrison*, 102 Ind. 14, 23, 1 N. E. 188. It is averred "that said writ was personally served on said defendant association by the proper officer having the writ for service, giving to S. W. McCulloch, deputy insurance commissioner of said commonwealth, at the office of the insurance commissioner of said commonwealth, a true attested copy of said writ and statement aforesaid, and making the contents known to him; the said McCulloch being legally authorized to receive and receipt said regular service as and for the insurance commissioner of said commonwealth, as the lawful representative and agent of said defendant association resident in said commonwealth for the purpose of receiving and receipting service of process, including the aforesaid writ, for said defendant association." The sufficiency of the complaint and the validity of the judgment are asserted on the theory that service upon the deputy insurance commissioner was service upon his principal. The Pennsylvania statute "to establish an insurance department" was in part incorporated in appellee's complaint. Only one section thereof—the thirteenth—was so pleaded. Appellee asserts that by a different section the deputy insurance commissioner was empowered to perform the acts attached to the office in certain contingencies; citing *McCann v. Old Wayne Mutual Life Ins. Co.*, 10 Pa. Dist. R. 560; *Reynolds v. Supreme Conclave*, 9 Pa. Dist. R. 622. The courts of this state do not take judicial notice of the statutes of another state. *Tyler v. Kent*, 52 Ind. 583. The statute pleaded stipulates that no insurance company not of that state shall do business therein until it has filed with the insurance commissioner a

¶ 1. See Judgment, vol. 30, Cent. Dig. §§ 1471-1473.

written stipulation agreeing that any legal process affecting the company "served on the insurance commissioner, or the party designated by him, or the agent specified by said company to receive service of process for said company shall have the same effect as if served upon the company." It is not averred that service was made upon the insurance commissioner, or upon any party designated by him, or upon any agent appointed by the appellant. Where a particular method of serving process is pointed out by statute, that method must be followed in order to secure jurisdiction of the person. *McCormick v. First National Bank*, 53 Ind. 466. The averments that the deputy was "legally authorized," and that he was the "lawful representative" of the appellant company, are legal conclusions, the correctness of which depends upon facts not exhibited by the pleading. The question presented is one of pleading. Whether, as a matter of pleading or proof, facts might be shown rendering service upon the "deputy insurance commissioner," if it should be made to appear that there is such an officer, equivalent to service upon the commissioner, as specified in the section of statute pleaded, is not decided in this case. Inasmuch as the second paragraph of complaint sets out specifically the manner in which jurisdiction of appellant's person was attempted to be acquired by the Pennsylvania court, and shows such attempt to have been futile, the demurrer to it should not have been overruled.

The judgment is reversed, with directions to sustain the demurrer to the second paragraph of complaint, and for further proceedings not inconsistent herewith.

ROBINSON, C. J., and HENLEY and BLACK, JJ., concur. COMSTOCK and WILEY, JJ., concur in result.

(31 Ind. App. 699)

UNION NAT. BANK OF MUNCIE v.
FRANKLIN SCHOOL TP. OF HENDRICKS COUNTY et al.

(Appellate Court of Indiana, Division No. 2.
Oct. 14, 1903.)

SCHOOLS — TOWNSHIP BOARDS — TRUSTEES —
CONTRACTS—RECOVERY ON QUANTUM
MERUIT—STATUTES—REPEAL.

1. No recovery can be had on a contract by a township trustee for school apparatus, when not made in conformity with Act Feb. 27, 1899 (Acts 1899, p. 150, c. 105), which directs that the trustee shall not create a debt not embraced in the annual estimates without special authority from the advisory township board provided for by the act.

2. Although goods sold to a township under a contract not made in conformity with the reform law of 1899 (Acts 1899, p. 150, c. 105), directing the township trustee not to incur debts not included in the annual estimates without special authority from the township board, are necessary and suitable for the purposes intended, and are retained and used by the township, no recovery can be had on quantum meruit for the goods, where they are tangible and can be repossessed.

3. Act March 4, 1899 (Acts 1899, p. 424, c. 192), which provides that township trustees shall take charge of the educational affairs of the township, employ teachers, provide furniture, etc., did not repeal Act Feb. 27, 1899, prohibiting a township trustee from creating a debt not included in the annual estimate without special authority from the advisory township board created by the act.

Appeal from Circuit Court, Hendricks County; Silas A. Hays, Special Judge.

Action by the Union National Bank of Muncie, Ind., against the Franklin school township of Hendricks county, Ind., and others. Judgment for defendants, and plaintiff appeals. Transferred from Supreme Court. Affirmed.

Hogate & Clark, for appellant. Brill & Harvey, for appellees.

WILEY, J. Appellant was plaintiff below, and brought its action, as assignee, upon a township note or warrant given as an evidence of indebtedness for heaters and ventilators purchased for the use of one of the schools of appellee township. The complaint, which is in one paragraph, seeks a recovery solely upon the quantum meruit. The cause was put at issue before the regular judge, and thereupon, a change of venue being taken from him, a special judge was appointed and called to try it. At the request of one of the parties the court made a special finding of facts, and stated its conclusions of law thereon. The conclusions of law were adverse to appellant, and the assignment of errors questions their correctness.

As the questions involved in this appeal are substantially the same as those decided by this court in the case of *Lincoln School Township v. American School Furniture Company* (present term) 68 N. E. 301, we do not deem it necessary to set out the special findings. It is sufficient to say that it is found as a fact that the trustee, in the purchase of heaters, etc., did not comply with the provisions of the act of February 27, 1899 (Acts 1899, p. 150, c. 105), and hence could not bind the township. It is also found that the price agreed to be paid for the articles furnished was reasonable, and that they were suitable and necessary for the uses intended. In the case last cited we held (1) that a contract of this character, not made in conformity with the provisions of the reform law of 1899, could not be enforced; (2) that where goods are sold to a township under a contract not in conformity to the reform law, although necessary and suitable to the purposes intended, and retained and used by the township, recovery could not be had upon the quantum meruit, where the goods were tangible and could be recovered; and (3) that the act of March 4, 1899 (Acts 1899, p. 424, c. 192), did not repeal the act of February 27, 1899. We still adhere to the rulings in that case, and the cases cited in support of it, and upon their authority the judgment is affirmed.

(31 Ind. App. 498)

EVERETTE PIANO CO. v. BASH.(Appellate Court of Indiana, Division No. 1.
Oct. 15, 1903.)**APPEAL—DISMISSAL—JUSTICES OF THE
PEACE—JURISDICTION.**

1. Under Burns' Rev. St. 1901, § 1337a, providing that no appeal shall be taken to the Supreme Court or to the Appellate Court in any civil case within the jurisdiction of the justice of the peace, where a cause is within the justice's jurisdiction the appeal to the Appellate Court must be dismissed without motion, as the court must take notice of its want of jurisdiction.

2. Under Burns' Rev. St. 1901, § 1500, conferring on justices of the peace original jurisdiction in actions of contract or tort where the debt or damages claimed or the property sought to be recovered does not exceed \$200, where a complaint for breach of warranty of a piano avers that plaintiff had incurred expenses for its repair amounting to \$75, and that the instrument, if equal to the guaranty, would be worth \$400, whereas it was not worth exceeding \$125, by reason of which he was damaged \$200, and prays judgment for such sum, the justice of the peace has jurisdiction, as plaintiff was bound by his claim for damages.

3. In an action for breach of warranty of a piano, the amendment of the complaint, stating the value of the instrument, does not affect the question of jurisdiction, where the amount of the damages demanded is unchanged.

Appeal from Circuit Court, Wabash County; W. G. Sayre, Special Judge.

Action by Sumner F. Bash against the Everette Piano Company. From a judgment for plaintiff, defendant appeals. Dismissed.

France & Dungan, for appellant. Lesh & Lesh, for appellee.

BLACK, J. The appellant was sued by the appellee for damages for a breach of a written warranty in the sale of a piano. The appellee, appearing specially, has filed a motion for the dismissal of the appeal for want of jurisdiction. The appeal was taken in term time, the transcript on appeal being filed July 15, 1902. The act of March 12, 1901, concerning appeals, etc. (Acts 1901, p. 565, c. 247 et seq.; section 1337a et seq., Burns' Rev. St. 1901), provided in section 6, "No appeal shall hereafter be taken to the Supreme Court or to the Appellate Court in any civil case which is within the jurisdiction of a justice of the peace except as provided in section 8 of this act." There is not in this case any question mentioned in section 8 of that statute, and, therefore, if the cause is one within the jurisdiction of a justice of the peace, the appeal must be dismissed; and this would be true without a motion to dismiss, inasmuch as this court must take notice of its want of jurisdiction. *Fitch v. Long*, 29 Ind. App. 463, 64 N. E. 622. The act of 1903 amending section 6 and section 7 of the above-mentioned statute of 1901 (Acts 1903, p. 280, c. 156) relates by its terms only to appeals taken after the taking effect of the amendatory act, March 9, 1903. By section

2 of an act of 1861 (Acts 1861, p. 140, c. 69; section 1500, Burns' Rev. St. 1901), it is provided: "Justices of the peace shall have jurisdiction to try and determine suits founded on contracts or tort, when the debt or damage claimed or the value of the property sought to be recovered does not exceed one hundred dollars, and concurrent jurisdiction to the amount of two hundred dollars, but the defendant may confess judgment for any sum not exceeding three hundred dollars. No justice shall have jurisdiction in any action of slander, for malicious prosecutions, or breach of marriage contract, nor in any action wherein the title to lands shall come in question, or the justice be related by blood or marriage to either party." The clause of this statute giving jurisdiction to the extent of \$100 is surplusage as to the amount stated, and, under this statute, justices of the peace have original jurisdiction in actions of contracts or tort, where the debt or damage claimed, or the value of the property sought to be recovered, does not exceed \$200, and have jurisdiction to enter judgment by confession to the amount of \$300. *Leathers v. Hogan*, 17 Ind. 242; *Chicago, etc., R. Co. v. Spencer*, 23 Ind. App. 605, 55 N. E. 882; *Second National Bank v. Hutton*, 81 Ind. 101; *Dugdale v. Doney*, 28 Ind. App. 283, 62 N. E. 643.

The written warranty declared upon, in the body thereof, was as follows: "This is to certify that the piano, style seventeen, E. B. No. 20,059, manufactured by the Everette Piano Company and sold by Wm. John & Son, of Huntington, Indiana, is warranted against any defect in manufacture, and seven years are allowed to test the same." It was alleged in the complaint "that said piano is defective in the manufacture thereof, in this: that it will not remain in tune for a reasonable length of time, and that the plaintiff is required to employ a skilled workman to place the same in tune as often as four times annually. Plaintiff avers that said failure to remain in tune results from defects in the construction and manufacture thereof. Plaintiff avers that by reason of said defective construction and manufacture he has been required to expend the sum of sixty-five dollars in having the same placed in tune, and has by reason thereof been damaged in said sum of sixty-five dollars; that he was once required to ship said piano to Cincinnati for repair, at an expense of ten dollars, by which he was damaged in the said sum of ten dollars; that the said instrument, if equal to the guaranty, would be of the value of four hundred dollars, whereas it is in fact worth not to exceed one hundred and twenty-five dollars. Plaintiff avers that the aforesaid defect in the construction and manufacture of said piano constitutes a breach of the said guaranty, by which breach he has been damaged in the sum of two hundred dollars, as above set out. Wherefore plaintiff prays judgment for two hundred dollars damages.

¶ 2. See *Justices of the Peace*, vol. 31, Cent. Dig. § 157.

his costs, and all other proper relief." It appears from an entry of record that the court granted the appellee leave to amend the complaint "by changing the amounts as to value of instrument from two hundred and fifty dollars to four hundred dollars." Upon trial the court found for the appellee in the sum of \$200, and therefore rendered judgment accordingly.

In *Washburn v. Payne*, 2 Blackf. 216, the action was brought before a justice of the peace on a bond for \$175, with condition for the delivery of certain property. The plaintiff, in stating his cause of action, claimed \$81.25, and he had judgment for that amount. The statute gave jurisdiction to a justice of the peace where the sum due or demanded did not exceed \$100. It was held that the cause was within the jurisdiction of the justice of the peace. In *State Bank v. Brooks*, 4 Blackf. 485, it was held that the whole amount of the several sums demanded in the declaration, and not the amount of any particular item, should be considered in respect to the jurisdiction of the court. See, also, *Beard v. Kinney*, 6 Blackf. 425; *Anderson v. Farns*, 7 Blackf. 343. In *Swift v. Woods*, 5 Blackf. 97, an action of assumpsit before a justice of the peace, there were three counts in the declaration, in each of which there was a separate claim for \$50 for breach of contract. It was said: "The plaintiff in this action claims, by three counts, one hundred and fifty dollars, which sum is beyond the jurisdiction of a justice of the peace. And there is no general conclusion to the declaration limiting this claim." It was held that there was want of jurisdiction. In *Epperly v. Little*, 6 Ind. 344, concerning the sum laid in the conclusion of a declaration in assumpsit and other actions sounding in damages, it was said: "We think the sum so laid limits, but does not enlarge, the plaintiff's claim." See, also, *Collins v. Shaw*, 8 Ind. 516; *Brown v. Lewis*, 10 Ind. 232; *Harvey v. Ferguson*, Id. 393. In *Short v. Scott*, 6 Ind. 430, a cause commenced before a justice of the peace, the declaration contained three counts—one for killing a dog of the value of \$45, another for killing a deer of the value of \$5, and another for killing another dog of the value of \$45; the only damages laid being at the conclusion of the declaration, in the sum of \$50. It was said: "Here the sum demanded, and of course the limit of the right to recover, being fifty dollars, we are of the opinion that the magistrate had jurisdiction." *Culley v. Laybrook*, 8 Ind. 285, was assumpsit, commenced before a justice of the peace. There were four counts. In the first it was alleged that in consideration that the plaintiff, at the defendant's request, would buy of him a certain mare for \$65, the defendant undertook and promised the plaintiff that the mare was sound; that the plaintiff bought the mare of the defendant, and paid him that amount of money, when in truth she was unsound and of no value. The

second count was substantially the same as the first. The third was for \$75, money lent; and the fourth was for \$75, money found due from the defendant to the plaintiff on an account stated. "To the damage of the plaintiff, seventy-five dollars." There was judgment for the plaintiff before the justice for \$1, and in the circuit court for \$65. It was said: "The amount stated in the general conclusion to the cause of action must be considered the limit of the plaintiff's demand, which amount in the present form of action is within a justice's jurisdiction. In the absence of such general conclusion, the decision of the court [in overruling a motion to dismiss for want of jurisdiction] would have been erroneous, but, as the case stands, the ruling must be sustained." In *Inhabitants, etc., v. Weir*, 9 Ind. 224, commenced before a justice of the peace, the complaint set out a note for \$93.88, with a credit of \$31.25, with paragraphs for goods sold, \$100, and one for work and labor, \$100; the damages demanded in conclusion being \$100. It was said: "The sum thus laid in the conclusion constitutes the claim, and determines the jurisdiction." The claim was held to be within the jurisdiction of the justice of the peace. In *Murphy v. Evans*, 11 Ind. 517—a case originating before a justice of the peace—the jurisdiction, under the terms of the statute, depending upon the amount of "the debt or damages claimed," it was said: "A party cannot, by a claim for damages, give himself a right to recover more than the facts stated by him will warrant. If he sues only upon a note for five hundred dollars, although he claims damages to the amount of fifteen hundred dollars, he can only recover his five hundred dollars and interest, and that sum is all there is in controversy. But such is not the case where a party claims damages less than the facts pleaded by him will warrant. In such case he is bound by the sum claimed as damages, and can recover no more. He may lessen, but cannot enlarge, by his claim for damages, the amount apparently due by the facts set up." See, also, *Guard v. Circle*, 16 Ind. 401; *Mitchell v. Smith*, 24 Ind. 252; *Mays v. Dooley*, 59 Ind. 287; *Louisville, etc., R. Co. v. Breckenridge*, 64 Ind. 113; *Breidert v. Krueger*, 76 Ind. 55; *Second National Bank v. Hutton*, 81 Ind. 101. In *Elgin v. Mathis*, 9 Ind. App. 277, 36 N. E. 650, it was said that where a complaint is filed before a justice of the peace to recover upon an account, and a bill of particulars giving the items of the account is filed with the complaint, and the amount shown to be due by the bill of particulars exceeds the jurisdiction, while the demand in the complaint is within the jurisdiction of the justice, the amount demanded in the complaint controls and determines the question of jurisdiction. See, also, *Decker v. Graves*, 10 Ind. App. 25, 37 N. E. 550; *Lee v. Watson*, 1 Wall. 337, 17 L. Ed. 557.

The amendment of the complaint before

us, stating the value of the instrument, did not affect the question of jurisdiction. The amount of damages demanded was not changed, and it was within the jurisdiction of a justice of the peace.

The appeal is dismissed.

(184 Mass. 326)

COMMONWEALTH v. ANTAYA.

(Supreme Judicial Court of Massachusetts.
Worcester. Oct. 22, 1903.)

CRIMINAL LAW—CONFESSIONS—ADMISSIBILITY—INSTRUCTIONS.

1. Where, on a trial for crime, a confession of defendant is offered in evidence, the question whether it is voluntary is in the first instance for the presiding judge, but after its admission the jury may disregard it if they are not satisfied that it is voluntary.

2. Defendant's confession was admitted in evidence. It appeared that a police officer took part in the conversation with defendant, and told him it would be better for him to tell the truth. The government witnesses testified that the officer did not make this statement until defendant had made the whole confession testified to by them. Defendant testified that the officer's statement was made before parts of the confession had been made. Held that, as the court on the preliminary question of the admissibility of the whole confession must have been of the opinion that the entire confession was made prior to the officer's statement, and therefore voluntary, the instruction that the jury should not consider any of the confession which they found was made subsequent to the officer's statement was sufficient.

Exceptions from Superior Court, Worcester County; J. H. Hardy, Judge.

Felix Antaya was convicted of crime, and brings exceptions. Exceptions overruled.

Charles C. Milton, H. H. Thayer, and J. P. Morrissey, for appellants. Rockwood Hoar and George S. Taft, for the Commonwealth.

HAMMOND, J. When a confession is offered in evidence, the question whether it is voluntary is to be decided primarily by the presiding justice. If he is satisfied that it is voluntary, it is admitted; otherwise it is rejected. But, even if it is admitted, the jury may disregard it if they are not satisfied that it is voluntary. *Commonwealth v. Preece*, 140 Mass. 276, 5 N. E. 494; *Commonwealth v. Bond*, 170 Mass. 41, 48 N. E. 756; *Commonwealth v. Reagan*, 175 Mass. 335, 56 N. E. 577, 78 Am. St. Rep. 496, and cases cited. In putting in its case the government introduced two witnesses, who, against the objection of the defendant, were allowed to testify to certain statements made by him in the nature of a confession. It is to be assumed that at the time this evidence was offered the presiding justice, upon the case as it then stood, was of opinion that the confession was voluntary. It was therefore properly admitted at that stage of the case,

unless, as matter of law, the judge was not justified in coming to that conclusion. *Commonwealth v. Bond*, 170 Mass. 41, 43, 48 N. E. 756. Without here reciting the evidence in detail, it is sufficient to say that it warrants the conclusion. The first request, therefore, was properly refused.

It subsequently appeared that one Shea, a police officer, "took part after a while in the conversation with" the defendant, and told him "it would be better for him and all concerned to tell the truth." The government witnesses testified that Shea did not say this to the defendant until the latter had made the whole confession testified to by them. The defendant testified that Shea's statement was made earlier in the conversation, and before parts of the confession put in by the government had been made. Upon this the jury were instructed not to consider any of the conversation which they found to be subsequent to the statement of Shea. It is now argued by the defendant that it was the duty of the judge either to pass upon the confession as a whole, or to designate what part was made before Shea's statement, and to admit only that part; and that the action of the court in leaving to the jury the question of the dividing line was wrong. It is, to say the least, doubtful whether this point is open to the defendant upon this record. He was trying to have the whole confession excluded, and the instruction to the jury to disregard the portion made after Shea's statement was, to that extent, favorable to him. The court was not asked to find the dividing line, and the defendant does not appear to have excepted to this method of leaving the question to the jury, except so far as it was inconsistent with the request that the whole be excluded. But, if the point be open, the obvious answer is that, even if it was the duty of the judge to pass upon the question as a whole, there is nothing in the record to show that he did not do it. Indeed, the fair inference from the record is that, so far as respected the preliminary question of admission, he was of opinion that the whole confession was made prior to Shea's statement. Since, however, the jury had the right to pass finally upon that question, the matter was left to them, and they were instructed to act as they should find the facts to be. This was in accordance with the well-established practice. *Commonwealth v. Cuffee*, 108 Mass. 285. See, also, cases cited in *Commonwealth v. Reagan*, 175 Mass. 335, 56 N. E. 577, 78 Am. St. Rep. 496.

The second request would have required the jury to reject the confession even if any part of the conversation in no way material to the questions involved had been omitted from the evidence. It was therefore rightly refused.

Exceptions overruled.

¶ 1. See Criminal Law, vol. 14, Cent. Dig. § 1219.

(184 Mass. 304)

McNAMARA v. COMMONWEALTH.(Supreme Judicial Court of Massachusetts.
Worcester. Oct. 21, 1903.)**EMINENT DOMAIN—WATER BOARD—INJURY
TO PROPERTY—DAMAGES.**

1. Under that clause of St. 1895, p. 573, c. 488, § 14, giving compensation to the owners of any real estate not taken, but directly or indirectly decreased in value, by the act of the metropolitan water board, no award can be made for damages to real estate lying without the prescribed boundaries, though a part of the same premises is within the designated limits.

2. Where the petitioner's well, on that part of his property which is outside of the lines mentioned, is drained by the doings of the commissioners, such damage is covered by an earlier clause in said section, giving damages to the owner "of any real estate injured by the taking of the waters of said river," and by sections 12 and 13 (pages 572, 573), giving damages to property for all acts done under the statute, to be determined "in the same manner as damages for lands taken for highways are determined."

3. Under St. 1895, p. 575, c. 488, § 15, relating to damages to property by the doings of the water commissioners, and providing that the board notify the owner that they will pay the damages, or, in case the petitioner offers to make surrender, "if they so prefer," they will pay the value agreed on, it is not obligatory on the board to take property tendered, but it is only in case they prefer to take the whole that they are obliged to do more than pay the damages.

Case Reserved from Supreme Judicial Court, Worcester County; John Lathrop, Judge.

Petition by Austin McNamara against the commonwealth to recover damages to his property by the acts of the metropolitan water board. Reserved for the Supreme Court on the report of the commissioners. Report recommitted.

John W. Corcoran and William B. Sullivan, for petitioner. Ralph A. Stewart, for respondent.

KNOWLTON, C. J. The petitioner seeks to recover damage to his property under that clause of St. 1895, p. 573, c. 488, § 14, which gives compensation to the owner of any real estate not taken, but directly or indirectly decreased in value, by the doings of the metropolitan water board, situated between certain lines in the town of Clinton. His estate contains about 50 square rods, with three tenement houses and sheds thereon. A part of it lies inside and a part outside of the boundaries given in the statute. The first question is whether he is entitled to damage to his entire estate, or only damage to that part of it within the designated boundaries. This is a peculiar provision, giving damages which may be remote and consequential, and which are produced by causes operating only indirectly upon the property. *Fairbanks v. Com.* (Mass.) 67 N. E. 335; *Burnett v. Commonwealth*, 169 Mass. 417, 48 N. E. 758; *Nashua River Paper Company v. Com.*, 68 N. E. 209. For this reason, it is only real estate within a prescribed place that was thought to be peculiarly affected by the statute

which gives its owner a right to this kind of damages. We think it plain that no award can be made under this clause of the statute for damages to real estate which is not within the prescribed boundaries.

The report also shows that the acts of the water board have drained the petitioner's well on that part of his property which is outside of the lines mentioned. This appears to be a special and peculiar damage caused directly by the doings of the board, which is covered by other provisions of the statute. An earlier clause in this section gives damages to the owner "of any real estate injured by the taking of the waters of said Nashua river." Sections 12 and 13 (pages 572, 573) give damages to property for all acts done under the statute, and these damages are to be determined "in the same manner as damages for lands taken for highways are determined." Under this provision there may be an allowance of special and peculiar damages which are at the same time direct and proximate, like the draining of a well, whether any part of the petitioner's land is taken or not. *Rev. Laws, c. 48, § 15*; *Parker v. Boston & Maine Railroad*, 3 Cush. 107, 50 Am. Dec. 709; *Trowbridge v. Brookline*, 144 Mass. 139, 10 N. E. 796; *Dana v. Boston*, 170 Mass. 593, 49 N. E. 1013; *Sheldon v. Boston & Albany Railroad Company*, 172 Mass. 180, 51 N. E. 1078; *Bickford v. Hyde Park*, 173 Mass. 552, 54 N. E. 343; *Putnam v. Boston & Providence Railroad Company*, 182 Mass. 351, 65 N. E. 790; *Nashua River Paper Company v. Com.*, supra. In *Chelsea Dye House v. Com.*, 164 Mass. 350, 41 N. E. 649, which was followed in *Cabot v. Kingman*, 166 Mass. 403, 44 N. E. 344, 33 L. R. A. 45, and *Magee Furnace Company v. Com.*, 166 Mass. 490, 44 N. E. 610, the decision was put distinctly upon the ground that the cause of the damage did not come within any other of the provisions of the statute, and that the case must stand, if at all, upon the word "taking" in the metropolitan sewer act; and it was held by a majority of the court that the taking of rights in the public highway imposed no additional servitude upon the land under the highway, and was therefore not a taking, within the meaning of that part of the statute. The opinions in some other cases under that act should be read with this fact in mind. So far as the petitioner has suffered damage to his property which would be recoverable if it were caused by taking land for a highway, it should be allowed, under this petition, and the case should be recommitted for the assessment of such damage.

The petitioner in the petition signified his willingness to surrender his real estate, and the commission has accordingly determined its value. The question is now raised whether the commonwealth is obliged to take it, or whether the water board may elect either to take it or to pay the damage. This question depends upon the effect of the words "if they so prefer," in the fifth line of section

15 (St. 1895, p. 575, c. 488). These words do not make it obligatory upon the board to take the property, but leave them to exercise their preference. It is only in case they prefer to take the whole that they are obliged to do more than to pay the damages which are legally determined.

Report recommitted.

(184 Mass. 234)

ALVEY v. AMERICAN WRITING PAPER CO.

(Supreme Judicial Court of Massachusetts.
Hampden. Oct. 20, 1903.)

**MASTER AND SERVANT—INJURIES TO SERV-
ANT—DEFECTIVE MACHINERY.**

1. Where the whole apparatus used for conveying steam into a beater in a paper mill was simple, and the only danger arose out of the sudden application of steam to the beater, whereby the pipe conveying it would swing upward, but the servant properly operating the apparatus would be in a position so as not to be injured thereby, the master was not guilty of actionable negligence, for failing to provide a fastening for the pipe, to a servant who knew the proper method of operating the apparatus, and who was negligent in believing that a wire running from the end of the movable pipe to the valve stem was designed to keep the pipe from flying up.

Exceptions from Superior Court, Hampden County; Francis A. Gaskill, Judge.

Action by Edwin Alvey against the American Writing Paper Company. Judgment for defendant, and plaintiff brings exceptions. Exceptions overruled.

T. B. O'Donnell, for plaintiff. Brooks & Hamilton, for defendant.

BARKER, J. The plaintiff was struck and hurt by the flying up of an iron steam pipe used to convey steam into a beater in a paper mill. The object of introducing steam in the beater was to heat the materials which were in it being ground into pulp, and which were in a semifluid state. The pipe which flew up was two feet and nine inches in length, and one inch and three-quarters in diameter, and was attached by a loose joint at the upper edge of the beater to a similar vertical pipe fastened to the edge of the beater and to the ceiling of the room, and connected with the source from which the hot steam was supplied. In this vertical pipe was a valve by which to turn the steam on or off. When the steam was not being applied to the material in the beater, the movable pipe rested in a horizontal position on the upper edge of the beater. When steam was to be applied, the end of the movable pipe was taken from the edge of the beater, and the pipe swung by its own weight into a vertical position within the beater, and with its lower end immersed in the semifluid mass, which it was intended to be the means of heating by serving as a conduit for the injection of steam into the material which was being ground into pa-

per stock. The opening of the valve in the fixed vertical steam pipe allowed the steam to pass through the movable portion of the pipe into the contents of the beater. There was no appliance designed to hold the movable pipe in a vertical position, and nothing to keep it in such a position except its own weight and the resistance of the semifluid mass in which it was immersed. When about to turn the valve and let on the steam, the workman could stand in such a position that, if the movable pipe flew up, he would be out of its way, or he could so stand that in such case he would be in its way. When the steam was on, the movable pipe became so heated that it could not be handled with safety or comfort, and a wire had been attached to its lower end, and carried over the stem of the valve, as a means of raising the movable pipe when heated. This wire had no tendency to keep the movable pipe in a vertical position. The whole apparatus was entirely simple, visible, and easily understood. The only danger in its use was that, if steam should be applied suddenly, its pressure against the material in which the movable pipe was immersed would cause the movable pipe to swing upward with such violence as to injure a person with whom it might come in contact. The evidence at the trial consisted of the testimony of a civil engineer, who described and gave the measurements of the beater and its parts and of the room in which it was, of the plaintiff's own testimony, and certain plans and exhibits intended to illustrate the beater and its steam connections. At the close of the evidence a verdict was ordered for the defendant, and the question raised by the plaintiff's exceptions is whether he should have been allowed to go to the jury upon the case.

We think that, upon the evidence as it stood, there were good reasons why the plaintiff could not recover. It might be found from his testimony that he thought that the wire running from the end of the movable pipe to the valve stem was designed to keep the movable pipe from flying up. But it is plain that it had no such purpose, and that it could not have any such effect. To have supposed that it could have that effect, and to have relied upon it as an efficient means of keeping the movable pipe in a vertical position when steam was to be turned on, was in itself a negligence. The plaintiff testified that he had used the wire to lift up the hot pipe, although he denied that he knew that it was intended solely for that purpose. But the whole apparatus was simple, and open to observation, and the plaintiff testified that he had run that particular beater for five days, during which he had lowered the movable pipe and turned on the steam at least twice on each day; and that he knew of the power of steam, and that, if he let on the steam too quickly, the pipe, if it was not fastened, would surely fly up. If he appreciated the fact that there was no fastening,

intended to hold the movable arm in a vertical position when steam was to be turned on, he appreciated the whole situation, which was as open and obvious a one as could be to any workman of his experience, and as it could be to his employer. If he mistook for a fastening the wire placed upon the pipe as a means of raising it, that mistake was a negligence, and it alone prevented him from fully appreciating a danger which any workman with his knowledge of the power and action of steam would have appreciated at the first, and which he therefore ought not to be permitted to say that he did not appreciate.

Besides this, a jury ought not to be permitted to find negligence on the part of the defendant from the evidence as it stood. The appliance of steam to the contents of beaters in the process of paper making seems, from the evidence, to have been a very recent improvement. The apparatus put in by the defendant was one which, when used with care and in the method designed, could be used as it was with safety. The plaintiff testified that he knew the proper method to be used, which was merely to turn the steam on slowly, and not suddenly. To find that the defendant failed in its duty to the plaintiff in not providing a fastening, when it was a simple matter so to use the appliances provided that no injury could happen with the apparatus as it was without a fastening, would be more than a jury ought to be allowed to do upon the evidence as it stood. Again, the plaintiff voluntarily stood within the range of motion of the pipe if it should fly up, although it was entirely feasible for him to have stood in such a position that he could not be hit. We think the case falls within the general rule "that, when the danger is obvious, and is of such a nature that it can be appreciated and understood by the servant as well as by the master, or by any one else, and when the servant has as good an opportunity as the master or as any one else of seeing what the danger is, and is permitted to do the work in his own way, and can avoid the danger by the exercise of reasonable care," the servant cannot recover. *Lothrop v. Fitchburg R. R. Co.*, 150 Mass. 423, 425, 23 N. E. 227, and cases cited.

Exceptions overruled.

(184 Mass. 328)

CENTRAL NAT. BANK v. COPP.

(Supreme Judicial Court of Massachusetts.
Worcester. Oct. 22, 1903.)

BILLS AND NOTES—FORGERY—RATIFICATION—EVIDENCE—SUFFICIENCY—PAYMENT.

1. In an action by a bank on forged notes held by it, the president of the bank testified that defendant came to the bank and was shown the notes, which bore the signatures of herself and husband, and was asked if they were all right, to which she replied that they were. Defendant testified that, on being asked if that was her signature, she had replied,

"That is my name." *Held*, that a finding that she had ratified the signing of her name by her husband was warranted.

2. Where one whose name had been signed to notes by another declared the signature her own, she became liable as though she had signed the notes, though the signature was a forgery.

3. Where the amount of notes executed by defendant and her husband to a bank was placed to his credit, and on maturity charged against the account kept by the husband, canceled by perforation, marked "Paid," and handed to the husband with his bankbook when it was balanced, but such notes were in fact taken up by the giving of notes signed by the husband and his wife, the signature of the wife being forged in renewal thereof, the first notes were not paid, and suit thereon might be maintained.

Exceptions from Superior Court, Worcester County; Jabez Fox, Judge.

Action by the Central National Bank against Elizabeth I. Copp. Judgment for plaintiff, and defendant excepts. Exceptions overruled.

Rockwood Hoar, for plaintiff. Thayer & Rugg, for defendant.

HAMMOND, J. The judge found that the name of the defendant on the notes declared on is forged, but that in January, 1899, she called at the bank and acknowledged in some form of words that the three notes then held by the bank "were her notes," and he found for the plaintiff upon them upon the ground of ratification. The defendant has argued that the finding of ratification is not warranted by the evidence, but we think otherwise. The president testified that after some conversation with the defendant as to "a line of discount notes signed by her and her husband jointly," in which he cautioned her as to the practice of signing notes for her husband, he took the three notes then held by the bank and handed them to the defendant and said, "These three notes amount to \$6,600. Are these all right?" and that she said, "Yes, they are all right." It is true that the defendant, in her testimony, denied that she said the notes were all right, and testified that the president said to her, "This is your signature, isn't it?" and that she replied, "That is my name." She further testified that the thought of forgery came to her mind, and she stopped. It might, perhaps, be argued that, under the circumstances, ratification could fairly be found upon the defendant's own testimony; but, whether that is so or not, there can be no doubt that, if the president's version of the interview is correct, the judge was amply justified in finding that, with full knowledge of the circumstances, she, for the purpose of shielding her husband, ratified her signature. By reason of this ratification she became liable as though her name had been originally placed upon the notes by her authority, even although there was forgery, and the question whether there was a liability by estoppel became immaterial. *Greenfield Bank v.*

Crafts, 4 Allen, 454; Wellington v. Jackson, 121 Mass. 157.

It is further argued that the three notes have been paid. There is no doubt that the bank went through all the forms usual in cases of payment. Upon maturity the notes were charged against the account kept by the husband in the bank, canceled by perforation, marked "paid," and, with checks and other things that were properly charged to his account, were handed to him with his bankbook whenever it was balanced. The defendant contends that in this way each note was paid as it matured, and that the taking by the bank of subsequent notes for the same respective amounts constituted in each case a new transaction. The judge, however, has found that "when the notes became due they were surrendered to the husband upon the substitution of other similar forged notes," and that "the method of renewal was this: The notes were charged to Copp's deposit account in the bank, and the new notes were at the same time credited to the same account"; and he rules that "the surrender of the notes by the bank upon the substitution of forged notes does not extinguish the bank's right of recovery." The evidence justifies this finding. According to the testimony of the plaintiff's president, these notes constituted a "line of discount," and there is nothing to show that either the bank or Copp supposed that any note was paid in any other way than is quite usual in such cases, namely, by the substitution of a new note by the way of renewal. The plaintiff never intended to release the defendant from her obligation on these three notes, and to look to the husband alone; and, having received the renewal notes upon the faith that they were valid as to the defendant, the renewals may be treated as a nullity, and the plaintiff may recover upon the original notes. Leonard v. First Congregational Society in Taunton, 2 Cush. 462; Almy v. Reed, 10 Cush. 421.

Lastly the defendant argues that there was such negligence on the part of the plaintiff and its officers as should preclude a recovery, and the fourth and fifth requests relate to that branch of the defense. It is plain, however, from the report, that these were among the requests regarded by the judge as inapplicable to the facts found by him. He finds that the plaintiff accepted without question and without suspicion the defendant's statement as to the validity of her signature to the three notes in question, and that the bank was not informed of the forgery until after the husband's death. It does not appear that the real signature of the defendant was ever known to the officers, or that they had any reason to suspect forgery.

It is not argued by the defendant that the thirteenth request is an accurate statement of the law.

In view of the findings of the judge, it is

unnecessary to go over the requests in greater detail. So far as shown by this record, for reasons above stated, we think that the judge rightly dealt with them.

As to the exclusion of the testimony of the witnesses Chapin and Willis, it is enough to say that it does not appear that the alleged conversations with Marsh, the president, occurred before the bank ceased to discount the Copp notes.

Exceptions overruled.

(184 Mass. 331)

POSNER v. SEDER et al.

(Supreme Judicial Court of Massachusetts.

Worcester. Oct. 23, 1903.)

MASTER AND SERVANT—CONTRACT—BREACH—CONSTRUCTION—QUANTUM MERUIT—RECOVERY—MEASURE OF DAMAGES.

1. A contract for services provided that plaintiff was employed by defendant for one year at \$17 a week, "the same to be paid at the end of each and every week." The contract required plaintiff to work from 6:30 a. m. to 6 p. m., with the exception of an hour between 12 and 1 p. m., and also, without extra pay, to work overtime, not more than two hours a day, and not more than two months aggregate in the year. *Held*, that such contract should be construed as a hiring for the year, with payments to be made in weekly installments, without reference to the amount of work done, and hence, on breach of the contract by the employer before the expiration of the year, plaintiff in a suit based on a quantum meruit was entitled to recover such a sum as his entire services rendered were worth, including the service rendered during extra hours, less what he has received.

Exceptions from Superior Court, Worcester County; Francis A. Gaskill, Judge.

Action by Jacob Posner against Samuel Seder and others. From a judgment in favor of plaintiff, defendants bring exceptions. Sustained.

Rockwood Hoar, for plaintiff. Dodge & Taft, for defendants.

HAMMOND, J. Under the contract the defendants were to employ the plaintiff for one year, and pay him for his services \$17 a week, "the same to be paid at the end of each and every week." The plaintiff was to report at the shop for duty at 6:30 a. m., and remain there on duty until 6 p. m., with the exception of the hour between noon and 1 p. m., and was "also, without extra pay, to work overtime at said shop, * * * not more than two hours in one day and not more than two months in the aggregate in the year." The defendants broke the contract by the discharge of the plaintiff. In such a case the innocent party may either sue on the contract for damages for the breach, or, if he so elects, he may regard the action of the defendants as indicating a purpose on their part to repudiate the contract, may accept the repudiation, and recover upon a quantum meruit the value of his services as if the special contract had not existed. Brown v. Woodbury, 183 Mass. 279, 67 N. E. 327. In

this case the plaintiff has sued upon a quantum meruit for the value of only a part of the services, namely, for those rendered in the extra hours named in the contract. The plaintiff contends that the \$17 which he received each week was payment for only the time between 6:30 a. m. and 6 p. m., and not for the extra time; and that, therefore, he may, upon breach of the contract, appropriate the weekly sum to the payment of the services during the regular hours, and recover on quantum meruit for the extra time. The defendants, on the contrary, contend that the \$17 was a payment for the services of the week, whatever they were, and therefore that the plaintiff has been fully paid, and so cannot recover. Neither view seems to us correct. The contract was to continue a year. The weekly hours of labor were variable, and it is fair to assume that there would be a weekly variation in the value of the services. The contract is to be taken as a whole. On the one hand, the defendants could not hold the plaintiff to the work during the extra hours in any week for the sum of \$17 except in connection with the other part of the contract, namely, that they were to pay him \$17 in other weeks when there was no extra time; nor, on the other hand, could the plaintiff hold the defendants to the payment of \$17 for a week in which he did not work extra time, except in connection with the other part of the contract, namely, that in any week in which he did work extra time he should receive only \$17. The true construction of the contract is that it was a hiring for a year, payments to be made by weekly installments, without reference to the amount of work done. Since the payments were made during the existence of the contract, they cannot be considered as having no reference to the other parts of the contract. If the plaintiff desires to proceed upon the theory that the contract has been repudiated, his proper course is to proceed upon quantum meruit for the value of all his services, less what he has received. If he has been paid what they are worth, he can recover nothing; if he has not, he may recover the balance due him. But it is plain that the sum due him is not necessarily the fair price for the extra hours in addition to the sum of \$17 per week which he has received. He cannot appropriate the \$17 to the payment of the ordinary week's work, and sue only for the balance, because, for the reasons above stated, that is not in accordance with the contract under which the payment was made. Upon quantum meruit the question is, what are his whole services fairly worth, and is there anything due him? Manifestly, under a contract like this, that may be an entirely different sum from the market value of the services during the extra hours. The case of *Clark v. Manchester*, 51 N. H. 594, is a good illustration of the principles applicable to a case like this. The second and fifth instructions should have been given in substance.

The other instructions were rightly refused. It is not necessary that the plaintiff, before bringing his action, should return what he has received. It is necessary only that the amount received should be credited upon his claim. *Brown v. Woodbury*, supra.

Exceptions sustained.

(184 Mass. 315)

PROVOST v. COOK et al.

(Supreme Judicial Court of Massachusetts.
Hampden. Oct. 22, 1903.)

SELLING POISONED OATS FOR FEED—LIABILITY OF SELLER.

1. Parties selling oats for feeding purposes which have been damaged by a fire in the building where they were stored, and during the confusion caused thereby exposed to the liability of being impregnated with paris green kept in the same room as the oats, are liable to the buyer for the loss of animals from poisoning by eating the oats, though the buyer purchased the oats with the knowledge that they had been damaged by dampness and other causes during the fire, but without knowing that they had been exposed to the paris green.

Exceptions from Superior Court, Hampden County; Albert Mason, Judge.

Action by Celina Provost against W. F. Cook and others. A verdict for defendants was ordered, and plaintiff excepted. Exceptions sustained.

This was an action in tort brought against defendants, wholesale and retail dealers in grain, to recover the value of four horses alleged to have been poisoned by eating oats sold by defendants and alleged to have contained paris green. The oats had been damaged when defendants' store in which they were stored was partially destroyed by fire. Defendants interposed a general denial to plaintiff's declaration, and further averred that plaintiff had bought the oats at a reduced price as damaged oats, and that therefore defendants were not liable.

Wallace R. Heady, for plaintiff. Webster, Taft & Tilley, for defendants.

HAMMOND, J. While the evidence was conflicting, and a verdict for the defendants might reasonably have been expected, still we think that it would have warranted a finding that paris green was kept at times by the defendants upon the shelf upon the east wall of the room in which the oats were kept, and sometimes packages of it, more or less broken, were allowed to be in other parts of the room; that it was so kept and scattered about the room at the time of the fire, and that by reason of the fire, the water used in extinguishing it, and the attendant confusion, the oats in the room, of which those sold to the plaintiff were a part, were exposed to this poison, and to a liability to be impregnated with it to such an extent as to be poisonous as food for animals; and that all this was known to the defendants. There was evidence tending to show, also, that the buy-

er bought the oats to be fed to her horses and cattle, that this was known to the defendants, that the oats were poisonous, and that the horses died from the effects of the poison. If such were the facts, then the case is within the rules laid down in *French v. Vining*, 102 Mass. 132, 3 Am. Rep. 440, and the plaintiff is entitled to recover, unless a distinction is to be made between the two cases upon the ground that here the oats were known to be somewhat damaged, and were bought as such. It is strongly insisted by the defendants that the rule of *French v. Vining* is not applicable to a case where the goods sold are known to be damaged. But in this case the damage which the parties had in contemplation was that which arose from dampness and other similar causes, and it cannot be assumed that either party supposed that the difference in price was due to the existence of a deadly poison in the oats. Although the oats were in some respects unsound, still it was in the contemplation of the parties that they should be fed to the buyer's animals, and under such circumstances the reason for the application of the rule is as strong as in the case of oats sound in all other respects.

Exceptions sustained.

(184 Mass. 337)

DANIELS v. BOSTON & M. R. CO.

(Supreme Judicial Court of Massachusetts.
Hampden. Oct. 30, 1903.)

MASTER AND SERVANT—MASTER'S RIGHT TO DISCHARGE—SERVANT'S BREACH OF DUTY—EVIDENCE—AUDITOR'S REPORT—FINDINGS—CONCLUSIONS OF LAW.

1. Where a contract is made in Vermont, and is to be performed in that state, the law of Vermont must govern the rights of the parties thereunder.

2. A railroad company employed a system of discipline marks, which on any breach of duty were entered against an employé's name. An official wrote an employé that, while he should not wish to apply discipline against him, he must do so, in view of the frequent trouble with his office. The contract between the employé and the railroad was made in Vermont, and it was proved that under such circumstances, according to the Vermont law, the railroad company had waived its right to discharge the employé for any preceding breach, but that, if anything further occurred, the master would have that additional cause. *Held*, that the railroad had elected not to discharge the servant.

3. A finding by the auditor that certain matters for which marks were applied were not waived, and that, until the use of the marks, defendant, by continuing to employ the servant with knowledge of his delinquencies, waived the same, were mere conclusions of law.

4. By continuing to employ the servant after knowledge of delinquencies, whether before or after the use of discipline marks, the master elected not to discharge the servant, but, as matters to be taken into account in case of a subsequent breach of duty, they were not waived.

5. A servant employed by a railroad company had written his superior relative to an increase of salary, which was refused, and subsequently

the servant applied for a leave of absence for 30 days commencing June 16th, and thereafter the servant wrote: "I think you ask too much for \$30. I am ready to step out for 30 days if you will send a man to relieve me. * * * You agreed to deal with me fairly. You have declined to do this. * * * You know this station should pay not less than \$45;" and there was a request that a man be sent to commence June 16th. *Held*, that the letter in question did not amount to a notification of the servant's refusal to work for 30 days after June 16th, nor to a repudiation of his contract on the servant's part, such as would entitle defendant to discharge him.

6. In an action against a railroad for damages because of the wrongful discharge of a servant, a contention that merely nominal damages were recoverable was untenable, the contract being one where the servant was entitled to permanent employment, and had the option of continuing in the employment or not.

7. In an action for damages for the wrongful discharge of a servant under a contract whereby he was to be employed as a station agent so long as he performed his duty in a thorough, honest, and businesslike manner, evidence as to his probable length of life might be relevant on the question of damages.

Exceptions from Superior Court, Hampden County; John Hopkins, Judge.

Action by W. H. Daniels against the Boston & Maine Railroad Company. Judgment in favor of defendant, and plaintiff brings exceptions. Exceptions sustained.

J. B. Carroll and W. H. McClintock, for plaintiff. Brooks & Hamilton, for defendant.

LORING, J. This is an action for breach of a written contract dated May 29, 1891, whereby the defendant agreed, in settlement of claims which the plaintiff had against it for personal injuries while in its employ as freight brakeman and freight conductor, to employ him as station agent at its station in Fairlee, Vt., so long as he should perform the duties of the place in a thorough, honest, and businesslike manner. The plaintiff began work as station agent at Fairlee on June 10, 1891, and was discharged on June 16, 1898. The defendant justified the discharge on the ground that he had been guilty of a number of shortcomings extending over nearly the whole of the period of his service. The case was sent to an auditor. It afterwards came on for trial before a jury. The jury were unable to agree, whereupon the judge directed them to find a verdict for the defendant, and the case comes here on an exception to that ruling. In submitting the case to the jury the presiding judge ruled that, if the plaintiff was entitled to recover, they could give him nominal damages only.

We are of opinion that the judge was wrong in directing a verdict for the defendant. The contract sued on was made in Vermont, and was to be performed in Vermont. The law of Vermont is the law which must be looked to in determining what would justify the defendant in discharging the plaintiff. The particular rule of law which is material here is how far the defendant cor-

¶ 4. See *Master and Servant*, vol. 24, Cent. Dig. § 26.

poration waived its right to discharge the plaintiff for a breach of duty by electing not to do so after the breach of duty came to its knowledge. A witness who was duly qualified to testify to the law of Vermont was asked this question: "Supposing the railroad company were informed of the dereliction of duty of the employé, and the railroad company, through its proper officer having charge of the employé, wrote to the employé, 'We shall have to submit to the general superintendent the question whether a certain process of discipline will be sufficient to meet this case,' and we will suppose, after the matter was submitted to the superintendent, it was decided that a process of discipline would be sufficient, and the employé would be allowed to continue, would you not say that the railroad company had waived its right to discharge the employé for any preceding breach?" To this he replied: "I should say they had, if nothing further occurs; but, if something further of the same kind occurs, they would have that additional cause." The auditor found "such to be the law in the state of Vermont." The auditor's report was put in evidence at the trial, and no evidence was introduced there to contradict or control this finding of fact.

The last breach of duty on the plaintiff's part prior to the letter of June 4th, which the defendant relies on in connection with the plaintiff's previous shortcomings as a justification for discharging him, was in connection with the plaintiff's duty as telegraph operator at the station in question. The defendant was under a contract with the Western Union Telegraph Company to furnish a competent and reliable man to do their work, to be paid by the telegraph company. On May 28th, the defendant asked the plaintiff for an explanation of a delay in a message held at White River Junction from 2 p. m., May 26th, until 8:05 a. m. of May 27th, "on account of that office being unable to raise you." The plaintiff's explanation was that he was away on that day, and his man might have plugged the telegraph instrument while talking over the telephone and have forgotten to take it out when he got through speaking on the telephone. On June 3d the defendant's superintendent, Folsom, wrote to the plaintiff acknowledging receipt of his letter of explanation, and, after stating the facts, wrote: "While I should not wish to apply discipline against you on account of it if it was the first case of this kind, must do so in view of the frequent trouble we have with your office in connection with telegraphing; and you must, if you wish to remain there, so conduct the office as to avoid these complaints." It was found by the auditor that "in 1897 a system of 'discipline marks,' as it was called, was adopted by the defendant, by which was meant that in case of any failure on the part of an employé to properly perform duties required of him certain discipline or demerit marks were put down

against his name on a record book kept in the office of the division superintendent." We are of opinion that the plaintiff is right in his position that the defendant elected not to discharge the plaintiff for the breach of duty in connection with the dispatch of May 28th, and the question arises whether the letter of June 4th was a breach of duty on the part of the plaintiff, which, taken with the previous shortcomings for which the defendant had elected not to discharge him, justified his discharge under the law of Vermont. The defendant has argued that under the findings of the auditor the question for the jury was whether the letter of June 4th, taken in connection with the previous delinquencies for which discipline marks were imposed, justified the defendant in discharging the plaintiff. The finding relied on here is that matters for which discipline marks were applied were not waived. But this and the preceding finding "that until the use of discipline marks, the defendant, by continuing to employ the plaintiff after knowledge of his delinquencies, waived the same," are conclusions of law, and are inaccurate, if not wrong. By continuing to employ the plaintiff after knowledge of his delinquencies, whether before and after the use of discipline marks, the defendant elected not to discharge the plaintiff for those shortcomings, but as matters to be taken into account in case of a subsequent breach of duty they were not waived. By continuing to employ the plaintiff after knowledge of a breach of duty the defendant waived its right to discharge him for that, but it did not waive the breach of duty, and in case of a subsequent shortcoming on the plaintiff's part the defendant had a right to take the plaintiff's whole record into account.

The question therefore arises whether the letter of June 4th alone or in connection with prior shortcomings of the plaintiff justified the defendant in discharging him; and we are of opinion that it did not. On June 4th the plaintiff wrote to the defendant: "Fairlee, Vt. June 4,—8. H. E. Folsom, Supt. Lyndonville, Vt.—Dear Sir: I think you ask too much for \$30.00. I am ready to step out for 30 days if you will send a man to relieve me. There can no man do the R. R. Co.'s work & live for \$30.00 here. I have tried to explain to you the additional business this station is doing, since I first took it, you agreed to deal with me fairly as to increase of compensation, as business materially increased. You have declined to do this, now I will take the matter up with some one else. You know & I know this station should pay not less than \$45.00. Will you please send man to commence June 16. Yours, W. H. Daniels." To understand this letter, and give it its proper construction, it becomes necessary to state that there was the following provision in the contract sued on: "In case of an increase or decrease of wages of station agents through the whole Passumpsic Divi-

sion of said road, the compensation above named shall be subject to the same, and in case the business at said station should materially increase, said Daniels shall be fairly treated as to increase in compensation." There was evidence at the trial that the business at Fairlee had increased 40 per cent., and that, beginning with a letter from the plaintiff to Superintendent Folsom dated December 31st, the plaintiff had insisted that he was entitled to have his wages of \$30 a month increased to \$45 a month. This was refused by Folsom because there had been an increase in the work of other agents on the same division without an increase of pay. Six letters were written back and forth on the subject between December 31, 1897, and January 27, 1898. Then the matter seems to have been dropped until May 25, 1898, when the plaintiff wrote to Folsom a letter, which was not put in evidence, but which Folsom answered on June 3d as follows: "I cannot consent to any increase in the way of an additional man at your station before July 1st, but will then consider it." The plaintiff also testified that before he received an answer to his letter of June 4th he wrote to Folsom on June 10th as follows: "If you consent to allow me to be absent for 30 days commencing June 16, will you kindly send me pass for Boston & return for myself & wife. I had ought to get quite well rested by that time." Under date of June 9th Folsom wrote that he would relieve the plaintiff of the station on June 16th. On receipt of this the plaintiff wrote on June 11th that his request was "only for 30 days, that I may get rested. Am nearly sick enough and have been some time, to be confined to the house. Please let me hear from you." To this Folsom answered that, "In view of the record of discipline against you, taken with your letter of 4th inst., I decide to make the change permanent." The tone of the letter of June 4th is not all that it should be, but it cannot be taken to be so wanting in respect as to be an act of insubordination, having the discipline of the railroad in mind, and it seems to us that it is only as such that this letter could be argued to be a breach of duty. It may well be that the plaintiff was sincere in thinking that he was entitled to an increase of pay, and the tone of the letter may be explained, although not justified, by the fact that the superintendent's refusal to give the plaintiff an additional man and his imposition of discipline marks for the delay of the telegraphic message on May 27th were received by the plaintiff on the same day. The defendant has made no argument on this point, and we take up the only arguments which it occurs to us can be put forward in its support.

It is not necessary to consider whether, under the rule of *Daniels v. Newton*, 114 Mass. 530, 19 Am. Rep. 384, and *Ballou v. Billings*, 136 Mass. 307, the defendant could have rescinded the contract had the plaintiff's let-

ter of June 4th been a notification of his refusal to work for 30 days after June 16th (which we assume would have been a breach of the contract—*Johnson v. Walker*, 155 Mass. 253, 29 N. E. 522), and whether, in case the defendant had a right of rescission, the plaintiff had a right to retract his notice by the subsequent letter of June 9th, which he testified was written before Folsom's letter of June 10th was received. In our opinion, the letter of June 4th was not such a notification. In the letter of June 4th the plaintiff wrote, "I am ready to step out for 30 days if you will send a man to relieve me," and, "Will you please send man to commence June 16." That is not a notice of refusal to act as station master for 30 days after June 16th. It goes no further than a statement that he is "ready to step out" in case the defendant will send a man to relieve him for those 30 days, and a request that the 30 days begin June 16th. It cannot be held to be an absolute repudiation of the contract on the part of the plaintiff, or an absolute refusal on his part to perform his obligation under it, which would entitle the defendant to discharge him, assuming that the defendant on such a notification would have been entitled to discharge him finally at that time, on which we express no opinion.

The only contention made by the defendant in support of the ruling that nominal damages only could be recovered is that the elements of damage are too uncertain, and it relies on the case of *Bolles v. Sachs*, 37 Minn. 315, 33 N. W. 862. But the case of *Carnig v. Carr*, 167 Mass. 544, 46 N. E. 117, 35 L. R. A. 512, 57 Am. St. Rep. 488, decides that they are not. The contract in question in *Carnig v. Carr*, as in the case at bar, was a contract where the plaintiff had the option of continuing in the defendant's employ or not. It was held that it was enough that the defendant agreed to give him permanent employment if he wished it. The plaintiff had a right to permanent employment, and is entitled to damages for being deprived of that right. See, also, *Johnson v. Walker*, 155 Mass. 253, 29 N. E. 522.

Evidence of the probable length of life of a man of the plaintiff's age might be relevant on damages. But the question was not, in the first place, how long the plaintiff would be able to breathe, but how long he would be able to work; and by the terms of the contract his employment was not so long as he could work, but so long as he should perform the duties of the place in a thorough, honest, and businesslike manner.

Evidence of the plaintiff's income from the railroad, the express company, the telegraph company, and from his outside business during the last year prior to his discharge and his income during the first year after, was offered and excluded. Under the decision that the defendant elected not to discharge the plaintiff for his derelictions of duty, if it was found that he had been derelict, the

question of the admissibility of this evidence will not come up again, as it did at the trial under consideration, and the question raised by this exception need not be discussed now. The other questions of evidence argued are not likely to arise in precisely the same way, and need not be passed upon.

Exceptions sustained.

(184 Mass. 294.)

SELECTMEN OF GARDNER v. TEMPLETON ST. RY. (two cases).

INHABITANTS OF GARDNER v. SAME.

(Supreme Judicial Court of Massachusetts.
Worcester. Oct. 21, 1903.)

STREET RAILWAYS—STATUTES—CONSTRUCTION OF TRACKS—ALTERATIONS—AUTHORITY OF SELECTMEN—EVIDENCE—COMPETENCY—MANDAMUS—EXISTENCE OF ADEQUATE REMEDY—COSTS.

1. St. 1898, c. 578 (Rev. Laws, c. 112, § 7), provides that the selectmen of a town, in granting a location to a street railway, may prescribe how the tracks may be laid, and the kind of rails, and may impose such other terms as the public interests may require. *Held*, that the selectmen had authority to prescribe that the railway company might use a certain rail, without granite paving between the rails, on condition that, if the construction did not prove satisfactory to the selectmen it should be changed within a specified time for a different rail and granite paving.

2. Rev. Laws, c. 112, § 100, gives the superior court jurisdiction in equity, on the petition of the selectmen of a town, to compel the observance by a street railway of all orders and regulations made in accordance with the provisions of the chapter. *Held*, that a suit in equity by the selectmen of a town to compel a street railway company to lay rails of a certain character, in accordance with an order previously made by the selectmen under the authority of chapter 112 could not be regarded as a suit to enforce a contract between the railway and the town, but as brought under the statute to compel the observance of the order.

3. The payment by a street railway company of the excise tax, under Rev. Laws, c. 14, §§ 43-47, exempting it from making repairs on public ways, does not exempt it from the duty to comply with orders made by the selectmen of the town in granting the location, and which require the road, in case a certain character of rail, pavement, etc., does not appear satisfactory, to cause another rail, and pavement between the rails, to be substituted therefor.

4. Rev. Laws, c. 112, § 7, provides that the selectmen of a town, in granting a location to a street railway, may impose such terms and obligations as the public interest may require, as to how the tracks shall be laid, the kind of rails, etc. *Held*, that in a suit by the selectmen of a town to compel a street railway to lay certain rails in accordance with an order of the board of selectmen, which order had provided that such rails should be laid in case certain other rails first laid should prove unsatisfactory, it was immaterial that the owner of the street railway was financially embarrassed and unable to carry the order into effect.

5. The determination of the selectmen of a town as to the character of rail that shall be used is final, in the absence of fraud, and cannot be controlled by the judiciary.

6. In a suit by the selectmen of a town, under Rev. Laws, c. 112, § 7, to compel a street railway to lay a certain rail, in accordance with an order made when granting the location, it was not competent to vary and control the written grant of location by evidence of an oral

agreement between the selectmen and defendant.

7. Rev. Laws, c. 112, § 100, provides that the superior court shall have jurisdiction in equity, on the petition of the selectmen of a town in which a street railway is located, to compel the observance of all orders made relative to the construction of the road in accordance with such chapter by the selectmen of a town. *Held*, that under the statute the selectmen are the proper parties plaintiff to bring a bill to compel observance of an order properly made by them under the statute as to the manner of the construction of a street railway within their jurisdiction.

8. By a proper construction of Rev. Laws, c. 112, § 100, all work of construction is to be done to the satisfaction of the selectmen.

9. Where the selectmen of a town file and pursue a bill in equity under the statute, they are not entitled to costs on appeal from a judgment dismissing a mandamus brought to enforce the same order as that sought to be enforced by the suit in equity.

10. An adequate remedy being provided by the statute for the enforcement of an order regulating the construction, etc., of a street railway, the inhabitants of a town in which a street railway is situated are not entitled to mandamus to compel the observance of such order.

11. Rev. Laws, c. 112, § 7, provides that the selectmen of a town, in granting a location to a street railway, may prescribe how the tracks shall be laid, the kind of rails, etc.; and section 100 provides that the selectmen of a town may maintain a suit in equity to compel the observance of any order regulating a street railway. *Held*, in a suit by a town, under the statute, to compel the observance of an order requiring rails of a certain character to be laid, an objection that the court would not interfere to compel the performance of continuous acts was untenable.

Exceptions from Superior Court, Worcester County; Francis A. Gaskill, Judge.

Suit by the selectmen of Gardner against the Templeton Street Railway; mandamus by the inhabitants of Gardner and mandamus by the selectmen of Gardner to compel the same defendant to make certain alterations in its tracks. From judgments dismissing the petitions for mandamus, plaintiffs appeal, and from a decree for plaintiffs in the suit, defendant appeals. Judgment dismissing petitions for mandamus affirmed, and decree for plaintiff in the suit.

James A. Stiles, for petitioner. Walter A. Bule and Clarence F. Eldredge, for defendants.

LORING, J. On July 18, 1899, the selectmen of Gardner, acting under St. 1898, c. 578 (now Rev. Laws, c. 112), granted to the defendant a location in the public highways within that town. It is provided by section 13 of this act (now Rev. Laws, c. 112, § 7) that, in case they are of opinion that public necessity and convenience require the granting of the location, the selectmen may "prescribe how the tracks shall be laid and the kind of rails," and other appliances which shall be used, and that they may "impose such other terms, conditions and obligations in addition to the general provisions of law governing such companies as the public interest may in their judgment require." Act-

ing under this section, the selectmen prescribed in the third article of the location that the company should use a T rail, with two exceptions. In case of the first exception, the selectmen prescribed that from one point to another point therein specified a girder rail should be used, and in case of the second exception it was provided that between two other specified points, "if the road * * * prove unsatisfactory to the selectmen, the board may at any time within two years from the completion of the road order that portion of the track laid under this location and lying between said crosswalk and the brook next westerly to be taken up and girder rails substituted therefor, with granite block paving between the rails and for eighteen (18) inches outside thereof." On June 11, 1901, the board, after hearing, determined "that the track of said street railway company" between the points specified in the second exception "is not satisfactory," and directed the defendant, in compliance with the third article of its grant of location, to "take up its track now laid between the aforesaid crosswalk and the aforesaid brook and substitute therefor a track laid with nine (9) inch girder rails, with granite block paving between the rails and for eighteen (18) inches outside the same. The entire work to be done and the street to be left in a condition satisfactory to this board." This the company refused to do, and a bill in equity was brought, under Rev. Laws, c. 112, § 100, to compel the observance of this order of the selectmen. We are of opinion that it is well brought.

The defendant's first contention is that, when the selectmen had prescribed what the original construction of the road should be, their power was exhausted, and this provision was void. But we are of opinion that in prescribing the original construction the selectmen could prescribe that the company, at its election, could use a cheaper rail without granite paving within the rails and for eighteen inches outside, on condition that, if that construction did not prove satisfactory to them, it should be changed within a specified time, and the more expensive construction carried into effect by the railway. This bill is brought, not to enforce a contract between the railway and the town, as the defendant contends, but to compel the observance by the railway of this "order" made by the selectmen of the town of Gardner in accordance with the provisions of what is now Rev. Laws, c. 112, § 100.

The payment by the defendant of the excise tax under what is now Rev. Laws, c. 14, §§ 43-47, exempts it from making repairs on the public ways (*Id.* c. 112, § 44), but it has nothing to do with its duty to construct the road in compliance with the grant of location.

There was nothing in the long offers of evidence made by the defendant. It was immaterial that the present owner of this street railway is financially embarrassed, and is not able to carry the order of the selectmen

into effect. The fact, if it was a fact, was also immaterial, that the selectmen ought to have been satisfied with the T rail. It is competent for selectmen, acting under Rev. Laws, c. 112, § 7, to prescribe that the construction shall be done to their satisfaction. If they do so prescribe, their determination, at least in the absence of fraud, is final, and cannot be transferred to or controlled by the court. See, in this connection, *Rice v. Middlesex Commissioners*, 13 Pick. 225. It was not competent to vary and control the written grant of a location by evidence of what was orally agreed upon between the selectmen and the defendant.

We are of opinion that Rev. Laws, c. 112, § 100, makes the selectmen the proper parties plaintiff to bring a bill under that act to compel observance of an order made by them, in compliance with the act, as to the construction of the railway in a public highway within their jurisdiction. For that reason, *Needham v. New York & New England Railroad*, 152 Mass. 61, 25 N. E. 20, and *Winthrop v. New England Chocolate Co.*, 180 Mass. 464, 62 N. E. 969, do not apply.

By the true construction of the second article, all work of construction is to be done to the satisfaction of the selectmen.

We are of opinion that a mandatory writ of injunction should issue in the terms of the order of the selectmen made on June 11, 1901.

In addition to the bill in equity brought by the selectmen of Gardner, we have before us appeals from judgments dismissing two petitions for a writ of mandamus—one brought by the selectmen, and one by the inhabitants of Gardner. These appeals are material only on the question of costs. The selectmen are not entitled to costs in this court in any event. They cannot have a remedy by mandamus in addition to a remedy by a bill in equity, and by pursuing the bill in equity they have made their election. But the town is entitled to costs if their petition was well brought. We are of opinion, however, that it was not. The writ of mandamus is an extraordinary remedy, granted only where it is necessary to prevent a failure of justice, and where there is no other adequate and effectual remedy. *Carpenter v. County Commissioners*, 21 Pick. 258; *Murray v. Stevens*, 110 Mass. 95; *Stackpole v. Seymour*, 127 Mass. 104; *Attorney General v. Boston*, 123 Mass. 460, 471; *Wheelock v. Auditor of Suffolk County*, 130 Mass. 486.

The petitioners contend that the remedy here in question is a remedy in equity, and that the rule in question refers to an adequate and effectual remedy at law. However that may be, where mandamus is asked for to enforce a common-law right, it does not apply to a right given by statute, for the enforcement of which a special statutory remedy is provided, which is adequate and effectual, even if that statutory remedy be on the equity side of the court. *State v. Railroad*, 62 N. H. 29. See, also, in this connection, *Jeffer-*

son v. Board of Education, 64 N. J. Law, 59, 45 Atl. 775; Sabine v. Rounds, 50 Vt. 74; Brennan v. Butler, 22 R. I. 228, 47 Atl. 320.

The town urges that it is or was doubtful whether the court would interfere to compel the observance of such an act as is here in question, and relies on Newcomb v. Norfolk Western Street Railway, 179 Mass. 449, 61 N. E. 42. But here the court is not asked to compel specific performance of continuous acts, as it decided in Newcomb v. Norfolk Western Street Railway it would do in case of an order under what is now Rev. Laws, c. 112, and here, as in that case, the work is to be done to the satisfaction of a public officer.

The entry must be: Judgment dismissing petitions for mandamus affirmed, with costs. Decree for plaintiff in bill of equity.

(184 Mass. 317)

EDWARDS v. SLATE.

(Supreme Judicial Court of Massachusetts.
Hampden. Oct. 22, 1903.)

MASTER AND SERVANT—WRONGFUL DISCHARGE—RIGHT OF ACTION.

1. Where a servant, who has entered into a written agreement with her master to serve him as housekeeper during his lifetime in consideration of a legacy to be left her by the master, is unjustifiably discharged by the master, she can maintain an action during the master's lifetime to recover damages for being deprived of her board and lodging and right to earn the legacy.

Exceptions from Superior Court, Hampden County; Francis A. Gaskill, Judge.

Action by Lizzie Edwards against Orrin Slate to recover for breach of contract. On report from the superior court. Judgment for plaintiff.

Plaintiff was hired by defendant in November, 1901, to work for him as housekeeper upon the verbal agreement that she should remain in his employ during his life, and should receive \$2 a week as wages, and the further sum of \$500 at defendant's death. Afterwards a written contract was executed, in which plaintiff agreed to become defendant's housekeeper during his lifetime, and to render him faithful and efficient service, and defendant agreed to leave her the sum of \$500 in his last will and testament. Plaintiff remained in defendant's employ until the last of August, 1902, when, according to her testimony, defendant ordered her to leave and discharged her. She thereupon brought this action to recover damages for the breach of the written contract. Defendant denied that he discharged plaintiff, and claimed that she left his employ voluntarily, and that there was cause for a discharge. The presiding justice directed a verdict for defendant.

J. B. Carroll and W. H. McClintock, for plaintiff. C. L. Gardner, C. G. Gardner, and E. S. Gardner, for defendant.

HAMMOND, J. The defendant contends that the only obligation imposed upon him

by this contract was to leave to the plaintiff by his last will a legacy of \$500, and that an action for breach of that obligation cannot be maintained during his lifetime. But this is a very incomplete view of the defendant's duties under the contract. At the time of its execution the plaintiff was, and for some months prior thereto had been, in the employ of the defendant as his housekeeper, at a salary of \$2 a week. Under the circumstances disclosed in this case the term "housekeeper" implies that she received also her lodging and her board, and the fair construction of the contract is that in this respect, at least, there was to be no change. It was implied upon the part of the defendant that the plaintiff should be permitted to work in his house, and have her board and lodging free of expense to her so long as there was no default on her part. The jury have found that she was unjustifiably discharged. This was a breach of the contract on the part of the defendant. It deprived the plaintiff of her board and lodging and of her right to earn her legacy. The declaration shows that the present action was not brought for breach of the promise to leave the legacy, but for unjustifiably discharging the plaintiff, and thus depriving her of her rights under the contract. For this breach of the implied duties imposed upon the defendant, duties to be performed in his lifetime, but which he unjustifiably refuses to perform, an action will lie during his life. It is a simple case of a breach of contract, and the general rule applies that the action may be brought as soon as the breach occurs. See Parker v. Russell, 133 Mass. 74; Paige v. Barrett, 151 Mass. 67, 23 N. E. 725. The defendant relies upon Daniels v. Newton, 114 Mass. 530, 19 Am. Rep. 384, and also upon those cases like Patterson v. Patterson, 13 Johns. 379, where actions have been brought during the lifetime of the promisor upon an alleged breach of an agreement to make a bequest; but the principle upon which those cases were decided has no application to a case like this. The action was not prematurely brought, and, there being no question raised as to the rule of damages, it follows that by the terms of the report the verdict should be set aside, and judgment entered for the plaintiff for the sum of \$325 damages, with interest from the date of the writ, and it is so ordered.

(184 Mass. 334)

KEEFE v. FAIRFIELD.

(Supreme Judicial Court of Massachusetts.
Hampden. Oct. 24, 1903.)

VENDOR AND PURCHASER—CONTRACT—BREACH—WAIVER—CONSTRUCTION—LIQUIDATED DAMAGES—PENALTY—RECOVERY OF PAYMENTS—RESCISSION OF CONTRACT.

1. Where a purchaser of real estate, under a contract providing that, if he failed to pay installments of the price, the vendor should have the right to retain all moneys previously paid

on account of the principal, and the contract should be void, failed to show performance on his part, or that he was ready to pay the balance due, he could not maintain an action to recover payments made.

2. Where a contract for the sale of real estate provided that if the purchaser failed to comply with the conditions of the contract, and make payments as required, the vendor should have the right to retain for his own use, as liquidated damages, all moneys previously paid on account of the principal, on the vendor's election to terminate the contract by reason of the purchaser's failure to perform, such agreement must be construed as providing for liquidated damages, and not a penalty.

3. Where a contract for the sale of real estate provided that, on the purchaser's failure to pay installments of the price for a period of 30 days after maturity, the vendor should have the right to terminate the contract, the fact that the vendor waived his right to cancel the contract by reason of the purchaser's failure to pay a particular installment within the time did not constitute a waiver of his right to cancel the contract for failure to pay a subsequent installment in time.

Exceptions from Superior Court, Hampden County; Wm. Cushing Wait, Judge.

Action by M. J. Keefe against George W. Fairfield. From a judgment in favor of defendant, plaintiff brings exceptions. Overruled.

Robert C. Goodale, for plaintiff. Leonard F. Hardy, for defendant.

KNOWLTON, C. J. This is an action brought to recover money paid by the plaintiff to the defendant under a contract in writing for the purchase of certain building lots from the defendant. The payments were to be made in monthly installments of \$10 each, and the writing contains this language: "Provided, however, that if said party of the second part, his heirs, executors, administrators or assigns, shall fail to pay any of the installments of said principal sum for the period of thirty days, this agreement shall become null and void and of no effect at the election of said party of the first part, and said party shall be released from all obligations hereunto, but shall have the right to retain for his own use as liquidated damages for such failure, all moneys previously paid on account of said principal sum. And no modification of any part of this agreement, or waiver of any of its provisions shall be binding, unless the modifications or waiver is noted hereon in writing signed by said party of the first part." The declaration is in two counts—one for money had and received by the defendant to the plaintiff's use, and one upon the contract, averring that the plaintiff had made payments to the amount of \$210, and that he had offered and tendered to the defendant payment of the balance due under the contract, but that the defendant had notified him that no further payments would be accepted, and that he would not give any deed or deeds under the contract. He also averred generally a

readiness on his part, and a refusal of the defendant, to perform the contract.

The only exception is to the refusal of the judge to give certain rulings requested. The bill of exceptions purports to state all the evidence material to the questions of law. The evidence showed that on August 7, 1899, the plaintiff was adjudicated a bankrupt, and that he was then somewhat in default in making the payments called for by the contract. Between this date and the date of the writ, which was December 7, 1901, he made payments aggregating only \$90, which left him much more in default upon the payments which had then become due. The exceptions state that no tender was made by the plaintiff at any time, nor any demand for a deed. There is nothing in the bill of exceptions to show performance, or an offer of performance, of the contract by the plaintiff; and, so far as appears, the defendant would at any time have received the balance due upon the contract, and have given a deed, waiving the plaintiff's delay, if the plaintiff had been ready to pay the balance due. The case stated in the bill of exceptions seems to be merely an attempt of one who has voluntarily made payments under a contract, and who has broken the contract by failing to make other payments as they became due, to recover back what he has paid to the other party to the contract, who has not broken it, and who stands ready to perform it. Manifestly, there can be no recovery in such a case, and none of the rulings requested could be given in such a case. This alone is enough to dispose of the exceptions.

Most of the requests for rulings seem to have been made upon an assumption that the defendant has exercised his right of election under the provision quoted above, and has treated the contract as void, and has retained the money as liquidated damages. If the facts were in accordance with this assumption, the rulings requested upon the apparent ground that the money cannot be retained as liquidated damages, and that the provision must be treated as declaring a forfeiture, upon which actual damages should be assessed, were rightly refused. The doctrine stated in *Guerin v. Stacy*, 175 Mass. 595, 56 N. E. 892, covers these requests. See, also, *Garst v. Harris*, 177 Mass. 74, 58 N. E. 174; *Wallace v. Smith*, 21 Cn. Div. 243; *Atkins v. Kinmler*, 4 Exch. 776-783.

The other questions in the case it is not necessary to consider at length. In view of the plaintiff's bankruptcy, it does not appear that he now has the rights which originally belonged to him under the contract. It is also expressly found that the defendant had no knowledge of his bankruptcy until after the commencement of this suit. Nor can it truly be said that the defendant, by accepting payments after default in making previous payments, waived the right to insist upon the provisions of the contract when the plain-

† 2. See *Damages*, vol. 15, Cent. Dig. §§ 163, 174.

tiff failed to make later payments as they became due. The waiver did not extend beyond the events that had then occurred, to which it related.

Exceptions overruled.

(184 Mass. 298)

**McLAUGHLIN v. SUPREME COUNCIL
CATHOLIC KNIGHTS OF
AMERICA.**

(Supreme Judicial Court of Massachusetts.
Worcester. Oct. 21, 1903.)

**BENEFICIAL ASSOCIATIONS—SUSPENSION OF
MEMBER—REINSTATEMENT—ESTOPPEL
—RECOVERY OF PAYMENTS.**

1. Where a benefit certificate is conditional on the member's being in good standing at his death, and requires, as a condition of reinstatement, that he furnish an examiner's certificate, as prescribed for the original application, which must be made on a certain form, and transmitted by the local examiner, sealed, to the supreme medical examiner, a member who, after suspension, submits to a personal examination by the local medical examiner, and delivers the report of the examination to the local branch, fails to comply with the requirements for his reinstatement, and, having died before such certificate was furnished to and approved by the supreme medical examiner, his beneficiary cannot recover.

2. A benefit certificate required, as a condition of reinstatement on suspension, that the member furnish an examiner's certificate, to be transmitted by the local examiner, sealed, to the supreme medical examiner. A suspended member, on his examination for reinstatement, took the certificate from the local examiner, and gave it to the local branch, instead of seeing that it was transmitted to the supreme examiner. In consequence of the delay the certificate was not acted on by the supreme examiner before the intestate's death. *Held*, that the beneficial order was not stopped by the delay from claiming that the member had not complied with the requirements for his reinstatement.

3. Where a member is suspended from a beneficial order for failure to pay assessments, and dies prior to his reinstatement, his beneficiary cannot recover the sums paid before the suspension.

Exceptions from Superior Court, Worcester County; Elisha B. Maynard, Judge.

Action by Ellen McLaughlin, as administratrix of the estate of Thomas McLaughlin, deceased, against the Supreme Council Catholic Knights of America. Judgment for plaintiff, and she brings exceptions. Exceptions overruled.

F. N. Thayer, for plaintiff. John H. Meagher, Emil Zaeder, and Joseph P. Morrissey, for defendant.

BARKER, J. This is an action at law, in contract, against a fraternal beneficiary order, to recover upon a benefit certificate. There is also a count for money received, and the plaintiff contends that, if not entitled to maintain her action on the benefit certificate, she can recover the amount paid into the treasury of the order by the deceased member, who was her husband, and of whose estate she is the administratrix. He became a member of the order in February, 1896,

when the benefit certificate was issued. By it the defendant agreed to pay, upon due proof of the member's death, "he being in good standing in the order," the sum of \$1,000, and the intestate agreed to pay "all assessments, dues and fines assessed against him according to the laws, rules and regulations of the * * * Supreme Council which may now or hereafter govern the order." After numerous small payments, he was on November 2, 1900, suspended from membership for failure to pay dues and assessments. On January 14, 1901, he applied for reinstatement. This application was more than 30 and less than 90 days after his suspension. The rules require that a suspended member applying for reinstatement shall pay up all arrearages and a reinstatement fee, and, if he has been suspended for less than 30 days, shall also "furnish the branch an affidavit that he is in sound health and has had no ailment during suspension," and, if he has been suspended more than 30 and less than 90 days, shall "furnish the branch the medical examiner's certificate as prescribed for persons on original application." The rules require the medical examiner's certificate, in case of an original applicant, to be made upon a certain form, and to be transmitted by the local examiner, sealed up, to the supreme medical examiner, who, in turn, if he approves the certificate and recommends the applicant as a fair risk, shall transmit the certificate, with his approval indorsed thereon, to the supreme secretary. The supreme medical examiner has power, by the rules, to approve or reject all such certificates, and from his decision there is no appeal. On making his application for reinstatement on January 14, 1901, the intestate paid to the local lodge all arrears of dues and assessments and the reinstatement fee, his whole payment upon that day amounting to \$8. On February 6, 1901, he was personally examined by a local medical examiner of the order, who made a certificate of the examination upon the prescribed form, but did not seal it up, nor transmit it to the supreme medical examiner, but gave it to the intestate, who, on or about the same day, delivered it to the branch. The intestate died on February 20, 1901. The medical examiner's certificate, which he had delivered to the local branch on February 6, 1901, was received from that branch by the supreme medical examiner on April 23, 1901, was not approved by him, and on the next day was returned by him for correction to the secretary of the branch; the supreme examiner not knowing the address of the local examiner who had made it. It never was returned to the supreme examiner, never approved by him, and never transmitted to the supreme secretary. It appears from the answers of the supreme secretary to interrogatories filed by the plaintiff that he did not issue new certificates to reinstated members, but that the reinstatement revived the old

one, and he further stated that the plaintiff's intestate was not reinstated because he had not furnished the medical examiner's certificate required in the rule.

The plaintiff asked the court to direct a verdict in her favor for the sum of \$1,000, the amount mentioned in the benefit certificate, and also contended that, if not entitled to that verdict, the jury should be instructed to return one in her favor for the sum of \$127.72, the amount of all the payments made to the order by her intestate, as set forth in her count for money had and received. The defendant asked the court to direct a verdict for the plaintiff for the sum of \$8, the amount paid on the intestate's application for reinstatement, on the ground that the plaintiff had not proved that her intestate was a member of the order at the time of his death, and that therefore the plaintiff could not recover in excess of the amount paid by the intestate to the local branch for reinstatement. The court ordered a verdict for the plaintiff for \$8, and the case is here upon her exceptions.

The promise to pay the \$1,000 was conditioned upon the member's being in good standing at the time of his death. *Lyon v. Royal Society of Good Fellows*, 153 Mass. 83, 26 N. E. 236. He died on February 20, 1901, having been suspended from the order on November 2, 1900. His application for reinstatement and payment of arrearages and a reinstatement fee on January 14, 1901, did not of themselves work a reinstatement, because he did not then furnish any medical examiner's certificate. As a full compliance with the rules governing reinstatements would of itself work his reinstatement, without the issuing of a new certificate, the decisive question is whether his giving to the local branch on February 6, 1901, the local medical examiner's certificate, was, with his previous application and payments, a complete compliance with the rule. No assessment is shown to have been made upon him and no payment to have been made by him after January 14, 1901, from which to infer estoppel or waiver. See *Campbell v. Knights of Pythias*, 168 Mass. 397, 47 N. E. 100. All that was done by him, by the local branch, or by any officer or member of the order, after that date and before his death, was for him to submit, on February 6th, to a personal examination by the local medical examiner, for that officer to make out a report of the examination on the proper form, and for the intestate to deliver that report to the local branch. If a fair construction of the rules required that the local medical examiner's report, before becoming an effectual compliance with the rule, so as to work a reinstatement, should be approved by the supreme medical examiner, that approval was not secured before the intestate's death, and in fact never was secured. In the language of the rule, the medical examiner's certificate, which the intestate, as an applicant for reinstatement, was to "furnish the branch,"

was a "medical examiner's certificate as prescribed for persons on original application." This was to be made in the first instance by the local examiner, and to be by him sealed up and transmitted to the supreme medical examiner; then, if approved by him, indorsed with such approval, and transmitted to the supreme secretary. It is clear that no such certificate could, under the rules, be sufficient to entitle an original applicant to insurance until approved by the supreme medical examiner. We think that the rule as to reinstatement puts an applicant for reinstatement who has been suspended for more than 30 days upon the same footing as an applicant for original insurance, so far as the medical examiner's certificate is concerned. It is no answer to this construction that it required of the intestate something which he could not furnish without the action of other persons. It was for him to effect his own reinstatement, and, if he did not cause to be done the necessary acts, his reinstatement would not be accomplished, and the defense that he was not in good standing in the order at the time of his death would be open, unless the doing of the necessary acts was prevented by some fault of the defendant. See *Audette v. L'Union St. Joseph*, 178 Mass. 118, 59 N. E. 668. The chief purposes of the rule as to reinstatement were, first, to insure the payment of all money which the applicant would have paid if he had kept his standing good; and, secondly, that the forfeiture of rights under the benefit certificate should not be taken off unless the applicant was in good health at the time of his reinstatement, and had suffered no illness during his suspension. Both of these objects it was as important to secure in the case of men who had been under suspension for more than 30 days as in the case of those who had been suspended more recently. Even in the case of those who had been suspended for less than 30 days, the applicant must furnish proof by affidavit that he is in sound health at the time of applying for reinstatement, and has had no ailment during his suspension. If a suspended member is taken ill within 30 days after suspension, and before applying for reinstatement, he cannot successfully apply for reinstatement within that time, because he cannot make the required affidavit. It would be absurd that he could apply after the expiration of the 30 days, and by submitting to an examination which might show that he was then dying of a fatal illness, and by merely delivering to the branch the local examiner's report of that examination, effectually work his own restoration to good standing in the order. We therefore think that "the medical examiner's certificate, as prescribed for persons on original application," which he must "furnish the branch," is a certificate approved by the supreme medical examiner.

Nor should the defendant be estopped by the delay which in the present instance oc-

curred in the forwarding of the certificate to the supreme examiner. The possibility of the delay came from the intestate's own act. Certificates on original examination are to be sent to the supreme examiner by the local examiner. The intestate himself, instead of seeing that this course was pursued, took the certificate from the local examiner and gave it to the local branch. He should have declined to receive the certificate, and have caused or allowed it to take the usual course of a certificate made on an original examination. There is no ground for finding bad faith on the part of the local examiner, the branch, or the defendant itself, or its supreme officers. It was a misfortune that the intestate mistook the true construction of the rule, and so interfered with the regular course in receiving the certificate from the local examiner and giving it to the branch, thereby making possible the delay of the branch, in consequence of which the certificate was not acted upon by the supreme examiner until after the intestate's death.

Nor could the plaintiff recover the sums paid by her intestate before his suspension. Those payments were in accordance with the contract between him and the order, and in consideration of his membership and of the insurance which had been in force upon his life until his suspension. So far as the benefit of the payments has been lost, that result is due to the intestate's failure to comply with the obligations imposed upon him by his agreements in the original contract, and not from any fault of the defendant or its agents. The forfeiture arose from his own omission to make payments in compliance with his contract. See *Keefe v. Fairfield*, 68 N. E. 342.

Whether the plaintiff could recover the \$8 paid when her intestate applied for reinstatement is a question not raised by her exceptions.

Exceptions overruled.

(184 Mass. 320)

COMMONWEALTH v. KELLEY.

(Supreme Judicial Court of Massachusetts.
Worcester. Oct. 22, 1903.)

LARCENY BY ADMINISTRATOR—INDICTMENT—
EVIDENCE—STATUTES—CONSTRUCTION
—EX POST FACTO LAW.

1. Within the first six months of defendant's appointment as an administrator he withdrew from savings banks in all \$1,684, and the total amount remaining to the credit of the estate in the banks, together with all he redeposited, amounted to only \$128.47, which was all the succeeding administrator received. Defendant paid out for the estate and retained for his services \$994.49, of which he was allowed by the probate court \$678.83. Before he withdrew the sum of \$125 which he was charged to have embezzled, he had already drawn from the banks \$900, and, in order to bring his charges and expenses to \$994.49, he asked to be allowed for his services \$175, of which he was allowed \$75. Defendant testified what he had done with the money, but it did not appear that he had in his hands property amounting to the bal-

ance found by the probate court against him. *Held*, that such facts were sufficient to sustain a conviction for larceny, within Pub. St. c. 203, § 46, providing that, if an administrator fraudulently converts money of the estate, he shall be guilty of larceny.

2. Rev. Laws, c. 218, § 38, prescribing a form of indictment for larceny, requires such indictment to state only that defendant did steal the property designated, alleging the value, and that it was property of another named; and section 38 defines the words "stealing" and "larceny" as the criminal taking, obtaining, or converting of personal property with intent to deprive the owner thereof, including all forms of larceny, criminal embezzlement, and obtaining by criminal false pretenses. *Held*, that an indictment under such chapter, alleging that defendant "stole" certain money, the property of an estate of which defendant was administrator, was sufficient to justify a conviction on proof of embezzlement.

3. Rev. Laws, c. 218, § 38, including embezzlement in the definition of larceny, and prescribing a single form of indictment for both crimes, but in no way altering the rules of evidence or nature of evidence required to convict, should be construed merely as relating to matters of pleading, and was therefore not objectionable as an *ex post facto* law with regard to crimes committed before its passage.

Exceptions from Superior Court, Worcester County; Edward P. Pierce, Judge.

One Kelley was convicted of larceny, and he brings exceptions. Exceptions overruled.

Rockwood Hoar and George S. Taft, for the Commonwealth. Frank B. Hall, for defendant.

HAMMOND, J. The defendant argues that the evidence was insufficient to convict him of larceny or embezzlement in any form. We are of opinion, however, that it was sufficient to warrant a finding that he had committed the offense described in Pub. St. c. 203, § 46, by embezzling, while administrator of the Downey estate, the whole or a part of the \$125, property of the estate, drawn from the Ware Savings Bank in July, 1897. Within the first six months of his appointment as administrator he drew out from that bank and another savings bank sums aggregating in the whole \$1,280, belonging to the estate. In all he drew out \$1,684. The total amount remaining in the two banks, together with all he redeposited, amounted to only \$128.47, which is all the succeeding administrator received. He paid out for the estate and retained for his services, according to his own account, \$994.49, and was allowed by the probate court only \$678.83. Before he withdrew the \$125 on July 1, 1897, he already had drawn from the two banks \$900. In order to bring his charges and expenses to the sum of \$994.49, he asked to be allowed for his services as administrator \$175, of which the court allowed only \$75. The defendant testified in his own behalf as to what he had done with the money, and as to outstanding obligations still existing for contracts made by him

¶ 3. See Constitutional Law, vol. 10, Cent. Dig. § 579.

while administrator, but, without reference to interest, it did not appear that he had in his hands property amounting to the balance found by the probate court against him, and the jury, in view of all the circumstances, may not have believed fully his statements. They may have concluded upon the evidence that there was no need of drawing out the \$125 above named for the payment of claims against the estate, and that it was subsequently fraudulently used by the defendant for his own purpose, and that such use was made of it in the town where the defendant resided, which was in Worcester county. We are of opinion that the evidence justified such a conclusion.

It is further argued by the defendant that, even if the evidence did show that he committed a crime, it was embezzlement, and not larceny; that these two offenses are different in law; and that, since the count upon which he was convicted alleges larceny, it is not supported by proof of embezzlement. It appears that at the trial the defendant urged this distinction, and requested the court to rule that the evidence did not show him guilty of larceny, and to direct a verdict of acquittal. This the court refused to do. He further requested the court to rule that the statute which provides that "whoever embezzles or fraudulently converts to his own use money * * * shall be deemed guilty of simple larceny" (Pub. St. c. 203, § 37) does not merge the two offenses, or make the embezzlement larceny. The court refused to make this ruling, "not because it was not true as a proposition of law, but because it was not called for by the facts disclosed." The count evidently was drawn up under Rev. Laws, c. 218, § 38, and complies with the form set forth at the end of that chapter under the title "Larceny"; and the question is whether it covers the crime of embezzlement. The provisions of this chapter, so far as material to this question, first appear in St. 1899, p. 411, c. 409, which was passed in accordance with the report and recommendation of the commissioners (see Senate Doc. No. 234 of that year) appointed under chapter 85 of the Resolves of 1897 (St. 1897, p. 621), "to investigate and report upon a plan for the simplification of criminal pleadings, and to propose a schedule of forms to be used in criminal cases." Prior to that statute, although one guilty of embezzlement was, in the language of the statutes, "deemed to have committed the crime of simple larceny," or, in the later forms, deemed to be guilty of simple larceny, still it was held that that kind of larceny was of a peculiar and distinctive character, and that the indictment must contain, in addition to all the requisites of an indictment for larceny at common law, allegations setting forth the fiduciary relation or the capacity in which the defendant acted. Accordingly, it has been held that proof of embezzlement will not sustain an indictment charging mere-

ly a larceny, and that proof of larceny will not sustain a charge of embezzlement. *Commonwealth v. Simpson*, 9 Metc. 139; *Commonwealth v. King*, 9 Oush. 284; *Commonwealth v. Berry*, 99 Mass. 428, 96 Am. Dec. 767. Somewhat akin to these two crimes in many respects is that of obtaining money or goods by false pretenses, and an indictment for this offense differs from that of larceny or embezzlement. It was felt by the commissioners that "the overrefined and illogical distinctions" between these three crimes "had led to scandalous abuses of justice by acquittal," and, "to obviate the possibility of miscarriage of justice on this account," they proposed "a simple form of indictment for the three crimes, containing simply an allegation that defendant 'stole' certain goods." See 1899 Senate Doc. No. 234, pp. 16, 17. The statute of 1899, following the recommendation of the commissioners, contains a simple form for larceny, but no separate form for embezzlement or false pretenses. In section 12, under the head of "Meaning of Words," it is provided that "the following words, when used in an indictment, shall be sufficient to convey the meaning herein attached to them"; and among others are these: "Stealing. Larceny. The criminal taking, obtaining, or converting of personal property with intent to defraud or deprive the owner permanently of the use of it; including all forms of larceny, criminal embezzlement, and obtaining by criminal false pretences." The count in question was drawn up under the provisions of this statute as subsequently enacted in Rev. Laws, c. 218, § 38. Under this last statute the word "steal" in an indictment becomes a term of art, and includes the criminal taking or conversion in either of the three ways above named; and hence the indictment is sustained, so far as respects the criminal nature of the taking or conversion, by proof of any kind of larceny, embezzlement, or criminal taking by means of false pretenses. If it be objected that this construction makes the indictment so indefinite that the accused is not sufficiently informed of the nature of the charge which he is called upon to meet, the answer is that it is provided in the same statute that "the court may, upon the arraignment of the defendant, or at any later stage of the proceedings, order the prosecution to file a statement of such particulars as may be necessary to give the defendant and the court reasonable knowledge of the nature and grounds of the" accusation, and, if requested by the accused, shall so order in all cases in which the court has final jurisdiction, where the accusation "would not be otherwise fully, plainly, substantially, and formally set out. If there is a material variance between the evidence and the bill of particulars, the court may order the bill of particulars to be amended, and may postpone the trial, which may be before the same or another jury, as the court may order. If,

in order to prepare for his defense, the defendant desires information as to the time and place of the alleged crime or as to the means by which it is alleged to have been committed, or more specific information as to the exact nature of the property described as money, or, if indicted for larceny, as to the crime which he is alleged to have committed, he may apply for a bill of particulars as aforesaid." This is a sufficient protection to the accused. Indeed, it is manifest that since, under the former practice, the right to a bill of particulars was a matter that lay within the discretion of the court, and therefore could not be claimed as of right (*Commonwealth v. Wood*, 4 Gray, 11), this statute, which makes the right to such a bill absolute, places the accused in a better position than he was before. Of course, the bill of particulars cannot enlarge the scope of the indictment. It cannot specify a charge not covered by the indictment. Its only purpose is to specify more particularly the acts constituting the offense.

In view of these considerations we are of opinion that the count in question must be regarded as including within its "four corners" any criminal act of taking or conversion of money the property of the estate therein named to the amount of \$1,000, committed by the defendant within the jurisdiction of the court, and within the statute of limitations, whether the offense be larceny, embezzlement, or obtaining money by false pretenses; and consequently that it covered the crime of embezzlement as described in Pub. St. c. 203, § 46, of which, under instructions not objected to, except as above stated, the jury convicted the defendant.

It is further urged by the defendant that, inasmuch as the offense of which he was convicted was committed prior to the statute, it is, as to that offense, an *ex post facto* law, and for that reason unconstitutional, as applied to his case. But this position is untenable. The statute neither creates a new crime nor in any way changes one existing at the time it took effect; nor does it increase or in any way affect the punishment for any crime. It does not establish any new presumption of fact or of law against the accused, nor in any other way alter any rule of evidence or the nature of the evidence required to convict. The defendant was tried for the same crime, under the same presumptions as to his guilt or innocence, and under the same rules of evidence as he would have been tried before the statute. It relates purely to the matter of technical pleading as to the words to be used in setting forth a criminal act, and even in this respect is favorable to the accused in that the right to a bill of particulars, which theretofore was within the discretion of the court, has become absolute. In no respect is the situation of the accused changed to his disadvantage. No citation of authorities is needed to show that the statute as thus interpreted is not

an *ex post facto* law, within the meaning of the term as used in either the federal or state Constitutions. The defendant was not prejudiced by the action of the court at the trial in dealing with his requests.

As the defendant was acquitted upon the ninth count, the rulings as to the competency of the evidence admitted as bearing solely upon that count become immaterial.

As to the first motion to set aside the verdict, it may be said that, so far as it raises any question of law, it raises none which could not have been raised at the trial, and, so far as it was an application for a new trial upon other grounds, the matter was within the discretion of the court. And, notwithstanding the remarks made by the judge, it does not appear that the motion was not overruled in the exercise of his discretion.

The second motion—that the verdict of the jury and the sentence be "set aside" so far as it respects the verdict—raises no question which could not have been raised at the trial, and, so far as it respects the sentence, does not show that the defendant was not sentenced for the crime with which he was charged and upon which he was convicted. Pub. St. c. 203; *Id.* c. 215, §§ 3, 8; *Rev. Laws*, c. 220, §§ 5, 10.

Exceptions overruled.

(176 N. Y. 239)

In re BOARD OF WATER COM'RS OF
VILLAGE OF WHITE PLAINS et al.

(Court of Appeals of New York. Oct. 13,
1903.)

WATERWORKS—PURCHASE BY VILLAGE—PROCEDURE—CONDEMNATION—AWARD—APPRAISAL.

1. *Laws 1875*, p. 157, c. 181, as amended by *Laws 1881*, p. 220, c. 175, by *Laws 1883*, p. 286, c. 255, and by *Laws 1885*, p. 370, c. 211, which provides that boards of water commissioners of villages may contract for, purchase, and take, by deed in the name of the village, all lands, streams, and property rights which may be required for the purpose of furnishing pure water to the inhabitants thereof, refers only to property of individuals, and not to those of waterworks corporations, and the only manner in which such villages can acquire the property of a waterworks company is under section 22 (*Laws 1875*, p. 162, c. 181), providing that, whenever it shall be necessary for the water commissioners of a village to acquire the property of a waterworks company, they may apply to the Supreme Court for appointment of commissioners, who shall determine the amount to be paid for such property.

2. Where an agreement between a waterworks company and the authorities of a village provided for a supply of water for five years at a stipulated price, with a provision that the village at the end of such time might purchase the waterworks on giving notice and paying the valuation to be determined by a board of arbitration, not to exceed the cost of the work more than 10 per cent., the agreement as to the purchase, being beyond the powers of the water commissioners, is void, and cannot be enforced by or against the village.

3. Where a board of water commissioners, appointed for a village under *Laws 1896*, p. 1013, c. 769, with authority to acquire by purchase or condemnation water rights and property neces-

sary to supply the village with water, bring condemnation proceedings to acquire the property of a waterworks company then supplying the village with water, and the commissioners appointed in such proceeding refuse to be governed by the method provided by the statute for appraising such property, including the good will and franchise of the company, at its full value, and determine the value of the property and plant of the company in a manner provided by a contract between the village and waterworks company, which contract was ultra vires and void, the award is illegal, and will be set aside, and a new appraisal ordered before new commissioners.

Cullen, J., dissenting.

Appeal from Supreme Court, Appellate Division, Second Department.

In the matter of the petition of the board of water commissioners of the village of White Plains to acquire property of the Westchester County Waterworks Company and others. From an order of the Appellate Division (76 N. Y. Supp. 11), which affirmed an order of the Special Term confirming a report of commissioners of appraisal in proceedings instituted to acquire the property of the Westchester County Waterworks Company, the waterworks company and others appeal. Reversed.

David McClure, for appellant Farmers' Loan & Trust Company. Louis Marshall, for appellants Westchester County Waterworks Company and others. Henry T. Dykman, for respondent.

HAIGHT, J. (after stating the facts). These proceedings were instituted on the 2d day of September, 1896, by the board of water commissioners of the village of White Plains, pursuant to chapter 769, p. 1013, of the Laws of 1896, to acquire all of the real estate, property, and franchises of the Westchester County Waterworks Company. They resulted in the appointment of commissioners of appraisal, who filed their report, awarding as damages for the taking of such property the sum of \$103,298, upon which a final judgment of confirmation has been entered. Upon a review of the judgment the Appellate Division reversed so much of the order as refused the application for an amended report, and required an amended report to be filed by the commissioners of appraisal. Thereupon the commissioners, in obedience to such requirement, made a further report, in which they stated that in making their award they intended to cover whatever rights to transact future business in White Plains the Westchester County Waterworks Company possessed, but were, however, "unanimously of the opinion that the company did not possess such a franchise as would entitle it to an award based upon its annual earnings or its future business prospects, the restrictive conditions with which, by the contract of July 1, 1886, the company's franchise was incumbered, having, in our opinion, reduced the value of this franchise to a sum necessarily insignificant as com-

pared with the value which an unrestricted franchise would have had," and then concluded with the statement that "we considered that an award of approximately one hundred thousand dollars would amply cover the value of such plant and real estate, liberally estimated. The balance of our award was intended to represent in part a slight overpayment for the material properties taken, and in part a payment for the nominal and practically valueless remaining rights which the company possessed at the time of the commencement of these proceedings." Upon the filing of this report the Appellate Division affirmed the judgment entered upon the order of the Special Term.

On the 14th day of May, 1886, John F. Moffett and others requested the board of trustees of the village of White Plains and the supervisors of the towns of Greenburg and White Plains to consider their application to supply the village of White Plains and its inhabitants with pure and wholesome water, and to grant them permission to form a waterworks company, under chapter 737, p. 1100, of the Laws of 1873, and acts amendatory thereof and supplementary thereto. On the 28th day of May, 1886, at a meeting of the trustees of the village a resolution was adopted, giving permission to Moffett and his associates to form a waterworks company for the purpose of supplying the village with water, pursuant to the provisions of the act above mentioned, imposing the following condition: "(7) The village shall have, at the end of five years, and at the end of every five years thereafter, the right to purchase said waterworks in the manner as now provided for by law." Thereafter, and on the 1st day of July, 1886, an agreement was entered into by and between the Westchester County Waterworks Company, which had theretofore been incorporated, and the village of White Plains, in which the village agreed to take, and the waterworks company agreed to supply, water for municipal and fire purposes for a period of five years at a stipulated price, and then provided: "The party of the second part reserves the right at the expiration of five years from the date of the completion of the works, and at the expiration of every five years thereafter, to purchase said works as they may then exist by giving to said company one year's notice of such intention and paying to said company the appraised valuation. The amount so paid to be determined by three persons not in the interest or employ of said village or company; the board of trustees of said village choosing one, the company choosing one, and these two persons choosing a third. Such valuation by said appraisers in no case to exceed the cost of the said works more than 10 per cent., and the decision and appraisal of these three persons to be final and conclusive on the parties to this contract." This agreement was renewed on the

23d day of July, 1892, by a written agreement, containing a number of changes which omitted the above purchase clause, and then concluded with the provision that "this agreement and the agreement itself (referring to the agreement renewed) shall remain and continue in force for the period of five years from the date of the execution of this agreement."

The waterworks company was the owner of four parcels of real estate in the town of White Plains. It had laid water mains from the source of supply to and through the streets of the village, about 17 miles in length. It had erected standpipes, pumping engines, hydrants, nozzles, and other implements of machinery necessary for carrying out its contract with the village. It had given two mortgages upon its property to the Farmers' Loan & Trust Company, upon which \$200,000 in bonds had been issued and were outstanding. Its income during the year 1896 was \$21,055.38; its expenses, \$6,199.35; its net earnings, \$14,856.03. The earnings, therefore, were more than sufficient to pay the interest on the bonded indebtedness. It is claimed that the cost of construction, as shown by the company's books, was \$293,067.03; that no dividends were paid to the stockholders prior to 1894; and that all of the earnings of the company prior to that time had been devoted to the construction and extension of its plant. Its experts testified that the property of the company was worth from \$300,000 to \$400,000. The counsel for the village has vigorously attacked the value of the company's property, and claims that the award made is largely in excess of its true value. He does not, however, question the amount given as the company's income from its business. It is not our province to determine questions of fact. Our jurisdiction is limited to the determination of questions of law. The commissioners of appraisal have, as they state, awarded only nominal damages for the franchises of the company and the good will of its business as a going concern, and it becomes our duty to determine whether the appraisers have adopted an erroneous basis in fixing the amount of their award.

The respondent claims that the result reached by the appraisers is unjust, and that this is practically conceded in their report. The holders of the \$100,000 bonds of the company, issued upon its second mortgage, have had their securities taken from them and their trustee turned out of court without any remuneration whatever. The stockholders, who for 10 years have been constructing a plan and procuring customers for the company, have had their property, franchises, and good will taken from them, without a penny for themselves or for their creditors. The commissioners of appraisal, recognizing the hardships or injustice resulting from their determination, have said to the bondholders in their report "that, in so far as

this decision affected innocent holders of the second mortgage bonds of the Westchester County Waterworks Company, we reached it with regret"; and to the stockholders they stated that "the suggestion that it seems rather hard on the organizers of this concern that they should not get the full benefit of their activity and enterprise in building up a water business in White Plains is, to our minds, fully met by the fact that these gentlemen must themselves have contemplated parting with their plant at a price based, not upon its value as a going concern, but upon its cost of construction, when they entered into the aforementioned contracts with the village," and, again, "the main reason, the only reason, for the existence of this unfortunate fact, is to be found in the inadequacy of the original franchise, as restricted by the contracts between the village and the company." The commissioners, in giving their reasons for their decision, state that "by the contract of July 1, 1886, the company's franchise was incumbered, having, in our opinion, reduced the value of this franchise to a sum necessarily insignificant as compared with the value which an unrestricted franchise would have had." Again, speaking of the company, they stated: "Did it possess a valuable franchise, which could be taken as a basis for the transaction of an unlimited, or even of a limited, but prolonged, amount of future business? Our conclusion was that it did not." It is thus apparent that the question involved in this case depends upon the construction, meaning, and effect that is to be given to the purchase clause embraced in the contract, to which we have already referred.

Under the contract the valuation by the appraisers was in no case "to exceed the cost of the said works more than 10 per cent." Were the appraisers to determine the value of the property as it then existed? Or were they to determine the cost—the amount expended by the company in the construction of the plant and in the establishment of its business? If the latter, then, as we have seen, the books of the company showed that the cost amounted at that time to nearly \$300,000, and 10 per cent. added would make nearly \$330,000. But the commissioners of appraisal did not adopt this basis in determining the amount of their award. They found the value of the visible, tangible property of the company as it then existed, excluding the franchise and good will, independent of the question of cost of construction, and made no finding as to the amount of such cost. It is, therefore, apparent that they did not follow the construction of the contract given by themselves in their report, in which they state: "These gentlemen (speaking of the organizers of the company) must themselves have contemplated parting with their plant at a price based, not upon its value as a going concern, but upon its cost of construction, when they en-

tered into the aforementioned contract." We, however, do not deem it advisable to rest our decision upon any construction of the contract which may have been given; for the case involves other questions of paramount importance, which, we think, must control its disposition.

The question raised by the appellants at the threshold of the discussion in this case is to the effect that the purchase clause incorporated in the contract of July 1, 1886, is *ultra vires* and void; that the village of White Plains had no power to contract for the purchase of the works, or to provide for the payment thereof. The statute then in force was chapter 181, p. 157, of the Laws of 1875, as amended by chapter 175, p. 220, of the Laws of 1881, chapter 255, p. 286, of the Laws of 1883, and chapter 211, p. 370, of the Laws of 1885. That statute authorized any incorporated village in the state to organize a board of water commissioners, and such commissioners were authorized to contract for, purchase, and take, by deed in the name of the village, all lands, streams, water, water rights, or other property, real or personal, or rights therein, which may be required for the purpose of supplying the village or its inhabitants with pure and wholesome water; and, in case the commissioners could not agree with the owners as to the compensation to be paid therefor, they were authorized to institute proceedings for the condemnation of such property rights, and upon their petition the Supreme Court was required to appoint commissioners residing in the county in which the village was located to determine the amount to be paid therefor. These provisions of the statute, however, had reference to lands, streams, water rights, etc., belonging to individuals, and not to the property acquired by waterworks corporations and already devoted to a public use. The only provision of the statute permitting the acquiring of the property of corporations is section 22 (Laws 1875, p. 162, c. 181), and that provides: "Whenever any corporation shall have been organized under the laws of this state for the purpose of supplying the inhabitants of any village with water, and it shall become or be deemed necessary, by the board of water commissioners herein authorized to be created, that the rights, privileges, grants and properties of such corporation shall be required for any of the purposes of this act, the commissioners herein authorized to be created * * * shall have the right to make application to the Supreme Court, at a special term thereof, held in the judicial district in which the works of such corporation are situated, for the appointment of three commissioners of appraisal, who shall be disinterested freeholders and residents of the county." The other provisions of the statute make it the duty of the commissioners of appraisal to determine the amount that should be paid, etc. No authority is, therefore, given to the board of

water commissioners to acquire the property of such a corporation by agreement. If it is deemed necessary that the property should be acquired, the board is to apply to the Supreme Court for the appointment of commissioners of appraisal. The statute contains no limitation as to the time within which such application may be made. It may, therefore, be made at any time when the board of water commissioners see fit to act, provided they have complied with the provisions of the act under which they were appointed.

The company's franchise was a perfect grant, permitting it to use the streets of the village for its water mains, and giving it the privilege of supplying the municipality and the inhabitants thereof with water. The only restriction was the clause which reserved the right of the village at the end of five years, and at the end of every five years thereafter, to purchase its works in the manner "as now provided for by law." The right to purchase in the manner provided for by law already existed under the statute to which we have called attention, and therefore this provision in the grant did not add to or take from the grant any right or power whatever, but simply left it subject to the provisions of the existing statute. On the 1st day of July, after the granting of the franchise, the contract in question was entered into to supply the municipality with water for the period of five years. In the first place it reserved the right to the village at the expiration of five years, and at the expiration of every five years thereafter, to purchase the works of the company as they may then exist by giving to the company one year's notice of such intention and paying the appraised valuation. In the second place the contract proceeds to specify how the valuation shall be made; that is, by three persons, one appointed by the trustees of the village, the other by the company, and the two persons so selected choosing the third. Then follow provisions limiting the valuation not to exceed the cost of the works by 10 per cent., and making the decision of the appraisers final and conclusive upon the parties. Under the statute the board of water commissioners had the right to apply to the Supreme Court to condemn the property and to appoint commissioners of appraisal, while under the contract the trustees of the village substituted an entirely different proceeding for the acquiring of the property. The statute, as we have seen, has not authorized the trustees of the village to acquire such property. That power the Legislature has given to the board of water commissioners. Such board only has the power to act for the village and make valid contracts with reference to the acquiring of property for waterworks. The board of trustees of the village had no power to carry out the provisions of the contract and complete the purchase of the property thereunder, even though the waterworks

company should consent thereto. They could not issue bonds, borrow money, or pay therefor, and make their acts binding upon the municipality, for the reason that the statute had given them no such powers.

The functions of municipalities, such as cities and villages, are chiefly public; but some may be private. The general powers of government are public. They pertain to the powers of legislation, the adoption of ordinances, the protection of property, the care of highways, and the raising of taxes for the support of the government. In addition to these powers, other functions are at times conferred upon municipal corporations, by which they may act in their individual capacity for their own private gain. Dillon, in his work on *Municipal Corporations* (volume 1, § 27), says: "Powers or franchises of an exceptional and extraordinary nature may be, and sometimes are, conferred upon municipalities, such as are frequently conferred upon individuals or private corporations. Thus, for example, a city may be expressly authorized, in its discretion, to erect a public wharf and charge tolls for its use, or to supply its inhabitants with water or gas, charging them therefor and making a profit thereby. In one sense such powers are public in their nature, because conferred for the public advantage. In another sense they may be considered private, because they are such as may be, and often are, conferred upon individuals and private corporations, and result in a special advantage or benefit to the municipality, as distinct from the public at large." At common law it was no part of the duty of municipalities to furnish light or water for their inhabitants, any more than it was their duty to supply any of the other necessities or conveniences. The supplying of gas and water by the municipality necessitates its engaging in business of a private character which competes with individual effort and enterprise. When, therefore, a city or village wishes to engage in such business, it must first obtain special legislative authority therefor.

In the case of *Wells v. Town of Salina*, 119 N. Y. 280, 23 N. E. 870, 7 L. R. A. 759, Earl, J., in delivering the opinion of the court, says: "Business corporations, unless restrained by their charters, possess the power to borrow money and issue securities therefor: * * * But towns and other municipal corporations are organized for governmental purposes, and their powers are limited and defined by the statutes under which they are constituted. They possess only such powers as are expressly conferred or necessarily implied. They are clothed with the power of taxation, and can thus raise all the money needed for ordinary municipal purposes. * * * It is the general, if not the universal, law of this country, and of England, that municipalities are not empowered to borrow money for municipal purposes, unless expressly authorized to do so by statute." In

the case of *Smith v. City of Newburgh*, 77 N. Y. 130, the action was to recover \$750 for rent upon a lease of land made by the plaintiff to the city of Newburgh. The lease was made by the city, upon recommendation of water commissioners, for the purpose of constructing thereupon a distributing reservoir. The lease ran for the term of 20 years. It was held that the city had no power to enter into such a contract, and that, therefore, the lease was void; that, where the officers of a municipality fail to pursue the strict requirement of a statutory enactment in contracting for the municipality, it is not bound, nor is it bound by any acts of its officers in ratification of such illegal contract. In the case of *Syracuse Water Company v. City of Syracuse*, 116 N. Y. 167, 22 N. E. 381, 5 L. R. A. 546, the question involved was as to whether the grant of a franchise to the water company was to be deemed the grant of an exclusive privilege to occupy the streets of the city with its pipes. It was held that the grants of franchises by the state are to be so strictly construed as to operate as a surrender of the sovereignty no further than is expressly declared by the terms of the grant. The grantee takes nothing in that respect by inference. Bradley, J., in delivering the opinion of the court, says: "The municipal corporation, as such, could bind itself by such contract only as it was authorized by statute to make. It could not grant exclusive privileges, especially to put mains, pipes, and hydrants in its streets; nor could it lawfully by contract deny to itself the right to exercise the legislative powers vested in its common council." In *Huron Waterworks Company v. City of Huron* (S. D.) 62 N. W. 975, 30 L. R. A. 848, 58 Am. St. Rep. 817, it was held that the power to construct a waterworks system for a city is not a necessary incident of its corporation, but must, like all its other powers, be derived directly from the Legislature of the state. See, also, *City of Petersburg v. Applegarth's Adm'r*, 28 Grat. 321, 28 Am. Rep. 357, and *Matter of Long Island Water Supply Co. (Sup.)* 24 N. Y. Supp. 807.

It consequently follows that the trustees of the village of White Plains had no power to make the contract in question, or to carry out its provisions; that it is not a contract which could be enforced by or against them, and it is, therefore, ultra vires and void. These proceedings were, as we have seen, instituted by the board of water commissioners, pursuant to the provisions of the statute to which we have called attention. Under the provisions of this legislation it became the duty of the commissioners of appraisal to appraise the value of the company's property, including its good will and franchise, at its full value, but without enhancement from any of the provisions of the act. The commissioners of appraisal, instead of following these provisions of the act, have, as we have seen from their report, refused to be

governed thereby and have, instead thereof, attempted to follow the provisions of the contract. In doing this they adopted a wrong basis for the ascertainment of the value of the company's property.

The order of the Appellate Division and that of the Special Term confirming the report of the appraisers should be reversed, and the report of the commissioners set aside, and a new appraisal ordered before new commissioners, to be appointed by the court, with costs to abide the final award of costs.

PARKER, O. J., and VANN and WERNER, JJ., concur. GRAY and MARTIN, JJ., absent. CULLEN, J., dissents.

Order reversed, etc.

(176 N. Y. 253)

PEOPLE *ex rel.* LEWISOHN v. O'BRIEN,
Sheriff, et al.

SAME v. WYATT, Justice of Court of Special Sessions.

(Court of Appeals of New York. Oct. 20, 1903.)

CONSTITUTIONAL LAW—PRIVILEGE OF WITNESS—CRIMINATING EVIDENCE.

1. Under Const. art. 1, § 6, providing that no person can be compelled in any criminal case to be a witness against himself, a witness, examined before a magistrate on an information charging another with keeping a gambling house, cannot be compelled to give evidence tending to incriminate himself, notwithstanding Pen. Code, § 342 (contained in chapter 9, relating to gaming), provides that no person shall be excused from giving testimony, on any investigation or proceeding for a violation of the chapter, because such testimony would tend to convict him of a crime, but that such testimony cannot be received against him on any criminal investigation or proceeding, as a witness cannot be compelled to disclose circumstances which would aid his prosecution, and any statutory protection short of absolute immunity from prosecution is insufficient.

Appeal from Supreme Court, Appellate Division, First Department.

Application by the people, on the relation of Jesse Lewisoohn, for a writ of habeas corpus to William J. O'Brien, sheriff of New York county, and others, and of certiorari to William E. Wyatt, justice of the Court of Special Sessions of the state of New York. From an order of the Appellate Division (80 N. Y. Supp. 816), reversing an order of the Special Term (80 N. Y. Supp. 198) denying relator a discharge from custody, respondents appeal. Affirmed.

William Travers Jerome, Dist. Atty. (Howard S. Gans, of counsel), for appellants. Alfred Lauterbach and P. J. Rooney, for respondent.

BARTLETT, J. In December, 1902, an information was presented to the Court of Special Sessions of the First division of the city of New York, charging in due form that for the period beginning the 1st day of Janu-

ary, 1902, and ending the 1st day of December, 1902, one Richard A. Canfield was conducting a gambling house at No. 5 East Forty-Fourth street, in the city of New York, and praying that subpoenas might issue in order that the matter be fully inquired into upon oaths of persons attending in obedience to such subpoenas. Thereafter, at the request of the district attorney, the magistrate issued a subpoena addressed to the relator herein, requiring him to attend before him and to answer such questions as might be put to him on the information against Canfield. The relator appeared and was duly affirmed, pursuant to law, and, after stating upon examination that he had known the defendant, Richard A. Canfield, four or five years, and that he had not been in the premises No. 5 East Forty-Fourth street prior to December, 1890, was asked the following questions: "Have you ever been in there in your life? Have you ever been in the premises No. 5 East Forty-Fourth street, in the city and county of New York?" These questions the relator refused to answer, on the ground, among others, that they might tend to criminate him. The district attorney thereupon promised the witness immunity, and called his attention to section 342 of the Penal Code as affording him complete protection. The court thereupon directed the witness to answer, and the latter said, "I respectfully decline, judge." Thereupon a complaint was made by a deputy assistant district attorney, duly setting forth the facts, and thereon and on certain exhibits annexed the magistrate issued a warrant for the arrest of the relator, charging him with a criminal contempt of court. The warrant was thereupon delivered to the appellant Gannon, a peace officer, who arrested the relator. After various proceedings unnecessary at this time to consider in detail, Gannon, the peace officer, was served with a writ of habeas corpus, commanding him to bring the relator before Justice Scott, of the Supreme Court, and a writ of certiorari was also obtained directed to Justice Wyatt, of the Special Sessions. Upon the hearing of the issues an order was made dismissing the writs and remanding the relator to the custody from which he was taken. Upon appeal the Appellate Division reversed this order with a divided court.

The relator seeks to justify his refusal to answer under article 1, § 6, of the Constitution of this state, which provides that no person "shall be compelled, in any criminal case, to be a witness against himself." It is insisted on behalf of the people that the witness is fully protected by section 342 of the Penal Code, and should have been compelled to answer. The section reads as follows: "No person shall be excused from giving testimony upon any investigation or proceeding for a violation of this chapter, upon the ground that such testimony would tend to convict him of a crime; but such testimony cannot be received against him upon any

criminal investigation or proceeding." The relator contends that this section does not afford him full protection, and is not as broad in its provisions as the Constitution. Const. art. 1, § 6. This constitutional provision is precisely the same in phraseology as the fifth amendment of the Constitution of the United States. The same language is also found, in substance, in many of the state Constitutions.

Early in the history of this court, in *People ex rel. Hackley v. Kelly*, 24 N. Y. 74, this provision of the state Constitution was construed; the court holding that it did not protect a witness, in a criminal prosecution against another person, from being compelled to give testimony which implicates him in a crime, when he has been protected by statute against the use of such testimony on his own trial. Judge Denio said (pages 82, 83): "It is perfectly well settled that, where there is no legal provision to protect the witness against the reading of the testimony on his own trial, he cannot be compelled to answer. *People v. Mather*, 4 Wend. 229 [21 Am. Dec. 122], and cases there referred to. This course of adjudication does not result from any judicial construction of the Constitution, but is a branch of the common-law doctrine which excuses a person from giving testimony which will tend to disgrace him, to charge him with a penalty or forfeiture, or to convict him of a crime. It is, of course, competent for the Legislature to change any doctrine of the common law; but, I think, they could not compel a witness to testify on the trial of another person to facts which would prove himself guilty of a crime without indemnifying him against the consequences, because, I think, as has been mentioned, that by legal construction the Constitution would be found to forbid it. But it is proposed by the appellant's counsel to push the construction of the Constitution a step further. A person is not only compellable to be a witness against himself in his own cause, or to testify to the truth in a prosecution against another person, where the evidence given, if used as his admission, might tend to convict himself if he should be afterwards prosecuted, but he is still privileged from answering, though he is secured from his answers being repeated to his prejudice on another trial against himself. It is no doubt true that a precise account of the circumstances of a given crime would afford a prosecutor some facilities for fastening the guilt upon the actual offender, though he were not permitted to prove such account upon the trial. The possession of the circumstances might point out to him sources of evidence which he would otherwise be ignorant of, and in this way the witness might be prejudiced. But neither the law nor the Constitution is so sedulous to screen the guilty as the argument supposes. If a man cannot give evidence upon the trial of another person without disclosing circumstances which will make his own guilt ap-

parent, or at least capable of proof, though his account of the transactions should never be used as evidence, it is the misfortune of his condition, and not any want of humanity in the law."

We thus have a clear interpretation of the constitutional provision which reads that "no person can be compelled, in any criminal case, to be a witness against himself," as follows: That the words "any criminal case" mean a criminal case against the witness; that the prohibition, "no person can be compelled * * * to be a witness against himself," is fully satisfied when the evidence of a witness taken on the trial of another person is held to be inadmissible on his own criminal prosecution; and the fact that his evidence on the trial of another person may afford the public prosecutor some facilities for fastening the guilt upon himself does not permit him to be silent. It is clear, if this case is to be regarded as containing a correct exposition of the constitutional provision under review, that the relator should have been required to answer the questions propounded to him, as his protection, alike under the Constitution and the statute, is confined to the single provision that his evidence cannot be received against him in any criminal investigation or proceeding. The opinion in *People ex rel. Hackley v. Kelly*, supra, was written by a distinguished jurist, whose learning and ability have placed him among the great judges of this state who now rest from their labors. It is with no little hesitation that this court feels constrained to adopt a less technical and more liberal interpretation of this brief provision of the Constitution. As we have already pointed out, the fifth amendment to the Constitution of the United States contains the precise language of our state Constitution now under review. In *Brown v. Walker*, 161 U. S. 591, 606, 16 Sup. Ct. 644, 650, 40 L. Ed. 819, the Supreme Court of the United States said: "It is true that the fifth amendment to the Constitution of the United States does not operate upon a witness testifying in the state courts, as the first eight amendments to the Constitution of the United States are limitations only upon the powers of Congress and the federal courts, and are not applicable to the several states, except so far as the fourteenth amendment may have made them applicable. *Barron v. Baltimore*, 7 Pet. 243 [8 L. Ed. 672]; *Fox v. Ohio*, 5 How. [U. S.] 410 [12 L. Ed. 213]; *Withers v. Buckley*, 20 How. [U. S.] 84 [15 L. Ed. 816]; *Twitcheil v. Commonwealth*, 7 Wall. 321 [19 L. Ed. 223]; *Presser v. Illinois*, 116 U. S. 252 [6 Sup. Ct. 580, 29 L. Ed. 615]." It therefore follows that, while the case to which we are about to refer of *Counselman v. Hitchcock*, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110, may not be binding as an authority upon this court, yet its reasoning is most persuasive, and has been followed in several states of the Union whose Constitu-

tions contain a similar provision to the one under consideration. *Smith v. Smith*, 116 N. C. 386, 21 S. E. 196; *Ex parte Cohen*, 104 Cal. 524, 38 Pac. 364, 26 L. R. A. 423, 43 Am. St. Rep. 127; *Ex parte Arnot Carter*, 166 Mo. 604, 66 S. W. 540, 57 L. R. A. 654; *Miskimins v. Shaver* (Wyo.) 58 Pac. 411, 49 L. R. A. 831. See, also, *Emery's Case*, 107 Mass. 172, 9 Am. Rep. 22.

In *Counselman v. Hitchcock*, supra, it was held that, where a person was under examination before a grand jury in an investigation into certain alleged violations of the interstate commerce act, he is not obliged to answer questions where he states that his answers might tend to criminate him, although section 860 of the United States Revised Statutes [U. S. Comp. St. 1901, p. 661] provides that no evidence given by him shall be in any manner used against him in any court of the United States in any criminal proceeding. The case before the grand jury was a criminal case. The meaning of the constitutional provision is not merely that a person shall not be compelled to be a witness against himself in a criminal prosecution against himself, but its object is to insure that a person shall not be compelled, when acting as a witness in any investigation, to give testimony which may tend to show that he himself has committed a crime. Mr. Justice Blatchford, writing for the court, said (page 562, 142 U. S., page 198, 12 Sup. Ct., 35 L. Ed. 1110): "It is broadly contended on the part of the appellee that a witness is not entitled to plead the privilege of silence, except in a criminal case against himself; but such is not the language of the Constitution. Its provision is that no person shall be compelled in any criminal case to be a witness against himself. This provision must have a broad construction in favor of the right which it was intended to secure. The matter under investigation by the grand jury in this case was a criminal matter, to inquire whether there had been a criminal violation of the interstate commerce act. If Counselman had been guilty of the matters inquired of in the questions which he refused to answer, he himself was liable to criminal prosecution under the act. The case before the grand jury was, therefore, a criminal case. The reason given by Counselman for his refusal to answer the questions was that his answers might tend to criminate him, and showed that his apprehension was that, if he answered the questions truly and fully (as he was bound to do if he should answer them at all), the answers might show that he had committed a crime against the interstate commerce act for which he might be prosecuted. His answers, therefore, would be testimony against himself, and he would be compelled to give them in a criminal case. It is impossible that the meaning of the constitutional provision can only be that a person shall not be compelled to be a witness

against himself in a criminal proceeding against himself. It would doubtless cover such cases, but it is not limited to them. The object was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime." At page 564, 142 U. S., page 198, 12 Sup. Ct., 35 L. Ed. 1110, the learned judge continues: "It remains to consider whether section 860 of the Revised Statutes [U. S. Comp. St. 1901, p. 661] removes the protection of the constitutional privilege of Counselman. That section must be construed as declaring that no evidence obtained from a witness by means of a judicial proceeding shall be given in evidence or in any manner used against him or his property or estate in any court of the United States in any criminal proceeding, or for the enforcement of any penalty or forfeiture. It follows that any evidence which might have been obtained from Counselman by means of his examination before the grand jury could not be given in evidence or used against him or his property in any court of the United States in any criminal proceeding or for the enforcement of any penalty or forfeiture. This, of course, protected himself against the use of his testimony against him or his property in any prosecution against him or his property in any criminal proceeding in a court of the United States. But it had only that effect. It could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property in a criminal proceeding in such court. It could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted." The court thereupon held that section 860 of the United States Revised Statutes [U. S. Comp. St. 1901, p. 661] is not coextensive with the constitutional provision, and that it was a reasonable construction of the provision that the witness is protected from being compelled to disclose the circumstances of his offense, or the sources from which or the means by which evidence of its commission or of his connection with it may be obtained or made effectual for his conviction, without using his answers as direct admissions against him. Judge Blatchford stated that the court could not yield assent to the views expressed by the Court of Appeals of New York in *People ex rel. Hackley v. Kelly*, supra.

We are of opinion that the construction given to the very clear and plain words of the Constitution in *Counselman v. Hitchcock* is reasonable, fair, and accords a witness only such protection as the plain letter of the Constitution confers. If this is not the proper construction, the witness might be

required to disclose circumstances that would enable the public prosecutor to institute criminal proceedings against him wherein he might be convicted without reading his evidence taken in another case. The language of Chief Justice Marshall in the Circuit Court of the United States for the District of Virginia (June, 1807) in Burr's Trial (1 Burr's Trial, 244), on the question whether the witness was privileged not to accuse himself, is as follows: "If the question be of such a description that an answer to it may or may not criminate the witness, according to the purport of that answer, it must rest with himself, who alone can tell what it should be, to answer the question or not. If in such a case he may say upon his oath that his answer would criminate himself, the court can demand no testimony of the fact. * * * According to their statement (the counsel for the United States) a witness can never refuse to answer any question, unless that answer, unconnected with other testimony, would be sufficient to convict him of crime. This would be rendering the rule almost perfectly worthless. Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the court to be the true sense of the rule that no witness is compellable to furnish any one of them against himself. It is certainly not only a possible, but a probable, case that a witness by disclosing a single fact may complete the testimony against himself, and to every effectual purpose accuse himself as entirely as he would by stating every circumstance which would be required for his conviction. That fact of itself might be unavailing, but all other facts without it would be insufficient. While that remains concealed within his own bosom he is safe, but draw it from thence and he is exposed to a prosecution. The rule which declares that no man is compellable to accuse himself would most obviously be infringed by compelling a witness to disclose a fact of this description. What testimony may be possessed, or is obtainable, against any individual, the court can never know. It would seem, then, that the court ought never to compel a witness to give an answer which discloses a fact that would form a necessary and essential part of a crime which is punishable by the laws." A clearer and more cogent statement of the rule it would be difficult to find.

It is insisted by the counsel for the respondent that *People ex rel. Hackley v. Kelly* was overruled in *People ex rel. Taylor v. Forbes*, 143 N. Y. 219, 38 N. E. 303. In that case there was no statute protecting the witness in the use of his testimony, and he having refused to answer, on the ground that to do so would tend to criminate him, this court held that the witness was in such a case the judge of the effect of answers sought to be drawn from him, and that nothing short of absolute immunity from prosecution could

take the place of the constitutional privilege. It is true that there are many expressions in the opinion of the court indicating its tendency to depart from the strict rule laid down in *People ex rel. Hackley v. Kelly*, but the case is not precisely in point. The respondent also cites *Matter of Peck*, 167 N. Y. 391, 60 N. E. 775, 53 L. R. A. 888, as sustaining his contention that *People ex rel. Hackley v. Kelly* can be no longer regarded as authority. It is sufficient to say of the case cited that the point now under consideration was not directly presented, but in the opinion *Counselman v. Hitchcock* is cited with approval as sustaining the failure of the holder of a liquor tax certificate to file a verified answer in proceedings under the liquor tax law. It is true in this case, as in the one last cited, that the general language of the opinion indicates the tendency of the court to depart from the rule laid down in *People ex rel. Hackley v. Kelly*.

The learned assistant district attorney insists that, while the case of *Counselman v. Hitchcock* has never been actually overruled, the court has refused to extend the principle, and has repudiated entirely the reasoning on which it was founded. In support of this contention *Brown v. Walker*, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819, is cited. That case involved the construction of the act of 1893 (Act Feb. 11, 1893, c. 83, 27 Stat. 443 [U. S. Comp. St. 1901, p. 3173]) in reference to producing books, papers, etc., before the interstate commerce commission. The court pointed out that this act was passed in view of the opinion of the court in *Counselman v. Hitchcock*, to the effect that section 860 of the United States Revised Statutes [U. S. Comp. St. 1901, p. 661] was not coextensive with the constitutional provision. The court held in substance that the statute of 1893 was coextensive with the Constitution in the immunity that it offered the witness, and that he was deprived of his constitutional right thereby and must answer the question. The statement by way of criticism of *Counselman v. Hitchcock* is as follows (page 600, 161 U. S., page 648, 16 Sup. Ct., 40 L. Ed. 819): "The danger of extending the principle announced in *Counselman v. Hitchcock* is that the privilege may be put forward for a sentimental reason, or for a purely fanciful protection of the witness against an imaginary danger, and for the real purpose of securing immunity to some third person, who is interested in concealing the facts to which he would testify. Every good citizen is bound to aid in the enforcement of the law, and has no right to permit himself, under the pretext of shielding his own good name, to be made the tool of others, who are desirous of seeking shelter behind his privilege." It is doubtless true that cases may arise where the mere fact of the witness asserting that to answer the question would tend to criminate him would not be conclusive. Where the court can see that the re-

refusal to answer is a mere device to protect a third party, and that the witness is in no possible danger of disclosing facts that would lead to his own indictment and conviction, an answer may be insisted upon.

The decision in *Brown v. Walker*, *supra*, in no way militates against the construction of the Constitution in *Counselman v. Hitchcock*. It merely argues that the rule might be used for improper purposes and to shield the guilty. Any general rule is subject to abuse, and the court will be always vigilant to see that it is not employed in the interests of fraud and to secure a failure of justice. It is clear that in *Counselman v. Hitchcock* the rule was properly applied, and we accord to that decision our full approval. This distinction is to be kept in mind as to the attitude of a witness before the court where complete statutory protection, coextensive with the constitutional provision, exists, and where it is lacking. In the former situation the witness is deprived of his constitutional right of refusing to answer. The point was decided by this court in *People v. Sharp*, 107 N. Y. 427, 14 N. E. 319, 1 Am. St. Rep. 851, and by the Supreme Court of the United States in *Brown v. Walker*, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819. We adhere to the point thus decided.

In the latter situation, where statutory immunity does not exist, which was dealt with by Chief Justice Marshall in language already quoted (1 Burr's Trial, 244), it rests with the witness whether he will answer or not, except, as we have pointed out, where the refusal is clearly a fraudulent device to protect a third party. In thus extending the rule as hitherto laid down by this court, we are persuaded that the complete immunity sought to be afforded the citizen by the Constitution from being a witness against himself in any criminal case is fully secured. The evolution of this right has been slow, indeed, since the days of the Star Chamber in England, when defendants, on a refusal to be sworn against themselves, were whipped at the cart's tail and pilloried, had ears cut off and noses slit, were fined enormous sums, and imprisoned for years. The methods of the seventeenth century were long since abandoned, but the desire to elicit from a suspected or accused person evidence that would send him to the cell or the scaffold unfortunately survives, and this court has in recent years been called upon to condemn on several occasions modes of procedure having that end in view. In the case at bar, in view of the principles of law discussed, the relator was justified in refusing to answer the questions propounded to him on the ground that the answers would tend to criminate him. It is quite impossible for the court to say to what extent the witness, if he answered, would be criminated or placed in jeopardy. He might be subjected to proceedings involving penalty or forfeiture. He might be tried and convicted as a common

gambler, which is declared by statute to be a felony. All this might be accomplished without using his evidence against him, if given herein.

We assume, as did the Appellate Division, that it is not contended by the prosecution that the questions which the relator refused to answer were preliminary in character, but rather that it is conceded by both parties that they are so framed as to call for a decision on the merits.

The order appealed from should be affirmed, with costs, the writs sustained, and the relator discharged.

GRAY, J. What hesitation I have in agreeing to an affirmance is because the effect of our decision will be to change a rule of construction which was early laid down in this state in *People ex rel. Hackley v. Kelly*, and to overrule the authority of that case. I find no decision of this court which has gone that far. But the rule of that case, being one of evidence or of procedure, may be changed, and should be changed, if not consistent with the enjoyment of the full measure of the citizen's constitutional rights. It is my judgment that the reasoning of the opinion of the United States Supreme Court in *Counselman v. Hitchcock* is more convincing, in giving a construction to the language of the constitutional clause, than is that of this court as expressed in its opinion in the *Hackley Case*. I, therefore, am willing to place this court in accord with the later expressed views of the federal tribunal. I think that the words "in any criminal case," which are used in the constitutional clause, are entitled, when we consider the moving principle for its incorporation into the fundamental law of the state, to a broader construction than was accorded to them in the *Hackley Case*. If the interests of the people are deemed to require it, it is, of course, quite competent, and proper, for the legislative body to provide for an exemption of the witness from liability to prosecution as broad in its effect as is the constitutional privilege.

PARKER, C. J., and O'BRIEN, HAIGHT, CULLEN, and WERNER, JJ. (and GRAY, J., in memorandum), concur with BARTLETT, J.

Order affirmed.

(176 N. Y. 289)

PEOPLE v. ENNIS.

(Court of Appeals of New York. Oct. 27, 1903.)

MURDER—EVIDENCE—REVIEW.

1. Evidence reviewed, and held sufficient to sustain a conviction of murder in the first degree.

2. In the absence of any exception, a conviction of murder will not be set aside, and a new trial granted, where the verdict was well supported by the evidence, and abundantly established the guilt of the defendant.

Appeal from Kings County Court.

William H. Ennis was convicted of murder in the first degree, and appeals. Affirmed.

John P. Kelly, John T. Norton, and J. Grattan McMahon, for appellant. John F. Clarke, Dist. Atty. (Robert H. Roy, of counsel), for the People.

PER CURIAM. The defendant was indicted for the murder of his wife, and, being tried upon the charge, was found guilty by a jury of murder in the first degree. The killing is not denied, and the evidence upon the trial showed that the crime was committed under circumstances of peculiar atrocity. These facts appeared: About a year after the marriage of the defendant with the deceased, and after the birth of their child in September, 1901, the latter left her husband, went to her mother's residence, and dwelt with her thereafter. She then commenced an action for separation upon the ground of cruel and inhuman treatment. A judgment was rendered in her favor by default, which awarded her alimony. A few minutes before 7 o'clock on the morning of the 14th day of January, 1902, the defendant entered the residence of his mother-in-law, went to her room, and, while she was in bed with his infant child, applying a foul epithet to her, he shot her in the breast with a revolver. He then said that he was going to shoot his wife, and, turning from the bed, met the latter coming from the adjoining room. He told her that he was going to shoot her, struck her, threw her down upon the floor, and, disregarding her entreaties not to shoot her, or that she might first be allowed to go to confession, shot her also in the breast, with the result of causing immediate death. One of her sisters, who had taken up the child from the bed, and held it in front of the defendant, in an effort to prevent the shooting, was threatened herself with death if she did not get out of the way. He then left the house, went to a hotel, and was there arrested, while asleep in bed. He stated to the officers who arrested him that he knew what he had done, and was willing to suffer for it, and he expressed his regret that he had not killed his mother-in-law. He subsequently volunteered similar statements, when confronted with his mother-in-law in the hospital. The only defense which was relied upon at the trial was that of insanity. Upon that issue testimony was given in his behalf by relatives, friends, associates, and medical experts; from which it was made to appear that when a lad he had received injuries in his head from a fall; that thereafter, and in later life, he showed symptoms of being afflicted with the disease of epilepsy, manifesting itself at times in convulsions; and that he had delusions, inducing acts of violence. According to the evidence

of the various lay and expert witnesses who testified in his behalf, whether from observation or from examination, they believed him to be of unsound mind, and to be a paranoiac. As against the evidence thus adduced upon the question of the defendant's sanity, the people introduced other evidence, in the testimony of medical practitioners and experts, who had capacity to speak either from acquaintance with or examination of the defendant, and in that of various lay witnesses who were acquainted or associated with him. According to the evidence of the latter class of witnesses, he had been rational in his conduct for several years prior to the date of the occurrences in question, though a hard drinker, and they had observed none of the usual epileptic manifestations; while according to the former class he was, in their opinion, not an epileptic, and was merely shamming. In addition to the evidence directed towards showing the sanity or insanity of the defendant, the jurors had before them the evidence of his conduct prior to and immediately following the killing, from which they were warranted in concluding that he was perfectly rational, and not acting under the influence of any delusion or maniacal attack. Upon the rendition of the judgment of separation and for alimony, he openly declared in court that he would "rot in jail before he would give a cent." Shortly before the killing he had declared his purpose to kill his wife, in a letter and in conversation. In the evening of the day before he was in a liquor saloon, and cashed a check, which he had received from the sale of the furniture in his residence. Later in the evening, and until nearly 1 o'clock in the morning, he was drinking in another saloon, and in conversation with the proprietor of the saloon invited him to have the last drink he would ever have with him, talked about his mother-in-law, and said he would put a bullet in her, as she had made all the trouble between him and his wife. He then went to another barroom, where he exchanged some of his money for the check of the proprietor, payable to the order of his sister. He next appeared in the residence of his mother-in-law, where, under the circumstances already narrated, he deliberately shot her, and then his wife; the testimony as to those occurrences being given by his mother-in-law and the two sisters of his wife, who were present. From their testimony it was evident that his conduct in the room was that of a man intending in cold blood to commit murder, and comprehending fully what he was doing and was about to do. Whether, upon a consideration of all the evidence adduced, the defendant was laboring under a defect of reason, or was the subject of an epileptic attack, was a question for the determination of the jurors as a disputed question of fact. Their verdict is conclusive upon us, and we do not see how they could have well reach-

ed any other determination upon the case than they did.

The defendant does not present to us any exception taken upon the trial upon which error is predicated, as warranting the reversal of the judgment of conviction. He appeals to our power to order a new trial, in the absence of any exceptions, upon the ground that a review of the record shows that justice demands it. We have reviewed the record. We are satisfied that the evidence well supported the verdict of the jury; that it abundantly established the guilt, and the responsibility of the defendant, and that his substantial rights have not been prejudicially affected. The power conferred upon this court in the review of capital cases is not called into exercise by the appearance of some error which no exception pointed out, and which cannot be seen to have affected the substantial rights of the accused. The demands of justice have been satisfied in the trial which has been had, and upon the whole case we reach the conclusion that no sufficient grounds have been presented, and none exist, to justify a reversal of the judgment of conviction.

PARKER, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, MARTIN, and VANN, JJ., concur.

Judgment of conviction affirmed.

(176 N. Y. 278)

PEOPLE v. TOBIN.

(Court of Appeals of New York. Oct. 27, 1903.)

MURDER—EVIDENCE—INSANITY—EXAMINATION—INSTRUCTIONS—APPEAL.

1. Evidence held sufficient to sustain a conviction of murder in the first degree.

2. At the request of counsel of one accused of murder, the court, at the time the indictment was moved for trial, appointed two physicians to report as to the sanity of the defendant, and adjourned the trial until such report could be made. The physicians, after examination, reported that the defendant was sane, in which opinion a third physician, who had charge of defendant at one time, concurred. Held, that the court was justified in denying a motion, based on affidavits of the defendant's attorneys, for a commission, under Code Cr. Proc. § 658, to examine the defendant as to his sanity at the time of the examination, where there was no evidence to controvert the report of the medical experts except such affidavits.

3. Instruction on a trial for murder, where the defense was insanity, that the general question presented was whether the crime, if committed, was committed by a sane person, and that on this question the presumption of sanity and the evidence are both to be considered, and, if a reasonable doubt exists as to whether the person is sane or not, he is entitled to the benefit of the doubt, is sufficient.

4. Where the court has carefully defined "reasonable doubt," and also that, if there is a reasonable doubt of accused's sanity, he must be given the benefit of the doubt, the refusal to charge substantially the same propositions in the language of defendant's counsel is not error.

5. An instruction cannot be reviewed, under Code Cr. Proc. § 528, in the absence of a specific exception thereto, where the court is satisfied that the verdict is based on clear and convincing evidence.

Appeal from Supreme Court, Trial Term, New York County.

Thomas Tobin was convicted of murder, and appeals. Affirmed.

Henry W. Unger and Abraham Levy, for appellant. William Travers Jerome, Dist. Atty. (Howard S. Gans, of counsel), for the People.

VANN, J. The homicide which is the subject of this appeal occurred on the 27th of September, 1902. The next month the defendant was indicted, and on the 18th of December following, after a trial which lasted eight days, the jury found him guilty of murder in the first degree, and judgment was pronounced accordingly. The counsel who conducted the trial are entitled to the thanks of the court and of the public for the thorough investigation made and the prompt disposition of this important case.

The defendant is 37 years old, and has spent about 19 years of his life in prison. The offenses for which he was thus punished were crimes against property, and he does not appear to have been charged with a crime against the person until the present accusation was made against him. In October, 1898, he was transferred from the State Prison at Dannemora, where he was confined for grand larceny, to the Matteawan Insane Asylum, for custody and treatment as an insane convict. On the 13th of December, 1900, he was returned to prison "as recovered." At the time of the homicide he was employed as a waiter at No. 38 West Twenty-Ninth street, in the city of New York, known as the "Empire Café," a place of resort for prostitutes and their patrons. At 1 o'clock on the morning of September 27, 1902, the police, according to their custom, cleared the place of all occupants except the employes; and during the rest of the night the door leading from the street to the first floor was locked, but access to the premises could be had through a Chinese restaurant in the basement. About an hour later, James Craft, a resident of Staten Island, 46 years of age, and already under the influence of liquor, entered the basement, where a prostitute began to talk with him; and, upon the suggestion of the defendant, all three went upstairs into the café. The defendant brought in beer and whisky ordered by Craft, who, in paying therefor, exhibited a roll of bills amounting to \$25 or \$30. After that all the employes and other persons left the place, some though the efforts of the defendant, except himself, Craft, and McEneaney, who was the barkeeper. Craft and the defendant continued to drink

¶ 5. See Criminal Law, vol. 15, Cent. Dig. § 2682.

until both were intoxicated, and at about 5 o'clock in the morning there was talk between them, approaching a quarrel, about some change claimed to be due after paying for drinks. After this discussion ended there was silence for about 20 minutes, and McEneaney, who was behind the bar, where he could hear, but could not see, what was going on, testified that he then heard a thud, followed by a fall. Going to the door, he saw Craft on the floor, bleeding and senseless, and the defendant was jumping on him, tearing his clothes and kicking him. Craft's face was swollen and covered with blood. McEneaney went over to the defendant, pushed him away, and asked him what he was doing. He made no reply, but went downstairs, while McEneaney tried to pour some brandy down the throat of the injured man, but did not succeed, "because his teeth were clinched." During his effort he got some blood on his hands, and while he was washing it off in another room the defendant returned, seized the body by the feet, and was dragging it downstairs, the head bumping on the steps, when McEneaney took hold of the arms and helped carry the man to the foot of the stairs. McEneaney then said: "Open the Chinese door and give him some air." The body was put down, the defendant went into the Chinese restaurant, and McEneaney went upstairs for some more brandy; and on his return the defendant had the body in the cellar under the basement, and was standing over it, with a butcher's cleaver in his hand. The head was nearly off, and the defendant struck the body once with the cleaver in the presence of McEneaney, who asked him what he was doing, and pushed him back, but was told to mind his own business. He was afraid the defendant was going to hit him, and, when told to take off his shirt, which was bloody, he did so, in fear of his life; and, as the shirt came off over his head, he pushed Tobin "with shirt and all," and ran upstairs. He put on his coat and hat, took a drink, picked up a bottle to defend himself, and went downstairs quietly, where he saw the defendant holding the head, severed from the body, in his hands, and walking toward the furnace in the cellar. He then ran out of doors, called a cab, drove to a station house, and informed the police. This is an outline of the story told by McEneaney, who was jointly indicted with the defendant, but was not tried with him. It was corroborated in nearly all respects by the testimony of several witnesses. When the police arrived they found the body, entirely naked, concealed under some rubbish in the cellar. There was a pool of blood two feet wide near the furnace, with a trail of blood leading to the furnace door. The head and clothing, half charred, were in the furnace, where a fire had been kindled, but was nearly out, as the draft did not work. The defendant was found, with blood on his hands and clothing,

hiding in the saloon. He had in his pocket \$36 in bills, besides some silver and coppers. A cleaver, old and with a rough edge, was picked up in the café, and was identified as one kept for use in the Chinese restaurant. The physician who made the autopsy found all the organs of the body in a healthy condition. Thirteen different blows had been struck with an instrument having more or less of a sharpened edge before the head had been severed. There was a fracture of the skull, which would probably have caused death in time; but the surgeon was of the opinion, from the flow of blood and other physical signs, that the man was alive, and the heart still beating, when his head was cut off. We will not continue this painful narrative, for the learned counsel for the defendant does not ask us to review the facts; still we have examined them with care, and find that the evidence sustains the verdict, including, as an essential part thereof, that the defendant was sane when he committed the act. The only substantial contest at the trial was over the sanity of the defendant, and upon that issue the weight of evidence was with the people. Four questions of law have been argued before us, which we will now consider.

1. On the 4th of December, 1902, when the trial of the indictment was moved, the counsel for the defendant stated that they believed he was insane, and asked the court to appoint some competent physician for the purpose of making an examination as to his mental condition. The court thereupon adjourned until the 8th of December, and in the meantime the justice presiding requested two expert physicians, of long experience and high standing, to examine the defendant and report as to his sanity. They made an examination, and reported that, in their judgment, the defendant was sane; and a third physician, who at one time had charge of the defendant, concurred in that opinion. When the court met pursuant to adjournment, a motion was made in behalf of the defendant, based upon the affidavits of his attorneys, for a commission, pursuant to section 658 of the Code of Criminal Procedure; but, in view of the report of the experts appointed by the court, the motion was denied. The case proceeded to trial, and it is now claimed that the denial of the motion was reversible error, but we think this point is not well taken. The statute authorizes, but does not require, the court to appoint a commission to examine "a defendant who pleads insanity," and report "as to his sanity at the time of the commission of the crime"; or when "a defendant in confinement, under indictment," either before or after conviction, appears "to be insane," the court "may appoint a like commission to examine him and report * * * as to his sanity at the time of the examination." Code Cr. Proc. § 658. When the motion in question was heard, no plea of insanity had been made by the defendant;

but this is not important, because the application was for a report as to his mental condition at the time of the proposed examination. The court was authorized to appoint a commission for this purpose, provided the defendant appeared to be insane when the motion was made. Since eminent medical experts, appointed informally upon the suggestion of the defendant's counsel, had within a day or two, after personally examining him, reported that he was sane, how could the court decide that he appeared to be insane, when no evidence was presented to show it, except the affidavits of the counsel themselves, who did not claim to be experts, and who presented no supporting affidavit from any physician? Their affidavits contained few facts, and were confined mainly to the expression of their own opinions. The facts, excepts the confinement of the defendant in the Matteawan Asylum, related to acts and words of the defendant which may have been feigned, and which it is reasonable to believe, in view of the testimony subsequently given at the trial, were in fact feigned. The question was within the sound discretion of the court, and we think it was discreetly exercised. The subject was thoroughly discussed in a recent case, the facts of which were so analogous as to make it controlling. *People v. McElvaine*, 125 N. Y. 596, 605, 26 N. E. 929.

2. In charging the jury upon the question of insanity, the court said: "Sanity being the normal and usual condition of mankind, the law presumes that every individual is in that state. Hence the prosecutor may rest upon that presumption. Without other proof, the fact is deemed to be proved *prima facie*. Whoever denies this, or interposes a defense based upon its untruth, must prove it. The burden, not of the general issue of the crime by a competent person, but the burden of overthrowing the presumption of sanity or of showing insanity, is upon the person who alleges it. And if evidence is given tending to establish insanity, then the general question is presented to the court and jury whether the crime, if committed, was committed by a person responsible for his acts. And upon this question the presumption of sanity and the evidence are all to be considered, and the prosecutor holds the affirmative, and, if a reasonable doubt exists as to whether the prisoner is sane or not, he is entitled to the benefit of that doubt." The counsel for the defendant claims that it was error to instruct the jury upon the vital question in the case that the presumption of sanity and the evidence are all to be considered. He argues that the function of the presumption with which the trial starts is ended when evidence has been given tending to show that the defendant is insane; that thereupon the presumption becomes *functus officio*, and the case proceeds as if it had never existed; that the burden of proof thus thrown upon the prosecuting officer re-

quires him to establish sanity by evidence, without any aid from the dead presumption, which is not evidence; that the only use of the presumption is to relieve the people of the necessity of proving sanity in the first instance, and when it has been overthrown by evidence for the defendant, while the jury may consider it, they are not required to, and should not be told by the court that it is their duty to. This point was not raised by an exception, and the portion of the charge above quoted was taken verbatim et literatim from the opinion in *Brotherton v. People*, 75 N. Y. 159, 162. That case has been cited and followed so faithfully for a quarter of a century both by trial courts and appellate courts, including ourselves, that we regard it as the established law of the state; and, while we appreciate the argument of counsel upon the subject, discussion is foreclosed, for the question is not open to consideration.

3. The defendant asked the court to charge the jury that, if they "entertained a reasonable doubt from the evidence in the case as to the sanity or insanity of the defendant at the time of the commission of the act charged in the indictment, he is entitled to the benefit of that doubt, and must be acquitted." The court declined to vary his charge, and an exception was taken. In the body of the charge the court carefully defined "reasonable doubt," and told the jury, among other things, that "whether the defendant killed Craft is a question of fact which you must determine from all the evidence in the case, and that must be established beyond a reasonable doubt." "If the people have failed to establish by the evidence, beyond a reasonable doubt, that there was premeditation and deliberation, then the prisoner is entitled to the benefit of that doubt." "Before you can find the defendant guilty of murder in the first degree, it is necessary that the facts should satisfy you beyond a reasonable doubt that the defendant struck the deceased with a deadly weapon, and that he had in his mind at the time he struck the blow or blows, or beheaded him, a deliberate and premeditated design to kill him." "You must be convinced of the prisoner's guilt beyond a reasonable doubt. * * *" "If you are satisfied beyond a reasonable doubt of the guilt of the prisoner, it will be your duty to say so." "If a reasonable doubt exists as to whether the prisoner is sane or not, he is entitled to the benefit of that doubt." "But it all rests upon your good judgment to determine * * * whether this defendant knew the nature of the crime that he was committing—whether he knew that he was doing a wrongful act or not. If you entertain a reasonable doubt upon that point, he is entitled to the benefit of that doubt." "If you reach the conclusion from the evidence that the defendant is innocent, it is your duty to acquit him; but, on the other hand, if you come to the con-

clusion from the evidence, beyond a reasonable doubt, that the defendant committed the crime, and that he was sane when he committed it, then it is your duty to find him guilty." At the close of the charge the counsel for defendant asked the court to instruct the jury that "when the defense of insanity was interposed in this case, and throughout the case, this defendant is entitled to the benefit of the reasonable doubt resting upon the question of insanity." The court remarked that he had charged that, and, when further asked to charge it in those words, said it was unnecessary, but added, "I charge the jury that, if they have a reasonable doubt as to his sanity, he is entitled to the benefit of that doubt." The learned justice further said: "Gentlemen, after the insanity is first established, or the defendant's witnesses give testimony tending to show that the defendant is insane, it then devolves upon the people to satisfy you beyond a reasonable doubt that at the time he committed the homicide he was sane." Upon the request of the defendant, he also charged "that the defense of insanity interposed here by the defendant need not be proven beyond a reasonable doubt." Then followed the request with reference to which the exception was taken. It is claimed that the court did not make it clear, while the request did, that the defendant should be acquitted if the jury had a reasonable doubt as to his sanity. It would be very remarkable if the jury failed to understand the effect of a reasonable doubt, and that, if they entertained it as to any one of the various elements of guilt, they should acquit the defendant. How could they give him the benefit of a reasonable doubt, as they were repeatedly told to in certain contingencies, except by acquitting him? They were told what the people were bound to show beyond a reasonable doubt in order to convict, and that the defense of insanity relied upon by the defendant need not be proved beyond a reasonable doubt. How could they observe these directions, or give any effect to them, except by finding a verdict of acquittal, if a reasonable doubt existed in their minds as to the sanity of the defendant? We find no error here, for the court, as we have repeatedly held, was not bound to charge in the language of counsel, provided the substance of the request was fairly covered, as we think it was. *People v. Pallister*, 138 N. Y. 601, 33 N. E. 741.

4. It is further claimed, although the point was not raised by an exception, that it was error for the court to charge that it was not "necessary that every circumstance should be proved beyond a reasonable doubt." The court did not mean by this that every circumstance constituting a link in the chain of circumstances necessary to establish "the fact of killing by the defendant" need not be proved beyond a reasonable doubt, but that every incidental circumstance, such as those

bearing upon the probabilities that the main circumstances were true, or that every fact essential to convict, such as "the death of the person alleged to have been killed," need not be proved beyond a reasonable doubt. Pen. Code, § 181. Moreover, it is to be remarked that only errors raised by exception require a new trial, and it is only when we are satisfied that the verdict was against the weight of evidence or against law, or that justice requires a new trial, that we are permitted to reverse, whether an exception shall have been taken, or not, in the court below. Code Cr. Proc. § 528. In this case we think the verdict was right, and that it was based upon evidence that is clear and convincing. We do not think that it was against the weight of evidence or against law, or that justice requires a new trial; and hence, owing to the absence of an exception, we are not at liberty to exercise a discretion confided to us for the protection of persons under sentence of death, as to whose guilt we may have some doubt. Exceptions are still necessary, notwithstanding the statute, to fully protect the rights, and especially the technical rights, of a person on trial, even for a capital offense. This is just, for, if an exception is taken, the court, warned by the challenge, may correct the error on the spot, and thus avoid the expense and delay involved in case a new trial should be ordered.

As we find nothing to justify a reversal, the judgment must be affirmed.

PARKER, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, and MARTIN, JJ., concur.

Judgment of conviction affirmed.

(176 N. Y. 299)

DYKMAN et al. v. UNITED STATES LIFE INS. CO.

(Court of Appeals of New York. Oct. 30, 1903.)

SUIT IN EQUITY—RIGHT TO JURY TRIAL.

1. An action by executors to set aside a contract of annuity between a decedent and a life insurance company, and to recover the amount paid for the annuity, with interest, less the amount of annuities paid, with interest thereon, is an action for relief in equity, so that plaintiffs are not entitled, under Code Civ. Proc. § 963, to a trial by jury as a matter of right.

Appeal from Supreme Court, Appellate Division, Second Department.

Action by William N. Dykman and others, as executors of Edward T. Hunt, against the United States Life Insurance Company. From an order of the Appellate Division (81 N. Y. Supp. 1125) affirming an order of the Special Term denying a motion to strike the action from the special term calendar, and send it to the Trial Term, before a jury, plaintiffs appeal. Affirmed.

¶ 1. See *Jury*, vol. 31, Cent. Dig. §§ 52, 71.

James C. Bergen and John E. Parsons, for appellants. Charles E. Patterson and Donald B. Toucey, for respondent.

BARTLETT, J. The learned counsel for the plaintiffs insists that the complaint sets forth an action for money had and received, and that the issues are triable by a jury. A carefully drawn complaint, covering nine printed pages, sets forth, in substance, that plaintiffs' testator, within five months of his death, purchased an annuity of the defendant, when he had long been addicted to habits of gross intemperance, which led to a diseased, disordered, irrational, and unsound mental condition, of which defendant had due notice; that plaintiffs' testator paid \$100,000 for an annuity of \$7,640 during life, payable in quarterly payments of \$1,910; that one quarterly payment was paid, and before another became due the testator died. There are other allegations in the complaint, that need not be referred to at this time.

The prayer of the complaint is, in substance: (1) That the contract of annuity be adjudged void, and that the same be canceled and set aside; (2) that the defendant be adjudged to pay to the plaintiffs the sum of \$100,000, with interest, less any sum, with interest, that defendant has paid out under the contract; (3) prayer for costs.

This is an action in equity, praying for relief that only a court of chancery can grant. The learned Appellate Division has certified to us this question: "Are the plaintiffs in this action, upon the pleadings herein, entitled, as a matter of right, to a trial by jury, under the provisions of section 968 of the Code of Civil Procedure?" The question is answered in the negative.

The order appealed from should be affirmed, with costs.

PARKER, C. J., and O'BRIEN, MARTIN, VANN, and WERNER, JJ., concur. **OULLEN, J.,** not sitting.

Order affirmed.

(176 N. Y. 293)

HALL v. CITY OF NEW YORK et al.

(Court of Appeals of New York. Oct. 27, 1903.)

APPEAL—MODIFICATION OF JUDGMENT—PARTIES.

1. Where a claimant in an action to foreclose a mechanic's lien appeals from a judgment which erroneously does not give his claim priority over the others, but places it last in the order of payment, and certain parties are not made parties to the appeal, the claim should be given priority over those claimants as to whom he has perfected the appeal.

Appeal from Supreme Court, Appellate Division, Second Department.

Action by Robert S. Hall against the city of New York and others. From a judgment of the Appellate Division affirming a judg-

ment in favor of plaintiff and certain of the defendants (79 N. Y. Supp. 979), the other defendants appeal. Modified.

John Quinn, for appellant Western National Bank. George L. Rives, Corp. Counsel (James McKeen, of counsel), for appellant city of New York. Frederick P. Bellamy and I. N. Slevwright, for respondent Hall. Theodore S. Rumney, Jr., for respondent David J. Dannat et al. Clarence Edwards, for respondent William C. Card. John T. Sackett, for respondent Otto E. Reimer Company. Robert H. Wilson, for respondent Yellow Pine Company. James F. Quigley, for respondent Christian Zieseniss.

PER CURIAM. The only questions which this court deem it necessary to consider arise upon the appeal of the Western National Bank. As to all the other questions involved, we concur in the conclusions of the court below. If the bank had properly appealed to that court, and served its notice of appeal upon all the parties, it is obvious that the error of the referee in subordinating its claim to those of the parties who had filed mechanics' liens would have been corrected. But by reason of its negligence in that respect the learned Appellate Division was required to hold that it could not, in justice to the other parties, either reverse the judgment entered upon the referee's report, or modify it by giving to the claim of the bank the full preference to which it was justly and legally entitled. This conclusion was based upon the fact that the judgment was final and binding upon the bank, which had not appealed as to the plaintiff. The court below were of the opinion that, if it could modify the judgment by determining the questions between the remaining parties who were before the court without working injustice to those whose interests were involved, it would be its duty to modify it in accordance with the law. In that it was obviously right. It was, however, of the opinion that that could not be done, either in whole or in part. We think otherwise, and that the judgment can be modified in part without injustice to any of the parties. The defendants Zufall, Yaeger, and Bogardus, although not served with a notice of the bank's appeal, were preferred lienors, and their claims were entitled to preference over the claims of all the other lienors, and were therefore superior to those of any of the other parties, including the bank, who did not appeal as to them. Consequently the allowance of the bank's claim would not have affected them, as the fund was entirely sufficient to pay the amount of their liens as well as the claim of the bank. Under the judgment, from which no appeal was taken, the plaintiff's claim was also superior to that of the bank. Moreover, the plaintiff's claim could not be made superior to those of the Yellow Pine Company, Shuldiner, or Dannat

& Pell, without working injustice to them, and hence the court was right in refusing to modify the judgment so far as it would affect their claims. But as the claims of Zieseniss, Reimer Company, and Card were subsequent to that of the plaintiff, so that they would not be affected by the failure of the bank to appeal as against the plaintiff, and as the bank appealed as to them, we are of the opinion that the court below should have modified the judgment by placing the bank's claim in the order of payment immediately after the plaintiff's, and that the payment of the claim of the bank should have been given preference over their claims. Hence we conclude that the judgment should have been modified by the court below so as to provide for the payment of the various claimants in the following order: Zufall, Yaeger, Bogardus, Yellow Pine Company, Shuldiner, Dannat & Pell, Robert S. Hall, Western National Bank, Zieseniss, Reimer Company, Card.

It follows that the judgment should be modified in accordance with these views, and, as thus modified, affirmed, with costs to all the parties to be paid by the city of New York.

PARKER, C. J., and GRAY, HAIGHT, MARTIN, VANN, CULLEN, and WERNER, JJ., concur.

Judgment accordingly.

(176 N. Y. 269)

CITY OF NEW YORK v. BAIRD et al.

(Court of Appeals of New York. Oct. 20, 1903.)

MUNICIPAL CORPORATIONS — CONTRACTOR'S BOND—ACTION—SETTLEMENT OF JUDGMENT—GOOD FAITH—QUESTION FOR JURY.

1. The city of New York sued on a bond given as a substitute for moneys retained by the comptroller under a contract for laying water mains to meet claims for damages which might arise from the negligence of the contractor. A judgment, based on such negligence, was obtained against the city and the contractor, and both appealed. The city settled by paying less than the amount of the judgment, against the protest of the contractor, leaving the judgment standing against the contractor, all without the knowledge of the surety. The ground of the settlement was the advice of the city counsel that, though the judgment might be reversed, he believed a greater recovery would be obtained on a second hearing. After the settlement the city sued on the bond given at the time of the execution of the contract to recover the full amount paid in settlement of the judgment. *Held* that, if the settlement was made in bad faith, with the intent of injuring both the contractor and the surety, plaintiff could not recover without evidence that it did not injure such parties, or without allowance of damages if they were shown to exist.

2. Where, in an action by a city on a contractor's bond given to secure it against the negligence of the contractor, it appeared that a judgment against the contractor and the city had been settled by the city, the question whether the settlement was made in good faith was a question of fact for the jury.

Appeal from Supreme Court, Appellate Division, First Department.

Action by the city of New York against William P. Baird and others. From a judgment of the Appellate Division (77 N. Y. Supp. 446) reversing an order of the trial term setting aside a verdict for plaintiff and granting a new trial, and directing judgment for plaintiff, defendants appeal. Reversed.

J. Woolsey Shepard and Joseph McElroy, Jr., for appellants. George L. Rives, Corp. Counsel (Theodore Connolly and Terence Farley, of counsel), for respondent.

PARKER, C. J. The recovery is on a bond given by defendants as principal and surety conditioned for the payment and satisfaction of any judgment which may be obtained in an action brought by one Kelly against the city of New York. Defendants insist that the recovery ought not to stand because (1) as to defendant Baird, the city, without right, made a settlement with Kelly, and caused the judgment to be satisfied as to it against the protest of Baird, who insisted that an appeal taken by the city and himself was well taken, and should be prosecuted to the end; and (2) as to the surety company, that it was entitled to notice of the settlement, and the consequent opportunity to take the city's place and prosecute the appeal.

The execution and delivery of the bond upon which this action is founded was induced by these circumstances: Baird had a contract with the city of New York for laying water mains, one of the provisions of which was that he would indemnify and save harmless the city of New York against and from all suits and actions and all costs and damages to which the city might be put for or on account of any injury, or alleged injury, to the person or property of another resulting from negligence in the performance of the work or in guarding the same. During the progress of the work, Kelly, a member of the fire department, drove his engine into some part of the excavation. It was in the nighttime, and he claimed there were no lights to warn him of the danger. His injuries were very serious, and very promptly he commenced an action against the contractor, Baird, and the city of New York; the liability of the latter resting upon its duty to keep the public highway in a safe condition for travel while the work was in progress, and its failure to guard the street and ditch. *Deming v. Terminal Ry. of Buffalo*, 169 N. Y. 1, 61 N. E. 983, 88 Am. St. Rep. 521. Before that action came on for trial, Baird, having completed his contract, sought to obtain from the comptroller the balance of the contract price, which exceeded the sum of \$25,000. But the comptroller, claiming, as he lawfully might, that the provisions in the contract to which brief reference has been made inured to the benefit of

the city, and entitled it to retain sufficient of the moneys due the contractor to indemnify it against any claim made against it by reason of the contractor's negligence (*Mansfield v. Mayor, etc.*, of N. Y., 165 N. Y. 208, 58 N. E. 889), refused to pay over such balance. Negotiations on this subject resulted in a consent by the municipal authorities to accept a bond with a surety company as surety for \$10,000, conditioned, as has already been noted, for the payment of any judgment to be obtained in the action, upon the giving of which the municipal authorities paid over the \$25,000 to Baird. The trial of Kelly's action, however, disclosed that the jury took a very different view of the extent of the injuries received by Kelly from that taken by Baird and the representatives of the municipality, for their verdict exceeded \$22,000. After the entry of judgment an appeal was taken by Baird and the city. Some months later, and while the appeals were pending undisposed of, the city made a settlement with Kelly by which it secured a reduction of the judgment as against it by something more than \$5,000. The city, having paid \$7,500 in excess of the amount secured by the bond, then brought this action.

Baird and his surety insist that the city, having taken an appeal, was bound to prosecute it to the end, although the result to the city might be a very substantial loss, while the view of the city authorities seems to be that the city owed no duty whatever either to the principal or his surety in the bond, and therefore could accept as final any judgment rendered in that action, no matter how excessive the damages, or how many the substantial errors of law committed by the trial court. But the viewpoint of each is partial, and quite too narrow, we think, and for that reason, doubtless, is unsupported by authority. In *Conner v. Reeves*, 103 N. Y. 527, 9 N. E. 439, the question was neither presented by the record nor discussed by the counsel or the court whether an indemnity can be availed of by one depriving the indemnitor of such rights of appeal as the statute undertakes to secure to all litigants. Nor was such a question presented in *Wheeler v. Sweet*, 137 N. Y. 435, 33 N. E. 483, although a very interesting question was decided, namely, that while a judgment against a sheriff, obtained in due course, ordinarily fixes the liability of the indemnitors, although not parties, and without notice of the action, at the same time good faith requires the sheriff, if requested, to give the indemnitors an opportunity to present a defense, and, if this is refused, or prevented by his act, he may not say that the indemnitors have not been injured, or that the judgment determines their liability. The proposition decided was no more to be found in that bond than in this one, but it was read into it by the court, and furnished a precedent, of which many more could be found, for a

like reading in this case if justice will be thereby promoted.

The excuse offered by the city authorities for changing their position after taking an appeal is that Kelly's counsel came to them with an offer of compromise, and, while the learned assistant corporation counsel was of the opinion that a reversal would quite likely result from the appeal, his view was that the reversal would be on technical grounds, which would not at all stand in the way of a submission of the case to a jury on a new trial; and it was his judgment that as large, and possibly a larger, verdict would result. Therefore he deemed it his duty in behalf of the city to secure a settlement which would reduce the amount to be paid as much as possible, and he secured a settlement by the terms of which the city paid something like \$5,000 less than the amount of the judgment against it. This \$5,000 reduction did not, however, benefit Baird. The city took care of itself, and let Baird go, although the record tends to show that not only did the city have this \$10,000 bond, but it also had a bond given by Baird when he entered into the contract, which covenanted for faithful performance of all the conditions of the contract and against the sureties upon that bond it seems the city has also proceeded. If that bond is good—and the record contains no hint to the contrary—the reason assigned by counsel for securing a reduction of the judgment, so far as the city is concerned, seems inadequate, and it becomes very difficult, therefore, to understand why it was insisted that the city should settle against the protest of Baird, who asserted persistently his anxiety to have the judgment reviewed by the Appellate Court. Baird's counsel says under oath that he protested against it with all possible vigor, and in that respect he is not contradicted by the assistant corporation counsel, who seems to have been equally determined that, so far as the city was concerned, the judgment should be compromised.

We have, then, a situation where, after consultation between the counsel for Baird and the representative of the corporation counsel, an appeal was taken to the Appellate Division by the city and Baird, and steps taken toward making a case; but before it was possible for it to be argued the municipal authorities changed their position, and settled the judgment. It would be strange, indeed, if, as a result of such action, the city of New York could recover on the bond should the continuance of the appeal by Baird result in a reversal of the judgment without possibility of a recovery against him on a new trial. And, on the other hand, it would equally offend against justice to deprive the municipality of the benefit of the wisdom of its officers should it happen that they were wise in concluding either that the judgment would not be reversed, or, if reversed, that it would be for technical reasons, with the result that the subsequent verdict

would be for an equal or greater amount. Our conclusion is that—reading this bond, as we should, in the light of the circumstances surrounding its execution, and the contract under which the money was being held by the comptroller, for which this bond was to become a substitute, for the protection of the city—the city could not deprive the principal and his sureties of his right of review without taking the chances of loss should such review and a subsequent trial had by reason of it result favorably to the principal; that midway between the two extremes claimed by plaintiff and defendants lies the true position, and the test of it is, was the action of the municipal authorities complained of taken in bad faith? If so, did it operate to the substantial injury of Baird and the surety? If the first question be answered in the affirmative, then the party indemnified cannot recover, unless it shows that its action—found by the jury to have been taken in bad faith with the intention of injuring both principal and surety—did not operate to the disadvantage of either, or, if it did to some extent, that, after deducting the amount of damage done to them, there still remained something due on the bond.

The defendants asked to go to the jury upon a number of questions, among others, as to whether the settlement of the suit of Kelly against Mayor was or was not made in bad faith, and collusively, and without respecting the rights of the indemnitors. The court denied defendants' application, and directed a verdict in favor of plaintiff, which he afterwards set aside. The judgment of the Appellate Division sets aside the order vacatur, and restores the original judgment, thus depriving defendants of the opportunity of having the question of good faith and fair dealing on the part of the municipal authorities passed upon; and, if this be error, then this court should reverse the Appellate Division, that defendants may have a chance to ask a jury to pass upon this question of fact. And it is error if there was evidence sufficient to make it a question for the jury, and it seems to us that there is no room for doubt on that subject. When this defendant company was invited to become surety on Baird's bond, the action of Kelly against the city was pending, and the municipal authorities, as well as Baird and the surety company, well knew that, if a substantial judgment should be obtained by the plaintiff, there would be an appeal. Upon the trial the learned assistant to the corporation counsel took part, and after the trial had a consultation with the counsel for Baird, during which he denounced the verdict as outrageous, and expressed the opinion, as he admits, that a new trial could probably be obtained. He served a notice of appeal, and ordered the stenographer's minutes, after which he entertained the overtures for a settlement made by plaintiff's counsel, and insisted that Baird

should join with him; and when Baird's counsel said his client would not do it, but would "fight to the finish," the city settled by paying \$5,000 less than the judgment, but left the judgment intact as against Baird. And of all this the surety was not advised, and it was not given an opportunity to say whether it would further indemnify the city on the condition that the city would either prosecute the appeal or permit the surety to do so. And the only excuse suggested for its action is that, while counsel thought that there might be a reversal, he believed there would be another recovery in as great, and perhaps greater, amount, and therefore he deemed it wise for the city to secure a reduction of \$5,000, inasmuch as the bond of defendants amounted to but \$10,000. But after this settlement the city brought an action on the bond executed at the time of the making of the contract, and conditioned for the faithful performance of all its covenants, in which it sought to recover the full amount of \$17,500 paid in settlement of the judgment. That action was pending at the time of the trial of this one, and, with the other evidence adduced on that subject, tended strongly to show that the officers of the city were not called upon to take the position they did, and settle the judgment against the earnest protest of Baird, for it was amply protected in any event. These prominent facts, together with other facts and circumstances presented by the record, should, we think, have gone to the jury, so that it might pass upon the good faith of the city's action, upon the same principle as that underlying the case of *Wheeler v. Sweet*, supra.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

HAIGHT, VANN, CULLEN, and WERNER, JJ., concur. GRAY and MARTIN, JJ., absent.

Judgment reversed, etc.

(176 N. Y. 301)

SOUTH BUFFALO RY. CO. v. KIRKOVER et al.

(Court of Appeals of New York. Oct. 30, 1903.)

EMINENT DOMAIN—MEASURE OF DAMAGES.

1. In condemnation proceedings by a railroad company, where land is acquired without the owner's consent, he is entitled to the market value of the premises taken and to compensation for any damages to the residue, including those sustained by reason of the use to which the railroad company puts the portion taken.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by the South Buffalo Railway Company against Henry D. Kirkover and others.

¶ 1. See *Eminent Domain*, vol. 12, Cent. Dig. §§ 245, 364, 365.

From an order of the Appellate Division (83 N. Y. Supp. 613) affirming an order of the Special Term confirming the report of commissioners in condemnation proceedings, plaintiff appeals. Affirmed.

This is a proceeding brought by the railroad company under the condemnation law to acquire for its corporate purposes nearly eight acres of land owned by the defendants. Commissioners were duly appointed, who awarded the sum of \$10,500 for the land actually taken and the sum of \$41,500 as compensation for the damages "to the remainder of the parcel of land owned by said defendants, out of which the lands and premises described in said petition and order are taken, * * * caused by the taking of the land described in this proceeding, and the use thereof for railroad purposes in the manner and to the extent shown by the evidence and the proceeding aforesaid. * * *". The Special Term confirmed this report, and the Appellate Division affirmed the order of the Special Term to that effect, with a divided court. From the order entered on this determination the present appeal is taken. The land sought to be acquired in this proceeding is a part of about 69 acres of vacant land situated in the southerly portion of the city of Buffalo.

John G. Milburn and Frank Rumsey, for appellant. Wilson S. Bissell and James McC. Mitchell, for respondents.

BARTLETT, J. (after stating the facts). The single question of law presented by this appeal is as to the rule which should govern the commissioners in awarding compensation for damages to the part of the tract of land not taken. The counsel for the appellant railroad company insists that the proper rule as to damages, in addition to those allowed for the land actually taken, may be thus stated: "Compensation is only allowed for such damages to the residue as are caused by the severance from it of the part taken, and (according to some of the cases) in estimating such damages the grade or elevation of the railroad may be taken into account as an element of the severance." The learned Appellate Division in its opinion (83 N. Y. Supp. 613) states the rule to be that the owner is entitled to recover the market value of the premises actually taken by such railroad company, and also any damages which resulted to the portion of his premises not taken, not only by reason of the taking of the property acquired by the railroad company, but also by reason of the use to which the property was put by the company. It has been frequently pointed out in judicial opinions that there has been great conflict of authority in this state as to which of the rules above stated was best calculated to do justice between the parties. The early cases in the Supreme Court laid down the rule insisted upon by appellant's counsel. *Troy & Boston R. R. Co. v. Lee*, 13 Barb. 169; *Albany North-*

ern R. R. Co. v. Lansing, 16 Barb. 69; *Canandaigua & N. F. R. R. Co. v. Payne*, Id. 273; *Matter of Union Village & Johnsonville R. R. Co.*, 53 Barb. 457; *Black River & M. R. R. Co. v. Barnard*, 9 Hun, 104; *Albany & Susquehanna R. Co. v. Dayton*, 10 Abb. Prac. (N. S.) 183. In *Matter of Utica, C. & S. Valley R. R. Co.*, 58 Barb. 456, the General Term held that, when land is taken for the construction of a railroad without the consent of an owner, compensation to be paid therefor is not limited to the actual value of the land taken and the depreciation of the residue of the lot from which it is taken by such separation; but the owner is entitled to recover also for any depreciation caused by the use to which it is appropriated. This case was followed in *Matter of N. Y. C. & H. R. R. R. Co.*, 15 Hun, 63, and *Matter of N. Y., Lackawanna & Western Ry. Co.*, 29 Hun, 1. The tendency of judicial decisions in the Supreme Court has been in favor of the more liberal rule adopted by the court below in the case at bar.

Our attention has not been called to any case in this court where the question was presented under the precise state of facts disclosed by this record. In *Henderson v. N. Y. C. R. R. Co.*, 78 N. Y. 423, it was held that in a proceeding by a railroad corporation to acquire a right to lay its tracks in a street or highway, the fee of which is in the owner of the adjoining land, the proper compensation is: First. The full value of the land taken. Second. The fair and adequate compensation for the injury the owner has sustained and will sustain by the making of the railroad over his land; and for this purpose it is proper to ascertain and determine the effect the conversion of the street into a railroad track will have upon the residue of the owner's land. In *Newman v. Metropolitan Elevated Ry. Co.*, 118 N. Y. 618, 23 N. E. 901, 7 L. R. A. 289, Judge Brown (page 623, 118 N. Y., and page 902, 23 N. E.) uses this language: "The principle upon which compensation is to be made to the owner of land taken by proceedings under the general railroad law has been frequently considered by the courts of this state, and the rule is now established, first, that such owner is to receive the full value of the land taken; and, second, where a part only of land is taken, a fair and adequate compensation for the injury to the residue sustained, or to be sustained, by the construction and operation of a railroad." The case in which the learned judge wrote was one of that large class of elevated railway cases in the city of New York involving injury to the easements of light, air, and access, no land being taken. In *Bohm v. Metropolitan Elevated Ry. Co.*, 129 N. Y. 576, 29 N. E. 802, 14 L. R. A. 344, Judge Peckham uses this language: "Then, as to the land remaining, the question has been to some extent mooted whether the company should pay for the injury caused

to such land by the mere taking of the property, or whether, in case the proposed use of the property taken should depreciate the value of that which was not taken, such proposed use could be regarded, and the depreciation arising therefrom be awarded as a part of the consequential damages suffered from the taking. I think the latter is the true rule." The learned judge cites *Henderson v. N. Y. C. R. R. Co.*, 78 N. Y. 423, 433; *Newman v. Metr. El. Ry. Co.*, 118 N. Y. 618, 23 N. E. 901, 7 L. R. A. 289; *Matter of Brooklyn Elevated R. R. Co.*, 55 Hun, 165, 167, 8 N. Y. Supp. 78, adding: "The question might be of great importance where there was an injury to the remaining land; but, if there has been no injury, the inquiry as to the scope of the liability for damages is not material." This was also an elevated railroad case, involving only the injury to easements, and no land was taken. It may be true, as stated by appellant's counsel, that the precise question now presented has never been passed upon by this court. It is, however, equally true that the decisions in the Supreme Court and in this court tend strongly to the recognition of the more liberal rule.

Considering the principle involved, unembarrassed by legal decisions, it is reasonable that where the state, in the exercise of the right of eminent domain, sees fit to take the property of the citizen without his consent, paying therefor such damages as are the result of the taking, the commissioners in the condemnation proceedings should not only be permitted, but required, to award the owner a sum that will fully indemnify him as to those proximate and consequential damages flowing from this act of sovereign power. The exercise of the right of eminent domain is allowed upon the theory that, while the taking of property may greatly inconvenience the individual owners affected, it is in the interest and to promote the welfare of the general public. This being so, there is no reason why the citizen whose land is taken in invitum should suffer any financial loss that may be prevented by awarding him proximate and consequential damages. It may well be that in every case there are remote damages that the citizen, under the circumstances, must suffer. It not infrequently happens that some extensive public improvement, as the construction of a great reservoir in the vicinity of a large city like New York, drives families from old homesteads occupied for generations, and submerges the entire property. It is apparent that in such cases no reasonable and lawful rule of damages can fully compensate the landowners thus dispossessed. In the case at bar we have the ordinary and usual situation, where the commissioners have reported in favor of paying the owner the value of the land taken, and the damage to the balance by reason of the severance, and the use to which the property taken is to be put by the railroad company. It is in-

sisted on behalf of the appellant that the commissioners erroneously took into account as factors causing damage the use to which the property was to be put; that is, the operation thereon of a railroad, with its smoke, noise, dust, and cinders, and the embankment obstructions to the view. It is also argued that the elevated railroad cases in the city of New York are in a special category, and not applicable to the case at bar. In most of the elevated railroad cases the city owned the fee of the street, the railroad being erected therein by legislative grant, and the original question presented to this court was whether the injury suffered by the abutting owner to his easements of light, air, and access created a cause of action against the railroad company. It was held in the *Story Case*, 90 N. Y. 122, 43 Am. Rep. 146, that these easements became at once appurtenant to the land, forming an integral part of the estate, and constituted property within the meaning of the state Constitution (article 1, § 6), which prohibits the taking of private property without just compensation. It therefore followed that in the trial of the elevated railroad cases any evidence was competent tending to show injury to these easements of light, air, and access, as they were property. A similar rule of evidence is applicable to the case before us. The difference between the elevated railroad cases and this case is not material. In this case, as in the elevated railroad cases, one of the questions is as to the damages inflicted upon land not taken, and the inquiry is, to what extent does the use of the railroad on the adjacent property taken damage the property the fee of which remains in the defendants? This property is the land and its appurtenances. Any evidence tending to legally establish the amount of this damage is competent.

It is to be assumed that the commissioners appointed from time to time in condemnation proceedings are intelligent and competent men, anxious to do exact justice between the parties. It may be further assumed that they will judiciously discriminate between farm lands in the country and property located within the limits of a city, upon which dwellings and other structures may be ultimately erected. In the one case, under existing conditions, damages might be slight, while in the other very substantial. In this case it is pointed out in the opinion of the learned Appellate Division that the average amount of damages to the property not taken was \$94,435, as fixed by nine witnesses called by the defendants, but the commissioners found the damages to be \$41,500. Attention is also called to the fact in the opinion that the average amount of damages fixed by plaintiff's witnesses was much less than the award. It appears by the report of the commissioners that on a number of days, by consent of counsel, they personally inspected the premises involved in this proceeding. We are of opinion that the rule of damages adopted

by the commissioners was the proper one, and that the record discloses no legal error.

The order and judgment appealed from should be affirmed, with costs.

PARKER, C. J., and O'BRIEN, MARTIN, VANN, CULLEN, and WERNER, JJ., concur.

Order affirmed, with costs.

(204 Ill. 184)

ROHN v. ROHN.

(Supreme Court of Illinois. Oct. 28, 1903.)

EXECUTOR DE SON TORT—EXISTENCE OF RELATION—ESTOPPEL.

1. Prior to the death of an intestate, he stated that, to avoid administration, he desired to reduce his estate to cash, and that his wife and children should receive certain proportions, different from those they would receive under the statute. Pursuant to this plan and to previous negotiations, he executed a bill of sale of his interest in a partnership, placing the document in the hands of his wife, to be delivered to the purchaser after his death, and on payment of the price. Intestate stated that, having full confidence in his father, he desired him to take charge of his affairs after his death. The father took charge of the bill of sale, and delivered it to the purchaser, accepting in part payment certain notes, some secured and others not. Later, at the request of the widow, the father prepared a declaration of trust, acknowledging receipt of the cash and the notes; that he held the same in trust for the intestate's widow and children; and agreeing to collect the notes, and pay over their shares to the widow and children according to the wishes of deceased. Held to constitute the father an executor de son tort.

2. Where the widow of an intestate consented to the acts of intestate's father in taking possession of the estate, such consent could not afterwards estop her from suing as administratrix to charge the father as executor de son tort, since her individual consent could not affect her rights in her representative capacity.

Appeal from Appellate Court, First District.

Action by Ida Rohn, as administratrix of the estate of William Rohn, Jr., against William Rohn. From a judgment of the Appellate Court (98 Ill. App. 509) affirming a judgment for plaintiff, defendant appeals. Affirmed.

Louis A. Heile (J. S. Huey, of counsel), for appellant. Henry P. Helzer, for appellee.

CARTWRIGHT, J. Appellee, Ida Rohn, as administratrix of the estate of her deceased husband, William Rohn, Jr., recovered a judgment in the superior court of Cook county for \$1,762.50 against appellant, William Rohn, father of said William Rohn, Jr., as executor de son tort of said estate, in an action on the case for negligence in failing to collect a note of \$1,500 against George Wildner, which appellant had in his hands. The Branch Appellate Court for the First District affirmed the judgment.

The material facts appearing on the trial

are as follows: William Rohn, Jr., was a partner of George Wildner in the manufacture of furniture in Chicago, and, having long been ill with a fatal disease, he attempted to arrange his business affairs and property in view of his approaching death. He had no real estate and no debts, and was averse to having his estate probated. To carry out his arrangement, he entered into a contract with Wildner for the sale of his interest in the partnership to Wildner for \$8,500, on which \$6,000 was to be paid in cash or securities and Wildner was to give his notes for the remainder, one for \$1,000 and the other for \$1,500. Wildner had \$1,600 in mortgages, and was going to raise \$400 to make up \$2,000. He arranged to borrow \$2,000 from his mother, and \$2,000 from Rudolph Rohn, brother of the defendant, for the purpose of paying the \$6,000. William Rohn, Jr., executed a bill of sale of his share of the partnership, dated September 28, 1893, and gave it to his wife, Ida Rohn, to be delivered upon compliance with the terms of sale. When the contemplated sale should be carried out, his estate would amount to \$11,000, which was all in personal property, and he said that he wanted to secure to his wife \$5,000 of that sum, and to each of his children \$3,000; that he wanted to leave all his effects in the care of his father, the defendant, in whom he had perfect confidence. He died October 10, 1893, and on October 17, 1893, the defendant, in pursuance of the arrangement, took the bill of sale and delivered it to Wildner, receiving from him \$6,000 and two judgment notes, payable to Ida Rohn, under the name of Mrs. William Rohn, Jr., one for \$1,000, due in two years, and the other for \$1,500, due in three years. The \$6,000 was raised by Wildner as above stated. The defendant gave to Ida Rohn, the widow, a list showing the two notes and other securities, aggregating \$11,000, which was the entire estate left in his custody, as requested by the deceased. She then went with a friend and the defendant to an attorney's office, where she said that her husband was dead, and it would be better to get things into proper shape in accordance with his will; that he wanted her to have \$5,000, and each of the children to have \$3,000, and she wanted a document drawn up to have the transaction shown, in case anything should happen, and to show that defendant held the property. The attorney drew up, according to her directions, a declaration of trust, by which defendant acknowledged that he had received from his son William Rohn, Jr., \$11,000 in notes, partly secured and partly unsecured, which he held in trust for Ida Rohn and her two minor children, in the proportion of \$5,000 for the former and \$3,000 for each of the latter. He agreed to collect interest on all the securities, and pay the same to Ida Rohn during the minority of the children; to turn over her share of \$5,000 on demand, and

¶1 See *Executors and Administrators*, vol. 22, Cent. Dig. § 2691.

\$3,000 to each of the children when they became of age. This declaration was signed by the defendant. He attended to the collection of the principal and interest on the securities as they matured, without any compensation, under the agreement. The \$1,000 note of Wildner was paid at maturity. Two annual payments of interest were made on the note of \$1,500, and that note matured October 17, 1896, and was not paid when due. Defendant's brother Rudolph Rohn had furnished said sum of \$2,000 when Wildner purchased the interest in the partnership, and the indebtedness had been increased to \$3,000, for which Rudolph Rohn had taken a chattel mortgage on the property in the spring of 1896, and Wildner also owed Rudolph Rohn nearly two years' rent. In the latter part of October, 1896, the defendant and Rudolph Rohn went to Wildner, and defendant requested payment of the note to the estate. They both wanted Wildner to pay them, and he asked for time, showing them his stock, and telling them he was looking for a partner, and was able to pay everybody. He asked them to wait until after the election, in November, when he would get a partner or make a stock company, and would see that they were protected. There was no agreement for any extension, but neither the defendant nor Rudolph Rohn took any steps to enforce collection. In November, Wildner's mother, who had loaned him \$2,000 to make the purchase, entered judgment on her note. Rudolph Rohn, learning that fact, paid the judgment to her, and foreclosed his chattel mortgage, leaving Wildner insolvent, and the \$1,500 note could not be collected. Plaintiff was appointed administratrix of her husband's estate on January 26, 1897, and on August 13, 1897, she indorsed upon the declaration of trust a receipt for \$0,500 in cash, and all interest thereon to that date. The defendant took charge of the property in entire good faith, without compensation, solely for the purpose of carrying out the wishes of his son. The only question of fact in controversy in the case was whether defendant was guilty of negligence in not entering judgment on the note, and making an effort to enforce collection by that means.

The arguments of counsel on both sides are directed almost exclusively to the facts, but the judgment of the Appellate Court must be treated by us as finally settling the fact that the defendant was guilty of negligence in not exercising such diligence for the collection of the note as a man of ordinary prudence would have exercised in his own affairs, and also that the loss and damage to the estate was equal to the damages assessed.

The assignments of error which we may consider relate to the giving and refusing of instructions. There were only two instructions given at the request of plaintiff, and objection is made to them on the ground

that they erroneously assumed that defendant, when the note became due, occupied the position of executor de son tort of his son's estate, while the evidence showed that he acted simply as a trustee for Ida Rohn and her two children, individually. What facts will constitute an executor de son tort of an estate is a question of law for the court, but the determination of the facts, if they are in controversy, is for the jury. In this case there was no controversy whatever as to the facts creating the relation of defendant to the estate. The defendant received all the property of the estate, consisting of \$11,000 in notes and securities, of which the widow was, under the statute, entitled to one-third, and the children to the balance, in equal shares. The arrangement by which the contract with Wildner had been carried out was for the benefit of the estate and in the interest of the minor children, and has not been questioned by anybody. The defendant, having taken the estate into his possession and assumed its management, was bound to hold and account for it in the proportions fixed by the statute. No doubt, the widow and the defendant honestly believed that, by reason of the expressed wish of the deceased, his estate could be divided as they attempted to divide it, and that the property could be placed in the hands of the defendant in a trust relation, as requested by the deceased; but they were both bound to know the law, and that the deceased could not change the distribution of his estate, under the statute, without a will, as he attempted to do. It is true that the declaration of trust was made at the request of Ida Rohn, and that the services of defendant were performed in good faith, with no other motive than to carry out the wishes of his deceased son, but the arrangement was void in law. Ida Rohn was entitled, as widow, to one-third of the estate, and the minor children each to one-third, and neither she nor defendant could increase her interest to \$5,000. The parties were wrong in their supposition that the arrangement was binding upon the minor heirs, and the undisputed facts placed the defendant in the position of an executor de son tort of the estate. He was bound to exercise, so far as the estate was concerned, the same diligence in the collection of the note as if he had been a regularly appointed administrator, and there was no error in assuming that he occupied the same position and assumed the same responsibilities and liabilities as an administrator. The court refused instructions, asked by defendant, to the effect that acts of kindness, beneficence, and charity do not amount to a usurpation of the office of administrator, and do not create a liability against any person. The acts done merely from kindness and charity, and for no other purpose, which do not create a liability, as we understand it, are limited to such acts as directing a funeral, payment of funeral ex-

penses, and the preservation of the estate from loss or waste, and the like, while in this case the entire estate was taken by defendant for management and distribution, including everything, in substance, that an administrator would be bound to do, but different from the provisions of the statute. The court did not err in refusing the instructions referred to.

It is further urged that the court erred in refusing to give instructions, asked by the defendant, advising the jury that if the arrangement was concurred in by the plaintiff, and the defendant held the note, with the other property, for the use and benefit of the widow and heirs of William Rohn, Jr., with the knowledge and acquiescence of the plaintiff, she would be estopped from charging him as executor de son tort, and that he would have the right to apply the note to her distributive share of the estate, which exceeded the amount of the note. We think the court was right in refusing these instructions. In law, the plaintiff represented the estate, suing as administratrix, and the only judgment at law would be for or against the defendant on the alleged liability to the estate. Counsel have pointed out no method by which a set-off or counterclaim could be interposed in a suit at law, or any estoppel be made effective against the plaintiff, representing the estate. A court of equity might look beyond the parties, and determine the case upon their true relations, and adjust the equities of all the parties. The minor children could not be required to bear any part of the loss, and in this suit the court could not apportion it. A court of equity may assume jurisdiction of the settlement of an estate, and in this case there was nothing to adjust except the interest of the distributees. If facts existed requiring that, as between the defendant and the widow, the loss ought to be taken from her distributive share of the estate, it cannot be done in this suit, and such relief must be sought in a court of equity. Whether she, as an individual entitled to a distributive share of the estate, was in any manner responsible for his failure to collect the note, is not a question in this case, and there was no error in refusing the instructions asked by defendant.

The judgment of the Appellate Court is affirmed. Judgment affirmed.

(214 Ill. 290)

PEOPLE ex rel. RAYMOND, County Treasurer, v. FULLER.

(Supreme Court of Illinois. Oct. 26, 1903.)

MUNICIPAL CORPORATIONS—LOCAL IMPROVEMENTS—SPECIAL ASSESSMENTS—DEFENSES—FORMER JUDGMENT—OBJECTIONS—TIME.

1. On an application for confirmation of a special assessment, a former judgment of confirmation under a former valid ordinance may be interposed as a complete defense.

2. Hurd's Rev. St. 1899, p. 373, c. 24, § 48, provides for the hearing of specified objections

on application for the confirmation of an assessment for local improvements, "together with all other questions arising in such proceeding"; and section 66 declares that no defense or objection shall be made or heard on an application for judgment for sale of delinquencies which might have been interposed in the proceedings for the making of such assessment, or the application for the confirmation thereof. *Held* that, since an objection that a judgment had been rendered confirming a prior assessment under a prior ordinance was available on an application for the confirmation of an assessment under a subsequent ordinance, it could not be urged as a defense to an application for judgment for sale for delinquencies thereof.

Appeal from Cook County Court; O. N. Carter, Judge.

Application by the people, on relation of one Raymond, county treasurer, against Isabelle H. W. Fuller, for a sale of land for a delinquent special assessment. From a judgment in favor of defendant, relator appeals. Reversed.

This is an application on the part of the ex officio county collector of Cook county for a judgment of sale for a delinquent special assessment for a water supply pipe in Michigan avenue, from 103d street to a point 568 feet southwesterly of 104th street, warrant No. 25,900, docket No. 24,739, confirmed March 14, 1901. The application of the county collector was in the usual and proper form, no point being made upon the form of the application. The objections of Isabelle H. W. Fuller, by Samuel J. Howe, her attorney, contain the following points: First, that the county court of Cook county has no jurisdiction of the person or the subject-matter in rendering the judgment of confirmation upon which warrant 25,906 is predicated; second, that said judgment of confirmation is and always has been void; third, that, prior to the said entry of judgment of confirmation of the assessment on which the said warrant is predicated, the county court heard and determined and entered judgment against the lands of the objector for the supposed benefits that would accrue to her lands by the making of the proposed improvement, which said judgment was not vacated during the term at which the same was rendered, and never has been vacated with the objector's consent. The usual prima facie proof was offered without objection, no point being made in the court below, or being preserved by assignment of error herein, or otherwise, in regard to the petitioner's prima facie case.

On behalf of respondent a stipulation was read in evidence, as follows: "It is hereby stipulated and agreed that, on the hearing of the above objections of Isabelle H. W. Fuller, the following shall be taken as and for an agreed statement of facts in this case: "First. A judgment of confirmation of a special assessment against the following described property of said objector, Isabelle H. W. Fuller, was entered by the county court of Cook county, by default, on March 14, 1901, after due statutory notice and publication

and due prima facie proof in cause docket No. 24,739, and judgment of confirmation was for the amounts and against the property hereinafter described, to wit: [Schedule here set out.] Second. The judgment of confirmation of the foregoing assessment has never been vacated, appealed from, reversed, stayed, or otherwise affected by any proceedings in the said cause, and still stands, so far as the record in said cause is concerned, as an apparently valid judgment of confirmation for said amounts, and against the said land of said objector. Third. The foregoing assessment case, No. 24,739, is the one for which application for judgment for sale for delinquent specials is herein sought; and it is stipulated and agreed that all due and proper steps have been taken to entitle the relator to judgment for sale against said lots for said amounts, unless the facts hereinafter stated constitute a valid defense to such application. Fourth. A judgment for the confirmation of an assessment for the same improvement against the same lands was entered prior to entry of the above-mentioned judgment of confirmation for the confirmation thereof in docket No. 23,281, in which proceeding the said objections were overruled and judgment of confirmation was duly entered on May 9, 1899. Fifth. That afterwards, to wit, on the 31st day of March, 1900, all judgments of confirmation previously entered in said cause (23,281) were vacated and set aside, and the petition for confirmation of said assessment dismissed, for the reason that the ordinance for the aforesaid improvement was repealed by the city council. Sixth. The judgment now sought to be enforced by judgment of sale was rendered in the proceeding (case 24,739) above referred to, which said proceeding was instituted after the dismissal of said former proceeding, and the improvement in question was made pursuant to the ordinance and judgment of confirmation in said last-mentioned case. Seventh. No objections were filed by this objector to the application for confirmation of said second assessment proceeding, to wit, docket No. 24,739. The sole question sought to be presented to the court is whether or not the defense of a former judgment can be heard at the application for judgment for sale upon said second assessment." Upon this stipulation of facts, the court sustained the objections, and entered an order refusing judgment of sale. The foregoing decision of the court in sustaining said objection and refusing judgment of confirmation is the sole error relied upon for reversal.

Edgar Bronson Tolman (Charles M. Walker, Corp. Counsel, of counsel), for appellant. Samuel J. Howe, for appellee.

RICKS, J. (after stating the facts). The sole question here presented is whether or not a former judgment confirming a special assessment for the same improvement under

a previous and repealed ordinance can be pleaded in bar on an application for a judgment of sale under a second ordinance. This court has held in a number of cases that, on the application for judgment of confirmation of an assessment, a former judgment of confirmation under a former valid ordinance could be interposed. *People v. McWethy*, 165 Ill. 222, 46 N. E. 187; *McChesney v. City of Chicago*, 161 Ill. 110, 43 N. E. 702; *City of Chicago v. Nicholes*, 192 Ill. 489, 61 N. E. 434. It has also been held that if the former judgment of confirmation sought to be interposed was based upon a void ordinance, and on account of the invalidity of which the void ordinance had been rescinded or repealed and the judgment of confirmation thereunder set aside at a subsequent term of court to that of its rendition, such judgment would not be a defense to the application for confirmation under a valid ordinance. *Gage v. City of Chicago*, 193 Ill. 108, 61 N. E. 850; *City of Chicago v. Nodeck*, 202 Ill. 257, 67 N. E. 39. These cases seem to establish the rule that the proper time to urge in defense a former judgment for an assessment for the same improvement is at the time of the application for confirmation of the new assessment. That the defense here sought to be interposed should have been made at the application for confirmation of the assessment would seem to be the natural deduction from the provisions of the statute in relation to special assessments for local improvements. Section 48 of the act (Hurd's Rev. St. 1899, p. 373, c. 24) provides for the hearing of certain specified objections upon that application, and then concludes, "together with all other questions arising in such proceeding," and by the provisions of the act all objections so made, except those relating to the benefits to property, are to be heard and determined by the court without a jury. The hearing at the confirmation is the only hearing to be had prior to application for judgment for sale for delinquencies of property owners in the payment of the special tax or assessment. And relative to this latter proceeding, and regulating the practice at such latter hearing, section 66 of the act provides: "No defense or objection shall be made or heard which might have been interposed in the proceedings for the making of such assessment, or the application for the confirmation thereof, and no errors in the proceeding to confirm, not affecting the power of the court to entertain and consider the petition therefor, shall be deemed a defense to the application herein provided for."

The practice is well settled, then, that the defense here urged and held sufficient by the county court was such a one as could and should have been heard at the application for confirmation of the assessment. It was not a matter that had arisen since the confirmation, but existed at the time the judgment of confirmation was had, and could have then, if at all, been successfully made, and

had the court refused to entertain it, or had an erroneous judgment been entered upon such defense or objection, the same could have been reviewed by this court; and we think, under the express provisions of section 66, above quoted, appellee was precluded from urging the defense now made to the application for judgment for sale. We think *Gross v. People*, 183 Ill. 260, 61 N. E. 1012, 86 Am. St. Rep. 322, applicable to and decisive of this point. Such a defense is a collateral attack upon the original judgment of confirmation. *People v. Green*, 158 Ill. 594, 42 N. E. 163; *Clark v. People*, 146 Ill. 348, 35 N. E. 60; *Casey v. People*, 165 Ill. 49, 46 N. E. 7; *People v. Lingle*, 165 Ill. 65, 46 N. E. 10; *Leitch v. People*, 183 Ill. 569, 56 N. E. 127; *Pipher v. People*, 183 Ill. 436, 56 N. E. 84. In *Leitch v. People*, supra, after noting the provision of section 66 of the local improvement act, supra, we said (page 570, 183 Ill., and page 128, 56 N. E.): "Upon the application to confirm the assessment, appellant had the undoubted right to appear in the county court and call in question the validity of the petition presented to the board of local improvements, and, as he was notified as required by law, it was his duty to appear and make objection if he desired to contest the validity of the proceedings; but, as he failed to appear on application to confirm, under the plain language of the statute he is concluded from calling in question any of the proceedings anterior to the judgment of confirmation, except the jurisdiction of the court rendering the judgment. Indeed, it has been held in a number of cases that, on an application to confirm the assessment, if the court has jurisdiction to render the judgment, the judgment will be conclusive on the landowner, and he cannot call in question the regularity of the proceedings prior to the judgment on a subsequent application for judgment and sale." In the case at bar there is no question as to the regularity of the proceedings, or of proper notice to the appellee. The court had jurisdiction of the subject-matter and the person, and the plea that is now sought to be interposed was one that could have then been urged as a bar to the proceeding. In *Pipher v. People*, supra, we said (page 437, 183 Ill., and page 85, 56 N. E.): "A judgment confirming a special assessment is not open to collateral attack on grounds not affecting the jurisdiction of the court which pronounced it, and, unless a want of jurisdiction is shown, the judgment of confirmation is binding upon all concerned. *Doremus v. People*, 161 Ill. 26, 43 N. E. 701. Objections to the validity of such a judgment, when interposed in a proceeding like this for a judgment and order of sale of delinquent property, constitute such collateral attack on the judgment of confirmation. In the case of ordinary taxes there is no judicial hearing prior to the application for judgment and order of sale, but in the case of a special assessment the law provides for such

a hearing when the officer authorized to spread the assessment has done so, and the assessment roll is returned to the court. Before the owner is concluded, notice must be given as provided by the statute, and he may have a trial by the court of any legal objection to the assessment, and by a jury of the justice of the amount assessed against his property. The assessment may be modified, set aside, changed, or confirmed, but when the court has acquired jurisdiction its judgment cannot be attacked collaterally." In the same case it is there further said that this is not only the rule based on general principles, but because of the express provision of section 66 of the local improvement act.

We think it the settled practice in this state, in this class of proceedings, that the defense here urged must be made at the time of the application for confirmation of the assessment, and that at any other stage in the proceedings such defense comes too late. It is important to all concerned that the validity of special assessments should be settled in this preliminary hearing, and the case at bar may well be considered as illustrating the necessity and wisdom of the application of such a rule. On the faith of such judgment of confirmation, contracts were let and the work and improvement made pursuant to the ordinance; and to leave the questions open that might and should have been settled on the application for confirmation, and allow them to be urged against the judgment for sale, is to make that uncertain which the Legislature evidently intended should be certain, and a protection to all persons acting on the faith thereof.

The judgment of the county court of Cook county is reversed, and the cause remanded to that court, with directions to enter a judgment for sale. Reversed and remanded.

(204 Ill. 435)

COLSTON et al. v. OLROYD et al.

(Supreme Court of Illinois. Oct. 26, 1903.)

DEEDS—MENTAL CAPACITY OF GRANTOR—UNDUE INFLUENCE—EVIDENCE—SUFFICIENCY—WITNESSES—COMPETENCY.

1. In a suit to set aside deeds, evidence considered, and held sufficient to show that the grantor was of sound mind when he executed the conveyance.

2. In a suit to set aside deeds executed by a father to his daughter, evidence held insufficient to show any undue influence at any time exercised by the daughter to induce the making of the deeds.

3. Where, in a suit to set aside deeds executed by a father in his lifetime to his daughter, the complainants have testified to conversations with her, she is competent to testify as to such conversations, over a general objection to her competency.

Error to Circuit Court, Cass County; Henry Higbee, Judge.

Bill by Mollie Colston and others against Elizabeth Olroyd and another to set aside certain deeds and for partition. From a decree

denying the prayer to set aside the deeds, and granting partition as to the balance of the premises, complainants bring error. Affirmed.

John A. Bellatti, A. Hedrick, and Jefferson Orr, for plaintiffs in error. R. W. Mills, for defendants in error.

RICKS, J. This is a bill in chancery filed by plaintiffs in error, Mollie Colston, Abigail Berry, William Wight, John C. Wight, Amos Wight, Jesse Blimling, Male Blimling, Abbie Blimling, John Blimling, and Garnet Blimling (the last five being minors, who sue by their father and next friend, Jacob Blimling), heirs at law of Jesse Wight, for the purpose of setting aside certain deeds made by said Jesse Wight to his daughter, Elizabeth J. Olroyd, née Wight, who, together with her husband, Henry Olroyd, are the defendants in error (Elizabeth J. Wight having been married in December after the making of the last deed in question), and for the purpose of partitioning the lands in question, together with other lands left by the deceased undivided. The bill sets up the fact that on or about January 2, 1901, Jesse Wight died testate, leaving no widow, but leaving surviving him his children and grandchildren as named in complainants' bill, his only heirs at law; that prior to his death, on March 7, 1898, he made and published his last will and testament, and among other bequests gave Elizabeth J. Olroyd \$300 in money and all the household goods, and then bequeathed all the residue of his property, both real and personal, to his seven children, share and share alike. The bill further sets up the fact that Sarah J. Blimling, one of the daughters of the testator, died prior to the death of her father, leaving the above-named minor heirs; that the testator had sufficient personal property to pay all debts and special legacies, and at the time of his death was seised in fee simple of the following described real estate, to wit, the W. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 26, township 17 N., range 10 W. of the third P. M., and the E. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of said section 26, except 65 acres off of the north end, all situated in Cass county, Ill., and that their interests are each a one-seventh part, except the grandchildren, whose interests are one thirty-fifth part. The bill further sets up the fact that Elizabeth J. Olroyd had two deeds purporting to have been executed by said Jesse Wight, one being of the date of November 15, 1899, for the 15 acres above described, reciting as the consideration love and affection for his daughter and one dollar in hand paid, and the other deed being of date October 25, 1900, purporting to convey all of the S. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of said above-described tract and reciting as the consideration love and affection and services rendered, and conveys and warrants, etc., being the regular statutory form of a warranty deed; that at

the time the deeds were purported to have been executed by Jesse Wight he was of unsound mind and memory, and that his mind was so impaired by old age and illness as to render him wholly incapable of understanding what he was doing and wholly incapable of executing deeds; that the grantee, Elizabeth J. Olroyd, exerted an undue influence, and induced the said Jesse Wight to execute the deeds; and that said deeds are a cloud upon the title to the property described herein. The bill asks that the deeds be declared null and void, and set aside, and that partition be made according to the rights and interests of the parties.

Elizabeth J. Olroyd and Henry Olroyd, the defendants, answered, denying that Jesse Wight died seised of the last two mentioned tracts of land, but admitting that he died seised of the N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of said section 26, and further saying that Jesse Wight in his lifetime conveyed to Elizabeth J. Olroyd the S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$, and 15 acres off of the south end of the E. $\frac{1}{2}$ of said above-described N. W. $\frac{1}{4}$ of section 26, and that at the time he made the conveyances he was of sound mind and memory, and made the conveyances for a good consideration, and denying that they were obtained by fraud, undue influence, or other unfair means.

At the hearing of the case, which was partly on evidence taken before a special master and partly on oral evidence taken in open court, the chancellor found against the allegation in complainants' bill in reference to the deeds made to Elizabeth J. Olroyd, and found that the equities as to those deeds were with the defendants, and decreed that in so far as the bill prayed that the deeds in question be set aside and annulled the prayer be denied, and granted partition as to the balance of the premises.

Several errors are assigned of record by plaintiffs in error, but only two are relied upon or argued; they being (1) as to the condition of Jesse Wight's mind on October 25, 1900, the date of the last deed in question, and (2) that the deeds were obtained under restraint and undue influence brought about by the defendant Elizabeth J. Olroyd and her husband, Henry Olroyd.

The evidence showed that the testator, Jesse Wight, was 72 years old and for more than two years prior to his death had been afflicted with cancer of the face; that he was debilitated and weak; and that on October 16, 1900, he fell, while going out of doors, and suffered a stroke of paralysis, resulting in partial paralysis of the lower extremities. It further shows that his daughter Elizabeth J. Olroyd had, some twelve or fifteen years before his death, been married, but that her marriage relation was such that, after attempting to live with her husband for two or three years, they finally separated, and the daughter returned to the home of her father, with a small child, and for at

least ten years continuously made her home at her father's house; that in 1892 her mother, the wife of the testator, died, and that he never remarried; that the child of Elizabeth died several years before the testator; that the daughter Elizabeth J., from the death of her mother, took charge of the household, and conducted the same from that time to the death of the testator; that she had three sisters and three brothers, all of whom were married some time prior to the death of the testator, and most of whom had left home before the death of the mother—the only member of the family, besides Elizabeth J., remaining at home for any length of time, being a son, William, who was the youngest of the boys. The evidence also establishes that the testator was, in his lifetime, a man of good business capacity and had acquired considerable property, and had assisted all of his children, except two daughters, who were married and living away from home, and the daughter Elizabeth J.; that he had paid considerable sums in security debts for his sons, and that he had for some reason conceived the idea that one of his sons was angered at him, and was disposed to treat him harshly, and frequently expressed fear of personal injury from him. One of the daughters, Mrs. Blimling, died some years previous to the death of the testator, and left, among others, a daughter, Maie, who was a small, young girl, and made her home with the testator for several years prior to and up to the time of his death. The evidence also discloses that the cancer with which the testator was afflicted was of such a character that he suffered, at times, intense pain from it, and that there was frequent and excessive flow of blood from it, requiring much attention in the way of wiping and keeping his face and clothing freed therefrom. The family physician who attended him testified that the form of cancer he had was highly contagious in its character, and the evidence discloses that his daughters, other than the daughter Elizabeth J., were unable, from the distressing and sickening condition of the testator's face at the times when he was suffering most, to render him the assistance necessary; that the defendant in error Elizabeth J., from the death of the mother to the death of the testator, both before and after his sufferings and afflictions came upon him, was constant and tender in her attentions to him, and, when his disease took the form that caused others to shrink from him, she remained his main reliance. It also appears from the evidence that prior to the death of the mother, and shortly after the daughter Elizabeth J. returned home and resumed the home relation, the testator deeded her $12\frac{1}{2}$ acres of timber land, and in 1898, about the time he began to be afflicted with the cancer, he deeded to her the 15 acres of land above mentioned. These conveyances were prompt-

ly put of record, and the other children of the testator became apprised of them, and conceived the idea that it was likely or probable that the testator would make other and further conveyances or gifts to defendant in error Elizabeth J., and there is much in the evidence tending strongly to show that the other children, by concert of action in making the charge that the mind of the testator was being affected, determined to defeat any such further or other conveyance, and that the testator was fully advised and informed of the conduct and determination of his other children.

The record is voluminous, and the evidence contradictory. Except the defendant in error Elizabeth J., all the living children of the testator, and the grandchild, Maie Blimling, and the husbands of the married daughters and wives of the married sons, testified that in their judgment the testator was of unsound mind for periods varying from six or seven months to a year or two before his death. In addition to these members of the family expressing this opinion were three other witnesses, who were not in any way related to the testator, so far as the record shows, nor in any way interested in the subject of litigation, who stated that in their opinion, for some period before his death, the testator was not of sufficiently sound mind to transact ordinary business; while on the part of defendants in error ten witnesses, aside from defendants in error, and who were in no way related to the parties and had no interest in the result of the suit, including the family physician, who had known the testator for 30 years, and been the family physician for the last 14 years of the testator's life and treated him in his last illness, and the others being neighbors and friends who were intimately associated with him, testified that he was of sound mind clear up to the time of his death, except in irrational delirium resulting from fever.

From a review of the entire testimony we are satisfied that the evidence utterly fails to show any general affection of the mind of the testator, and that it also fails to show that there was at any time any undue influence exercised by the defendant in error Elizabeth J. Olroyd to induce the making of the deeds sought to be set aside. There is not a word of evidence in the record showing that she at any time or under any condition solicited, urged, influenced, or induced the testator to convey to her any property. Her husband, Henry Olroyd, was employed by the plaintiff in error William Wight to stay at the house and assist in taking care of the testator shortly after this stroke of paralysis and four or five days before the making of the deed to the 40-acre tract. At that time it is shown that he was wholly unacquainted with his present wife, and that there never had been any association between them; and there was not the slightest evi-

dence to show that until long after the deed in question was made he had any interest in her welfare or in the procurement of any conveyance to her. The deed to the 40-acre tract was made on the 25th day of October, and six days after the paralytic stroke; and the real controversy in this case, and the only one that there is a semblance of substantial testimony to support, is the condition of the mind of the testator on the day of making that deed. In reference to his condition upon that day the evidence is absolutely irreconcilable. It was simply a question of fact, supported upon one side by those interested in defeating the conveyance, and upon the other side by the doctor who was in attendance, by the notary who took the acknowledgment, and by the defendants in error. Those attacking the deed state that on that day the testator was in a stupor and was irrational, and if their testimony is to be taken as true it is very doubtful if the deed should be sustained; while, on the other hand, the witnesses for defendants in error state that he was entirely rational, talked understandingly, discussed politics and the weather, and talked about the business in hand with as much clearness as he had ever discussed any business or general matter.

At the time this deed was made the attending physician brought the notary out to the residence of the testator to take the acknowledgment, which was done pursuant to previous arrangement between him and the testator, who had instructed him to have the deed made and to bring a party to have it acknowledged. It was acknowledged before Mr. Edward Clifford, a notary public, then reading law with Mr. R. W. Mills, and afterwards a partner with Mr. Mills in the practice of law; and he and the doctor both testified that they had been apprised of the determination of the other children to prevent any further conveyance being made to the defendant in error Elizabeth J., and that to that end the other children of the testator, and those interested in defeating it, had all been circulating the report that the testator's mind was affected, and that upon the occasion of the execution and acknowledgment of the deed they made a special effort and gave especial attention to the mental condition of the testator in anticipation of the trouble that followed. Much of this evidence was heard before the chancellor in person, who came to the conclusion that the truth of the matter lay with the defendants in error, and we are satisfied with his conclusion.

As showing the animus in this case, the evidence discloses that some of the children, having ascertained that these deeds were made, refused to visit the testator during his last illness, and that on Christmas, in anticipation of the gathering of the family, an elaborate dinner was prepared, and none of them came to partake of it; that on the 29th day of December, being three days before the death of the testator, and at his sollicita-

tion, the children all met at his house, and there such proceedings were had, in an effort to have defendant in error Elizabeth J. reconvey this property, as showed an utter want of feeling on the part of his children for the dying father. To enter into the details of that scene would be a reproach to the living and the dead, and of no benefit to anybody. In this was shown sufficient to justify a chancellor in feeling that there are people who, when in the grasp of greed and selfishness, will go to almost any length to acquire property. It is not surprising if the confidence of the court in the testimony of these plaintiffs in error was shaken by that transaction.

It is complained that defendant in error Elizabeth J. Olroyd was not a competent witness, and when she was offered as a witness a general objection to her competency was interposed. Plaintiffs in error had testified to a number of conversations with her, and, among them, the scene of the 29th of December, of which we have just spoken. She was a competent witness as to all the conversations to which they testified. After the general objection to her competency, no other objection was interposed at any time to her testimony. She was allowed, without objection, except the general objection, to testify to matters as to which she was not competent; but it was the duty of the chancellor—and we presume he performed that duty—to only consider the competent evidence. There was no reversible error committed by the chancellor.

We think the decree of the circuit court should be, and it is, affirmed.

Decree affirmed.

(204 Ill. 494)

PEOPLE ex rel. HOYNE et al. v. OLSEN,
County Clerk, et al.

(Supreme Court of Illinois. Oct. 26, 1903.)

STATUTES—VALIDITY—EFFECT OF PARTIAL
INVALIDITY—ADDITIONAL CIRCUIT
COURT JUDGES.

1. Act May 10, 1901 (Laws 1901, p. 130), creating additional circuit and superior court judges for Cook county, and providing that they shall be elected on the first Monday in November, 1902, and hold office until Tuesday after the first Monday in June, 1903, when their successors shall be elected for a term of six years, being violative of Const. art. 6, §§ 12, 14, 23, providing that the terms of office of the circuit judges shall be six years, and that the judges shall be elected on the first Monday of June, is invalid in toto.

Original application for mandamus by the people, on relation of Thomas M. Hoyne and others, against Peter Olsen, county clerk of Cook county, and others, to compel them to canvass the vote and transmit to the Secretary of State an abstract showing the election of relators, respectively, to the office of circuit judge of Cook county. Writ denied.

Maclay Hoyne, Robert S. Iles, and Hiram T. Gilbert, for relators. Edwin W. Sims, Co. Atty., and Frank L. Shepard, for respondents.

PER CURIAM. This is an original petition by the people of the state, etc., on the relation of Thomas M. Hoyne, Joseph A. O'Donnell, and George Mills Rogers, praying for a peremptory writ of mandamus to compel Peter Olsen, county clerk of Cook county, and Olaf F. Severson and M. J. O'Donoghue, justices of the peace of the town of West Chicago, to canvass the vote and transmit to the Secretary of State an abstract showing the election of relators, respectively, to the office of circuit judge of Cook county. By the petition it is alleged that each of the relators is eligible, and was regularly nominated, and on the first Monday of June, 1903, duly elected, as an additional judge of the circuit court of Cook county, under the act of the Legislature in force July 1, 1901, and that the respondent Olsen, as county clerk, and Severson and O'Donoghue, justices of the peace selected by him to assist in opening the returns of said election and making abstracts of the votes cast thereat, being of the opinion that relators could not be lawfully elected to said office of judge of the circuit court of said county, have refused and do refuse to make abstracts of the votes cast for relators, and the said county clerk has announced his intention to, and does and will, refuse to transmit to the Secretary of State any abstract of said votes cast as aforesaid, wherefore a writ of mandamus is prayed, etc. At our last June term, respondents appeared in answer to said petition, and filed a general demurrer thereto, upon which a final hearing was had, and the writ denied, with the announcement that an opinion would thereafter be filed.

But two questions were raised by counsel upon the argument: First, is the entire act of the Legislature of May 10, 1901, entitled "An act to provide for additional judges of the circuit and superior courts of the county of Cook," unconstitutional? And, second, is the act of the last General Assembly, adopted April 17, 1903 (Laws 1903, p. 143), to repeal said act of May 10, 1901 (Laws 1901, p. 130), valid? If the first question is decided in the affirmative, the second will become unimportant.

The legislature on the 10th day of May, 1901 (Laws 1901, p. 130; Hurd's Rev. St. 1901, p. 554), passed the first-named act, which provides: "As it appears by a canvass of this state * * * that the number of inhabitants of the county of Cook is over one million eight hundred thousand (1,800,000), and that thereby said county is entitled to additional judges by section 23 of article 6 of the Constitution of this state; therefore the number of judges of the circuit court of Cook county be, and hereby is, increased from fourteen, its present number, to seventeen, and the number of judges of the superior court of Cook county be, and hereby is, increased from twelve, its present number, to fifteen. On the Tuesday after the first Monday in November, A. D. 1902, there shall be elected three judges of the circuit court of said county of Cook,

and three judges of the superior court of said county of Cook. The terms of office of the said additional judges of the said circuit court shall expire on the first Monday of June, A. D. 1903, upon the election and qualification of their successors in office, and upon said first Monday of June, A. D. 1903, and every six years thereafter, there shall be elected at the same time and in the manner as the other judges of the circuit court, three judges of said circuit court, successors in office of the judges by this act authorized to be elected. The terms of office of the said additional judges of the said superior court shall expire on Tuesday after the first Monday in November, A. D. 1904, upon the election and qualification of their successors in office, and upon the said Tuesday after the first Monday in November, A. D. 1904, and every six years thereafter there shall be elected, at the same time and in the same manner as the other judges of the superior court, three judges of said superior court, successors in office of the judges by this act authorized to be elected." The constitutionality of the act was passed upon in a mandamus proceeding brought to this court by appeal in the case of *People ex rel. v. Knopf*, 198 Ill. 340, 64 N. E. 842, 1127, in which we held that, in so far as it provided for the election of judges of the circuit and superior courts for terms of less than six years, it was unconstitutional and void, but declined to pass upon the validity of the whole act, for the reason that it was not necessary to do so in that case. Thereafter the General Assembly passed an act repealing said statute, with an emergency clause, to take effect from and after its passage, which was approved April 17, 1903. Notwithstanding the decision of this court and said repealing statute, nominations were made and certified to the county clerk in said county for three additional judges of the circuit court, which were called "provisional judges under the act of 1901," and the candidates so nominated were voted for, as alleged in the petition, at the June election, 1903, the relators receiving a majority of the votes cast. They base their right to the writ here sought on the claim that the provisions of the act of May 10, 1901, except as declared unconstitutional in the foregoing case of *People v. Knopf*, supra, are constitutional and valid, and that the act of 1903 repealing the same is unconstitutional and invalid. The position of respondents is that the former act is unconstitutional and void as a whole; that the part which authorizes an election of three judges of the circuit court in June, 1903, as the successors in office to the judges by that act authorized to be elected, and that part declared unconstitutional, are so interdependent that the remainder is not capable of being executed, in accordance with the legislative intent, without the other; that the provisions of the act are so related, in substance and object, that it is impossible to suppose the Legislature would have passed the one without the other, and

therefore the whole act must fall. The rule is: "If a statute attempts to accomplish two or more objects and is void as to one, it may still be in every respect complete and valid as to the other; but if its purpose is to accomplish a single object only, and some of its provisions are void, the whole must fall unless sufficient remains to effect the object without the aid of the invalid portion, and if they are so mutually connected with and dependent on each other, as conditions, consideration, or compensation for each other, as to warrant the belief that the Legislature intended them as a whole, and that if all could not be carried into effect the Legislature would not pass the residue independently, then, if some parts are unconstitutional, all the provisions which are thus dependent, conditional, or connected must fall with them." Cooley's Const. Lim. pp. 178, 179. We have often recognized and adopted this rule. Applying it to the statute under consideration, there seems little ground for the contention of relators that enough of the statute of 1901 can be held valid, notwithstanding our decision in *People v. Knopf*, supra, to authorize their legal election in June, 1903. To say that the Legislature intended to increase the number of circuit and superior judges of Cook county, without any reference to the express enactment as to when such judges should be elected and their terms of office should expire, would be to attribute to it an intention directly in conflict with its express provisions. It did not attempt to say that the number of judges of the circuit court of Cook county should be increased from 14, its present number, to 17, at some future time, but undertook to say that the necessity for such additional judges then existed, and that they should be elected on the first Monday of November, 1902, and that their terms of office should expire on the first Monday of June, 1903, upon the election and qualification of their successors in office, and every six years thereafter, etc. In other words, the enactment increasing the number of judges, and the provision for their election and terms of office, are so mutually connected with and dependent on each other, as conditions or compensation for each other, as to compel the belief that the Legislature intended them as a whole. There was neither a necessity nor a reason for the Legislature of 1901 to increase the number of judges, to take effect on the first Monday in June, 1903, there being by law an intervening session in 1903, at which, if the necessity then existed, the increase could be made; and it is significant that at the session of 1903, instead of amending the act of 1901, or re-enacting a valid statute making such increase, that General Assembly repealed the former statute entirely, with an emergency clause. In short, we are at a loss to perceive upon what logical or legal ground it can be held that the naked enactment that the number of judges shall be increased can be sustained, and at the same time all the provisions which authorize the election and terms of office of the ad-

ditional judges be sustained, and we entertain no doubt that to do so would be to defeat the clearly expressed intention of the Legislature. The entire act must therefore be held invalid.

If, in this view of the case, it were at all important or necessary to consider the second contention of counsel for respondents, we should be inclined to sustain it also; but, as already indicated, it is not necessary to decide that question, or extend this opinion by a discussion of it.

Our former order denying the writ of mandamus was proper. Writ denied.

(204 Ill. 524)

CITY OF BEARDSTOWN v. CLARK.

(Supreme Court of Illinois. Oct. 26, 1903.)

MUNICIPAL CORPORATIONS—DEFECTIVE SIDEWALK—ACTION FOR INJURIES—EVIDENCE—INSTRUCTIONS—APPEAL—WAIVER OF OBJECTIONS.

1. An objection that the verdict is not supported by the evidence cannot be raised on appeal in an action at law where the question was not raised before the trial court by a demurrer to the evidence, motion to take the case from the jury, or motion to have the jury instructed to find for the defendant.

2. Where, in an action against a city for injuries from a defective sidewalk, the evidence as to the condition of the walk was conflicting, it was proper, in order to show notice to the city, to permit plaintiff to introduce in evidence an ordinance passed some months before the injury, requiring property owners adjoining the street on which said sidewalk was located to rebuild said sidewalk, and to permit plaintiff to prove that the adjoining owners had been notified to rebuild.

3. In an action against a city for injuries owing to a defective sidewalk, instructions that it was the duty of the city to keep its sidewalks in a reasonably safe condition were not prejudicial error on the ground that a city is only required to use reasonable care to keep walks in a reasonably safe condition, the evidence not justifying the jury in finding otherwise than that the sidewalk was out of repair, and the city having had notice of such condition.

4. In an action against a city for injuries owing to a defective sidewalk it was proper to refuse to submit an interrogatory as to whether, if plaintiff had used her eyes with ordinary care, she could have seen and avoided the hole, such question going to an evidentiary fact.

Error to Appellate Court, Third District.

Action by Nellie J. Clark against the city of Beardstown. From a judgment of the Appellate Court affirming a judgment in favor of plaintiff (104 Ill. App. 568), defendant brings error. Affirmed.

Connolly & Barnes, for plaintiff in error.
Mills & McClure, for defendant in error.

HAND, J. This is an action on the case, commenced in the circuit court of Cass county by Nellie J. Clark against the city of Beardstown, to recover damages for a personal injury alleged to have been sustained by her by means of a defective board in a sidewalk situated upon one of the public streets in said city giving way as she step-

¶ 2. See *Municipal Corporations*, vol. 24, Cent. Dig. § 1734.

ped thereon. The jury returned a verdict in her favor for \$2,080, and, upon a remittitur of \$580 being entered, the court overruled a motion for a new trial, and rendered judgment upon the verdict for \$1,500, which judgment has been affirmed by the Appellate Court for the Third District, and a writ of error has been sued out from this court to review said judgment.

The sidewalk upon which the defendant in error was injured was located near the post office in said city, upon a public street, and was constructed of boards one and one-fourth inches thick and from six to eight inches wide, nailed cross-wise upon three stringers; which sidewalk, the evidence tended to show, had been in use for many years, and was out of repair. The defendant in error testified the injury was caused by her stepping upon the edge of a board in the sidewalk, a part of which broke off, and her foot went through the walk, and she was thrown down and her ankle sprained and her back hurt, from the effect of which injuries she had suffered great pain, and was suffering pain at the time of the trial, which occurred some three months subsequent to the time of the accident.

It is first assigned as error that the verdict is not supported by the evidence. That question was not raised before the trial court by a demurrer to the evidence, motion to take the case from the jury, or a motion to have the jury instructed to find for the defendant. In such state of the record no question of law—and this court determines only questions of law in cases of this character—is presented to this court for decision. *Chicago & Alton Railroad Co. v. Gomes*, 153 Ill. 208, 38 N. E. 651.

It is next assigned as error that the court admitted improper evidence on behalf of the plaintiff. The court upon the trial, over the objection of the defendant, permitted the plaintiff to introduce in evidence an ordinance of said city passed some months before the injury to the plaintiff, requiring property owners adjoining the street upon which said sidewalk was located to rebuild said sidewalk; also permitted the plaintiff to prove that said adjoining property owners, in pursuance of said ordinance, had been notified by the superintendent of streets of said city to rebuild said sidewalk. There was a conflict in the proofs as to the condition of the sidewalk, and we think the evidence was admissible, not for the purpose of showing that the sidewalk was out of repair, but for the purpose of showing that the city had notice of its condition. *Bibbins v. City of Chicago*, 183 Ill. 359, 61 N. E. 1030; *City of Taylorville v. Stafford*, 196 Ill. 288, 63 N. E. 624.

It is further assigned as error that the court misdirected the jury as to the law upon behalf of the plaintiff. The court in a number of instructions informed the jury that it was the duty of the city to keep its sidewalks in a reasonably safe condition,

while the law is that "it was only required to use reasonable care to keep its sidewalks in a reasonably safe condition." *City of Elgin v. Nofs*, 200 Ill. 252, 65 N. E. 679. In view of the evidence in this case the jury could not well have found otherwise than that the sidewalk was out of repair, and the city had notice of such condition. We do not think the jury were misled by said instructions, and are of the opinion that the case ought not to be reversed by reason of the giving of said instructions.

The last assignment of error is that the court improperly refused to submit to the jury the following special interrogatory: "If the plaintiff used her eyes with ordinary care to guide her footsteps in passing over the walk, could she have seen and avoided the hole where the injury is alleged to have occurred?" We agree with the Appellate Court that this interrogatory only called for an evidentiary fact. The question of whether or not the plaintiff was in the exercise of due care for her own safety at the time she was injured was one of fact for the jury, and could only be determined by it from a consideration of all the evidence in the case, and as an answer to the interrogatory sought to be submitted, either way by the jury, would not have been repugnant to or irreconcilable with their general verdict, the court committed no error in declining to submit it to the jury. *Metcalf Co. v. Nystedt*, 203 Ill. 333, 67 N. E. 674.

We find no reversible error in this record. The judgment of the Appellate Court will therefore be affirmed. Judgment affirmed.

(204 Ill. 499)

McDOWELL v. PEOPLE ex rel. MARTIN,
County Treasurer.

(Supreme Court of Illinois. Oct. 26, 1903.)

MUNICIPAL CORPORATIONS — SIDEWALKS —
GRADES—ESTABLISHMENT—RESOLUTION
—ORDINANCE—CERTAINTY.

1. Grades of streets can be established for the building of sidewalks, etc., only by ordinance, and not by resolution.

2. A city ordinance providing for the laying of a sidewalk, and providing that there should be an excavation of earth four inches below the established grade, "except where it would be better, on account of drainage, to excavate less or grade up at low places," was defective in failing to show the grade with sufficient certainty.

• Appeal from Lawrence County Court; J. D. Manning, Judge.

Action by the people, on the relation of Curtis H. Martin, county treasurer, against J. O. McDowell, for a special tax for the purpose of building a sidewalk. From a judgment for plaintiff, defendant appeals. Reversed.

W. F. Foster, for appellant. Gee & Barnes and S. C. Lewis, for appellee.

RICKS, J. This is an appeal from a judgment of the county court of Lawrence county

against a tract of land situated in the city of Sumner, belonging to appellant, for a special tax levied thereon for the purpose of building sidewalks. The case was tried partly on an agreed state of facts and partly on documentary evidence. Several objections were filed to the payment of the tax, but, inasmuch as the sixth objection filed in the county court by appellant—being that there was no grade established by any ordinance of the city for the construction of said sidewalks—is vital to the whole proceeding, under our view of the law it will only be necessary to discuss this one objection. There were two separate ordinances passed November 13, 1901, being Ordinances No. 79 and No. 80, for the building of two separate sidewalks, each ordinance providing that the entire cost of the sidewalk and all expenses should be paid by special taxation of the lot or parcels of land along the line of the sidewalk, according to their frontage thereon; and were passed under the provisions of an act entitled "An act to provide additional means for the construction of sidewalks in cities, towns and villages," approved April 15, 1875, in force July 1, 1875. Hurd's Rev. St. 1899, p. 319, c. 24. The essential features of both ordinances were the same, each describing the kind of material and the manner in which the same was to be used. Ordinance No. 80 located a walk on the east side of Christy avenue, and Ordinance No. 79 located a walk on the north side of Cedar street, both being the city of Sumner, and one running along the side and the other along the front of appellant's property. Section 2 of each ordinance provided that: "The building, laying and constructing of said stone sidewalk aforesaid shall be done according to the following plans and specifications: There shall be made an excavation of the earth four inches below the established grade," etc. Ordinance No. 80 then proceeds as follows: "Of that portion of said Christy avenue where said sidewalk shall be built, and five feet wide, unless said excavations have previously been made," etc. Ordinance No. 79 proceeds: "Of that portion of Cedar street, and three feet wide, except where it would be better and more practicable, on account of proper drainage, to excavate less or grade up at low places along the line of said sidewalk aforesaid," etc. The above is all that is said in either ordinance in reference to the grades. There is not even a reference to a general ordinance establishing a grade for the city, and no evidence introduced as to the establishment of a grade, except the introduction of a resolution in evidence establishing the grades of the city, as follows: "Whereas, the city of Sumner, Illinois, did on the third day of November, 1898, contract with Edwyn E. Watts, civil engineer, for making the necessary surveys and furnishing the data necessary to establish the grades of the streets and alleys of the said city; and whereas, the said Watts

has this day filed in the office of the clerk of said city a map, endorsed thereon as follows: 'City of Sumner, Illinois.—Grade map, by E. E. Watts, C. E.,' and the following: 'Explanation—Continuous curb grades of the streets and alleys are indicated hereon in red. Elevations are shown at street intersections and all other points in the line of the street or alley where the ratio of grade changes. One elevation at an intersection or intermediate point indicates the same grade for all curbs at that point, otherwise separate elevations are indicated. All grades conform to the grades of intersecting streets. Distances to intermediate change points are shown, excepting where change occurs in the middle of the block no distance is shown,' and a record of permanent bench marks noted thereon: Now, be it resolved by the common council of the city of Sumner, Illinois, that said elevations of said streets and alleys and of the permanent 'bench marks,' as indicated upon said map, be and the same are hereby declared to be the established grades of said respective streets and alleys, and that from and after the passage of this resolution shall be deemed and considered the established grade of the streets and alleys of the city of Sumner, Illinois. And be it further resolved, that the clerk of said city be hereby ordered and directed to spread a copy of said map upon the minutes of this session of said council."

We have repeatedly held that grades cannot be established by resolution, and that the only manner in which grades of streets can be established for the building of sidewalks or the paving or making of any permanent improvement of a street is by ordinance. In the case of *Chicago & Northern Pacific Railroad Co. v. City of Chicago*, 174 Ill. 439, 51 N. E. 596, we said (page 444, 174 Ill., and page 598, 51 N. E.): "The proof in the case showed that the order of March 23, 1896, was not styled in accordance with section 2 of article 5 of part 1 of the city and village act [1 Starr. & C. Ann. St. (2d Ed.) p. 717, c. 24, par. 64]. Section 2 requires that the style of the ordinance in cities shall be, 'Be it ordained by the city council of * * *.' The proof also shows that the order of March 23, 1896, was not passed by a majority of the members of the city council, as required by section 13 of article 3 of part 1 of the city and village act; also that the yeas and nays were not taken upon its passage, as required by said section 13; also that the yeas and nays were not duly entered upon the journal of the proceedings of the city council, as required by said section 13; also that the same was not presented to the mayor for his approval, as required by section 18 of said article 3. *Barr v. Village of Auburn*, 89 Ill. 361; *Hackman v. Village of Staunton*, 42 Ill. App. 409; *Schofield v. Village of Hudson*, 56 Ill. App. 191. It is thus clearly shown that the order in question lacked the requirements which the statute makes necessary in

order to constitute a valid ordinance. The order in question was nothing more than a mere resolution, and in no sense an ordinance. * * * A resolution or order is not a law, but merely the form in which the legislative body expresses an opinion. An ordinance prescribes a permanent rule of conduct or government, while a resolution is of a special and temporary character. Acts of legislation by a municipal corporation which are to have continuing force and effect must be embodied in ordinances, while mere ministerial acts may be in the form of resolutions. * * * As an ordinance is required to establish a fixed rule for the conduct of the affairs of the city, it would seem that the grade of a street should be established by an ordinance, and such is the general practice in this and other states." *City of Bloomington v. Pollock*, 141 Ill. 346, 31 N. E. 146; *City of Carlinville v. McClure*, 156 Ill. 492, 41 N. E. 169; *Washington Ice Co. v. City of Chicago*, 147 Ill. 327, 35 N. E. 378, 37 Am. St. Rep. 222; *Chicago & Northern Pacific Railroad Co. v. City of Chicago*, 172 Ill. 66, 49 N. E. 1006; *State v. City of Bayonne*, 35 N. J. Law, 335; 1 *Dillon on Mun. Corp.* (4th Ed.) § 307, and note; *Horr & Bemis on Mun. Police Ordinances*, § 226; *Nazworthy v. City of Sullivan*, 55 Ill. App. 48; *Village of Crotty v. People*, 3 Ill. App. 465; *Craig v. People*, 193 Ill. 199, 61 N. E. 1072. Ordinance 79, as will be seen, having only the above resolution to support it, in reference to the grade further says: "Except where it would be better and more practicable, on account of proper drainage, to excavate less or grade up at low places along the line of said sidewalk aforesaid." Even if it could be said that the grades of the city were established as shown by the resolution and map on file in the city clerk's office, it could not be held that this ordinance was sufficiently certain to inform a person as to the grade for the building of a walk. Under the statute the property owner has the right, within 30 days after the publication of the ordinance, to construct the sidewalk in front of his property in accordance with the specifications of the ordinance authorizing it. He has the right to know the grade on which the sidewalk is to be built, otherwise he cannot properly construct the same. The ordinance should fix the grade at which the sidewalk is to be built in express terms, or a reference should be made therein to some ordinance of the city fixing such grade, or it should state therein that the sidewalk should be laid according to the established grade of the sidewalks of the city, or in some other way define the grade so that the property owner may know definitely the grade at which the sidewalk is to be laid; otherwise it would be impossible for the property owner to avail himself of the right conferred upon him by the statute to construct sidewalks in front of his own property, or for the officer designated in the ordinance to supervise and approve the

construction thereof. *Biggins' Estate v. People*, 193 Ill. 601, 61 N. E. 1124. It is a well-established rule that, where an ordinance providing for an improvement, the expense of which is to be defrayed by special taxation, requires said improvement to conform to a certain grade, the tax for such improvement will not be legal if the ordinance does not establish such grade or make proper reference to an ordinance from which such grade may be ascertained. *Craig v. People*, supra. In order to sustain the judgment rendered by the county court in this case, it was incumbent upon appellee to show that the grade of the sidewalks in question was established by ordinance with sufficient certainty to advise appellant in regard thereto, so he might, if he chose, construct the improvement himself. The ordinance providing for the improvement in question being insufficient for the purpose stated, the judgment against appellant's property for the tax in question must be held to be erroneous, and must be reversed.

The judgment of the county court of Lawrence county is reversed, and the cause remanded. Reversed and remanded.

(204 Ill. 378)

HAGEMANN v. HAGEMANN.

(Supreme Court of Illinois. Oct. 26, 1903.)

GIFTS INTER VIVOS—EVIDENCE—SUFFICIENCY.

1. Deceased selected from his papers certain notes, which he placed in an envelope, indorsing it notes owned by his brother. He delivered at the same time to a third person a paper signed by himself, stating that he had assigned and transferred to his brother such notes, which were to be found in an envelope indorsed as above, in his box in a safety deposit vault. The envelope was placed in the box, and the key was given to the brother, who afterwards took the envelope to his home. Prior to deceased's death his brother collected the interest on the notes, and deceased stated the notes belonged to him. Deceased for some purpose prior to his death took the notes to his home. *Held* sufficient to sustain a finding that deceased in his lifetime transferred and delivered the notes to his brother as a completed gift inter vivos.

Appeal from Appellate Court, First District.

Action by Michael Hagemann against Wilhelmina Hagemann, administratrix of the estate of Fritz Hagemann, deceased. From a judgment of the Appellate Court (102 Ill. App. 479) affirming a judgment for plaintiff, defendant appeals. Affirmed. See 90 Ill. App. 251.

This case began in the probate court of Cook county as a claim of Michael Hagemann, the appellee, against the estate of his deceased brother, Fritz Hagemann, praying, in the alternative, for the payment to him of the value of or the delivery to him of certain specific promissory notes described in said claim and in the inventory filed in said estate, aggregating \$4,000, and enumerated by the names of the makers, as follows: Wartzeck note, \$1,250; second Wart-

zeck note, \$550; Glup note, \$1,000; Reimer note, \$1,000; also another Wartzack note for \$200, which was not listed in the inventory filed in the estate. The probate court dismissed the claim, and the claimant appealed to the circuit court, which also dismissed the claim "for want of equity or legal right." Claimant then appealed to the Appellate Court for the First District, and the cause was assigned to the Branch Appellate Court. That court found that Fritz Hagemann, in his lifetime, made a gift inter vivos to Michael of notes to the amount of \$4,000, which had been put in a certain envelope marked, "Notes Owned by Michael Hagemann.—Fritz Hagemann," and described in the opinion of the court; but on the question of identity of the particular notes placed in the envelope said Appellate Court reversed the case, and remanded the same, with specific directions "to ascertain as nearly as practicable and determine what notes came into the possession of appellant [Michael] which were in said envelope, and which deceased obtained from appellant as stated, and to decree that such notes, or the proceeds of such of them as have been paid, if any, be delivered and paid to appellant," Michael. The administratrix then prayed an appeal to this court, which was allowed, but dismissed by this court as being premature. *Hagemann v. Hagemann*, 188 Ill. 363, 58 N. E. 950. The cause having been redocketed in the circuit court, on January 14, 1901, reference was made to the master by an order directing him "to take proofs, and to ascertain, as nearly as practicable, and determine from the proofs so taken, together with the evidence now of record in the cause, what notes came into the possession of Michael Hagemann which were in the envelope mentioned in the opinion of the Appellate Court, and also which, if any, of said notes have been paid, and also what proceeds of any of said notes have come to the possession of the administratrix, Wilhelmina Hagemann, and to report such proofs, together with his conclusions thereon, to this court." The master did as directed, and in his report found that the notes described in the claim of appellee, in so far as said notes appear in the inventory filed in the estate of Fritz Hagemann, are the identical notes which were put into the envelope mentioned in the opinion and judgment of the Appellate Court, but also finding that appellee had failed to prove his title to the \$200 Wartzack note, and that "after the death of Fritz Hagemann said \$200 note was held and owned by an outside party." The present appellant then appealed to the Appellate Court from a judgment of the circuit court approving the findings of the master. The Appellate Court having affirmed the judgment of the lower court, this appeal is brought.

Appellee is a brother of Fritz Hagemann, deceased, and is a laboring man without financial resources. Deceased was a brick-

layer, then a contractor, and, though in poor health most of his life, had been financially successful. In October, 1878, he was married to the administratrix, but their married life was unpleasant. The two brothers had always been friendly, and appellee gave deceased much assistance during times of illness. On October 5, 1896, these two brothers went to the office of William E. Hatterman, who was in the broker business, and Fritz Hagemann executed the following paper:

"Chicago, October 5, 1896.

"This is to certify that in consideration of one (\$1.00) dollar I have this day assigned and transferred to my brother, Michael Hagemann, notes secured by trust deeds, being for the total sum of four thousand (\$4,000) dollars. Said notes are to be found in an envelope or package which is marked, 'Notes Owned by Michael Hagemann,' which may be found in my safety box in the Hatterman Safety Deposit Vault Company, Chicago, to which box my said brother has access.

"Fritz Hagemann."

This paper was left with Mr. Hatterman without specific directions. Deceased selected from his papers notes supposed to be of the amount of \$4,000, put them into an envelope separate from his other papers, wrote upon the envelope, "Notes Owned by Michael Hagemann," and Fritz Hagemann signed his name thereto. The envelope containing the notes was then put into box No. 448 of the Hatterman deposit vault. This box had been rented by Fritz Hagemann since February 23, 1894. June 23, 1896, appellee was appointed by his brother, Fritz, his representative, "to have access to and control of the contents of safe No. 448, in the vaults of the Hatterman Safety Deposit Company." On March 1, 1897, deceased rented box No. 835. Three or four weeks after the transaction of October 5, 1896, Fritz gave Michael a key to box No. 448, in which the notes in controversy had been placed. On May 27, 1897, Michael visited box No. 448, and the evidence indicates he at that time took these notes to his own house, where they remained until about two weeks before Fritz's death, when Fritz came to Michael's house, and got them, saying he "wanted to see something on them," and promised to give them back. Charles Reimer testifies that several times he paid the interest on his notes to Michael, the notes being at Michael's house, the last time only a short time before the death of Fritz. He also states that Fritz had told him that he should pay the interest to Mike, so that his wife would not know it, and that after he (Fritz) died the rest belonged to Mike. Fritz died September 1, 1897, with the notes in question still in his possession. Michael immediately began to search for the notes, and on September 2d went to box No. 448 to see if they had been returned there, but found the box empty. He then asked Fritz's widow, the administratrix, several times about them,

but she professed not to know anything about them. When the inventory of Fritz's estate was filed in probate these notes were inventoried, and appellee then made written demand for them, and the administratrix refused to give them up, and this proceeding was begun. Hatterman states that on October 5, 1896, at the time the notes are claimed to have been given to appellee, Fritz Hagemann stated that he gave them as a present.

The decree of the trial court found "that said Fritz Hagemann, deceased, did in his lifetime transfer, assign, and deliver, as a full and complete gift inter vivos to Michael Hagemann, the complainant, notes secured by trust deeds, being for the total sum of \$4,000, or about that sum; that said notes were put into an envelope, which envelope was indorsed, 'Notes Owned by Michael Hagemann,' which indorsement was signed, 'Fritz Hagemann,' that after title to said notes had fully vested in Michael Hagemann, the complainant, said notes came into the possession of said Fritz Hagemann, deceased, and were in his possession at the time of his death, but without any act or statement by the complainant tending to show an intention on his part to transfer the title to said notes; and that the title of complainant to said notes was not thereby destroyed or impaired."

Henry Utpatel (Ernest Saunders, of counsel), for appellant. F. M. Burwash, for appellee.

RICKS, J. (after stating the facts). Appellant assigns 16 errors, but the only contentions argued are that the transaction had between Fritz Hagemann and appellee at the time the written instrument of October 5th, set out in the statement, was executed, does not constitute a sale, as there was no consideration, neither did said transaction constitute a gift inter vivos or causa mortis, and that the notes in question have never been sufficiently identified as the notes with reference to which the paper of October 5th was executed.

We think it clear that the intention of the donor, in cases of this character, is a controlling factor, and from the facts herein we are of the opinion that the chancellor was justified in decreeing that Fritz Hagemann "did in his lifetime transfer, assign, and deliver, as a full and complete gift inter vivos, to Michael Hagemann," the notes, etc.; "that said notes were put into an envelope, which envelope was indorsed, 'Notes Owned by Michael Hagemann,' which indorsement was signed, 'Fritz Hagemann.'" We are of the opinion that the above findings are in accord with the weight of the evidence, and were properly sustained by the Appellate Court. Michael Hagemann was poor; the donor, his brother, well to do. The brothers had always been friendly. Michael had as-

sisted his brother during times of illness. Mr. Hatterman, in whose presence the transaction of October 5, 1896, took place, states that deceased said that he gave the notes in question to Michael. The language of the writing executed at that time imports a transfer and delivery. Michael was given a key to the box containing the said notes. This alone has been held to be a good symbolical delivery. *Stephenson's Adm'r v. King*, 81 Ky. 425, 50 Am. Rep. 173; *Telford v. Patton*, 144 Ill. 611, 33 N. E. 1119. Michael could, and the evidence shows that he did, go and take the said envelope from the box in the vault and take it to his home, and the maker of one of the notes stated that he saw it there several times when he paid his interest, the last time being only a short time before the death of the donor. The witness Reimer testified that deceased told him that the notes belonged to Michael. The fact that the deceased took the notes to his house for some purpose, but without any manifest intention of reinvesting himself with the title to them, does not militate against the theory of ownership by appellee. *Martin v. Martin*, 170 Ill. 18, 48 N. E. 694. If there was ever a valid delivery of the notes to appellee, the fact that the donor was again found to be in possession of the notes could have no tendency to establish title in him, especially where there are no circumstances showing that such act manifested an expression or intention on the part of the donor that he had never relinquished control or ownership of the notes.

Other grounds are urged by appellee for affirming this case, but it is not necessary to consider them, as, for the reason already stated, we are of the opinion that the judgment of the Appellate Court should be affirmed.

Judgment affirmed.

(204 Ill. 456)

PIERSON v. PEOPLE ex rel. WALTER.

(Supreme Court of Illinois. April 24, 1903.)

MUNICIPAL CORPORATIONS—SIDEWALKS—CONSTRUCTION—ORDINANCES—PUBLICATION—PROOF—SPECIAL TAXES—ASSESSMENTS—CONSTRUCTION BY ABUTTING OWNER—NOTICE—SUFFICIENCY—SPECIAL TAX COLLECTOR—APPOINTMENT—NECESSITY OF SIDEWALKS—BENEFIT—DETERMINATION—CONCLUSIVE—NESS.

1. 1 Starr & C. Ann. St. (2d Ed.) p. 717, c. 24, par. 65 (Village Act, art. 5, § 3), declares that all ordinances imposing any fine, penalty, or forfeiture, or making any appropriation, shall, within one month after they are passed, be published, etc., and that no such ordinance shall take effect until 10 days after such publication; but that all other ordinances, orders, and resolutions shall take effect from and after their passage, unless otherwise provided therein. *Held*, that a general city ordinance providing for the construction of sidewalks, as authorized by Sidewalk Act 1875, was not an ordinance imposing a fine, etc., and took effect from its passage.

2. Where a general city ordinance, providing for the construction of sidewalks at the expense of abutting property owners, took effect

on the same day a special ordinance for the construction of certain sidewalks was enacted, such general ordinance was properly incorporated in the special ordinance by reference.

3. Where a general sidewalk ordinance provided that the smooth surface made for the sidewalk should be eight inches below the grade line of the sidewalk as such grade line was established by the city council, and there was evidence that the council had established the grade for the street on which the sidewalks were constructed, an objection that the ordinances ordering the construction did not establish the grade was not sustainable.

4. A city ordinance making it the duty of the committee on streets and alleys to have the line of the sidewalk required by the ordinance surveyed, and the grade line thereof established, should be construed as empowering such committee to properly designate the grade points previously established by ordinance.

5. 1 Starr & C. Ann. St. (2d Ed.) p. 858, c. 24, par. 430, provides that a sidewalk ordinance may require all owners of abutting lots to construct a sidewalk in front of their respective lots, etc., within 30 days after publication of the ordinance, and in default thereof the same should be constructed by the city. *Held*, that the word "may" in such act should be read "shall."

6. Where written notice was served on a property owner, by a city committee on streets, notifying her that in pursuance of an ordinance she was required to construct a sidewalk in front of her premises within 30 days from the date of the notice, and under such notice she was allowed 30 days from July 8, 1901, instead of 30 days from July 5, 1901, when the publication of the ordinance was made, such notice was a sufficient compliance with 1 Starr & C. Ann. St. (2d Ed.) p. 858, c. 24, par. 430, requiring notice to the owner to construct the sidewalk within 30 days from the publication of the ordinance.

7. A general sidewalk ordinance provided that, on the filing of the bill of costs, the city clerk should prepare a special tax bill, and thereupon issue a warrant to the collector of special assessments, who should proceed to collect the same. Sidewalk Act 1875, § 3, provides that the clerk shall "thereupon issue warrants directed to such officer as may be designated in the ordinance for the collection of the special tax," etc. *Held*, that where, in an action to collect a special sidewalk assessment, an ordinance creating the office of collector of special assessments for sidewalk construction was introduced, and it was shown by proceedings of the city council that M. had been appointed such collector and had qualified as such, an objection that there was no such officer in the city as collector of special taxes, assessments, etc., was unsustainable.

8. A certificate of the city clerk, under the city corporate seal, that two sidewalk ordinances passed and approved on a certain date were published in a certain paper in the city on a day specified, constituted sufficient proof of the publication of the ordinance.

9. A sidewalk ordinance providing that the sidewalks should be constructed, under the direction of the street and alley committee of the city, to the satisfaction of such committee, and that no defective work should be considered as accepted, but should be rebuilt or the defects remedied under the directions of such committee, constituted a sufficient compliance with Sidewalk Act 1875, § 2, declaring that ordinances might provide that the construction of the work should be under the supervision and subject to the approval of some officer or board of officers of the city to be designated in the ordinances.

10. Where a city council, by ordering the construction of a new sidewalk at the expense of abutting property owners, has determined that such sidewalk is necessary, and that the abut-

ting property is benefited thereby to the extent of a special tax, such determination, unless arbitrary and unreasonable, is conclusive of the question of the necessity of the sidewalk and of the benefit derived therefrom.

On Rehearing.

11. Where a city ordinance provided that the entire cost of constructing sidewalks in front of certain lots should be assessed to such lots, as authorized by Hurd's Rev. St. 1899, p. 319, c. 24, § 284, in the absence of evidence of oppression or unreasonable discrimination against a lot owner, evidence in an action to enforce an assessment for sidewalks in front of her lots that the city had not built all the walks ordered by the ordinance to be constructed was properly excluded.

12. Where an ordinance for the construction of sidewalks prescribed the width of the sidewalk, and the general ordinance fixing the manner of construction provided for the setting on the inside and outside lines one course of brick on end as a curb, which made the walk four inches wider than the limit prescribed by the ordinance, such extra width was not such a substantial departure as would invalidate an assessment for the laying of the walk.

Appeal from Bureau County Court; R. M. Skinner, Judge.

Action by the people, on relation of J. F. Walter, against Elizabeth Pierson. From a judgment in favor of relator, defendant appeals. Affirmed.

This is an appeal from a judgment of the county court of Bureau county against certain lots belonging to the appellant, Elizabeth Pierson, for a special tax levied for the purpose of building a sidewalk opposite said lots by the city of Spring Valley in said county. The judgment is for \$124.20 against two lots, described as lots 15 and 16 in block 7, Dalzell's first addition to Spring Valley. There were introduced in evidence two ordinances passed by the city council of Spring Valley, the one a general ordinance, entitled "An ordinance in relation to construction of sidewalks," and the other a special ordinance, entitled "An ordinance providing for the construction of certain sidewalks," including that opposite the lots of appellant, both of which said ordinances were passed and approved on July 2, 1901. The appellant filed objections to the entry of judgment against her lots. These objections were overruled, and exception was taken to the action of the court in overruling them.

J. L. Murphy, for appellant. C. N. Hol-
lerich, Wm. Hawthorne, and Ora H. Porter,
for appellee.

MAGRUDER, C. J. The main objection made by the appellant to the entry of judgment against her lots is that both of the ordinances upon which the delinquent special tax report of the city clerk of the city of Spring Valley is based are void. The proof shows that both ordinances were passed on July 2, 1901, and published on July 5, 1901. The special ordinance relating to the construction of the sidewalk here in controversy provides for its construction in accordance

with the terms and provisions of the general ordinance, and in the manner specified in the general ordinance. In *Hoover v. People*, 171 Ill. 132, 49 N. E. 367, we held that a general ordinance adopted by a city, providing that all sidewalks should thereafter be built by special taxation in a certain manner, and that special ordinances might be passed from time to time locating such walks, might be incorporated, by reference, into a subsequent ordinance specifying the places where sidewalks were to be built by special taxation. It is claimed on the part of the appellant that the general ordinance passed on July 2, 1901, and published on July 5, 1901, did not take effect until July 15th, that is to say, 10 days after it was published; and that, inasmuch as the special ordinance depended for its existence and operation upon the general ordinance, it was a nullity, as being based upon an ordinance which had not yet gone into effect. In support of this contention, reference is made to section 3 of article 5 of the city and village act (Laws 1871-72, p. 218), which provides that "all ordinances of cities and villages, imposing any fine, penalty, imprisonment or forfeiture, or making any appropriation, shall, within one month after they are passed, be published at least once in a newspaper published in the city or village, or, if no such newspaper is published therein, by posting copies of the same in three public places in the city or village; and no such ordinance shall take effect until ten days after it is so published. And all other ordinances, orders and resolutions shall take effect from and after their passage, unless otherwise provided therein." 1 Starr & C. Ann. St. (2d Ed.) p. 717, c. 24, par. 65. The contention of counsel for appellant in this regard is without force, because section 3 has no application to a sidewalk ordinance, like the one here under consideration, constructed under the provisions of the sidewalk act of 1875. It is true that such ordinances as are mentioned in section 3 do not take effect until 10 days after they are published, but the ordinances there referred to are those "imposing any fine, penalty, imprisonment or forfeiture, or making any appropriation." The sidewalk ordinances upon which the present proceeding is based do not come within the class of ordinances thus specified in section 3. The ordinances here involved contain no provision which, by a fair construction, can be regarded as imposing a fine, penalty, imprisonment, or forfeiture, or as making any appropriation. *Illinois Central Railroad Co. v. People*, 161 Ill. 244, 43 N. E. 1107; *Mix v. People*, 106 Ill. 425; *Holland v. People*, 189 Ill. 348, 59 N. E. 753. The general ordinance in the case at bar took effect from and after its passage, that is to say, from and after July 2, 1901. Section 3 of the special ordinance is as follows: "This ordinance shall take effect and be in force from and after its passage and due publication;" and, as it was passed on July 2, 1901, and

published on July 5, 1901, it was certainly in force on July 5, 1901. Therefore the special ordinance was not based upon a general ordinance which had not yet gone into effect, but was based upon a general ordinance which was already in force.

The objection is also made that the ordinances are void upon the alleged ground that they refer to no established grade, and establish no grade, and provide no way for legally establishing a grade, for sidewalks. Section 4 of the general ordinance provides "that, whenever such special ordinance shall have been passed by the city council, authorizing and ordering the construction of a sidewalk, such sidewalk shall be constructed in the following manner: The surface of the ground, upon which such sidewalk is to be laid, shall be graded by excavating or filling, and a smooth surface made for the bed of such sidewalk eight inches below the grade line of such sidewalk, as said grade line is established by the city council; that a layer of good sand six inches in depth shall be placed on the graded surface and properly tamped. Then upon such layer of sand shall be placed the brick, bringing sidewalk to grade," etc. Here is a reference to the grade line as "established by the city council." There was introduced in evidence an ordinance passed by the city council on August 25, 1899, establishing the grade for parts of certain streets in Spring Valley, including the street upon which the lots of appellant abut. The reference thus contained in section 4 to the grade line as established by the city council was sufficient, and the ordinance of August 25, 1899, showed what that grade was. It is not necessary that a sidewalk ordinance should fix the grade at which the sidewalk is to be laid, but a reference therein to the established grade of the street to be improved is a sufficient specification of the grade. *Claffin v. City of Chicago*, 178 Ill. 549, 53 N. E. 339; *Brewster v. City of Peru*, 180 Ill. 124, 54 N. E. 233. It is true that section 5 of the ordinance makes it the duty of the committee of the city council on streets and alleys, under whose direction and supervision the sidewalk is to be constructed, within a certain time after the passage of any ordinance authorizing and ordering the construction of a sidewalk, to have the line of the sidewalk thereon authorized surveyed, and the grade line thereof established and properly designated; but this provision merely empowered such committee to properly designate and mark the grade points which had previously been established by ordinance. If the intention of section 5 was not to authorize such committee to properly designate and mark the previously established grade points, but to actually establish a grade, then such provision in section 5 is void. This is so because the establishment of the grade is a legislative function, and must be exercised by the council, and therefore the power so to

establish the grade cannot be delegated by the city council to a committee, or other official of the city. *County of De Witt v. City of Clinton*, 194 Ill. 521, 82 N. E. 780. If, however, such provision in section 5 were void, as conferring power on a committee to fix the grade, yet it would have no effect in invalidating the provision, already referred to, contained in section 4. "It is a well-established rule in regard to by-laws and ordinances that, if a provision relating to one subject-matter be void and as to another valid, and the two are not necessarily or inseparably connected, it may be enforced as to the valid portion as if the void part had been omitted." *People v. City of Pontiac*, 185 Ill. 437, 56 N. E. 1114.

Objection is also made that the ordinances here under consideration did not require the owners to construct the sidewalk within 30 days after the ordinance came into force. Section 2 of the sidewalk act of April 15, 1875 (*Laws 1875*, p. 63), provides that the ordinance for the construction thereunder of a sidewalk "may require all owners of lots or parcels of land touching the line of said proposed sidewalk, to construct a sidewalk in front of their respective lots or parcels in accordance with the specifications of said ordinance, within thirty days after such publication, and in default thereof, said materials to be furnished and sidewalk to be constructed by said city, town or village," etc. 1 *Starr & C. Ann. St.* (2d Ed.) p. 858, c. 24, par. 430. The word "may," as here used, means "shall" or "must." "The word 'may' in a statute will be construed to mean 'shall' or 'must' whenever the rights of the public or of third persons depend upon the exercise of the power to perform the duty to which it refers; and such is its meaning in all cases where the public interests and rights are concerned, or where a public duty is imposed upon public officers, and the public or third persons have a claim de jure that the power shall be exercised. Or, as the rule is sometimes expressed, whenever a statute directs the doing of a thing for the sake of justice or the public good, the word 'may' will be read 'shall.'" 20 *Am. & Eng. Ency. of Law* (2d Ed.) pp. 239-242. In *James v. Dexter*, 112 Ill. 489, we said: "The word 'may' means 'shall' whenever the rights of the public or of third persons depend upon the exercise of the power, or the performance of the duty, to which it refers. *Kane v. Footh*, 70 Ill. 587; *Fowler v. Pirkins*, 77 Ill. 271." While the general ordinance which is made a part of the special ordinance for the construction of the sidewalk in this case does not specifically require the owners to construct the sidewalks in front of their respective lots within 30 days after the publication of the ordinance, yet it directs, in section 5, the committee on streets and alleys to notify the owner "that he or she is required to construct a sidewalk in front of such lot or

parcel of land in accordance with the specifications and requirements of this ordinance within thirty days after the publication of said ordinance, and in default thereof that such sidewalk shall be entirely constructed by the city of Spring Valley," etc. While it was unnecessary to require the committee to give the notice here provided for, yet the notice was to specify what the statute required. The statute says that the ordinance may require the owner to construct the sidewalk within 30 days after publication, while this ordinance requires the committee to notify the owner that he must construct the sidewalk within 30 days after the publication of the ordinance. Substantially, and in effect, the requirement of the sidewalk act has been complied with by the terms of the present ordinance. The testimony shows that, on July 8, 1901, written notice was served upon appellant, by the committee on streets and alleys, notifying her that, in pursuance of the ordinance here referred to, she was required to construct the sidewalk within 30 days from the date of the notice, that is, within 30 days from July 8, 1901. The appellant cannot complain that she did not have such notice as was provided for by the statute. She was allowed 30 days from July 8, 1901, to construct the sidewalk, instead of 30 days from July 5, 1901, when publication of the ordinance was made; but this defect in the time from which the 30 days were to run caused no injury to her, but rather operated to her advantage in extending the time. We are therefore of opinion that the objection to the ordinance in the respect thus considered was properly overruled.

Another objection made by the appellant is to the effect that there was no such officer in the city of Spring Valley as is described in said general ordinance as collector of special taxes, assessments, etc. Section 7 of the general ordinance provides that, upon the filing of the bill of costs in the office of the city clerk, the clerk shall prepare a special tax list, and "shall thereupon issue a warrant for the amount of the special tax so shown to be due, directed to the collector of special assessments and taxes, who shall proceed to collect said warrant," etc. Section 3 of the sidewalk act of 1875 provides that the clerk "shall thereupon issue warrants directed to such officer, as may be designated in such ordinance, for the collection of the amount of special tax," etc. 1 *Starr & C. Ann. St.* p. 858, c. 24, par. 431. In *Butler v. Nevin*, 88 Ill. 575, it was held that where the ordinance does not designate, as the statute requires, the officer to whom the warrant shall issue, such ordinance is not sufficient, and a warrant issued thereunder is absolutely void for want of power to issue the same. There was introduced in evidence an ordinance, dated August 2, 1898, creating the office of collector of special assessments, special taxes, and special taxes for the construction of sidewalks, and provid-

ing for his appointment by the mayor, by and with the advice and consent of the city council. There were also introduced in evidence proceedings of the council, which showed that the mayor appointed one Maurer as such collector, and that he gave bond in the sum of \$10,000, which was approved. The journal of the city council, and an ordinance book in which all the ordinances were transcribed, sufficiently showed that such ordinance was passed, and that the collector named therein was appointed by the mayor. The proof also shows that written demand for the payment of the special sidewalk tax against her property was made upon the appellant by Maurer, the collector. It follows that the objection in regard to the officer mentioned in the ordinance was properly overruled.

Objection is made that no proof of the publication of the ordinances was made. We find attached to the ordinances, as introduced in evidence, a certificate of publication by the city clerk, under the corporate seal of the city, certifying that the two ordinances passed and approved on July 2, 1901, were published in the Spring Valley Gazette in said city of Spring Valley on July 5, 1901. We are unable to see why this certificate of publication is not sufficient.

Objection is made that the ordinances do not provide for the approval of the construction of the sidewalk by any officer or board. Section 2 of the sidewalk act provides that the ordinance "may provide that the materials and construction shall be under the supervision of, and subject to the approval of some officer, or board of officers of such city, town or village, to be designated in said ordinance." Upon referring to the general ordinance in the case at bar, we find in section 5 the following provision: "Such sidewalk shall be constructed under the direction and supervision of the street and alley committee of said city;" and in section 10 we find the following: "All material and workmanship shall be to the satisfaction of said committee. No work defective in material or construction shall be considered as accepted, but shall be condemned, and taken up and re-built, or the defects otherwise remedied under the direction of said committee." We think that these provisions of the ordinance sufficiently comply with the requirement of the act upon this subject. The sidewalk was to be constructed under the supervision of the street and alley committee of the council, and the material and workmanship could not meet with the satisfaction of the committee unless they were approved of by the committee. The report, signed and sworn to by all the members of said committee, to the city clerk, shows the failure of the owner to construct the sidewalk, and that it was constructed by such committee, and the manner in which it was constructed, and the materials entering into its construction.

Objection is also made that the sidewalk here constructed with brick was of no benefit

to the property, and that, inasmuch as sidewalks already existed opposite appellant's property, and were torn up in order to construct the new sidewalk, the latter was not necessary. It is sufficient to say, in answer to this objection, that the determination by the city council that sidewalks should be constructed by special taxation is a determination that the property so specially taxed is benefited to the extent of the special tax. *White v. People*, 94 Ill. 604; *Craw v. Village of Tolono*, 96 Ill. 255, 36 Am. Rep. 143; *City of Springfield v. Green*, 120 Ill. 269, 11 N. E. 261; *Lightner v. City of Peoria*, 150 Ill. 80, 37 N. E. 69; *Payne v. Village of South Springfield*, 161 Ill. 285, 44 N. E. 105; *Illinois Central Railroad Co. v. People*, 170 Ill. 224, 48 N. E. 215; *Job v. City of Alton*, 189 Ill. 256, 59 N. E. 622, 82 Am. St. Rep. 448. Such determination by the city council must not be arbitrary or unreasonable, but it does not here appear that the ordinances in question are unreasonable or oppressive. As to the necessity of the improvement, that question is committed by law to the council, and the courts have no right to interfere, except in a case where it clearly appears that the discretion of the council has been abused. It does not so appear here. *McChesney v. City of Chicago*, 171 Ill. 253, 49 N. E. 548; *Walker v. Village of Morgan Park*, 175 Ill. 570, 51 N. E. 636; *Field v. Village of Western Springs*, 181 Ill. 186, 54 N. E. 929.

The judgment of the county court is affirmed. Judgment affirmed.

On Rehearing.

(Oct. 26, 1903.)

PER CURIAM. A rehearing was granted in this case to enable us to give further consideration to certain objections of appellant. One of these is that the city was bound to construct the entire line of walk upon each street before levying the tax upon any particular lot, for the reason that otherwise there might be unreasonable discrimination in the enforcement of the ordinance, and the city might select certain lots and construct sidewalks in front of them, and not build a continuous walk so as to give the owners the benefit of the entire improvement. On the hearing appellant offered to prove that the city had not built all the walks ordered by the ordinance to be constructed, and the court excluded the evidence.

The act under which the tax was levied authorizes a city to provide for the payment of the whole or any part of the cost of a sidewalk by special taxation of the lot, lots, or parcels of land touching upon the line where any such sidewalk shall be ordered, and provides that such special taxation may be either by a levy upon any lot of the whole or any part of the cost of making any such sidewalk in front of such lot, or by levying the whole or any part of the cost upon each of the lots or parcels of land touching upon

the line of such sidewalk pro rata upon each of said lots or parcels according to their respective values, or in proportion to their frontage upon the sidewalk, or in proportion to their superficial area. Hurd's Rev. St. 1899, p. 319, c. 24, § 284. If the cost is levied pro rata upon the several lots or parcels of land touching upon the line of the sidewalk according to their values, frontage, or superficial area, the entire sidewalk must be constructed before the apportionment can be made or the tax levied. If the cost of the sidewalk is to be apportioned upon the lots, a certified bill of costs cannot be made before the sidewalk is completed. *Craig v. People*, 193 Ill. 199, 61 N. E. 1072. Where the cost of making a sidewalk in front of a lot is levied upon such lot, the reason for the rule does not exist, and the rule does not apply. In such case each lot is independent of every other. The ordinance in this case provided for the construction of five different lines of sidewalk on different streets of the city, and the general ordinance provided that all sidewalks should be constructed by special taxation of the lot, lots, or parcels of land touching upon the line where the sidewalk should be ordered by levying upon each lot or parcel of land in front of and adjoining such sidewalk the total cost of that portion of such sidewalk in front of or adjoining such lot or parcel of land. Apparently, appellant would not be interested in the construction of sidewalks on other streets not adjacent to her property, except as citizens generally would be interested in such improvement. The offered evidence did not tend to show that the sidewalk as built in front of her property did not make a continuous line from one street to another, connecting with other sidewalks, or that there was any oppression or unreasonable discrimination against her. She did not offer to prove that her lots alone were selected for building the walks, and that her property did not receive all the substantial benefits of the improvement. There was no error in rejecting the evidence.

It is further urged that the sidewalk, as built, was four inches wider than the ordinance prescribed, making a slight difference in the amount of the tax. The ordinance prescribed the width of the sidewalk, and the general ordinance fixed the manner of construction and provided for setting on the inside and outside lines one course of brick on end as a curb. The alleged extra width consisted of this curb, and, if it could be regarded as a departure from the sidewalk provided for, it was not a substantial departure.

The objections called to our attention in the petition for rehearing are not such as to call for a change of the judgment heretofore entered, and it is ordered that said judgment affirming the judgment of the county court be re-entered, and stand as the judgment of the court.

Judgment affirmed.

(304 Ill. 402)

CITY OF KEWANEE v. OTLEY et al.

(Supreme Court of Illinois. Oct. 23, 1903.)

WATER COURSES—POLLUTION—INJUNCTION—REMEDY AT LAW—JUDGMENT—BAR—DRAINS FOR MUTUAL BENEFIT—JOINT TORT FEASORS.

1. The granting or refusal of an injunction rests in the sound discretion of the trial court, and its action cannot be disturbed in the absence of an abuse of such discretion.

2. Equity will enjoin the pollution of a stream flowing through plaintiff's lands, and he is not compelled to bring an action at law.

3. Where the sewage of a city, or part thereof, combined with tainted water flowing from other sources, was mingled with the waters of a stream flowing on plaintiff's land, creating a nuisance to plaintiff's injury, a judgment in trespass on the case was not a bar to a subsequent suit in equity to enjoin the city, but such judgment would be deemed to afford compensation only for the injury to the time of the judgment.

4. Where plaintiff complained of the pollution of a stream flowing on his land by sewage from the land above, and a tile to carry the sewage was laid across plaintiff's land with his consent, on such tile becoming inadequate he was not precluded from enjoining the pollution.

5. An oral agreement by the owner of land to the laying of tile across the land for carrying sewage which had been polluting a stream flowing thereon, did not estop the owner from seeking to enjoin pollution of the stream subsequently caused by the inadequacy of the tile, as the oral consent vested no irrevocable right.

6. The owner of land having complained to a manufacturing company that sewage from its plant polluted a stream flowing on plaintiff's land, the company, with plaintiff's consent, laid a tile across plaintiff's land to carry the sewage. A city having subsequently directed its sewage to such tile, it proved insufficient, and plaintiff sought to enjoin the city from polluting the stream. *Held*, that the city could not invoke Act July 1, 1889 (Starr & C. Ann. St. 1896 [2d Ed.] c. 42, pars. 228-231), limiting the time within which an agreement by adjoining land-owners for a drain for the mutual benefit may be withdrawn, as section 2 of said act expressly declares that it shall not be lawful for either of the parties interested to permit any other person to connect with the drain, and that a person so connecting may be enjoined by either party.

7. Though other sources than that of defendant city may have contributed to the pollution of a stream complained of, such fact was no defense to the city if it contributed to the nuisance sought to be enjoined.

8. A bill to enjoin pollution of a stream alleged that defendant city had constructed drains which discharged polluted water on plaintiff's land and in the stream flowing thereon, rendering it unsuitable for the purposes to which it was adapted, namely, pasturage, cultivation, and building lots for residences; that said lands are arable lands, and were used for farming purposes and for pasturage; and that lots laid out thereon were suitable for building purposes, and would be valuable therefor, but for the nuisance created by said sewage, which occasioned the complainant great loss and irreparable injury. *Held* that, while the allegations of injury were somewhat general, they were sufficient.

Appeal from Circuit Court, Henry County; Frank D. Ramsay, Judge.

Bill by Robert Otley and others against the city of Kewanee to enjoin the pollution of a stream. From a decree in plaintiffs' favor, defendant appeals. Affirmed.

This action was begun at the November term of the circuit court of Henry county,

1900, and is a bill for injunction against the city of Kewanee to restrain it from discharging certain offensive sewage upon the lands of appellees, which adjoin said city on the east. The bill alleges that a stream of water has its source upon the tract of land upon which the city is located, and in the natural course of drainage flows across the lands of appellees described in the bill; that the stream in its natural state is suitable for drinking purposes, and renders the pasture lands of the appellees, through which it flows, valuable; that the defendant city, without the consent of appellees, has constructed drains and sewers, which discharge upon the said premises of appellees noxious, filthy, and polluted waters, defiling said stream, and rendering it unsuitable for the purposes to which it is adapted, viz., pasturage, cultivation, and building lots for residences; that the said lands are arable lands, and are used for farming purposes and for the pasturage of horses, cattle, and hogs; that lots laid out thereon are suitable for building purposes, and would be valuable therefor, but for the nuisance created by said sewage, which, by emitting injurious and offensive odors, creates a nuisance to the neighborhood, and occasions the complainants great loss and irreparable injury; that quite a number of residences, in which people reside, are in the immediate vicinity of the nuisance complained of; that by reason of said nuisance complainants are obstructed and hindered in and about the cultivation of their crops; that by reason of the discharge complained of the waters of said stream are rendered injurious to the animals pasturing upon said lands to such an extent as to deprive complainants of the beneficial use of the said pasture for stock purposes; and that, if the same is permitted to be continued, complainants will suffer great loss. Demurrer was filed to the bill and overruled. A plea in bar was then filed, setting up that after the matters alleged in the bill, to wit, on May 26, 1899, complainant Robert Otley, having filed suit in trespass on the case against the defendant for damages to the same lands and for the same causes alleged in the present suit, obtained a judgment against the defendant for \$400. This plea was demurred or excepted to, which exception was sustained. Answer was then put in, and the defense set up in the plea was renewed and replication filed and issues joined. Appellee testified that before the said nuisance was created there was good spring water on said premises, used by him for stock purposes and for drinking water, which uses were destroyed by reason of said nuisance. The cause was referred to the master to take proof and report conclusions. The master, in his report, found all the contentions in favor of the appellees, and recommended that the relief asked be granted. Exceptions were filed to the report and overruled, and a decree entered perpetually enjoining appellant

from discharging or allowing to be discharged upon the premises of appellees the waters and sewage complained of.

Northwest of the lands of appellees is located the plant of the Western Tube Company, where are employed in the neighborhood of 2,500 persons. From this plant there is a natural depression, extending through the city to and across the lands of appellees. Into this depression the water of the southeastern portion of the city, as well as the water from the tube company, naturally drains, and said drainage leads to the stream extending through the lands of appellees. From the tube company's works to the Otley lands this depression crosses some five or six streets of the city, and at the street intersections culverts have been placed by the city, said culverts in some cases extending clear across the street, in others just across the traveled road. The lots along this course have been gradually filled in, and by a gradual development there has come to be a continuous line of tile or sewer pipe drainage extending from the grounds of the tube company down this natural waterway, and discharging into a manhole on the east side of East street (the west boundary of the Otley lands), and three or four rods north of the Otley open ditch. Tiles or drains along some of the streets crossed by this line of drainage connect with it for the purpose of carrying off the surface water of the streets, and on other streets are grated openings for allowing the surface water to flow into the drain in question. From the manhole above mentioned a twelve-inch tile extends to and discharges into the Otley ditch. From the same manhole an eight-inch sewer tile extends east and across the Otley lands, and is just north of the open ditch through said lands. The Haxtum Steam Heating Company was the predecessor of the Western Tube Company, and long prior to the establishment of the drain above spoken of extending from the tube company's works to the Otley lands the Haxtum Company sent its drainage down this depression. After the establishment of the tube company large quantities of crude petroleum and oil were used for fuel, and tallow was used on the rolls of the company, and quantities of acid were used in the galvanizing department. The oily, greasy, acid refuse from the tube company formed oily deposits along the ditch across the Otley lands. About 10 years prior to the commencement of this suit the nature of this drainage had become such that Otley made complaint to the tube company, and as a result the sewer tile above mentioned was laid across the Otley lands. There is conflict in the evidence as to just what was the understanding of the parties at the time this tile was put in. Otley claims that at that time he stated that the eight-inch tile was insufficient. The master found that said tile was put in as an experiment, merely, by the joint action of the village of Kewanee and

the tube company, to which finding exception was taken and overruled. After several years this tile became clogged up, so that the discharge from the drain from the direction of the tube company's works no longer passed through it, but passed from the manhole, through the twelve-inch tile spoken of, down into and through the Otley open ditch, where it has since been running, except for a short time after the eight-inch tile had been at one time taken up, cleaned, and relaid. In May, 1899, Otley sued the city for damages resulting from this discharge above spoken of, and recovered the judgment already designated in the plea of defendant. The city offered to again have this eight-inch tile spoken of cleaned, but Otley refused, claiming it was useless to do so.

Robert C. Morse, City Atty., Theron H. Chesley, and Charles K. Ladd, for appellant. Jas. K. Blish and Wilson & Moore, for appellees.

RICKS, J. (after stating the facts). Counsel for appellant argue that the allegations of complainants' bill are of such a general nature that the aid of equity cannot be invoked in behalf of appellees; that the injury complained of is simply a pecuniary one, susceptible of being compensated by a judgment for damages; and hence the allegations are not such as will sustain a bill in equity seeking an injunction. The whole contention seems to be that the case presented is not one for equitable interference. The master to whom the case was referred found that upon the tract of land upon which said city is located a stream of water has its source, which, in its natural state, flows down and across the parcels described as belonging to appellees; the water of which stream, in its natural state, is pure and wholesome for drinking purposes for stock; that on said premises is a spring of pure water, which is discharged into said stream, affording a good and sufficient supply of pure water for stock; that the city, without the consent of the appellees, has constructed certain drains and sewers, which discharge upon the lands of appellees certain noxious, filthy, and polluted waters, in which are carried great quantities of poisonous acid and oily and greasy substances, defiling said stream, and rendering it unfit and unsuitable for the uses and purposes aforesaid, and emitting noxious, injurious, and offensive odors, so as to create a nuisance which is offensive to the neighborhood, making an irreparable injury to the waters, and that the city threatens to continue indefinitely to discharge said polluted waters upon the lands described; that on the lands in question was a spring of pure water, which was becoming unfit to use for stock purposes by being defiled by the water flowing over said lands from said sewer, the water from the sewer flowing into or backing up into the spring; that the water from the said sewer injuriously affected cattle and hogs; that urch-

nals in the yards of the Western Tube Company were connected with the sewer, and that certain manholes or street inlets took into the sewer the refuse water of the street. Samples of the water flowing from the sewer in question were admitted in evidence, and the evidence unmistakably showed that it was of a composition positively injurious to persons or animals. Exceptions to the master's report were overruled by the chancellor, who found the equities of the case were with the complainants, and that they were entitled to the relief asked.

From a review of the evidence we are of the opinion that the master was amply justified in reaching the conclusions embodied in his report, and the chancellor did not err in overruling the exceptions to said report. The granting or refusal to grant an injunction rests in the sound discretion of the trial court, and its action cannot be disturbed, in the absence of clear proof of an abuse of such discretion. *Platt v. Waterbury*, 72 Conn. 531, 45 Atl. 154, 48 L. R. A. 691, 77 Am. St. Rep. 335. As indicated above, we are of the opinion, not only that there has been no abuse of the discretion which the law vests in an equity judge, but that there has been a proper application of equity principles in the case at bar.

Counsel for appellant argue that the judgment at law for damages which was set up in the answer should have been held to be a bar to the relief sought in the present bill; that the damage complained of was not of a character to furnish ground for equitable relief by injunction; that it is capable of compensation by a judgment at law; that the injury complained of is of a permanent nature, and that future, as well as present or past, damages are recoverable in a single action, and in such case but one recovery can be had. This contention, we think, is not consonant with better reason, nor in harmony with the adjudicated cases. In the case of *Barton v. Union Cattle Co.*, 28 Neb. 250, 44 N. W. 454, 7 L. R. A. 457, 26 Am. St. Rep. 340, the injury complained of was the pollution of a water course, and the court there said: "I do not deem it necessary to discuss the question whether the plaintiffs have a remedy by an action at law, for I understand it to be settled by the authority of the cases cited, as well as many others, that a continuing nuisance by polluting the waters of a stream, and others of a like character, may be proceeded against either in law or in equity, at the election of the injured party"—citing *Webb v. Portland Mfg. Co.*, 3 Sumn. 189, Fed. Cas. No. 17,322; *Angell on Water Courses*, § 444, and cases there cited.

A case that has been often cited and adhered to as presenting a clear and correct exposition of the principles of law applicable in cases analogous to the present is that of *Holsman v. Boiling Spring Bleaching Co.*, 14 N. J. Eq. 335, in which it is said: "Every owner of land through which a stream of water flows is entitled to the use and enjoyment of

the water, and to have the same flow in its natural and accustomed course, without obstruction, diversion, or corruption. The right extends to the quality as well as the quantity of the water. The Court of Chancery has a concurrent jurisdiction with courts of law, by injunction, equally clear and well established in cases of private nuisances; and it is a familiar exercise of the power of the court to prevent by injunction injuries to water courses by obstruction or diversion. * * * A disturbance or deprivation of that right [to the use and enjoyment of the water in its natural state] is an irreparable injury, for which an injunction will issue. * * * Where the nuisance operates to destroy health or to diminish the comfort of a dwelling, an action at law furnishes no adequate remedy, and the party injured is entitled to protection by injunction. * * * It is urged that the right of the complainant is not clear, and must therefore be fully established at law before an injunction will issue. Where the complainant seeks protection in the enjoyment of a natural water course on his land, the right will ordinarily be regarded as clear, and the mere fact that the defendant denies the right by his answer, or sets up title in himself, will not entitle him to an issue before the allowance of an injunction."

In the case of *Butler v. Village of White Plains* (Sup.) 69 N. Y. Supp. 193, the defendant village operated a sewerage disposal plant, the effluent from which was deposited in a river on which the plaintiff was a lower riparian owner. Such discharge at times produced a foul and offensive odor over the plaintiff's lands, and polluted the waters of the stream. It was held that, as plaintiff had a right to the reasonable use of the river in its natural flow and purity, the injury was a continuing nuisance, and hence, though plaintiff might have an adequate remedy at law for the damages already suffered, equity would restrain the same to prevent a multiplicity of suits.

In the case of *Merrifield v. Lombard*, 13 Allen, 16, 90 Am. Dec. 172, it was held that any user of a stream by an upper proprietor, which substantially diminishes its volume or defiles or corrupts it to such a degree as essentially to impair its purity and prevent the use of it for any reasonable and proper purpose to which running water is usually applied, is improper, and will be enjoined; that the acts of the defendant tended to create a nuisance of a continuous and constantly recurring nature, for which an action at law would furnish no adequate relief; and a perpetual injunction was granted.

The contention of appellant's counsel that the judgment at law heretofore alluded to is a bar to the present action we regard as unsound. From the cases cited in this opinion it is clear that the courts have regarded acts such as are complained of in the case at bar proper subjects of equity jurisdiction, and such a nuisance as is here sought to be

enjoined as continuous and constantly recurring, rather than permanent. In the case of *Butler v. Village of White Plains*, supra, the right of a lower riparian owner to enjoy, unpolluted from the sewerage of the village, the waters of a stream, was in question, and it was held that such owner had a right to the reasonable use of the river in its natural flow and purity, and the injury was a continuing nuisance; and hence, though he might have an adequate remedy at law for damages already sustained, equity would interfere to prevent a multiplicity of suits. In *Merrifield v. Lombard*, supra, it was held that the corruption of a stream which prevented its use for any reasonable and proper purpose to which running water is usually applied was a nuisance of a continuous and constantly recurring nature, and for which wrong an injunction would lie. In cases of this character courts of law and equity have concurrent jurisdiction. *McCallum v. Germantown Water Co.*, 54 Pa. 40, 93 Am. Dec. 656; *Gardner v. Newberg*, 2 Johns. Ch. 161, 7 Am. Dec. 526; *Proprietors of Mills v. Water Supply Co.* (Mass.) 21 N. E. 761, 4 L. R. A. 272. When a nuisance is regarded as a continuing, rather than a permanent, one, judgments at law are held to afford compensation only for the injury sustained to the time of such judgment, and a continuance of the nuisance is a grievance for which subsequent actions may be maintained. *Schlitz Brewing Co. v. Compton*, 142 Ill. 511, 32 N. E. 693, 18 L. R. A. 390, 34 Am. St. Rep. 92; *Chicago, Burlington & Quincy Railroad Co. v. Schaffer*, 124 Ill. 112, 16 N. E. 239; *McConnel v. Kibbe*, 29 Ill. 485; *Illinois Central Railroad Co. v. Grabill*, 50 Ill. 241. But should the injured party desire to avoid a multiplicity of suits, and to have the nuisance abated, equity alone affords him an adequate remedy, and in this case the judgment pleaded is no bar to the relief sought.

Nor is the contention in accordance with what has generally been understood to be the rule applicable to such cases. In the earlier cases and text-books relative to nuisances and equitable relief relating to them the rule was commonly announced that before relief by injunction would be granted the person injured should establish the fact of the nuisance by an action at law. This rule, however, has been departed from in this state, and we have held that, where the facts establishing the nuisance were clear, and there was no substantial doubt as to the right of relief against an existing nuisance, equity would assume jurisdiction in the first instance (*Village of Dwight v. Hayes*, 150 Ill. 273, 37 N. E. 218, 41 Am. St. Rep. 367), and we are unwilling to now go to the other extreme, and hold that the establishment of the fact of a nuisance by an action at law is a bar to a proceeding in equity.

The case at bar, however, we think, is even stronger for appellees than is necessary to bring it within the principle as above laid

down. The principle of law which contemplates that damages sustained for a permanent injury to land shall be recovered in one action is applicable only to those cases where the party or agent committing the injury acts within the authority of the law. In this case, when the sewage of the defendant city, or any part thereof, though combined with sewage or deleterious waters from other sources, was cast upon the lands of appellees, or mingled with the waters of a stream running over the same, so that a nuisance was created as to appellees, and they were injured thereby, such act of the defendant was unlawful, and it could not be sanctified by time. Nor could it be said that such a nuisance was a permanent one, for it would be the duty of its authors to have it abated. *Proprietors of Mills v. Water Supply Co.*, supra; *Irrigation Co. v. Canal Co.*, 16 Utah, 246, 52 Pac. 168, 40 L. R. A. 851, 67 Am. St. Rep. 607. If, however, it be regarded that the eight-inch tile across appellees' land was originally provided as a satisfactory arrangement for the carrying off of this objectionable sewage, but, as a matter of fact, it subsequently became inadequate for such purpose, even then appellees would not be precluded from obtaining relief, upon proof of such inadequacy and damage resulting therefrom, and a prior judgment for damages would be no bar to the present action. In such case appellees would not be bound to assume that the provision made to protect them from damage, if found to be inadequate, would be a permanent one, but it would be the duty of the proprietors of the land above them, who sought to cast this burden upon appellees' land, to make whatever provision was necessary to save them free from injury, and the moment that this was not done a right of action would be created in appellees. *Chicago, Burlington & Quincy Railroad Co. v. Schaffer*, 124 Ill. 112, 16 N. E. 239.

There is some conflict in the evidence as to the original position assumed by appellees in regard to this tile; but, even if there were none, and the version of their relation as given by appellant be taken as correct, even then there could be no estoppel, as a mere parol consent for the pollution of a stream or the creation of a nuisance vests no right not capable of revocation at any time. *Village of Dwight v. Hayes*, 150 Ill. 273, 37 N. E. 218, 41 Am. St. Rep. 367; *Barrett v. Mount Greenwood Cemetery Ass'n*, 159 Ill. 385, 42 N. E. 891, 31 L. R. A. 109, 50 Am. St. Rep. 168. The right of drainage through the lands of another is an easement requiring for its enjoyment an interest in such lands, which cannot be conferred except by deed or conveyance in writing. *Pifer v. Brown*, 43 W. Va. 412, 27 S. E. 399, 49 L. R. A. 497; *Tanner v. Volentine*, 75 Ill. 624. The subject of such an agreement would be within the statute of frauds, and void, not being in writing. Such is the rule at common law, and such rule obtains and is applicable in this

state to all cases except those coming within the provisions of the act entitled "An act declaring legal drains heretofore or hereafter constructed by mutual license, consent or agreement, by adjacent or adjoining owners of land, and to limit the time within which such license or agreement heretofore granted may be withdrawn," approved June 4, 1889, in force July 1, 1889 (Laws 1889, p. 116), which act is paragraphs 228-231 of chapter 42 of the second edition of *Starr & C. Ann. St.* 1896, and relates to the construction of drains by mutual license, and is invoked by appellant, which insists that appellees are estopped by virtue of that act and certain facts insisted upon by it as bringing the case within said act. Section 1 (paragraph 228) of that statute provides: "That whenever any ditch or drain, either open or covered, has been heretofore or shall be hereafter constructed by mutual license, consent or agreement of the owner or owners of adjoining or adjacent lands, either separately or jointly, so as to make a continuous line upon, over or across the lands of said several owners, or where the owner or owners of adjoining or adjacent lands shall hereafter by mutual license, consent or agreement, be permitted to connect a drain with another already so constructed, or where the owner or owners of the lower lands has heretofore or shall hereafter connect a drain to a drain constructed by the owner or owners of the upper lands, then such drains shall be held to be a drain for the mutual benefit of all the lands so interested therein."

The evidence discloses that Emerit Baker was vice president of the Western Tube Company, and that appellees made complaint of the character of the sewage coming from the plant of that company and cast upon appellees' lands; that portions of the city and the lands of many holders lay between the lands of the tube works and appellees' lands, and the sewage from the tube works went through a line of natural drainage until it reached appellees' lands. Baker recognized the justness of appellees' complaint, and undertook to remedy the difficulty, and proposed to appellees to lay, and did lay, across appellees' lands, outside the course of natural drainage, or rather outside the ditch and natural way, but along the course of the natural fall, 3,900 feet of 8-inch sewer pipe, which was paid for by the Western Tube Company. This pipe was carried back to a sort of manhole or catch-basin, where the drainage would be gathered, and conducted thence through the sewer pipe. This manhole or catch-basin was about two rods away from the branch or natural waterway. After this sewer was thus constructed, the residents along the line of natural drainage between the Western Tube Company's works and appellees' lands began to drain their lands into the drains, and the citizens, together with the city (the city and the land and lot owners paying the expense thereof),

practically constructed a system of sewerage, consisting principally of regular sewer pipe, most of which was 24-inch tile, and connected the same with the said manhole near appellees' premises, so that the 8-inch tile through appellees' lands was required not only to take care of the sewage coming from the Western Tube Company, but to take care of all the sewage, including the rainfall, the house and other sewage, of that portion of the city lying between the tube company's works and appellees' lands, in consequence of which the tile laid by the tube company on appellees' lands became filled and stopped up, so that it would not carry the sewage, or any considerable portion of it. This manhole or catch-basin, where the sewage was accumulated and to be discharged into the sewer pipe across appellees' lands was also situated in the line of the natural depression, and so near the ravine and spring branch forming the natural drainage that when the sewer pipe would not receive and carry the sewage across appellees' lands it sought the course of natural drainage, and was drained down the ravine and spring branch, as complained of in the bill. There is no pretense that Baker was acting for the city, or for anybody except the Western Tube Company, and any agreement or arrangement that he might have made with the appellees would not authorize appellant to construct a public system of sewerage that should carry obnoxious matter and the general sewage of the city into this same drain.

Section 2 of the statute that is here invoked, which is paragraph 229 of chapter 42, Starr & C. Ann. St. 1896, provides: "It shall not be lawful for either of the parties interested in said drain to authorize any other person or persons to connect therewith without the consent of all the parties interested in said drain, and all drains connecting therewith without such permission shall be unlawful, and any person interested, may by bill in chancery, compel the person or persons constructing such unlawful drain to fill the same up and in addition may have a right of action for all damages occasioned thereby." Appellant does not claim to have had appellees' consent to thus connect with the line of sewer pipe laid across appellees' land by the Western Tube Company, and, while the evidence tends to show the tube company co-operated with the city and the property owners between the tube company's works and the land of appellees in the construction of the drains that were afterwards carried to the manhole above mentioned, this clearly was contrary to section 2, supra, of the act relied on, as such connection could not be made "without the consent of all parties interested in said drain." When this statute is considered all together, it is very clear that it cannot in any way benefit appellant; but, if it is to be given any effect at all it would be favorable to the relief claimed by appellees.

The further contention of counsel for appellant, that the objectionable sewage came from some other source than that of appellant, is also untenable. It was found by the master that the defendant had constructed sewers which discharged the objectionable matter referred to upon the lands of appellees. We are unable to say that such finding was not warranted by the evidence. Though other sources than that of the defendant city may have been responsible for the collection of this objectionable sewage, such fact furnishes no defense to the defendant here, if it in fact contributed to the nuisance complained of, and participated in the pollution of the waters that caused injury to appellees. *Richmond Mfg. Co. v. Atlantic, etc. Co.*, 10 R. I. 106, 14 Am. Rep. 658; *City of Mansfield v. Hunt*, 19 Ohio C. C. 488; *Attorney General v. Leeds*, L. R. 5 Ch. 583; *Paper Co. v. Pope* (Ind. Sup.) 57 N. E. 721, 56 L. R. A. 899; 28 Am. & Eng. Ency. of Law, 968; *Village of Kewanee v. Ladd*, 68 Ill. App. 154; *Barrett v. Mount Greenwood Cemetery Ass'n*, 159 Ill. 385, 42 N. E. 891, 31 L. R. A. 109, 50 Am. St. Rep. 168; *Watson v. New Milford*, 72 Conn. 561, 45 Atl. 167, 77 Am. St. Rep. 345.

Counsel for appellant also contend that the allegations of complainants' bill are not such as show the kind of injury to them necessary for the interposition of a court of equity by injunction. While the allegations of injury in the bill are to some extent general, we think the personal injury to appellees is made sufficiently explicit, and by the evidence so clearly established that relief ought not to be denied. The bill alleges that the injury complained of is such as to constitute a nuisance on the lands of complainants, rendering them unfit for the uses to which they have been placed, depreciating their value, and depriving the appellees of great gains and profits; that the stream thereon is polluted by the objectionable sewage, and that noxious, injurious, and offensive odors are thereby created. The evidence unmistakably shows that the sewage complained of was such as to pollute the stream on appellees' land, rendering the waters thereof extremely deleterious to man and beast. The books are full of cases holding that equity jurisdiction is properly invoked to afford relief to a lower riparian owner where an upper proprietor defiles or corrupts a stream to such a degree as essentially to impair its purity, and prevent its use for any reasonable and proper purpose to which running water may be applied. It is the right of every owner of land over which a stream of water flows to have it flow in its natural state, and with its quality unaffected. The right to a stream of water is as sacred as a right to the soil over which it flows. It is a part of the freehold, of which the owner cannot be disseised except by due process of law; and the pollution of a stream constitutes the taking of property, which may not be done without

compensation. *Gardner v. Newberg*, 2 Johns. Ch. 161, 7 Am. Dec. 526; *Simmons v. Paterson* (N. J. Err. & App.) 45 Atl. 995, 48 L. R. A. 717, 83 Am. St. Rep. 642.

In accordance with the views above expressed, the decree of the lower court is affirmed. Decree affirmed.

(204 Ill. 352)

BODDIE v. BREWER & HOFMANN BREWING CO. et al.

(Supreme Court of Illinois. Oct. 26, 1903.)

LANDLORD AND TENANT—LEASE—LEGALITY OF OBJECT—GAMBLING HOUSE—JUDGMENT FOR RENT—INVALIDITY—RECOVERY OF RENT.

1. Where the hearing was in open court, and the testimony of the witnesses, who were numerous, was conflicting, a court of review will not reverse for error of fact.

2. Under Cr. Code, §§ 127, 135, which make it a penal offense to knowingly rent property for use as a gambling house, and provide that all judgments recovered upon agreements entered into contrary to the provisions of the act of which those sections form a part may be set aside in equity, equity has power to set aside a judgment recovered upon a lease of property for use as a gambling house, where the legality of the contract was not set up or adjudicated in the suit at law, though the lessee knew that the lessor was aware of the purpose for which the premises were leased before the judgment at law was rendered.

3. In a suit to avoid such judgment, equity will not decree repayment of former similar rents collected by enforcing former judgments therefor.

Appeal from Appellate Court, First District.

Bill by Brewer & Hofmann Brewing Company and others against John T. Boddie to set aside certain judgments at law. From a decree of the Appellate Court (107 Ill. App. 357) affirming a decree for plaintiffs, defendant appeals. Affirmed.

Loesch Bros. & Howell, for appellant. Edward Maher, for appellees.

HAND, C. J. This is an appeal from a judgment of the Appellate Court for the First District affirming a decree of the circuit court of Cook county setting aside two judgments of the superior court of the said county—one for \$1,750, rendered March 13, 1897, and one for \$5,794.42, rendered March 16, 1899—the former of which had been affirmed by the Appellate and Supreme Courts. The judgments were for installments of rent due upon a lease executed by the appellant to the appellee company and others, bearing date February 3, 1893, of the premises known as 130 South Clark street, in the city of Chicago. The lease stated the premises were to be used for saloon purposes only. It was, however, averred in the bill that the purposes for which the premises were to be used were not truthfully stated in the lease, but that the same were to be used as a gambling house, and that they were so used

by the lessees with the knowledge and consent of the lessor.

Two propositions only are asserted by the appellant and urged in his brief as grounds for a reversal: First, the weight of the testimony does not support the finding of the decree that the premises named in the lease were rented for gambling purposes; second, appellees' liability to pay the two judgments in question is *res judicata*, and equity cannot grant relief therefrom. We have read the record with care, and are of the opinion the chancellor was justified in finding the premises were rented to be used as a gambling house, and were used as a gambling house with the knowledge and consent of the appellant. A review of the testimony of the witnesses who testified upon that subject, who were numerous, and whose testimony was conflicting, would serve no useful purpose. Where the hearing, as here, was in open court, and the testimony of the witnesses, who were numerous, was conflicting, a court of review will not reverse for error of fact, unless the error is palpable. *Fabrice v. Von der Brelle*, 190 Ill. 460, 60 N. E. 835.

The appellees, when sued, appeared, and filed pleas to each of the actions in which the judgments sought to be set aside were recovered, and said judgments were each based upon the verdict of a jury after a trial. The defenses, however, interposed were other than that said premises were leased for the purpose of carrying on therein a gambling house, and the defense that said premises were leased for that purpose was not interposed until the filing of this bill. In *Harris v. McDonald*, 194 Ill. 75, 62 N. E. 310, it was held that under sections 127 and 135 of the Criminal Code, which make it a penal offense to knowingly rent property for use as a gambling house, and provide that all judgments recovered upon agreements entered into contrary to the provisions of the act of which those sections form a part may be set aside in equity, equity has power to set aside a judgment recovered upon a lease of property for use as a gambling house, where the legality of the contract was not set up or adjudicated in the suit at law. In that case the judgment debtor did not know that the premises were knowingly leased for a gambling house before the judgment sought to be set aside was rendered, while here it did. As the defense could have been interposed in the actions at law in which the judgments sought to be set aside were rendered, did the fact that the appellee company knew the premises were leased for use as a gambling house make it necessary that it should plead that fact when sued for rent upon the lease, or could it appear and interpose other defenses to the actions, and, after judgments had been rendered against it, raise the question that the premises had been leased for use as a gambling house by bill in equity to set aside the judgments? We think, under the authority of *Mallett v. Butcher*, 41 Ill.

¶ 2. See *Gaming*, vol. 24, Cent. Dig. § 88.

382, Lucas v. Nichols, 66 Ill. 41, West v. Carter, 129 Ill. 249, 21 N. E. 782, and Harris v. McDonald, supra, it could. In the Mallett Case, which was a bill in equity to set aside a judgment on a note given for money lost at gambling, it was said (page 385): "Great reliance is placed on the case of Abrams v. Camp, 3 Scam. 290, where, under this same law, this court held that relief in such case would not be granted against a judgment at law when a party permitted a judgment to pass against him without setting up his defense. We cannot receive this as the rule in cases arising under this statute. That is *sui generis*, and provides for special cases, and must be executed with reference alone to itself, and under it we are free to say that neglecting to set up the statute at law does not preclude a party claiming the benefit from a resort to chancery for relief. It was the intention of the Legislature to make all judgments, like the contracts on which they were founded, absolutely void—of no vitality—and they cannot be vitalized by the action of any court." And in the West Case the court said (page 254, 129 Ill., and page 872, 21 N. E.): "It can make no difference that a defense was or might have been made in the suit at law to recover judgment upon the illegal contract." And in the Harris Case, which was the last expression of this court upon the subject, it is said (page 80, 194 Ill., and page 312, 62 N. E.): "It is not a sufficient defense to the bill to prove that the complainant appeared and defended in the suit at law in which the judgment was rendered, it appearing that the illegality of the contract, under the statute alleged in the bill as a ground for relief, was not set up or adjudicated in the action at law." In the cases above referred to the general doctrine is recognized that, where a party has a defense to an action at law, and he fails to make it, or fails to bring forward his entire defense, a court of equity will not relieve him; but it is said cases falling within the statute passed for the purpose of prohibiting gambling are, by force of section 135 of that statute, taken out of the general rule.

The appellee company has assigned as cross-error the action of the court in refusing to decree to it the repayment of certain sums of money which it had been forced to pay the appellant upon executions issued upon certain other judgments recovered against it for prior installments falling due as rent by the terms of said lease. The court did not err in declining to decree the repayment of said sums to the appellee. The appellee having knowingly entered into a lease prohibited by the Criminal Code, a court of chancery will leave it where it finds it, and will not interpose to assist it in recovering back money paid by it in furtherance of such unlawful leasing, although the payment was coerced by an execution issued upon a judgment at law. *Shaffner v. Pinch-*

back, 133 Ill. 410, 24 N. E. 867, 23 Am. St. Rep. 626.

The judgment of the Appellate Court will be affirmed. Judgment affirmed.

(204 Ill. 356)

CITY OF CHICAGO v. SMITH et al.

(Supreme Court of Illinois. Oct. 26, 1903.)

APPEAL AND ERROR—INTERMEDIATE COURT—FINDINGS OF ACT—CONCLUSIVENESS ON FURTHER APPEAL.

1. Where, in an action by a city for conversion of certain water pipes, the agreed facts on which the case was tried did not stipulate the ultimate fact as to whether the pipes were fixtures or not, but contained only the evidentiary facts from which such question was to be determined, a finding of the Appellate Court, on reversing a judgment of the circuit court, that such pipes were fixtures, and therefore belonged to defendants, was conclusive on the Supreme Court on a further appeal.

Appeal from Appellate Court, First District.

Action by the city of Chicago against Jacob P. Smith and others. From a judgment of the Appellate Court (107 Ill. App. 270) reversing a judgment of the circuit court in favor of defendants and entering judgment in defendants' favor for an increased sum, plaintiff appeals. Affirmed.

Charles M. Walker, Corp. Counsel, and William D. Barge, Asst. Corp. Counsel, for appellant. Chester Firebaugh, Stephen A. Foster, and John Barton Payne, for appellees.

BOGGS, J. The declaration was in trover by appellees against the appellant city to recover the value of a Hersey meter and certain six-inch and four-inch water pipes and hydrants and appurtenances thereunto belonging, the property of the appellees, alleged to have been converted to its own use by the city. There was but a single plea, that of not guilty. The cause was submitted upon the following stipulation of facts:

"It is hereby stipulated and agreed between the respective parties to the above and foregoing suit that the following facts are true, and are admitted by both parties to the above suit to be true, as hereinafter set forth:

"First. That at all the various times in the declaration mentioned the plaintiffs constituted a voluntary association, doing business as the West Pullman Land Association, under articles of agreement set out in 'Exhibit X' attached hereto and made a part hereof, and that the plaintiffs and the American Trust & Savings Bank at all said times sustained to each other the relation of cestui que trust and trustee, the latter at all said times holding in fee simple, in trust as aforesaid, for the plaintiffs, the northeast quarter of section 29, township 37 north, range 14 east of the third principal meridian, in Cook county, Illinois, except as conveyed as hereinafter

stated; the agreement in relation to said trust being also contained in the said 'Exhibit X,' hereto attached. That said premises above described, until their annexation to the city of Chicago, hereinafter mentioned and admitted, did not form any part of any incorporated village, town, or city, but until said annexation were a part of the unorganized township of Calumet, in said county of Cook.

"Second. That on August 22, 1892, a subdivision of all of said premises herein described was made, and a plat thereof duly filed and recorded in the recorder's office of Cook county, Illinois, as 'First Addition to West Pullman,' in Book 55 of Plats, at page 42, which said map or plat was in metes and bounds, lines, words, and figures as follows: [Here follows a plat of lots, blocks, streets, and alleys, but without any acknowledgment as to the execution thereof.] That prior to August 22, 1892, plaintiffs caused certain streets shown upon the said plat aforesaid to be opened upon and through the said premises, which said streets were and are used generally as streets by the public.

"Third. That subsequent to said August 22, 1892, and prior to February 25, 1895, the plaintiffs caused 4,614 lineal feet of 6-inch water pipe and 2,886 lineal feet of 4-inch water pipe to be laid and placed beneath the surface of said premises within and along the streets so marked out as aforesaid, the location of said pipes being shown by a blue line on the said map or plat aforesaid. That the entire cost of said pipes was \$6,507.54 (of which approximately the sum of \$2,000 was for cost of laying), which sum was also the reasonable fair market value of all of said pipes at all the times and places herein mentioned. That prior to the commencement of this suit the defendant caused a proper survey of all of said premises and said pipes aforesaid to be made, and it is shown by the said survey that a permanent annual revenue of ten cents per lineal foot has been for a long time previous to the commencement of this suit, and still is being, derived by the defendant from the said water pipes so placed by the plaintiffs as aforesaid, and that there was at all times in the declaration mentioned, and still is, in full force and effect, a certain ordinance of the city council of the defendant in the words and figures as follows, to wit: '1609.—[Cost Advanced by Property Owners.] The commissioner of public works may extend water mains where the owners of the property or persons desiring such extension shall advance and pay into the city treasury a sum of money equal to the entire cost thereof; and whenever, upon a proper survey, it is shown that a permanent annual revenue of ten cents per lineal foot is being derived from said water mains, then said money so advanced, as aforesaid, shall be re-paid to the person or persons so advancing the same: provided, however, if the money so advanced is not paid back within

two years, interest at the rate of five per cent. per annum shall be allowed after the expiration of said two years, until paid.' That there were also, at the same time with the laying and placing of said pipes aforesaid, placed and laid, in connection with the same, twenty-two double hydrants, one single hydrant, four six-inch valves, and two four-inch valves. That the cost of all of said hydrants and valves was \$960, which sum was also at all the times and places herein mentioned the reasonable fair market value thereof.

"Fourth. That at all the times in the declaration mentioned the defendant was owning and operating a system of waterworks, pursuant to law, authorizing cities, incorporated towns, and villages to construct and maintain waterworks supplying its inhabitants with water for hire, at all said times having its water pipes extending in and along the various streets of the defendant. That on July 14, 1892, plaintiffs caused a six-inch Hersey meter to be installed at the corner of Halsted and One Hundred and Twentieth streets, upon the western boundary line of the defendant, said meter being connected on its west side with the eastern terminus of the said water pipes so laid and placed by the plaintiffs aforesaid, and said meter being connected on its eastern side with the system of water pipes or waterworks then and there owned and operated by the defendant as aforesaid. That until the defendant took possession of the said pipes laid and placed by the plaintiffs as herein mentioned the plaintiffs received from the defendant and the defendant supplied to the plaintiffs, at and through the said Hersey meter so placed as aforesaid, water for the supply of consumers of the same at other termini of said pipes, including the persons to whom conveyances of lots and tracts of land in said subdivision were made. That monthly readings of said Hersey meter were regularly made during all of the period from the time of the installation of said Hersey meter, as aforesaid, until the same was removed by the defendant, as herein mentioned, and the plaintiffs regularly paid defendant for all of the water passing through said meter according to the monthly readings thereof. That the plaintiffs during all of said times regularly collected their pay for said water from the consumers thereof by means of meters placed at other termini of said pipes so laid and placed by the plaintiffs as aforesaid. That the plaintiffs hired the defendant to install the said Hersey meter as aforesaid, paying the defendant therefor \$673.59, which sum was also the reasonable, fair market value thereof at all the times herein mentioned; the cost of said meter being \$490, and the cost of putting the same in being \$183.59.

"Fifth. That on January 19, 1896, the defendant took from the possession and control of the plaintiffs, and carried away and converted to its own use, the said Hersey meter

so paid for by the plaintiffs as aforesaid, and then and there took the same from the plaintiffs' possession and control, and assumed exclusive control of the said pipes and said appurtenances thereunto belonging, and then and there connected said pipes so laid and placed by the plaintiffs as aforesaid with its system of waterworks then and there operated, as aforesaid, by the defendant, and then and there made all of said pipes, and the hydrants and valves connected therewith, and the said Hersey meter, as aforesaid, a permanent part of its said system of waterworks aforesaid, and ever since said time has used and operated the same as a part of its said system, and derived ever since said time a revenue therefrom of ten cents per lineal foot for all of said pipes so laid and placed by the plaintiffs herein, as hereinbefore stated. That on February 25, 1895, such proceedings were had that all of said premises herein described were duly annexed to and became a part of the city of Chicago, the defendant herein, and still so remain.

"Sixth. That the title to all of the real estate herein described continued to be at all of the times herein mentioned, and still is, in the American Trust & Savings Bank, in trust for the plaintiffs herein, except such lots or parcels or tracts thereof which are marked upon the said plat or map hereinbefore mentioned as conveyed. That said lots or tracts so marked 'Conveyed' on the said map or plat were conveyed to other persons than the plaintiffs herein prior to said annexation.

"Seventh. At the time when said pipes were laid, and from then until the present time, the indebtedness of the city of Chicago has been greater than the amount of five per cent. of the value of the taxable property in said city, as ascertained by the respective annual assessments for state and county taxes; that is to say, the city of Chicago has been indebted beyond the limit fixed by article 9, § 12, of the state Constitution."

The trial court entered judgment for the appellees, the defendants, in the sum of \$918.14. The appellees brought the cause into the Appellate Court by writ of error, and judgment was there entered reversing the judgment of the circuit court and entering judgment in that court in favor of the appellees in the sum of \$11,058.36. The Appellate Court incorporated in its judgment the following finding of facts: "That January 19, 1896, when the city of Chicago took the Hersey meter from the possession of plaintiffs in error, and assumed exclusive control of the pipes in question and the appurtenances thereunto belonging, and connected the same with the water system of said city, and made the same and the said meter a permanent part of said water system, the said meter and said pipes and their appurtenances were the personal property of plaintiffs in error, and that said city has not compensated plaintiffs in error for the same, or any part thereof." The appellant city has perfected this appeal to this court

to reverse the judgment of the Appellate Court.

There is but one ground for reversal presented in the brief in behalf of the appellant city. It is that, as the city alleges, it clearly appeared from the stipulation of facts that the water pipes, hydrants, and appurtenances come within the definition of "fixtures," and as such constitute real estate, which belongs either to the American Trust & Savings Bank of Chicago (in whom rested the title to the tract of land on which the said addition to West Pullman was laid out), or to the grantees of the various lots sold by the proprietors of platted ground; it being contended that, as the plat was not acknowledged in conformity with the statute, the purchaser of a lot in the plat took therewith title to the center of the street on which the lot abutted, and that such grantee of each lot would, as it argued, become the owner of the water pipes laid in the soil between the lot line and the center of the street. But we are concluded on the question whether the pipes, hydrants, etc., were personal property belonging to the appellees, or fixtures, and a part of the real estate, by the finding of the Appellate Court. The Appellate Court differed with the trial court as to the proper deductions of fact to be drawn from the recitals of the stipulation, and for that reason incorporated a statement of facts in its judgment. The parties did not, by their stipulation, agree as to the ultimate fact of the status of the pipes, hydrants, etc., but only as to various evidentiary facts, from which, when properly weighed and balanced, the final fact could be determined. Among other evidentiary facts bearing on the question whether the pipes, hydrants, etc., were fixtures, the stipulation stated the location of the pipes, etc., in the land; the intent with which they were placed there and the purpose to be served by them; that the appellees, at their own expense, had procured the city to install the Hersey meter, and connect therewith the water pipes, and had paid water rates to the city for all consumers and owners of lots in the addition to West Pullman; and that the appellees had collected pay for water so furnished from all such consumers, including the purchasers of lots in said addition.

Whether the water pipes, hydrants, etc., remained the personal property of the appellees or became fixtures, and part of the realty, was a question of fact to be determined from the proper consideration of the evidentiary facts found in the stipulation bearing thereon. It was the duty of the circuit court, in the first instance, to weigh and balance these evidentiary facts, and declare the ultimate fact; and the Appellate Court constituted the final tribunal for the weighing and balancing of such evidentiary facts and the determination of the ultimate fact established thereby. We cannot go

behind the finding of the Appellate Court, and consult the stipulation, in order to enter upon an investigation of the question whether the circuit court or Appellate Court correctly determined the controverted question of fact upon which the right of the litigants depended. The only question open for our determination on this record is whether the Appellate Court, in rendering its judgment, properly applied the principles of law applicable to the final fact found by it to be established by the stipulated facts. That the judgment entered in the Appellate Court is the result of the application of correct principles of law to the facts recited in the judgment of that court is not and cannot successfully be denied.

The judgment of the Appellate Court is affirmed. Judgment affirmed.

(204 Ill. 546.)

GLOS et al. v. ADAMS.

(Supreme Court of Illinois. Oct. 26, 1903.)

EQUITY—SETTING ASIDE TAX DEED—EVIDENCE OF PLAINTIFF'S TITLE—DECREE—COSTS.

1. Where, in a suit to set aside a tax deed as a cloud on title, complainant's bill alleged that she was the owner of the east half of a certain block, and in order to show title introduced a deed to her of the south five acres of the east half of the block, but made no proof of the number of acres in the east half, it was error to set aside the deed to the entire east half.

2. Where it appeared that the tax deed sought to be set aside included other lands than the premises complainant sought to free from the cloud, it was error to set aside the deed as to other premises than complainant's.

3. On the setting aside of a tax deed it was error not to decree defendants the costs where no tender of the amount due for taxes, interest, and costs had been made prior to the filing of the bill.

Appeal from Circuit Court, Du Page County; Geo. W. Brown, Judge.

Suit by Mary J. Adams against Jacob Glos and others. From a decree for complainant, defendants appeal. Reversed.

Jacob Glos, pro se, and John R. O'Connor, for appellant Emma J. Glos. J. F. Snyder (James Ewing Davis, of counsel), for appellee.

HAND, J. This is a bill in chancery filed by the appellee in the circuit court of Du Page county against the appellant to set aside and cancel a tax deed as a cloud upon the title to the east half of block 22 of Stough's Second addition to the town of Hinsdale, Du Page county, Ill. The bill alleged that the appellee was the owner of the premises in fee simple; that the same were vacant and unoccupied; that a certain tax deed dated March 22, 1894, issued to Jacob Glos on said premises, and recorded in said county, was void; that the appellee was ready and willing to pay to him the amount

for which said premises sold at tax sale, together with interest, subsequent taxes, and costs; and prayed that said tax deed be set aside and canceled as a cloud upon her title to said premises. The defendants filed their several answers denying the allegations of the bill, and, replications thereto having been filed, a trial was had, the evidence being taken in open court, and a decree entered finding all the material allegations of the bill to be true, and the said tax deed was set aside and ordered canceled, and an appeal has been prosecuted to this court to reverse said decree.

To show title to said premises in herself, the appellee introduced in evidence a quitclaim deed to her, bearing date January 13, 1876, from Cornelius R. Field and wife, which was filed for record and recorded in the recorder's office of Du Page county, January 17, 1876, to the south five acres of the east half of said block 22, and said deed was all the paper title to said premises introduced in evidence to show title in appellee. In order to obtain a decree setting aside and removing said tax deed as a cloud upon the title to said premises, it was necessary that appellee show title in herself. *Rucker v. Dooley*, 49 Ill. 377, 99 Am. Dec. 614; *Walker v. Converse*, 148 Ill. 622, 36 N. E. 202; *Glos v. Goodrich*, 175 Ill. 20, 51 N. E. 643. She averred she was the owner of the east half of said block. To prove that fact she introduced in evidence a deed to the south five acres of the east half of said block, but failed to make proof, by the introduction of a plat or otherwise, of the number of acres contained in the east half of said block. From aught that appears from this record the east half of said block contained more than five acres, and, as it does not appear that the deed offered in evidence covered all of the east half of said block, we think it was error to set aside and cancel said tax deed upon the entire east half of the block.

It further appears that the tax deed sought to be set aside and canceled included other lands than the premises claimed by appellee. In the decree the court set aside said deed, and ordered that it be delivered up by Glos and canceled by the clerk of the circuit court. This was error. The deed should not have been set aside and canceled except as to the premises described in the bill. *Gage v. Curtis*, 122 Ill. 520, 14 N. E. 30.

The court also erred in not decreeing the defendants their costs and awarding them execution therefor, as no tender of the amount due them for taxes, interest, and costs had been made prior to the time the bill was filed. *Glos v. Woodard*, 202 Ill. 480, 67 N. E. 8.

The decree of the circuit court is reversed, and the cause remanded. Reversed and remanded.

(204 Ill. 179)

TRAKAL v. HEUSNER BAKING CO.

(Supreme Court of Illinois. Oct. 26, 1903.)

**APPEAL—INTERMEDIATE COURT—REVERSAL
OF JUDGMENT—FINDING OF FACTS
—CONCLUSIVENESS.**

1. Under Practice Act, § 87 (Hurd's Rev. St. 1899, § 88, c. 110), providing that, if a final determination of a cause shall be made by the Appellate Court as the result of a finding of fact different from the finding of the trial court, it shall recite the facts found, it was the duty of such court, in an action for injuries to a servant alleged to have resulted from his employer's negligence, on reversing a judgment for plaintiff as the result of a different finding of facts from those found by the trial court, to find whether the plaintiff was or was not in the exercise of ordinary care, and whether the defendant was or was not guilty of negligence.

2. Where, in an action for injuries to a servant by reason of defendant's alleged negligence, the Appellate Court, on reversing the judgment for plaintiff on a different finding of facts, found, as required by Practice Act, § 87 (Hurd's Rev. St. 1899, c. 110, § 88), that plaintiff was injured by reason of his own negligence, that defendant was not guilty of negligence, and that plaintiff assumed the risk incident to the employment, etc., such finding was conclusive on the Supreme Court.

Appeal from Appellate Court, First District.

Action by Joseph Trakal against the Heusner Baking Company. From a judgment in favor of plaintiff, reversed by the Appellate Court (107 Ill. App. 327), plaintiff appeals. Affirmed.

The following is the statement of facts which precedes the opinion of the Appellate Court in this case: "Appellee, a baker by trade, aged fifty-five years, was injured while in the employ of appellant. His hand was caught between two iron rollers of an appliance used for mixing dough. This dough mixer was a machine made up of two cylinders, like the cylinders of a common wringing machine used on a washtub. They were in positions parallel to each other, about one-half inch apart. These two cylinders occupied such a relative position that a line passed through their axes would be at about an angle of forty-five degrees from the horizontal. They were about two feet long and three or four inches in diameter. The dough was placed upon a slanting board back of the cylinders, on which it slid down by gravitation upon the cylinders at their line of articulation. The cylinders revolved by steam power in the same directions as do those of the washtub wringer, and drew the dough through between them, dropping it down below upon a horizontal board, where the workman, standing in front of this board, would pick it up in his hands and throw it over the top of the cylinders back on the slide board, where it would pass through between the rolls again, and again be picked up by the workman, and the operation repeated until the dough was sufficiently mixed. The top of this mixing machine—that is, the top of the cylinders—was about three and one-half

feet from the floor. Over the top of the higher cylinder was a guard which prevented the arms of the workman from coming in contact with the cylinders. This mixing machine was supplied with a belt shifter, by which it could be stopped or started at the will of the workman. During the eight months that Trakal worked at this bakery he worked in the same room where the machine was, about two and one-half hours each day; and, before commencing to work for appellant, Trakal had worked in another bakery, at Freeport, Illinois, where they had a similar machine. However, he had not operated this kind of machine himself but a portion of two days—the day of his injury and the day preceding. The plaintiff states that on the day preceding the accident the man who usually worked on the dough machine was absent on account of sickness, and the plaintiff was told to take his place. He thereupon, without complaint or protest, went over to the mixing machine, took hold of the belt shifter, started the machine in motion, brought over his dough, mixed it, again took hold of the belt shifter, stopped the machine, and carried away his mixed dough. The next day he was again told to use the dough mixer, and he again went over to the machine, which was standing still, took hold of the belt shifter, and started the machine in motion by shifting the belt. Then, noticing that on the slide board, at a point one and one-half feet away from the rolls, there was some dirt or water which he feared might pollute the dough, he took a little scraper which belonged to the machine, and, without shifting the belt or stopping the machine, reached over the top of the rolls and began scraping the dirt off the slide board. While doing this, from some unexplained cause his hand passed through the space of one and one-half feet from the point where he was scraping the dirt to the line of articulation between the cylinders, at which latter point it was caught by the cylinders, drawn between them, and was injured. These cylinders moved at the rate of sixty to seventy revolutions per minute. Their motion created no perceptible draft or suction—not even enough to disturb the dry flour upon the slide board. No other part of this machine moved while it was in operation, except these cylinders. The declaration alleged that appellee (plaintiff below) was a baker in the employ of appellant, but was not familiar with this dough mixer, which appellant well knew or ought to have known; that the foreman of appellant directed him to work upon this machine, but neglected to instruct him in its use, or to warn him that it was dangerous; and that while working therewith, while in the exercise of due care, from his want of skill in its operation and his ignorance of its dangers, his left hand was caught between the cylinders and was crushed, etc. At the close of plaintiff's case the

defendant moved the court to exclude the evidence, and to instruct the jury to find the defendant not guilty. The court denied such motion, and the defendant took exception thereto. At the close of all the evidence the defendant renewed its said motion, and presented to the court a written instruction to find the defendant not guilty, and asked the court to give the same to the jury, which the court refused to do, to which action the defendant duly excepted. The jury returned a verdict for the plaintiff, and assessed his damages at the sum of \$3,500." Judgment was entered upon the verdict. An appeal was taken to the Appellate Court, where the judgment was reversed, and the present appeal is from such judgment of reversal.

Leopold Saltiel, for appellant. O. W. Dynes, for appellee.

MAGRUDER, J. (after stating the facts). In this case the Appellate Court reversed the judgment of the superior court of Cook county without remanding the cause, and in its judgment it made the following finding of facts: "The court finds that appellee was injured by reason of his own negligence; that appellant was guilty of no negligence which contributed to such injury; that appellee failed to use ordinary care and caution for his own safety, and in consequence thereof he received the injuries of which he complains; and that appellee assumed the risks incident to his employment, including those arising from the use of this machine." In *Supple v. Agnew*, 202 Ill. 352, 66 N. E. 1069, the Appellate Court embodied in its judgment a finding that the injury to the appellee in that case was not caused by any negligence of the appellants therein, and that the injury to appellee was caused by the negligence of appellee and his fellow servants, in failing to exercise due care and caution, and failing to use obvious and ordinary precautions for their own safety; and in that case we said: "That the Appellate Court had the power, under section 87 of the practice act, to reverse the judgment of the superior court, without remanding the cause, upon the ground that the weight of the evidence did not authorize the verdict, is too well settled by our former decisions to be longer a matter of controversy. *Fitzsimmons v. Cassell*, 98 Ill. 332; *Hawk v. Chicago, Burlington & Northern Railroad Co.*, 147 Ill. 399, 35 N. E. 139, and cases cited; *Borg v. Chicago, Rock Island & Pacific Railway Co.*, 162 Ill. 348, 44 N. E. 722. Nor can it be denied that the finding of facts recited by the Appellate Court in its judgment is conclusive upon this court. In such case we can only determine whether or not the Appellate Court properly applied the law to the facts so found. A few of the cases so holding are *Hawk v. Chicago, Burlington & Northern Railroad Co.*, supra; *Hancock v. Singer Mfg. Co.*, 174 Ill. 503, 51 N. E. 820;

Davis v. Chicago Edison Co., 195 Ill. 31, 62 N. E. 829; *Homersky v. Winkle Terra Cotta Co.*, 178 Ill. 562, 53 N. E. 346. It is not pretended that plaintiff below could, under the law applied to the facts found by the Appellate Court, recover. The judgment of that court must accordingly be affirmed." The decision in the case of *Supple v. Agnew*, supra, applies to and controls the disposition which should be made of the case at bar. Under section 87 of the practice act (*Hurd's Rev. St. 1899*, c. 110, par. 88), the finding of facts embodied in its judgment by the Appellate Court is conclusive upon this court. The facts which the Appellate Court is required by section 87 to find and incorporate in its judgment are the ultimate facts, upon the existence or the nonexistence of which, as set up in the pleadings, the rights of the parties depend. In an ordinary action for damages on account of injuries received, the ultimate facts will ordinarily be that the plaintiff was or was not in the exercise of ordinary care, and that the defendant was or was not guilty of negligence. *Hogan v. City of Chicago*, 168 Ill. 551, 48 N. E. 210; *Siddall v. Jansen*, 143 Ill. 537, 32 N. E. 384; *Senger v. Town of Harvard*, 147 Ill. 304, 35 N. E. 137; *Hawk v. Chicago, Burlington & Northern Railroad Co.*, 147 Ill. 399, 35 N. E. 139. Inasmuch as the Appellate Court has found that the present appellant, who was the appellee in the Appellate Court, failed to use ordinary care and caution for his own safety, and in consequence thereof received the injuries of which he complains, and that the present appellee company, which was the appellant before the Appellate Court, was guilty of no negligence which contributed to the injury, an affirmance of the judgment of the Appellate Court necessarily follows. The argument of counsel for the appellant, made in this court, consists principally of a discussion of the facts, and is an attempt to show by such discussion that the Appellate Court was mistaken in finding that the present appellant failed to exercise ordinary care, and that the present appellee was not guilty of negligence. Such discussion can have no influence with this court, for the reason that, under the law, the finding of facts thus indicated is binding upon this court, and cannot be contradicted in this court.

Accordingly the judgment of the Appellate Court is affirmed. Judgment affirmed.

(204 Ill. 532)

HLASATEL v. HOFFMAN.

(Supreme Court of Illinois. Oct. 26, 1903.)

LIBEL — MALICE — MITIGATION OF DAMAGES — JUSTIFICATION — EVIDENCE — ADMISSIBILITY.

1. Where, in an action for libel, the libelous matter having been spoken of a married woman, the one who wrote the article testified that he procured the information set out in the article from the woman's husband in the office of a certain person, it was not prejudicial error not to permit the person in whose office the informa-

tion was communicated to testify as to the details of the conversation.

2. In libel, testimony as to what the husband of the plaintiff had told the writer of the article as to her conduct was not admissible under a plea of justification, it being mere hearsay, and inadmissible to prove the truth of the statements published.

3. In libel, defendant filed not only the general issue, but a plea of justification, and the writer of the article testified that he procured the information set out in the article from the husband of the plaintiff. The offer to prove such conversation between the husband and the writer was not accompanied by the statement that it was merely for the purpose of mitigating the damages, and showing no malice, nor was any instruction asked or given that the information communicated by the husband was not evidence as to the guilt or innocence of the person spoken of. *Held*, that it was not error to refuse to receive evidence as to the details of the conversation, since if the details had been testified to the jury might have regarded them as tending to prove the truth of the charge in the libel.

Appeal from Appellate Court, First District.

Action by Aloise Hoffman against Spolek Denni Hlasatel. From a judgment of the appellate court (105 Ill. App. 170) affirming a judgment for plaintiff, defendant appeals. Affirmed.

This is an action for libel, begun on June 30, 1899, in the superior court of Cook county by appellee against appellant. The trial was before the court and a jury, and resulted in a verdict and judgment in favor of appellee for \$1,800. This judgment has been affirmed by the Appellate Court, and the present appeal is prosecuted from such judgment of affirmance. In May, 1899, appellee, the wife of one Vaclav Hoffman, was living separate and apart from her husband, having applied for a divorce. The appellant, defendant below, Spolek Denni Hlasatel, is a corporation, organized under the laws of Illinois, and in May, 1899, was publishing a newspaper in Chicago, printed in the Bohemian language.

On May 27, 1899, appellant's newspaper published an article, which, after setting forth what purported to be a statement of appellee's courtship and marriage, continued as follows: "From that time on it appears his wife [meaning appellee] slighted him and sought elsewhere a substitute, although she had a little girl now six years old. She frequently absented herself from her home. * * * They no more than moved to their new residence when Mrs. Hoffman began to throw up to him that she did not need him any more. She herself would go out nights after nine o'clock. * * * A peculiar circumstance, however, served him [the husband] well. On the 30th of September last year he was at home alone with his little girl, lying on his bed. He was dozing. In that interval he saw his wife, who did not know of his presence in the home, begin to make love with their neighboring saloon keeper, Angelic. He quickly jumped up, but the seducer ran away. On that day he left

the house, and returned on the 3d of October, when she drove him out, saying that she had no more use for him."

It is charged in the declaration that, by the statement that the appellee slighted her husband "and sought elsewhere a substitute," it was meant and intended to charge the plaintiff with the crime of adultery, and with having sexual intercourse with a man or men other than her lawful husband; and that, by the statement that appellee's husband saw his wife "begin to make love with their neighboring saloon keeper, Angelic," and that, when the husband jumped up, "the seducer ran away," it was meant and intended to charge the plaintiff "with having had unlawful sexual intercourse or with being about to have unlawful sexual intercourse with said Angelic, and * * * that this plaintiff and the said Angelic were interrupted in the commission of the offense of adultery."

Appellant filed the general issue, and also three special pleas, setting forth, first, that the language of the publication was not intended to and did not convey to the readers of the article the meaning alleged and attributed to it in the declaration; second, that the publication was a fair bona fide comment in a newspaper article upon the conduct of the plaintiff in a public capacity; and, third, that the facts set out in the article were true.

Upon the trial one R. J. Tupy was called as a witness on behalf of the defendant, and gave testimony without objection, a part of which was as follows: "I wrote the printed article set out in the declaration the day prior to its publication. It was written in the office of the defendant. I had no acquaintance with plaintiff prior to writing the article. I never met Vaclav Hoffman before that. I met him in the office of Kohout & Novak on the 26th, at ten o'clock in the morning. Before that I knew of a divorce suit pending between plaintiff and her husband. I procured the information set out in the article from Mr. Hoffman. I knew nothing about the facts set forth in the article, except as I learned through Mr. Hoffman."

Subsequently, Edward J. Novak, a lawyer, and a member of the firm of Kohout & Novak, was called as a witness on behalf of defendant, and gave testimony, which in part was, in substance, as follows: "I knew Vaclav Hoffman, defendant in the divorce suit commenced by Aloise Hoffman. I knew Mr. Tupy. I saw Mr. Hoffman and Mr. Tupy at my office in May, 1899. They were there talking possibly three-quarters of an hour." Thereupon, the following questions were asked of the witness Novak on the part of the defendant, to wit: "Q. What, if anything, was said at that time by Hoffman to Tupy with reference to Hoffman's wife's conduct? Q. Was there anything said on that subject by Hoffman and Tupy at the interview you speak of? Q. Was there any-

thing said by Hoffman to Tupy at that interview concerning Hoffman's wife?" Each one of these questions, when asked, was objected to by counsel for the plaintiff, each objection was sustained by the court, and to each ruling the defendant excepted. Thereupon the counsel for the defendant made the following offer of proof: "If the court please, I desire to prove by this witness that, at the interview alluded to, Mr. Hoffman, in substance, told Mr. Tupy all the facts that were set out in the alleged libelous article." To this offer of proof the plaintiff objected, the court sustained the objection, and the defendant below excepted.

Fanning & Herdlicka and Hiram T. Gilbert, for appellant. William C. Malley and V. A. Geringer, for appellee.

MAGRUDER, J. (after stating the facts). Various errors were assigned upon the record in this case when the case was before the Appellate Court; but counsel for appellant announce in their brief that the only question now desired to be presented to this court is whether the rulings of the trial court upon the questions asked of the witness Novak, and upon the offer made in regard to what was expected to be proven by that witness, were correct or not.

It is stated by counsel for appellant that the purpose of the evidence offered by it, which the court rejected, was to show that the libel was not a mere invention of appellant, but was the result of a communication made to appellant, or to appellant's agent, by the husband of appellee. The contention is that one who publishes a libel which is entirely of his own invention is much more malicious, and deserving of punishment by way of exemplary damages, than one who in good faith makes a publication on the strength of a statement of one apparently cognizant of the facts, which the one who makes the publication believes to be true.

There are authorities which hold that testimony as to what the defendant had been told by another is admissible, because it tends to show that the defendant spoke the words in good faith, and believed them to be true; that such testimony rebuts the charge that the words spoken or written were fabricated maliciously; and that the sources of information, and the reliability of such sources, and belief in the truth of the allegations made, may be shown to rebut the presumption of malice, which otherwise obtains, and to reduce the damages, but not as a substantive proof of the truth. *Lawler v. Earle*, 5 Allen, 22; *Owen v. Dewey*, 107 Mich. 67, 65 N. W. 8; *Farr v. Rasco*, 9 Mich. 353, 80 Am. Dec. 88.

It has been held that proof that the defendant repeated but did not originate the alleged slander does not amount to a justification, but may be considered in mitigation of damages. *Hinkle v. Davenport*, 38 Iowa,

356; *McDonald v. Woodruff*, 2 Dill. 245, Fed. Cas. No. 8,770; *Fitzpatrick v. Daily States Publishing Co.*, 48 La. Ann. 1116, 20 South. 173.

In *Young v. Bennett*, 4 Scam. 43, it was held by this court that, in an action for slander in charging the plaintiff with stealing, it is not admissible for the defendant to prove, under the general issue in mitigation of damages, that there was a report in the neighborhood of the plaintiff that he had been guilty of stealing from the defendant.

In *Regnier v. Cabot*, 2 Gilman, 34, we said (page 38): "Whether a party, under the general issue, in an action of slander, can be permitted to show, in mitigation of damages, specific facts which would tend to cast suspicion of guilt upon the plaintiff, is a question upon which heretofore there has been some conflict of authorities. The current, however, of the more recent decisions is strongly against the doctrine, and, in some of the very few cases where it has been held that the defendant had this right, the judges themselves, who admitted the correctness of the principle, acknowledged that it was unsupported by sound reason or good sense. * * * The rule of law, as applicable to this question, seems, by the weight of authority, now to be that where a defendant does not justify he may mitigate damages in two ways only: First, by showing the general bad character of the plaintiff; and, second, by showing any circumstances which tend to disprove malice, but do not tend to prove the truth of the charge." In the case of *Regnier v. Cabot*, supra, it was also held that, by the plea of not guilty, or the plea of general issue, in an action of slander, the defendant only declares that he did not speak the words charged in the plaintiff's declaration to have been spoken by him, and does not affirmatively allege that they are true, but admits them to be false, and only professes to defend himself, upon the ground that he has not defamed the plaintiff's character in the manner charged against him in the declaration.

In *Sheahan v. Collins*, 20 Ill. 326, 71 Am. Dec. 271, the doctrine laid down in *Young v. Bennett*, supra, and *Regnier v. Cabot*, supra, was indorsed and reaffirmed. See, also, *Storey v. Early*, 86 Ill. 461.

In the American and English Encyclopedia of Law (vol. 18 [2d Ed.] p. 1073) it is said: "It is no defense in an action for libel or slander to show that a rumor existed as to the matters published, or that the information upon which the charge was made was derived from another, even though the defendant at the time believed the matter to be true, and the rule is not altered, though the defendant in making the charges stated that he was only repeating a rumor, or that he relied on information from another, whose name he mentions." See cases in note cited to sustain the text.

The appellant upon the trial below did not

attempt to show, by way of mitigating the damages, that the plaintiff was a person of general bad character. No testimony whatever was introduced to that effect. If it be admitted that appellant had a right to show under the general issue, by way of mitigating damages, that the facts published by it were communicated to it by appellee's husband, proof to that effect was introduced without objection, and the fact that the appellant did not originate the statements published by it, but was informed of the facts therein contained by the appellee's husband, was established by the testimony. The witness Tupy, a reporter for the appellant newspaper, said in his evidence: "I procured the information set out in the article from Mr. Hoffman. I knew nothing about the facts set forth in the article, except as I learned through Mr. Hoffman."

The testimony thus given by Tupy was not denied or disputed by the appellee. The only testimony proposed to be called out by the questions subsequently addressed to the witness Novak related merely to the details of the conversation between Hoffman, appellee's husband, and Tupy, appellant's reporter. The details of the conversation could not have made the fact that appellant did not originate the statements made by it, but was informed of them by another, any stronger or more emphatic than it was already made by the evidence of Tupy, the reporter. His evidence made every fact narrated in the article a part of the conversation he had with Hoffman. Therefore appellant suffered no injury from the action of the court in refusing to allow the witness Novak to answer the questions addressed to him.

There is another reason why no error was committed by the court in this respect. In the case at bar the appellant filed a plea of justification, and therein asserted that the statements published by it were true. Testimony as to what appellee's husband told appellant's reporter or agent was mere hearsay evidence, and wholly incompetent for the purpose of proving the truth of the statements published in the newspaper article. Such proof is never admitted in support of the plea of justification, but when received is only admitted, under the general issue, for the purpose of showing that the appellant was not influenced by malice, but merely stated that of which he was informed by others. When the offer was made to prove the conversation between Hoffman and Tupy, it was not accompanied by the statement that it was merely for the purpose of mitigating the damages, and showing that appellant was not influenced by malicious motives. Nor was any instruction asked by the appellant, or given to the jury, telling them that the information communicated by Hoffman to the appellant's agent was not evidence of appellee's guilt or misconduct. No instruction was given limiting such testimony to the mitigation of damages only. A plea of

justification having been filed by the appellant, the details of the conversation, if they had been testified to by the witness, may have been regarded by the jury as tending to prove the truth of the charges in the libel, when they could not have been properly introduced for any such purpose.

Substantially the same state of facts presented by this record in respect to the point here under consideration existed in the case of *Thomas v. Dunaway*, 30 Ill. 373, which was an action for libel. In that case it was held that the defendant in an action for libel, by pleading the general issue, virtually admits the falsehood of the statements on which the action is based; but if it is proved that he did publish them he may then, under that issue, show any circumstance in mitigation which tends to disprove malice, but does not tend to prove the truth of the charge; and it was there said (page 386): "It is also insisted that the court erred in not permitting the witness Schooley to testify that appellant, before he made the publication, had been informed by Jesse Dunaway that all the charges were true. Jesse Dunaway had already testified that he gave the information upon which the appellant made the publication. * * * It would therefore seem to be a matter of no consequence whether Schooley testified to that fact, as it does not seem to have been controverted that Dunaway did give the information." So, in the case at bar, Tupy had already testified that appellee's husband had informed him of the facts published in the newspaper article, and it would seem to be a matter of no consequence whether Novak testified or not as to the details of the information so communicated. It is not controverted in this case that Hoffman, appellee's husband, did give the information.

We find no error in the action of the trial court, so far as our attention has been called to it, and therefore the judgment of the Appellate Court is affirmed. Judgment affirmed.

(204 Ill. 191.)

RIEKER et al. v. CITY OF DANVILLE.

(Supreme Court of Illinois. Oct. 26, 1903.)

LOCAL IMPROVEMENTS—CONDEMNATION—DISMISSAL—COSTS AND COUNSEL FEES.

1. Hurd's Rev. St. 1899, p. 839, c. 47, § 10, relative to eminent domain, and providing that if the petitioner shall dismiss before entry of the final order, or fail to make payment within the time named, the court shall make such order for payment by the petitioner of costs, expenses, and attorney's fees as seems just, does not apply to proceedings under the local improvement act of July 1, 1897, as amended by Laws 1901, p. 117.

2. Under Local Improvement Act, § 94, as amended in 1901 (Laws 1901, p. 117), providing that the entire costs and expenses connected with the proceedings provided for, including the court costs, shall be paid by the city, village, or town out of its general fund, a petitioner in proceedings under the local improvement act is liable for the court costs and attorney's fees of de-

endant upon refusal by the petitioner to pay the amount adjudged to be just compensation for the land.

Appeal from Vermillion County Court; S. Murray Clarke, Judge.

Proceeding by the city of Danville against John Rieker and another to condemn certain property for the purpose of local improvements. From an order denying a motion to require petitioner to pay defendants' costs and attorney's fees upon dismissal of the petition, defendants appeal. Reversed.

Keeslar & Acton, for appellants. J. H. Lewman, City Atty., for appellee.

CARTWRIGHT, J. The appellee, the city of Danville, filed in the county court of Vermillion county its petition, under the act concerning local improvements, in force July 1, 1897 (Hurd's Rev. St. 1899, p. 362, c. 24), for the appointment of two commissioners to act with the president of the board of local improvements in fixing the compensation for private property to be taken for opening and extending a street, and to assess benefits resulting therefrom. The commissioners were appointed and their compensation was fixed as provided by the act, and they reported that the appellant John Rieker, an insane person, was the owner of certain property (described in the report) to be taken for the improvement; and they fixed the compensation to be paid for the same at \$1,605, and assessed benefits against his property at \$274. Summons was issued to the appellants, the said John Rieker, and W. F. Rieker, his conservator. They appeared and filed objections to the report, and, a jury having been called, the evidence was heard, and a verdict was returned, finding the just compensation for the lands of John Rieker to be taken for the improvement to be \$1,955, and that his lands would not be benefited in any manner by the improvement. Afterward appellee came into court and moved to dismiss its petition, whereupon appellants entered their motion that the court would make an order for the payment by appellee of the costs, expenses, and reasonable attorney's fees incurred in the defense of the petition, and for the payment of all taxable costs. The court refused to hear evidence of the costs, expenses, and attorney's fees paid or incurred by appellants in defense of the petition, and denied the motion. The motion of appellee was allowed, and the petition dismissed without costs.

The right to recover fees or costs rests upon statutes, and they cannot be allowed or recovered unless given by statute. *Smith v. McLaughlin*, 77 Ill. 596; *Dobler v. Village of Warren*, 174 Ill. 92, 50 N. E. 1048. The general statute relating to costs does not provide for the payment of expenses and attorney's fees, and does not include a proceeding like this, but it is contended that the provision concerning such expenses and fees in the act to provide for the exercise

of eminent domain (Hurd's Rev. St. 1899, p. 837, c. 47) also governs the court in proceedings under the act concerning local improvements. Section 10 of the eminent domain act provides that if the petitioner shall dismiss the petition before the entry of the final order, or shall fail to make payment of compensation within the time named in such order, the court shall, upon application of the defendants, or either of them, make such order for the payment by the petitioner of all costs, expenses, and reasonable attorney's fees paid or incurred in defense of the petition as shall be right and just, and also for the payment of the taxable costs. We do not see how that statute can be made to apply to the local improvement act. The eminent domain act governs an entirely different class of proceedings, in which the procedure and practice are wholly different. The authority for requiring payment of costs, expenses, and attorney's fees is contained in a proviso to the section providing that, upon the verdict of the jury, the court shall order that petitioner enter upon the property condemned, and the use of the same, upon payment of full compensation within a reasonable time to be fixed by the court, and if the petition is dismissed before that order is entered, or if the petitioner fails to pay the compensation within the time named in the order, the allowance shall be made. The local improvement act provides for making improvements by special assessment, special taxation, or general taxation, to be prescribed in the ordinance providing for the improvement. Section 12 of the act provides that, if the ordinance shall require the taking or damaging of property, the proceeding for making just compensation therefor shall be as described in sections 13 to 33, inclusive, of the act. Those sections provide a complete code of procedure, different from that of the eminent domain act. The petitioner is allowed 90 days after final judgment as to all defendants to elect whether it will dismiss the proceeding, or enter judgment on the verdict. If the petitioner elects to enter the judgment, the judgment is final, whether the assessment be collected or not. The local improvement act regulates the entire proceeding, without resort to any other act, and there is no provision in it for allowance of expenses or attorney's fees. The Legislature might have provided for such allowances in case the petition should be dismissed. *Sanitary District v. Bernstein*, 175 Ill. 215, 51 N. E. 720. They have not done so in the act governing the proceeding, nor in any other act which can be applied to it.

We are of the opinion, however, that the statute does provide for the payment of the taxable costs by the petitioner, whether the petition is dismissed or not. Section 94 of the local improvement act, as amended in 1901, provides that the entire cost and expenses connected with the proceedings there-

in provided for, including the court costs, shall be paid by the city, village, or town out of its general fund. Laws 1901, p. 117. The proviso to that section is not material in this case. By its terms this statute includes the court costs, without reference to the question whether the petition is dismissed or not; and it is manifestly just, as well as in harmony with the Constitution, to apply it to cases where the petition is dismissed. The Constitution provides that private property shall not be taken or damaged for public use without just compensation, and the taxable costs paid or incurred by a defendant in a proceeding to ascertain the compensation are required to be paid by the petitioner as a part of the compensation. *Chicago & Northwestern Railway Co. v. City of Chicago*, 148 Ill. 141, 35 N. E. 881. The proceeding fixes the amount to be paid before the property can be lawfully taken, and the city has a right to abandon the proceeding, and does not then become liable for the compensation. *City of Chicago v. Hayward*, 176 Ill. 130, 52 N. E. 26. The ordinance provided for making the improvement by special assessment, and in such case the statute authorizes the petitioner, after final judgment as to the amount of damages and compensation, and also the benefits to be assessed, to elect whether it will abandon the proceeding or enter the judgment. In such a case the compensation cannot be paid, except from benefits assessed, and the amount of benefits assessed may properly lead to an abandonment of the improvement. Section 94, however, provides for payment of cost of maintaining the board of local improvements, the cost of the assessment, and the court costs, including the fees of commissioners in condemnation proceedings, out of the general fund, so that their payment is not dependent upon the collection of a special assessment. That section indicates an intention that the costs should be paid at all events, and that construction ought to be adopted if it reasonably can be. Where private property is taken for public use, just compensation cannot be made to the property owner if he is compelled to prosecute in the courts for his just rights at his own cost. *Eppling v. Dickson*, 170 Ill. 329, 48 N. E. 1001. The framers of the Constitution did not intend the owner to pay the costs in the proceeding which results in taking his property against his will. If a city takes his property for a public improvement, it must pay the value of the property taken, and his costs in the proceeding. If there is an appeal, the petitioner may deposit the amount of judgment and costs, after deducting benefits, and file a bond securing the payment of any future compensation which may be finally awarded, and the costs. It is true that, if the petition is dismissed, the property is not actually appropriated to the public use; but, if the defendant cannot recover his costs, the effect is to deprive him of money or property, under the power to

take his property for the public use, in an attempt to do so, where the result is unsatisfactory to the petitioner. The costs in a condemnation proceeding might equal the value of the property sought to be taken, and the property be sold to satisfy such costs, effectually depriving the owner of it for costs incurred in preventing its being taken without just compensation. In this case an insane person was brought into court by process of law, and in making his defense, by his conservator, was compelled to subpoena witnesses and to pay costs. The compensation had been assessed at \$1,605, from which \$274 was to be deducted as benefits. The trial resulted in finding the just compensation to be \$1,955, and that there were no benefits. If the petitioner had taken the property, the owner would have received its value and his taxable costs, as provided by the Constitution. If the petitioner is not required to pay the taxable costs, the owner has been compelled to expend a part of the value of the property in having the compensation correctly ascertained. It would be neither just, nor in accordance with the spirit of the Constitution, to say that the petitioner might, at its option, take the property, paying the owner the value and the costs, or compel the owner to pay the costs, representing a part of the value of the property, by refusing to take it. The statute, by its terms, requires the payment of the court costs by the petitioner, and we think it should be so construed as to require payment of taxable costs in any event, although the petitioner may elect to dismiss the proceeding. The conclusion of the county court was right, except as to the taxable costs, but we think it was erroneous as to them.

The decree of the county court is reversed, and the cause is remanded to that court, with directions to enter judgment against the appellee for the taxable costs of appellants. Reversed and remanded.

(204 Ill. 320)

KESNER v. MIESCH.

(Supreme Court of Illinois. Oct. 26, 1903.)

COURTS—JURISDICTION OF APPEAL—REMOVAL OF CLOUD—STATUTE OF FRAUDS—CONTRACT FOR SALE OF LANDS—RATIFICATION.

1. The title to a freehold is not in issue in a suit asking the cancellation as a cloud upon title of a purported contract by plaintiff to convey land, and hence the Appellate Court has jurisdiction of an appeal in such a suit.

2. Where, after the overruling of a demurrer to the bill, defendant answered, he could not thereafter assign error on the overruling of the demurrer.

3. A contract to convey land entered into on behalf of the owner by a person not authorized so to do, but not showing such want of authority on its face, constitutes a cloud on the owner's title, which equity has jurisdiction to remove.

4. Under the statute providing that an agent has no authority to bind the owner of realty by a contract for the sale of the same unless lawfully authorized in writing, a verbal promise on

¶ 2. See Pleading, vol. 39, Cent. Dig. § 1403.

the part of the property owner to carry out a contract of sale, made by an agent not authorized in writing, is of no effect.

Appeal from Appellate Court, First District.

Suit by Catherine Miesch against Jacob L. Kesner and others. From a judgment of the Appellate Court (107 Ill. App. 468) affirming a judgment for plaintiff, defendant Kesner appeals. Affirmed.

Slimeon Straus and Edward N. D'Ancona, for appellant. M. L. Thackaberry, for appellee.

CARTWRIGHT, J. Appellee, Catherine Miesch, being the owner and in possession of certain real estate in the city of Chicago, with the building and improvements thereon, commonly known as 4732 Grand Boulevard, filed her bill in this case in the circuit court of Cook county against appellant, Jacob L. Kesner, and certain other persons, acting as his attorneys and agents, asking the court to remove as a cloud upon her title an instrument dated March 28, 1900, and filed in the office of the recorder of deeds of said county on March 29, 1900, and duly recorded, purporting to be a contract under seal between appellant and appellee for the sale and conveyance by her to him of said premises, in consideration of the conveyance by him to her of certain lots and the payment of \$10,500 in cash, and to have been signed by her, "Per J. A. Amendt, Agt." The bill was filed on April 16, 1900, and alleged that appellee never in any manner authorized said Amendt to enter into said contract, or any contract, for the sale of said real estate, and that she had no knowledge or information as to said alleged contract until April 14, 1900. Appellant demurred to the bill, and, the demurrer being overruled, he answered that the contract was entered into in good faith by him; that it was authorized by appellee; that she had full knowledge of its execution, and ratified the same; and that he was ready to fulfill the contract on his part. He denied the averment of the bill that appellee had no knowledge of the contract, and denied that she was entitled to any relief. The cause was referred to a master, who took the evidence, and reported that Amendt was not authorized to enter into the contract; that appellee had no knowledge of it, and did not ratify it. The court approved the report, and entered a decree setting aside the alleged contract as a cloud upon appellee's title, and enjoining appellant and the other defendants from interfering with the premises. Appellant removed the case by appeal to the Appellate Court for the First District, where the decree was affirmed, and he prosecuted this further appeal.

Appellee presents an argument that the Appellate Court ought to have dismissed the appeal for want of jurisdiction, because a freehold was involved, but she has assigned no cross-error raising that question. We are

of the opinion, however, that a freehold was not involved in the appeal. The suit will not result in one party gaining and the other losing a freehold estate, and, if the contract should be held valid, appellant would only become entitled to a conveyance upon performance on his part. The title to the freehold is not put in issue in any manner by the pleadings, and there is no assignment of error touching the freehold. In a suit for specific performance to compel the execution of a conveyance of a freehold estate the freehold is involved, but appellant has not sought such relief in this case. The freehold is also involved in a proceeding to cancel a deed purporting to convey title and to remove the same as a cloud, but this instrument does not purport to transfer or convey title. No question concerning the freehold was contested or adjudicated, and none is involved in the appeal.

Counsel for appellant, in their argument, insist that the court erred in overruling the demurrer to the bill of complaint, for the reason that the bill, by its allegations, showed that Amendt had not been appointed agent or authorized to make the contract, and no authority to make it appeared of record, so that there was not on record a complete instrument apparently binding appellee, and therefore the bill did not show that the instrument was a cloud on her title. After the demurrer was overruled, appellant did not stand by it, but answered the bill, and therefore waived the demurrer. He cannot now assign error on the overruling of the demurrer, having waived such objections to the bill as could only be taken by demurrer. He could, however, have the same advantage on the final hearing of the whole case as to matters of substance, if it should appear, upon a consideration of all the pleadings and proof, that the complainant was not entitled to the relief sought. *Gordon v. Reynolds*, 114 Ill. 118, 28 N. E. 455; *Bauerle v. Long*, 165 Ill. 340, 46 N. E. 227.

Appellant, by his answer, raised an issue of fact as to the validity of the contract, alleging that it was executed by authority of appellee, and ratified by her, and claiming that it did not cast a cloud upon her title, but entitled him to a conveyance when he should perform it upon his part. If he succeeded in proving that the contract was authorized or legally ratified, it would not be a cloud. He now says that there was no cloud, because he would be compelled, in order to enforce the contract, to show the authority of Amendt to make it, which he would be unable to do. It has been held that where the instrument or alleged cloud is void upon its face, or where the party claiming under it, in order to enforce it, must necessarily offer evidence which will show its invalidity, it does not cast a cloud upon the title. The instrument did not show that it was executed without authority, and that it was void on its face. Neither did it show:

that appellant, in attempting to enforce it, would necessarily produce evidence showing the want of authority. The mere fact that the authority did not appear of record would not establish the fact that there was none, but appellant would be able to enforce the contract upon the production of authority to make it, although not recorded. It is undoubtedly true that the instrument would be a serious injury to appellee's title, depreciating its market value, and interfering with its sale and transfer. Appellant, having waived his demurrer, insisted upon the validity of the contract, and attempted to establish it by proof, and we think that equity jurisdiction was properly exercised to remove the cloud.

It was proved that Amendt had no authority to dispose of the property, or to enter into any contract for the sale of it, but appellant offered evidence tending to prove that on April 14, 1900—two days before the bill was filed—appellee verbally admitted to appellant's attorneys that the contract was all right, and promised to close the deal. Under our statute an agent has no authority to bind the owner of lots by a contract for their sale unless lawfully authorized in writing, signed by the owner. *Hughes v. Carne*, 135 Ill. 519, 26 N. E. 517. The statute provides the mode and means by which an agent shall receive authority to make such a contract, and he cannot be authorized in any other mode. The alleged admission that the contract was all right and the promise to carry it out were expressly denied by appellee, and the circumstances justify the conclusion of the master that she did not even verbally admit the authority of Amendt. There is nothing to take the case out of the statute of frauds, and a verbal promise on her part to carry it out, if made, would be of no effect. We are satisfied that the decree was right.

The judgment of the Appellate Court is affirmed. Judgment affirmed.

(204 Ill. 297)

VILLAGE OF WINNETKA v. CHICAGO & M. ELECTRIC RY. CO.

(Supreme Court of Illinois. Oct. 26, 1903.)

MUNICIPAL CORPORATIONS—STREET RAILWAYS—RIGHT OF WAY—ESTOPPEL.

1. A village granted a street railway company a right of way 25 feet in width through a certain street, and, upon its appearing that the construction of a viaduct over a portion of the street would be necessary, an amendatory ordinance was granted, a certified copy of which in the hands of the railway company authorized the construction of a viaduct 25 feet in width. The amendatory ordinance could not be found, but, as copied in the records, it authorized the use of only 20 feet of the street, but from the beginning of the work the president of the village council and the village engineer, under whose supervision the work was done, had knowledge that the company was using more than 20 feet of the street. *Held*, that after the completion of the viaduct the village was estopped from insisting upon the removal of that portion of it which exceeded the 20-foot limit.

Appeal from Appellate Court, First District.

Suit by the village of Winnetka against the Chicago & Milwaukee Electric Railway Company. From a judgment of the Appellate Court (107 Ill. App. 117) affirming a decree for defendant, plaintiff appeals. Affirmed.

Stacy W. Osgood and Millard F. Riggie, for appellant. Wood & Oakley, for appellee.

BOGGS, J. The appellee company is the successor and assignee of the Bluff City Electric Railway Company. In the year 1898 the former company entered upon the enterprise of building an electric railway, the line whereof passed through the limits of the appellant village. An ordinance was adopted by the village council on the 24th day of May, 1898, authorizing the construction of the railway along Wilson street and across Willow, Maple, and Ash streets of the village, and also across other of its streets, not necessary to be mentioned. Nor is it necessary the terms and conditions which were by the ordinance and an agreement of the company annexed to the grant should be set forth in full. Of these conditions it is only necessary to mention that the ordinance permitted the use of the streets to the width of 25 feet by the railway company, and that the ordinance, and the agreement of the company which became a part thereof, required the railway company to purchase a strip of land not less than 42 feet in width, extending from Maple avenue to Willow street, and to dedicate said strip of land to the village for use as a public street, to be called "Wilson Street Extended," and to macadamize the roadway of the street, put in the curbing, and lay a sidewalk on the easterly side of the street; said street improvements to be made under the supervision of the village authorities. The ordinance and the agreement provided that said strip of land so to be dedicated and improved by the railway company, and to constitute Wilson street extended, should be subject to the right of the railway company to use the west 25 feet thereof for its right of way for the period of 25 years. The railway company procured the necessary ground, and entered upon the construction of the railway and the fulfillment of its obligations under the ordinance.

The ordinance authorized the construction of a line of street railway upon the surface of the ground. It was subsequently ascertained that the conformation of the surface at the crossing of Willow street and Wilson street, and for a short distance along Wilson street and the proposed Wilson street extended, was such that it would be impracticable for the company to lay the track of the road along the surface of the ground, and that the operation of the road along a track on the surface of the ground would be dangerous to the life and limb of passengers and of the public using the street. It was there-

fore deemed advisable the road should be carried over the depression on an elevated structure. Profiles of the viaduct, which, in the opinion of the engineers of the railway company, should be constructed for that purpose, were prepared, and laid before the village council. In view of this situation, the council, on the 7th day of March, 1899, adopted an amendatory ordinance, the record whereof in the book of the record of the proceedings of the council reads as follows: "The council of the village of Winnetka do ordain that the ordinance heretofore granted on the 20th day of May, 1898, to the Bluff City Electric Street Railway Company, be and is hereby amended to give said company, its successors and assigns, the right and authority to construct a superstructure or trestle on the west twenty feet of the right of way heretofore granted, between the west line of Maple street and the south line of Willow street, and on Wilson avenue from the south line of Willow street to such point as will make the grade on said trestlework about one per cent. Said right and authority are given upon the express condition that said Bluff City Electric Street Railway Company, its successors or assigns, shall cause to be dedicated to the village of Winnetka, for street purposes, the east thirty-six feet of Wilson avenue, extending to the south corporate limits of said village."

The railway company entered at once upon the construction of the viaduct. It was built of the width of about 23 feet. In the month of July, 1899, the viaduct was completed, and the tracks of the railway laid thereon, and the company was ready to operate its cars along the track and over the viaduct. The company was then notified by the president of the village that the village claimed under the amendatory ordinance the company was only authorized to occupy 20 feet of the street, and that its viaduct exceeded that width, and was to that extent unlawfully upon the street. The company contended that the amendatory ordinance as adopted by the council had not been properly recorded in the record book of the village, and that, as adopted, the width of the right of way theretofore granted by the former ordinance was not changed, but was expressly recognized and stated in the amendatory ordinance, as the same was adopted, to be 25 feet, and also contended that the provisions of the former ordinance and agreement permitting the company to occupy 25 feet of the street was not intended to be changed or affected by the amendatory ordinance, and that under a proper construction of the amendatory ordinance, even as it appeared upon the record, the width of the right of way of the company in the street as fixed by the former ordinance was in no wise reduced or affected. The amendatory ordinance which was introduced into the council and voted upon and adopted could not be found, but the railway company produced a copy thereof,

duly certified under the hand and seal of the clerk of the village. This certified copy was made by the village clerk after the adoption and passage of the ordinance, but before the same was copied at large in the book in which the ordinances of the village were recorded. The width of the right of way of the appellee company in the street referred to in the amendatory ordinance was shown by this certified copy to be 25 feet.

Acting upon the authority of a resolution of the village council, the proper official of the village notified the railway company that it was a trespasser upon the street to the extent of 5 feet beyond its right of way, and demanded that it should within 10 days remove all portions of its viaduct from said 5 feet of the street. The appellee company thereupon filed its bill in chancery for a writ of injunction restraining the village from in any way interfering with the viaduct, or its use of the same in the operation of its cars. A preliminary injunction was issued as prayed, and upon a final hearing a decree was rendered making the same perpetual. The village prosecuted an appeal to the Appellate Court for the First District, and, the decree being affirmed by that court, has perfected this its further appeal to this court.

The master to whom the case was referred, upon consideration of all the evidence bearing upon the point, found that the original pencil draft of the amendatory ordinance "was, on its face, in terms a grant of the use of the entire twenty-five feet constituting the original right of way under the said ordinance of May 24, 1898, and that said certified copy of said ordinance of March 7, 1899, introduced in evidence as the complainant's 'Exhibit D,' was prepared by said clerk of said village from said original pencil draft of such ordinance of March 7, 1899, so preserved in his said office, on or about the 13th day of May, A. D. 1899"; and this finding we think to be well supported by the proofs. The decree, however, was granted upon the theory the village had become equitably estopped from demanding the superstructure beyond the width of 20 feet should be removed from the street.

The general principle relative to the power of the village to remove any structure in a street which excludes the public from the use of that portion of the street is not entirely applicable to the situation. This portion of Wilson street was created under an agreement between the village and the railway company that the company should purchase the ground upon which the street was to be extended, and dedicate it to the village, for the purpose of devoting it in part to the use of the railway company. Moreover, beyond the limits of the viaduct at least 32 feet of the street remained open for the free and uninterrupted use of the public at a point where there had before been no public way; and, still further, the ground

under the greater portion of the viaduct was so rough and uneven that the public could not have used it unless improved, at great cost, for such use. The use of a street for street railway purposes is not an illegitimate use of the public way, as we have frequently declared. The viaduct may exclude the public to some extent from the use of parts of the street, but in *Summerfield v. City of Chicago*, 197 Ill. 270, 64 N. E. 290, we held that if a city council, acting in good faith, for the best interests of the public, in the matter of elevating railroad tracks at the junction of two streets, determines that the safety of the public will be best conserved by providing a subway and supporting the tracks by means of walls in the street, courts will not declare such action unauthorized merely because the plan adopted would result in excluding the public from that portion of the street which would be occupied by the walls of the subway.

We think the proof amply warranted the decree on the ground the village should be deemed equitably estopped to demand that the viaduct, or any portion thereof, should be removed from the street. The viaduct was constructed by the company in the belief it had a right to use 25 feet of the street. This belief was grounded upon the original ordinance granting it the use of the street to that extent, and also upon a certified copy of the amendatory ordinance, which was entirely consistent with that view. From practically the beginning of the work of constructing the viaduct the president of the village council and the village engineer, both acting in their representative official capacities, and the latter in obedience to a provision of the ordinance of the village, had actual knowledge that the company was using more than 20 feet of the street in erecting the viaduct. The original ordinance provided that all the work on the street should be done under the supervision of the village engineer. That official performed that duty in the construction of the viaduct, and the president of the village frequently inspected the work as it progressed, and the manner of building the viaduct was the subject of discussion at different times between these officials of the village and those acting for the railway company in the building thereof, and changes in the work were made at the request of the village authorities. Though it was then well known by the village authorities that the structure occupied more than 20 feet of the street, no objection was made thereto until the viaduct had been entirely completed, the track laid thereon, and the structure was ready for the operation of trains over it. Upon the clearest principles of right and justice the village should not be allowed to then insist that the viaduct should be removed, and such great pecuniary loss and sacrifice be inflicted upon the railway company. That equitable estoppels of this nature may be declared and enforced against

municipal corporations, when good conscience and justice demand, has long been the doctrine of this court. *City of De Kalb v. Luney*, 193 Ill. 185, 61 N. E. 1036, and many cases there cited.

The bill alleges that a clerical error was made by the village clerk in transcribing the amendatory ordinance upon the record, whereby the clerk omitted to copy the word "five" in that part of the ordinance which refers to the width of the street to be occupied by the railway company as a right of way, thus leaving the width of the street to be used to appear to be 20 feet instead of 25 feet; and the special prayer of the bill was that this clerical error in the record should be amended. The insistence, however, that the relief to be given must be limited by this special prayer of the bill, is not well made. The bill contained a general prayer for such further or other relief as the nature of the case may require and as to equity and good conscience may seem meet. "The rule is, where a bill contains a prayer for special relief, and also a prayer for general relief, the complainant may be denied a decree for the relief specially prayed for, and under the general prayer be granted such relief as he may be found entitled to have under the allegations of fact made in the bill and the proof in support thereof." *Gibbs v. Davies*, 168 Ill. 205, 48 N. E. 120. The allegations of the bill in the case at bar disclosed all the facts necessary to be known to entitle complainant to a decree on the ground the village should be equitably estopped, and the general prayer for relief authorized the granting of a decree based upon that principle of equity jurisprudence.

The judgment of the Appellate Court is affirmed. Judgment affirmed.

(204 Ill. 117)

UNION LEAGUE CLUB v. BLYMYER ICE MACH. CO.

(Supreme Court of Illinois. Oct. 26, 1903.)

SALES — CONSTRUCTION OF CONTRACT — APPROVAL — RIGHT OF REJECTION — COMPETENCY OF EVIDENCE — INSTRUCTIONS.

1. A contract for the sale of a refrigerating machine guaranteed the machine in certain particulars, and provided that if it should prove unsatisfactory for any other cause than those guaranteed it should be removed by the seller, and that it should be optional with the buyer to accept and retain the machine on a named date. Other provisions showed that the machine was to be tried and tested. *Held*, that the contract did not give the buyer an arbitrary right to reject the machine without cause.

2. In a suit by the seller to recover on the contract, it was competent to prove that the guaranties had been fulfilled in order to show that if the machine was unsatisfactory it was from some other cause.

3. A party cannot complain of instructions that are in substance the same as those it requested.

Error to Appellate Court, First District.

Suit by the Blymyer Ice Machine Company against the Union League Club. From a

judgment of the Appellate Court (104 Ill. App. 106) affirming a judgment for plaintiff, defendant brings error. Affirmed.

This is a suit begun on October 14, 1898, in the circuit court of Cook county by the defendant in error against the plaintiff in error upon a contract made by the defendant in error with the plaintiff in error for the building and erection for the latter of one of the defendant in error's latest improved compound compression refrigerating machines in the clubhouse of plaintiff in error in Chicago. The plea filed by plaintiff in error was the general issue. The cause was tried before the court and a jury. The jury found the issues for the plaintiff, and assessed the plaintiff's damages at the sum of \$2,030.50. Motions for new trial and in arrest of judgment were overruled, to which exceptions were taken, and judgment was rendered upon the verdict, to which exception was also taken. An appeal was taken to the Appellate Court from the judgment of the circuit court, where the judgment of the latter court was affirmed. The present writ of error is from such judgment of affirmance by the Appellate Court.

The declaration sets out the contract in writing in *hæc verba*, and avers that, pursuant to the agreement, the plaintiff did build and erect for the defendant the refrigerating machine in accordance with the terms and specifications of the contract; and that defendant, the Union League Club, used said machine, so built and erected by plaintiff on its premises, for a period of, to wit, four years, and that during that time the machine served all the purposes and did all the things required by the defendant by it to be done, and carried out and fulfilled all the guaranties made by the plaintiff therein to the defendant. The declaration also avers that the defendant has never paid to the plaintiff the money in said contract specified by it to be paid.

The contract sued upon was entered into on December 21, 1894, between the Blymyer Ice Machine Company, A. B. Meader, trustee, and the Union League Club. It provided that the refrigerating machine should consist of a compressor, condenser, ammonia, valves, pipes, and fittings. It then provided as follows: "We guarantee that this machine will refrigerate the following sizes of boxes to the temperature named for each." (Then follows a list of boxes, their capacity in cubic feet, and the temperatures at which the machine is guaranteed to refrigerate.) "We also guarantee that the power required to run this machine shall not exceed six horse power. We also guarantee that the water required for the condenser shall not exceed four gallons per minute at a temperature of seventy degrees. Considerations: We agree to erect the machine in the Union League Club house, we paying all freights, for the sum of \$1,800.00, payable October 1, 1895,

provided the machine fulfills the guaranties herein given. In case of its failure to fulfill the guaranties, we agree to remove the machine from said premises, and put the said boxes in the same condition in which they were at the time we took charge of them. It is further agreed that the boxes shall be left in such condition, at all times, that in case the machine fails, even for one day, the boxes can be refrigerated with ice, as heretofore, in which case the ice is to be paid for by said club and not by us. We also agree that, in case the machine proves unsatisfactory for any other cause than those above stated, we shall remove it from said premises, replacing the boxes in the same condition in which they were when we entered the premises, and it shall be optional with the said Union League Club to accept and pay for the machine or not, as it may please, on the date above specified. Agreements on Part of Union League Club: Said club agrees to furnish the power for running this machine; we will furnish all needed shafting, piping, pulleys and belting to transmit the power to the machine. Said club agrees to furnish the necessary water, required at a close point to the machine, and convenient for making connections thereto. Said club also agrees to see that the machine has proper care while running, and is kept lubricated, and to furnish a solid floor on which to stand the machine; work to be done at such hours as not to interrupt the business of the club."

Pliny B. Smith, for plaintiff in error.
Moses, Rosenthal & Kennedy, for defendant in error.

MAGRUDER, J. (after stating the facts). The refrigerating machine, which defendant in error agreed to erect for plaintiff in error in its clubhouse, was installed about July 1, 1895, and finally dismantled by the club on or about May 13, 1898. The evidence is clear and undisputed that the club continued to use the machine from the time it was so installed until about May 13, 1898, a period of nearly three years. At the latter date a fire occurred in the clubhouse, and prior thereto the club had resolved to have a larger machine than that of defendant in error, and had entered into negotiations for the purchase of such larger machine. When the refrigerating machine erected by the defendant in error was dismantled, certain parts of the machine, consisting of "I" beams fastened in the walls of the building, hangers attached thereto, and a shaft with pulleys thereon secured in the hangers, were not removed, but were retained by the club. The shaft and one of the pulleys were afterwards attached to a ventilating fan and to the new machine purchased by the club. After the dismantling the club continued to use the "I" beams, which were about 30 feet in length, and extended from the west wall through the inner or fire wall and into the room east of

the fire wall, being secured by holes made in the fire wall, through which the beams were thrust, their west ends being inserted into the west wall of the building. The openings in the walls to admit the beams were closed up with brick and mortar or cement. The pulleys and shaft were used for the purpose of transmitting power from the engine to the refrigerating machine.

After the refrigerating machine was thus dismantled, and on May 25, 1898, the chairman of the property committee of the club sent a written request to A. B. Meader, the trustee and agent of defendant in error, requesting him to remove the machine without delay, so as to leave the clubhouse in the same condition in which defendant in error had found it.

Several times during the period from the date of the contract on December 21, 1894, to May 25, 1898, the board of directors of the club, upon the recommendation of its property committee, voted to order the refrigerating machine removed, and, in pursuance of such votes, notices were given to the defendant in error to make such removal. The first order made for the removal of the machine was on December 16, 1895. But the club receded from its determination to have the machine removed, and as late as February, 1896, made provision for an examination of the machine by an expert, and an expert was sent from Cincinnati by Meader to test the machine, with the consent of the club. The superintendent of the club wrote to Meader on July 7, 1896, that it would be entirely satisfactory to him if the test was made on the 10th day of July. Accordingly, an expert was sent from Cincinnati to make the test, and on August 28, 1896, reported that "the machine has been taking care of all the boxes and easily doing all of the work with which it is connected." On September 2, 1896, the superintendent of the club telegraphed to Meader at Cincinnati as follows: "Directors' meeting September 14; machine working O. K." The correspondence introduced in evidence consists of about 59 letters, which passed between Meader, the agent and trustee of the defendant in error, and some representative of the club, sometimes the superintendent, sometimes the secretary, and sometimes the chairman of the property committee, as it was called. During the correspondence Meader proposed to put in a carafe box, which was capable of freezing about 200 caraffes per day, and this proposition seems to have been consented to or accepted by the club.

On September 15, 1896, the board of managers of the club had a meeting, and voted not to accept the ice machine, and Meader was advised of this vote by the secretary of the club on the same day, September 15, 1896. The correspondence shows that the club gave no reasons why it refused to accept the ice machine. At one time the club spent \$150 in repairing the machine, and during all

the time when this correspondence was going on, from October, 1895, to May, 1898, the club continued to use the machine. After the vote taken on September 15, 1896, the club seemed to again recede from the position taken by it on that day, and sent to Meader a copy of the report of its property committee, dated September 8, 1896, upon which its action taken on September 15, 1896, appears to have been based. After its action on September 15, 1896, the club, instead of stopping the machine and ordering its removal from the clubhouse, listened to arguments by Meader against the correctness of the report of September 8, 1896. The correspondence shows that, although Meader was continually asking for the reasons why the club regarded the machine as a failure, no such reasons appear to have been given to him by the club or any of its representatives. As late as February 18, 1897, the superintendent of the club resumed the correspondence, and informed Meader that a new property committee had been appointed, with a new chairman, and stated to Meader that he would find the new chairman "a very pleasant gentleman." As late as March 19, 1897, Meader wrote to the chairman of the property committee, stating that nearly two years had elapsed since the machine had been turned over to the club, and that it had been in continual operation, doing its full duty, and showing a surplus capacity beyond that required by the club. The testimony tends to show that the machine had been doing good work all the time. Many of Meader's letters, however, were unanswered, although the club still continued to use the machine. It would appear that as late as September, 1897, or August 30, 1897, the superintendent of the club had written a letter to Meader inquiring whether the machine could be changed into an "ice-maker." Meader replied on September 16, 1897, that it could not be changed into an ice-maker. For eight months after this letter of September 16, 1897, the club, although continuing to use the refrigerating machine, and although it entered into negotiations during the latter part of that time with another company for a new and larger ice machine, made no reply to the letters of Meader and his continual requests for a settlement. The next communication, sent to Meader by the club after September 16, 1897, was the notice already referred to of May 25, 1898.

The club gave no reasons to the defendant in error why it desired a removal of the machine, because it took the ground that under the contract it had the option to accept or reject the machine arbitrarily, and without giving any reasons for doing so. We do not think that this is the proper interpretation of the contract.

In the contract defendant in error made three specific guaranties: First, that the machine would refrigerate certain sizes of boxes to the temperature named for each; second,

that the power required to run the machine should not exceed six-horse power; and, third, that the water required for the condenser should not exceed four gallons per minute at a temperature of 70 degrees. The contract then contains the following provision: "We agree to erect the machine in the Union League Club house, we paying all freights, for the sum of \$1,800.00, payable October 1, 1895, provided the machine fulfills the guaranties herein given. In case of its failure to fulfill the guaranties, we agree to remove the machine from said premises, and put the said boxes in the same condition, in which they were at the time we took charge of them."

The evidence in the case shows that the machine did fulfill the guaranties thus mentioned in the contract. The evidence upon that subject was introduced by the defendant in error. The plaintiff in error introduced no evidence upon the subject, whether the machine fulfilled the guaranties or not, upon the ground, assumed by the club, that it was purely optional with the club whether it purchased the machine or not, and therefore it made no difference whether the guaranties were fulfilled or not. For this reason it is claimed by plaintiff in error that the court erred in allowing the defendant in error to produce any evidence to show that the guaranties were fulfilled. We are of the opinion that there was no error in this regard. The contract expressly provides that the purchase price of the machine, to wit, \$1,800.00, was payable on October 1, 1895, "provided the machine fulfills the guaranties herein given." Inasmuch as the guaranties were fulfilled, the plaintiff in error was bound to pay for the machine on October 1, 1895, except so far as the provision of the contract making it payable on that date is modified and changed by the subsequent part of the contract.

The subsequent part of the contract provides as follows: "We also agree that in case the machine proves unsatisfactory for any other cause than those above stated, we shall remove it from said premises, replacing the boxes in the same condition in which they were when we entered the premises, and it shall be optional with the said Union League Club to accept and pay for the machine or not, as it may please, on the date above specified." If the machine proved to be unsatisfactory for any other cause than that it did not fulfill the guaranties named, then defendant in error was required to remove it, and the option was not an option to take and pay for the machine or not, as plaintiff in error should please, but it was an option to accept and pay for the machine or not, "as it may please, on the date above specified"—that is, on October 1, 1895. In other words, if the machine was not satisfactory for any other cause than the nonfulfillment of the guaranties, then the plaintiff in error had the option not to accept or pay for it on October 1, 1895; but there is no statement in the contract that it was not to pay for it at all.

The provisions of the contract show that the machine was to be tried and tested in order to determine whether it would fulfill the guaranties or not, and in order to determine whether it was unsatisfactory or not from some other cause than the nonfulfillment of the guaranties. This is shown by such provisions as that the club was to furnish a solid floor on which to stand the machine, and the work was to be done at such hours as not to interrupt the business of the club. In case it became necessary to test the machine at some period beyond October 1, 1895, then the club was relieved from the obligation to accept and pay for it at that date.

Counsel refers to the case of *Goodrich v. VanNortwick*, 43 Ill. 445, in support of his contention that proof upon the question of the fulfillment of the guaranties was improperly admitted by the court. But that case is not on all fours with the case at bar. There the contract was in relation to the sale and purchase of a fanning mill to clean wheat, and it was agreed that "if the mill suited appellee, and answered the purpose, he was to keep it, otherwise it was to be returned within thirty days from the time the purchase was made and the money was to be refunded." And it was there held that "the terms of the agreement were that if it suited and answered the purpose. It is manifest that it was required to answer both requirements. If it did not suit appellee, then he had the right to return the property, and he was by the terms of the contract to be the sole judge of whether it suited him."

Counsel also refers in support of his position upon this branch of the case to the case of *Low v. Pardee*, 48 Ill. 466, where the contract was, "if Low did not like the planter he was to return it, and nothing was to be paid."

In the case at bar there is no such provision as that plaintiff in error was to have the option not to accept and pay for the refrigerating machine unless it suited the club or it liked it. On the contrary, the club was to pay for the machine if it fulfilled the guaranties, and if, for any cause other than the nonfulfillment of the guaranties, the machine was unsatisfactory, the club had a certain option. The very fact that there was to be some other cause than the nonfulfillment of the guaranties shows that the club did not have an arbitrary option to reject the machine. The proof that the machine fulfilled the guaranties was necessary in order to show that, if the machine was not satisfactory, it must have been from some other cause than the failure to fulfill the guaranties. Therefore the evidence upon this subject was properly admitted by the court. It was the duty of the club to show what the cause was which was claimed by it to establish the unsatisfactory character of the machine.

There are authorities which hold that "where one party agrees to do a thing to the satisfaction of another, and the excellence

of the work is a matter of taste, such, for instance, as a portrait, bust, suit of clothes, dramatic play, or a particular piece of furniture, the employer may reject it without assigning any reason for his dissatisfaction." But where the matter involved is not one of "taste, fancy, or judgment, but of common experience, such as an ordinary job of mechanical work, or the quality of material, a different rule applies, and in such cases the law will say that what in reason ought to satisfy a contracting party does satisfy him." 21 Am. & Eng. Ency. of Law (1st Ed.) p. 714, note 2. Thus, in *Wood Reaping and Mowing Machine Co. v. Smith*, 50 Mich. 569, 15 N. W. 908, 45 Am. Rep. 57, it was said: "The cases where the parties provide that the promisor is to be satisfied, or to that effect, are of two classes; and whether the particular case at any time falls within the one or the other must depend on the special circumstances, and the question must be one of construction. In the one class the right of decision is completely reserved to the promisor, and without being liable to disclose reasons or account for his course. * * * The cases of this class are generally such as involve the feelings, taste, or sensibility of the promisor, and not those gross considerations of operative fitness or mechanical utility which are capable of being seen and appreciated by others. * * * In the other class the promisor is supposed to undertake that he will act reasonably and fairly, and found his determination on grounds which are just and sensible, and from thence springs a necessary implication that his decision in point of correctness and the adequacy of the grounds of it are open considerations and subject to the judgment of judicial triers." *Daggett v. Johnson*, 49 Vt. 345; *Hartford Sorghum Manf. Co. v. Brush*, 43 Vt. 528; *Duplex Safety Boiler Co. v. Garden*, 101 N. Y. 387.

In *Keeler v. Clifford*, 165 Ill. 544, 46 N. E. 248, where the contract provided that certain work was to be done to the satisfaction of the employer, it was said (page 549, 165 Ill., and page 249, 46 N. E.): "Where a contract is required to be done to the satisfaction of one of the parties, the meaning necessarily is that it must be done in a manner satisfactory to the mind of a reasonable man. The plain construction of the contract in this regard is that the work was to be completed in accordance with the contract, in such a manner that appellant, as a reasonable man, ought to be satisfied with it. In the nature of things, it would rarely happen that a contract, abandoned or uncompleted by one party, would be fulfilled to the satisfaction of the other party thereto."

But let it be admitted that the plaintiff in error had, under the contract, an option to be exercised in an arbitrary way, and according to its own judgment, either to accept and pay for the machine, or not to accept and pay for it, still the question remains

whether or not the machine was kept and used so long by the club that it was bound to accept and pay for it. The case seems to have been tried upon the theory that, although the machine may have been rejected at one time by the plaintiff in error, yet that plaintiff in error had the right to take back its rejection, and keep the machine. It was left by the instructions to the jury to determine the question of fact whether plaintiff in error accepted the machine, and in determining this question they were authorized by the instructions to take into consideration, in connection with all the other evidence bearing upon the question, any conduct on the part of the plaintiff in error which, when reasonably considered in the light of all the other evidence in the case bearing upon the question of acceptance, would show an acceptance of the machine; and they were told that if the conduct of the plaintiff in error, when reasonably considered in the light of all the other evidence bearing upon the question of acceptance, showed an acceptance of the machine by the plaintiff in error, the defendant in error was entitled to a verdict. These instructions are complained of by the plaintiff in error, but without reason, because instructions of the same character were asked by the plaintiff in error. For instance, the court gave for the plaintiff in error, and at its request, an instruction numbered 3, which said to the jury: "If from the evidence you believe that the club never did promise to purchase and pay for the machine, and did not retain and use the machine for such length of time and under such circumstances as to amount to an election to purchase the machine, then you should find for the defendant." By this instruction the question of fact was left for the determination of the jury whether plaintiff in error retained and used the machine for such a length of time and under such circumstances as to amount to an election to purchase it. Upon this question of fact the jury found in favor of defendant in error, and the finding is conclusive upon this court.

There was some evidence introduced by the plaintiff in error tending to show that the club merely retained and kept possession of the machine as a favor to defendant in error, because it was requested by defendant in error to do so, upon the ground that its rejection and removal would injure the defendant in error in its business, and would be made use of by its business competitors to its injury. Proof was introduced by defendant in error contradicting this testimony on the part of plaintiff in error. The instructions given left the question to the jury to determine, and they have found the fact in favor of the defendant in error. For instance, the fourth instruction given for plaintiff in error, and at its request, was as follows: "If from the evidence you believe that the club never agreed to purchase the machine in question, but ordered it taken out, and that the plaintiff's

agent requested the club to retain the machine in its position and make such use of it as the club might see fit, and stated that such retention should not prejudice the club, or its right to reject the machine, or words to that effect, and that pursuant to such request and upon such condition only the club allowed the machine to remain in its position and made use of it, such retention or use would not bind the club to purchase or pay for the machine, and you should find for the defendant."

Some other objections are urged against the instructions given and refused, and some other criticism is made of the action of the trial court in admitting evidence. But all these objections grow out of the general claim, made by plaintiff in error, that, under the terms of this contract, it had an arbitrary option to reject and refuse to pay for the machine if it chose to do so, and whenever it chose to do so, without reference to the question whether there was any good reason or cause for its rejection of the machine and refusal to pay for it or not. As we hold, for the reasons above stated, that such is not the correct interpretation of the contract, it is unnecessary further to consider the other objections made, which are not here discussed. There was no error in the giving or refusal of instructions, or admission or exclusion of evidence, which tended in any way to injure the plaintiff in error, in view of the interpretation here given to the agreement, and in view of the manner in which the case was tried and submitted to the jury.

The judgment of the Appellate Court is affirmed. Judgment affirmed.

(204 Ill. 82)

FOWLER v. FOWLER et al.

(Supreme Court of Illinois. Oct. 26, 1903.)

SPECIFIC PERFORMANCE — DESCRIPTION OF PROPERTY — CONSIDERATION — BILL — SUFFICIENCY — AMENDMENT — FAILURE TO VERIFY — AUTHORITY OF AGENT — JURISDICTION.

1. Amendments to a verified bill need not be sworn to when they merely amplify a statement in the bill.

2. When an amended bill is demurred to, the amendments cannot be objectionable on the ground that they are unverified, as the demurrer admits their truth.

3. By demurring to an amended bill, respondent is estopped from claiming that certain letters attached as exhibits were not a part of the bill.

4. In an action by a daughter against her father and others for specific performance of a contract entered into by exchange of numerous letters, it appeared that the letter from the father agreeing to convey the property referred to the daughter by her given name only, but the letter accepting the offer, together with other letters, all written by the daughter's attorney, referred to the daughter by her full name. *Held*, that the letters sufficiently established complainant's identity as the person to whom the offer was made.

5. In a suit by a daughter against her father and others to enforce specific performance of a contract entered into by means of a number of letters between the father and the daughter's attorney, the bill alleged that a letter from the

father offered to convey the property for a stated price, and the attorney's letter in response stated that the daughter would take the property at the price named, "on account of the indebtedness which exists between yourself and her." It was further alleged that the father was indebted to the daughter in a sum exceeding the agreed price of the property. *Held*, that the bill sufficiently alleged that the purchase price was to consist of a credit on the indebtedness, and was not to be paid in cash.

6. The bill in a suit by a daughter against her father and his sister to enforce specific performance of the father's contract to convey realty alleged that the father, being indebted to the daughter, agreed to convey to her certain realty for an agreed price, to be credited on his indebtedness. It was further alleged that, instead of conveying as agreed, the father conveyed to his sister, who took with knowledge of the previous agreement and fraudulently, and for the purpose of depriving the daughter of the property. *Held* to state a cause of action for specific performance against the sister.

7. While an application for specific performance is addressed to the discretion of the court, nevertheless, where a valid contract, which is fair and unobjectionable, is shown, the court is bound to give the relief sought.

8. In a suit by a daughter against her father and others to compel specific performance of a contract entered into by correspondence between the father and the daughter's attorney, it appeared that, in a letter from the father, he offered, for a certain consideration, to assign "my interest in my mother's estate." In the reply accepting the proposition, the attorney asked for a legal description, and the father replied that the attorney could go to the probate record and get numbers of the property. *Held*, that the description of the property was capable of being rendered certain, so as to justify specific performance.

9. Where a father agreed to convey land to his daughter at an agreed price, to be credited on an indebtedness due from him to her, the consideration was sufficient to justify specific performance.

10. A bill to enforce specific performance of a contract made in complainant's behalf by her attorney was not demurrable because not alleging that the attorney was authorized in writing.

11. Where an offer to sell land was accepted by the attorney of the prospective purchaser, it was not necessary to the validity of the contract, as against the seller, that the attorney should have been authorized in writing.

12. In a suit to enforce specific performance, the vendor lived in a different state, and was not personally served; but it was alleged that, after the execution of the contract sought to be enforced, the land had been conveyed to a resident, who took with knowledge, and fraudulently intending to deprive complainant of the benefits of the contract, and the bill prayed that this resident purchaser be required to convey to complainant. *Held*, that the court had jurisdiction to compel a conveyance by the person holding the title, even though it was without jurisdiction to make a decree against the nonresident vendor.

Appeal from Circuit Court, Cook County; Elbridge Haney, Judge.

Suit by Edna I. Fowler against Harriet Fowler and others. From an order sustaining a demurrer to the amended bill, complainant appeals. Reversed.

This is a bill originally filed on December 5, 1901, in the circuit court of Cook county by the appellant, Edna I. Fowler, against the appellee Harriet Fowler and Charles H. Fowler and Bernard Fowler, for the purpose

¶ 1. See Equity, vol. 19, Cent. Dig. § 615.

of enforcing the specific performance of a contract alleged to be embodied in certain letters which passed between Charles H. Fowler and the attorney of appellant. The appellant, Edna I. Fowler, is the daughter of Charles H. Fowler, and Harriet Fowler is her aunt (her father's sister), and Bernard Fowler is her grandfather (her father's father). To the bill, as originally filed, the letters in question were not attached as exhibits. The original bill was demurred to, and the demurrer was sustained. On February 15, 1902, the bill was dismissed as to Bernard Fowler, the grandfather. On February 20, 1902, appellant, by leave of court, filed an amended bill, to which 13 letters which passed between Charles H. Fowler and the attorney of appellant were attached as exhibits. Harriet Fowler filed a general and special demurrer to the first amended bill, which was sustained by the court. Charles H. Fowler lived at Benton Harbor, Mich., and publication was made as to him as a nonresident, but he was not personally served. Harriet Fowler lives in Cook county, and was personally served with process. Appellant also lives in Cook county, Ill.

On October 23, 1902, the appellant, by leave of court, filed a second amended bill, to which the three letters hereinafter mentioned, dated September 26, September 30, and October 7, 1901, were attached as Exhibits 1, 2, and 3. The second amended bill was sworn to by appellant's solicitor. Harriet Fowler filed a general and special demurrer to the second amended bill, which was sustained, and appellant took leave to amend; the amendment being filed to the second amended bill on January 12, 1903. A general and special demurrer was filed by Harriet Fowler, not only to the second amended bill, but also to the amendments to the second amended bill. The court below sustained the demurrer to the second amended bill and the amendments thereto, and the appellant elected to stand by her bill. Thereupon the second amended bill, as amended, was dismissed for want of equity, and execution ordered to issue in favor of the defendant Harriet Fowler for her costs. The present appeal is prosecuted from such decree of dismissal.

The second amended bill alleges that on September 26, 1901, Charles H. Fowler was seised in fee of the following real estate in Cook county, Ill., to wit: An undivided one-sixth interest in the southerly 25 feet of the easterly one-half of the southerly 50 feet of lot 85 in Ellis' East addition to Chicago; also the southerly one-half of lot 11, being the southerly 41 feet of said lot 11 of the county clerk's subdivision of lots 83, 84, 85, 86, and 87 in Ellis' East addition to Chicago; also the north $6\frac{1}{2}$ feet of lot 82 and the south 20 feet of lot 83 in Kenwood subdivision, in section 2, township 38 north, range 14 east; that said real estate comprised and was the entire interest in real estate in Chicago, acquired by Charles H. Fowler through the es-

tate of his mother, deceased; that on said date Charles H. Fowler likewise owned an interest in other real estate in Cook county, known as the Hayford elevator property; that on said date Charles H. Fowler made a written proposition for the sale to appellant of all said property at \$8,000, including \$4,500 for his interest in the Chicago real estate acquired from the estate of his deceased mother, "which is the real estate first herein described, and \$3,500 for said Hayford elevator property"; that a copy of said proposition is attached to the bill, marked "Exhibit 1"; that said proposal was accepted by appellant by letter addressed to Charles H. Fowler, dated September 30, 1901, a copy of which is attached to the bill and made a part thereof, marked "Exhibit 2"; that, at the time of making said contract, Charles H. Fowler was and still is a resident of St. Joseph, Berrien county, Mich.; that he was indebted to appellant at the dates of said letters in the sum of about \$15,000 for the proceeds of property belonging to appellant, sold by him, which he retained in his possession, of which about \$11,500 still remains due and unpaid to appellant; that by the letter of September 30, 1901, appellant agreed to pay for the real estate so contracted to be conveyed to her by Charles H. Fowler by giving him credit on said indebtedness for the purchase price set by him upon the property; that Charles H. Fowler thereafter wrote a letter, dated October 7, 1901, a copy of which is attached to the bill, marked "Exhibit 3," and made a part thereof, and thereby requested that the appellant's attorney procure the description of the real estate, and prepare a warranty deed conveying the same to appellant; that appellant thereafter caused said deed to be prepared and sent to Charles H. Fowler for execution, and requested him to execute the same and return it for record; that, in all of said dealings, appellant acted by her attorney, Arthur W. Underwood, and expressly authorized and directed all of the acts and correspondence hereinbefore set forth.

The bill further alleges that since October 7, 1901, Charles H. Fowler has conveyed to appellant, in accordance with his agreement, his interest in the property known as the Hayford elevator property, and appellant has given him credit on said indebtedness for \$3,500 agreed upon between them, leaving still due and unpaid to appellant from Charles H. Fowler the sum of about \$11,500; that appellant has been at all times since the making of said agreement, and is still, ready and willing, and has already offered, and hereby again offers, to give Charles H. Fowler credit upon said indebtedness for the sum of \$4,500 in consideration of the conveyance to appellant of the real estate first in the amended bill described; that appellant has requested him to make such conveyance to her as agreed, but he has continually refused and neglected, and still refuses, to make said con-

veyance; that appellant has always been ready and willing to comply with the terms of the agreement on her part; that she has caused to be prepared, and sent to Charles H. Fowler for execution, a proper deed of conveyance in due form; that he, as appellant is informed and believes, has executed said deed, but thus far has refused and neglected to turn over said deed of conveyance, and still refuses and neglects to do the same; that Harriet Fowler was advised of all said transactions and agreements between Charles H. Fowler and appellant, as and when the same occurred, and well knew that he had agreed to convey to appellant, and appellant had agreed to receive and pay for, as aforesaid, said one-sixth interest in the premises above described, at the price of \$4,500, and that he was largely indebted to appellant, and had already executed a deed of said premises to appellant, and was prepared to carry out the transactions on his part, yet that Harriet Fowler, for the purpose of defrauding appellant out of the value of said premises, and preventing her from acquiring title thereto, and enabling Charles H. Fowler to escape from his said agreement, and to convert into money property agreed to be conveyed to appellant, conspired and confederated together with Charles H. Fowler and with Bernard Fowler, being the agent of Harriet Fowler in that behalf, and on or about October 28, 1901, took from Charles H. Fowler a conveyance of said one-sixth interest held by him in the premises hereinbefore described; that said conveyance undertook to transfer to Harriet Fowler the title to said premises; that said deed has been placed on record in the recorder's office of Cook county, and thereby Charles H. Fowler and Harriet Fowler have conspired to make a pretended and fraudulent transfer of the title held by Charles H. Fowler to Harriet Fowler; that Charles H. Fowler has received from Harriet Fowler in payment of said fraudulent transfer \$1,000 in cash, and \$3,500 in notes, signed by Harriet Fowler and by her agent, Bernard Fowler, payable to the order of Charles H. Fowler, all being negotiable, and that Harriet Fowler pretends, in consideration of the transaction between herself and Charles H. Fowler, it was agreed that the latter should turn over to appellant the consideration so paid by Harriet Fowler to Charles H. Fowler for the said fraudulent conveyance; that all of said transaction was designed as a conspiracy and a sham, for the purpose of interfering with, and preventing the completion of, the bona fide agreement between appellant and Charles H. Fowler for the purchase of said premises; that all said steps were taken by said Harriet Fowler with full knowledge of appellant's rights and dealings in the premises, and with full knowledge that, by reason of the agreement between appellant and Charles H. Fowler, appellant was and is the equitable owner of said premises; that Charles H. Fowler was

and still is insolvent, and unable to pay his debts, and that his financial condition was at all times well known to Harriet Fowler; that said transaction was made with the design to prevent appellant from securing title to said property, or recovering compensation for the injury, loss, and damage done to her; that all said steps taken by Harriet and Charles H. Fowler were fraudulent and void as against appellant; that Harriet Fowler holds the title to said premises as trustee for appellant, and that the pretended conveyance from Charles H. Fowler to Harriet Fowler ought to be canceled and set aside as a fraud upon appellant, and that defendant should be compelled to convey said premises to appellant in accordance with the contract of purchase aforesaid; and that appellant offers to produce in open court the letters before referred to, etc.

The bill prays that Charles H. and Harriet Fowler be made defendants and required to answer, the oath being waived; that said pretended conveyance from Charles H. Fowler to Harriet Fowler may be canceled, annulled, and set aside as fraudulent and void as against appellant, and that the rights of said Harriet Fowler thereunder may be declared and held to be void and of no force and effect; that the title held by Harriet Fowler may be decreed to be held by her as trustee for appellant; and that she be decreed to release the same to appellant; that Charles H. Fowler may be decreed to specifically perform said agreement, and to make and deliver to appellant a deed of conveyance to said premises, appellant being ready and willing and hereby offering to specifically perform said contract upon her part by crediting him upon his indebtedness to her with the sum of \$4,500, agreed upon as the consideration of said conveyance, upon receipt of proper conveyance of said premises; and that appellant may have such other and further relief as equity may require, etc.

The amendments to the second amended bill merely inserted the sum of \$11,500 as the indebtedness, instead of the sum of about \$15,000, and inserted attached copies of five additional letters, numbered Exhibits from 1 to 4, inclusive, and Exhibit 8. The eight letters referred to in the second amended bill, and the amendments to it, are as follows:

A letter dated Benton Harbor, Mich., September 13, 1901, signed by C. H. Fowler, and addressed to Arthur W. Underwood, Esq., Chicago, to wit:

"Your letter of the 12th at hand and carefully noted. I say to you as I told Edna I would do, which is as follows: I would assign my interest in my mother's estate and my equity in the elevator property to my father for her benefit. Whatever is got out of the two properties would go to her. This I am ready to do and have been. As to signing over to her without any price set or agreed on, I don't think there is any law that can make me do it. All I want is to be pro-

tected and make the property pay what there is really in it. The estate has been held by my father for three years. All the heirs have confidence in him to handle to get the most out of it. I am ready at any time to assign to him for Edna's interest, which she runs no risk in getting. Any one has a right to assign his property for the benefit of his creditors. I am ready to make such papers at any time. As to signing the papers you sent over, I will not do unless a satisfactory price set, then I will turn over, but no other way."

A letter dated September 16, 1901, signed by Arthur W. Underwood and addressed to Charles H. Fowler at Benton Harbor, Mich., as follows, to wit:

"Your letter of the 13th is at hand and contents carefully noted. I have, since receiving it, consulted with your daughter, Miss Edna Fowler, and beg to state in reply, as follows:

"Miss Fowler would prefer that such property or interests in property as she may receive from you should be transferred directly to herself, and not placed on trust with any other person for her benefit. This is not for the reason that she lacks confidence in your father or in yourself, or any other person, but being now of age she feels that it is her duty, as well as her right, to manage her own affairs, and she would much prefer, and will insist, that any transfer for her benefit be made to herself.

"You indicate in your letter that upon an agreement as to price you would see no special objection to carrying out the proposal made by me, even though the terms were not exactly followed. Of course this is a suggestion along the line which we were naturally ready to consider. I should be glad to have you advise me by return mail as to what you consider a satisfactory price for the property interests of which mention has already been made. I might say that Miss Fowler tells me you have offered to transfer your interest in your mother's estate for the sum of \$3,000.00, and that the interest which you have in the elevator, being a difference between the contract price of \$7,500.00 under which it is now held and the debt of \$4,000.00 owed by you to the vendor, is approximately \$3,500.00. Kindly advise me by return mail, as already stated, what you are willing to do in the matter of price. We will give you a prompt answer, and if we cannot get together, beg to assure you that there will be no delay in getting at some conclusion one way or another. This is said not by way of threat, but in appreciation of the spirit in which your letter is written, and to advise you that negotiations will be carried on in a corresponding spirit if you promptly comply with our reasonable request."

Also a letter dated September 23, 1901, signed C. H. Fowler, and addressed to A. W. Underwood, of Chicago, Ill., as follows:

"As soon as I can get values of property in neighborhood of ours, will tell you what I will be willing to price it at. I never offered my interest for \$3,000.00 to any one. Will write you as soon as I hear."

A letter dated September 24, 1901, signed by Arthur W. Underwood, and addressed to C. H. Fowler, of Benton Harbor, Mich., as follows:

"I have your letter of September 23, and note its contents. I shall expect a further answer as early as you can possibly get the facts in your possession. I don't suppose you will want to make us the same offer you have made to other people, but the information I have is very definite as to your offer of \$3,000.00. However, that is a matter which, as already stated, does not bind you in dealing with us. Kindly let us hear from you, as requested."

Also a letter dated Benton Harbor, Mich., September 28, 1901, signed by C. H. Fowler, and addressed to A. W. Underwood of Chicago, Ill., as follows:

"Your letter came to hand and noted. Would say I am willing to assign over to Edna my interest in my mother's estate (the Chicago real estate) at \$4,500.00. The elevator, \$3,500.00, subject to Sidwell's lien, in all \$8,000.00. I never offered any one my interest in the estate for \$3,000.00. This price is much less than it was purchased for many years ago. If this satisfactory, I am ready to assign any time."

Also letter dated September 30, 1901, signed by A. W. Underwood, and addressed to Charles H. Fowler, Benton Harbor, Mich., as follows:

"In answer to your letter of recent date, I beg to say that your proposition is accepted by Miss Edna Fowler, upon condition that she is furnished with instruments satisfactorily vesting in her the title to the property which you mention. Will you kindly forward to me the legal description of the property in which you are interested, including both the elevator property and the real estate which formerly belonged to the estate of your mother and in which you are now interested. I expect it will be necessary, in order to cover all possible controversy, that you give to Miss Fowler an assignment of the contract which you hold for the purchase of the elevator property and of your interest in the lease and contract of sale; also that you give her a quitclaim deed covering the property by its legal description. In regard to the estate of your mother, I think we should have an assignment of the interest which you hold, and also the conveyance of your undivided interest in the real estate held by the estate, describing it by its legal description. If you will furnish me the proper description of the real estate and dates of the contracts referred to, together with the names of the parties to the contracts, so that I can properly draw assignments of the same, I should be glad to put them in shape. Miss

Fowler will take the property at the price named by you, to wit, \$8,000.00, on account of the indebtedness which exists between yourself and her."

Also a letter dated Benton Harbor, October 7, 1901, signed by C. H. Fowler, and addressed to A. W. Underwood of Chicago, Ill., as follows:

"Your message came to hand. You can go to the probate records and get numbers of the property, 3622 Lake ave. I do not know the numbers. It is the second door north, forty feet front, and 4561 Lake ave. You can make warranty deed to Edna for the undivided one-sixth interest. By going to Mr. Sidwell's office you can get copy of my contract with him; also lease, which I assign to Edna. Consideration of the first to be \$4,500.00; the elevator property, \$3,500.00; Edna assuming the conditions of the contract. This can be done as well as waiting until father gets the numbers for me. You will find the records of the estate of Martha Fowler filed some time about January 1, 1898."

Also a letter dated October 8, 1901, signed by Arthur W. Underwood, and addressed to Charles H. Fowler, Benton Harbor, Mich., as follows:

"I have your letter of the 7th, and will immediately take up the matter of papers and get the whole thing closed."

Arthur W. Underwood and J. A. Bloomington, for appellant. Alfred D. Eddy and James A. Fullenwider, for appellees.

MAGRUDER, J. (after stating the facts).

1. The first ground, upon which appellee seeks to sustain the decree of the lower court, is that the amendments to the second amended bill were not sworn to. It is said that, inasmuch as the second amended bill was sworn to, the amendments to it should also have been sworn to. The fact that a bill is verified by affidavit does not necessarily deprive the complainant of the benefit of an amendment. Amendments to bills in chancery are allowed with great liberality, in furtherance of justice, until the proofs are closed, when the bill is not under oath, but greater caution is exercised in regard to amendments to bills where they are sworn to. A complainant is undoubtedly estopped from so amending his bill as to contradict facts which he has sworn to as positively true, unless he can clearly show the court that the statement was made in mistake. But when an amendment only enlarges and amplifies a statement in the bill, it may be made without being sworn to. *Marble v. Bonhotel*, 35 Ill. 240; *Gregg v. Brower*, 67 Ill. 525; *Booth v. Wiley*, 102 Ill. 84. Of such a character were the amendments here made. Appellee demurred to the amendments to the second amended bill, as well as to the second amended bill itself, and she thereby admitted all the statements therein

to be true. This being so, it makes no difference whether an affidavit was attached to the amendments to the second amended bill or not. There can be no necessity for a verification of the facts by oath when such facts are admitted by the adverse party upon the record. By the demurrer, appellee waived her objections to the second amended bill and its amendments in this respect. *Keach v. Hamilton*, 84 Ill. App. 413. Appellee is also estopped from claiming that the additional letters attached as exhibits to the amendments were not made a part of the amended bill, because the demurrer is a demurrer to the second amended bill and the amendments thereto, thereby admitting that the letters attached are included in the amendments to the bill.

2. It is claimed by appellee that the second amended bill, either with or without the amendments thereto, does not show an agreement which is complete, certain, fair, and just in all its parts, so as to entitle appellant to a specific performance of the alleged contract. *Tryce v. Dittus*, 199 Ill. 189, 65 N. E. 220. Under this head it is said that the letter of September 28, 1901, refers to "Edna," without stating what Edna is meant. The very next letter, dated September 30, 1901, in which the proposition, contained in the letter of September 28th is accepted, states as follows: "Your proposition is accepted by Miss Edna Fowler." A prior letter of September 16, 1901, written to Charles H. Fowler, refers to a consultation "with your daughter, Miss Edna Fowler." This and other parts of the correspondence clearly indicate that the Edna referred to is the appellant. In the letter of September 28, 1901, C. H. Fowler expresses his willingness "to assign over to Edna my interest in my mother's estate (the Chicago real estate) at \$4,500.00." It is said that the words "my mother's estate" make the description of the real estate uncertain and indefinite, upon the alleged ground that "there is no such governmental subdivision of real estate as 'my mother's estate.'" *Glos v. Wilson*, 198 Ill. 44, 64 N. E. 734. The reference to C. H. Fowler's interest in his mother's estate, taken in connection with other letters which will be hereafter referred to, makes the description of the real estate sufficiently certain and definite. It is said, also, that the propositions of C. H. Fowler, as embodied in his letters, were coupled with conditions. One of these conditions was that his assignment of his interest in his mother's estate and of his equity in the elevator property should be to his father, Bernard Fowler, for the benefit of his daughter Edna I. Fowler. Subsequent letters, however, show that he did not insist upon having the conveyance made to his father in trust for his daughter, because he says in one letter that he will assign his interest directly to Edna herself, and in another letter he tells her attorney to make out a warranty deed for the undivided one-sixth

interest owned by him in his mother's estate directly to his daughter Edna. The complaint is furthermore made that in the letter of September 26, 1901, addressed by Fowler to Underwood, the value of his interest in his mother's Chicago real estate is placed at \$4,500, and in the elevator property at \$3,500, subject to a certain lien, making \$8,000 in all, but that nothing is therein stated about the price being credited upon the indebtedness claimed by appellant to be due to her from her father, and that therefore the presumption is that the price was to be paid in cash, and not in property. It appears, however, from the letter of September 30, 1901, written by A. W. Underwood to Charles H. Fowler, that the following statement is made: "Miss Fowler will take the property at the price named by you, to wit, \$8,000.00, on account of the indebtedness which exists between yourself and her." The second amended bill, and the amendments thereto, allege this indebtedness to be \$15,000, or, as reduced by the application thereto of \$3,500, the agreed valuation of the elevator property, to be \$11,500, and this allegation as to the amount of the indebtedness is admitted to be true by the demurrer. It appears from the allegations of the bill, and the letters thereto attached, that Charles H. Fowler owed his daughter, the appellant, \$15,000 for money which he had obtained from the sale of her property and failed to turn over to her. In part settlement of this indebtedness, he agreed to turn over his interest in certain elevator property at Hayford, and the one-sixth interest in his mother's estate, consisting of land on Lake avenue, in Chicago, to the appellant. The negotiations between appellant's attorney and Charles H. Fowler ended in a contract, as shown by the letters, whereby he was to repay his indebtedness, to the extent of \$8,000, by turning over his interest in the above-mentioned property. His interest in the elevator property was actually transferred and assigned to his daughter, and he was given credit therefor to the extent of \$3,500 upon his indebtedness, thereby reducing it to \$11,500. We think the letters show an agreement upon his part to transfer to his daughter his one-sixth interest in his mother's real estate in Chicago in payment of an additional \$4,500 of his indebtedness, and to convey said interest to his daughter by a warranty deed. This deed, according to the allegations of the bill, which were admitted to be true by the demurrer, was actually drawn up and sent to him to be executed, but he refused to do so. Instead of conveying his interest in his mother's estate to his daughter in accordance with the agreement, he conveyed the same to his sister Harriet Fowler, although being insolvent at the time, and took back from her \$1,000 in cash and \$3,500 in notes signed by her and by his father, Bernard Fowler, and payable to his own order. The bill alleges, and the allega-

tion is admitted by the demurrer to be true, that, when Harriet Fowler took this conveyance from her brother Charles H. Fowler, she knew of the previous agreement he had made with his daughter to transfer the property to the latter. It is also alleged, and admitted by the demurrer to be true, that the transfer to Harriet Fowler was a fraud as against Edna Fowler, and was made for the purpose of depriving her of the property which her father had agreed to convey to her. This bill is for the purpose of compelling the specific performance of the contract by which Charles H. Fowler agreed to convey his interest in his mother's estate to his daughter in consideration of receiving a credit of \$4,500 upon his indebtedness to her. We are unable to see why the appellant was not entitled to the relief prayed in her bill, and will only notice some of the main reasons why appellee urges that the trial court correctly sustained the demurrer to the bill.

3. It is true that an application for the specific performance of a contract is addressed to the sound legal discretion of the court, and that, even where a legal contract is shown to exist, it will not be decreed as a matter of course. *Bowman v. Cunningham*, 78 Ill. 48; *Tryce v. Dittus*, 199 Ill. 189, 65 N. E. 220. But the discretion of the court in such cases must be exercised according to settled principles of equity, and not arbitrarily. *Barrett v. Geisinger*, 179 Ill. 240, 53 N. E. 576. A court of equity will, as a matter of course, grant the specific performance of a contract for the conveyance of land, where it is valid at law, fairly entered into, and unobjectionable in any of its features which address themselves to the judicial discretion of the chancellor. In such case a court of equity is equally bound with a court of law to grant the appropriate relief when properly applied to for that purpose. *McClure v. Otrich*, 118 Ill. 320, 8 N. E. 784; 3 *Pomeroy's Eq. Jur.* § 1405. In his work on Equity Jurisprudence, *Pomeroy* says (section 1404): "The granting the equitable remedy is, in the language ordinarily used, a matter of discretion, not of an arbitrary capricious discretion, but of a sound judicial discretion, controlled by established principles of equity, and exercised upon a consideration of all the circumstances of each particular case." It is well settled that, where the description of the property in a contract for the sale of real estate is uncertain, the contract will not be specifically enforced, *Glos v. Wilson*, 198 Ill. 44, 64 N. E. 734; *Hamilton v. Harvey*, 121 Ill. 489, 13 N. E. 210, 2 Am. St. Rep. 118. Where land is the subject-matter of such a contract, it should be so described as to leave no uncertainty as to its quantity, shape, and location. But a written contract for the conveyance of land is not void for uncertainty in the description of the land sold or conveyed, if, from the words employed, the description can be made certain by extrinsic evidence of facts, physical conditions, measurements, or monuments referred

to in the deed. *Hayes v. O'Brien*, 149 Ill. 403, 37 N. E. 73, 23 L. R. A. 555. In *Hamilton v. Harvey*, supra, it appears that a contract, mentioned in a case therein referred to, described certain tracts of land as all the land a party "owned and held contracts for in the township of Harrington," and it was held that this description was sufficiently certain, it being there said: "The maxim is, 'Id certum est quod certum reddi potest.' It can be shown with certainty what lands he owned, or held contracts for, in these boundaries." In the case at bar, we think that the letters introduced in evidence show a sufficient description of the land intended to be conveyed. In the letter of September 13, 1901, Charles H. Fowler says: "I would assign my interest in my mother's estate and my equity in the elevator property." In the letter of September 26, 1901, he says: "I am willing to assign over to Edna my interest in my mother's estate (the Chicago real estate) at \$4,500.00. The elevator, \$3,500.00, subject to Sidwell's lien, in all \$8,000.00. * * * If this is satisfactory I am ready to assign any time." In the letter of September 30, 1901, appellant's attorney says: "I beg to say that your proposition is accepted by Miss Edna Fowler, upon condition that she is furnished with instruments satisfactorily vesting in her the title to the property which you mention. Will you kindly forward to me the legal description of the property, in which you are interested, including both the elevator property and the real estate, which formerly belonged to the estate of your mother, and in which you are now interested? * * * Miss Fowler will take the property at the price named by you, to wit, \$8,000.00, on account of the indebtedness which exists between yourself and her." In the letter of October 7, 1901, C. H. Fowler, in answer to the letter asking for a legal description of the property, says to appellant's attorney: "You can go to the probate records and get numbers of the property, 3622 Lake avenue. I do not know the numbers; it is the second door north, forty feet front, and 4561 Lake avenue. You can make warranty deed to Edna for the undivided one-sixth interest. By going to Mr. Sidwell's office you can get copy of my contract with him. Also lease, which I assign to Edna. Consideration of the first to be \$4,500.00; the elevator property \$3,500.00, Edna assuming the conditions of the contract. * * * You will find the records of the estate of Martha Fowler filed some time about January 1, 1898." These letters sufficiently described the property, so that it could be identified. The street numbers are given, and the records of the estate, where the property belonging to the estate is described, are mentioned as the proper source for the ascertainment of the legal description. It is apparent that, from the words employed in these letters, the description can be made certain, so that the contract cannot be regarded as void for uncertainty. Moreover, the second amended bill specifically de-

scribes certain property in which a one-sixth interest was owned by Charles H. Fowler as being located in Ellis' East addition and Kenwood subdivision, giving the numbers of the lots, etc., and alleges that such interest in the property so described was the interest in the Chicago real estate acquired by Charles H. Fowler in his deceased mother's estate; and this allegation is admitted by the demurrer to be true.

4. It is said by the appellee that there was no consideration for the contract, upon the theory that "a past and executed consideration is not sufficient to sustain a new contract based thereon." Here there was not a past and executed consideration, but a present and new consideration, to wit, an agreement to release a portion of the indebtedness of \$15,000, to wit, \$8,000, for the transfer of real estate which both parties agreed to value at \$8,000. The agreement to release \$8,000 of this indebtedness was clearly a sufficient consideration upon which a contract of this character could be based. Appellee refers to the case of *Davidson v. Burke*, 143 Ill. 139, 32 N. E. 514, 36 Am. St. Rep. 367, as sustaining the contention that the present contract is without a valid consideration. In that case a creditor sought to release a debtor by payment of one-half of his indebtedness. The debtor was a joint debtor, and was under obligations to pay the full amount. The promise was there held to be nudum pactum, because there was no consideration to support it, for the reason that an agreement to pay one-half of an obligation would not form any consideration for a release of the whole, and, to release the joint debtor, the full amount must necessarily have been paid. The case, however, has no bearing here.

5. It is furthermore contended by the appellee that Arthur W. Underwood, who wrote the letters in behalf of appellant, is not shown to have had any written authority to represent her, or to make any propositions for her. The bill alleges that appellant acted by her attorney, Arthur W. Underwood, and expressly authorized and directed all of his acts and correspondence. This allegation of the bill is admitted to be true by the demurrer. It is true that there is nothing upon the face of the bill to show whether Underwood was authorized in writing or not. But it will not be presumed that his authority was a mere verbal one, and within the statute of frauds, because the bill does not allege that his authority was in writing. "The benefit of the statute of frauds as a defense can be taken by demurrer only when it affirmatively appears from the bill that the agreement relied upon is not evidenced by a writing duly signed." *Hamilton v. Downer*, 152 Ill. 651, 38 N. E. 733. Inasmuch as it does not affirmatively appear from the bill in this case that the authority of Underwood is not evidenced by a writing duly signed, the statute of frauds cannot be used as a defense by demurrer. See, also, *Speyer v. Desjar-*

dins, 144 Ill. 641, 32 N. E. 283, 36 Am. St. Rep. 473. The person charged in the contract for the sale of the land was Charles H. Fowler. If he had sought to act through an agent, such agent would be required to show written authority. But in the present case Underwood, acting in behalf of appellant, was merely negotiating a settlement, and his principal was not the party charged in the contract to transfer the land. In other words, the contract for sale of land need only be signed by the party to be charged, which party in this case was Charles H. Fowler, and not Edna I. Fowler. If Edna I. Fowler had accepted orally the written proposition of Charles H. Fowler to transfer the land to her as a credit upon his indebtedness, it would be sufficient to satisfy the statute of frauds. *Farwell v. Lowther*, 18 Ill. 252; *Esmay v. Gorton*, Id. 483; *McConnell v. Brillhart*, 17 Ill. 354, 65 Am. Dec. 661.

6. The main ground, however, upon which the appellee seeks to sustain the decree of the court below, is the alleged ground that the court was without jurisdiction to grant the relief prayed for. The contention upon this branch of the case is that, in order to decree the specific performance of a contract, a court of equity must have personal jurisdiction of the party who signed the contract, and against whom performance is sought to be enforced. In other words, the position taken by counsel is that the proceeding for specific performance of a contract is an action in personam, and not in rem. We deem it unnecessary, for the purposes of this decision, to discuss the question whether such a proceeding as the present one is a proceeding in rem, or a proceeding in personam, or a proceeding partly in rem and partly in personam. Charles H. Fowler is a nonresident of Illinois, and was not personally served, but was only brought in by publication, and we are inclined to think that a decree could not be entered against him for the specific performance of the contract here under consideration. *Hayes v. O'Brien*, 149 Ill. 403, 37 N. E. 73, 23 L. R. A. 555; *Johnson v. Gibson*, 116 Ill. 294, 6 N. E. 205; *Cloud v. Greasley*, 125 Ill. 313, 17 N. E. 826. In the case at bar, however, the title to this property is in Harriet Fowler. The bill alleges that Charles H. Fowler, in violation of the contract with his daughter, transferred the property to his sister Harriet Fowler, and that she had full knowledge of the contract between him and appellant, and was not a bona fide purchaser. One part of the prayer of the second amended bill is as follows: "That the title held by said Harriet Fowler may be decreed to be held by her as a trustee for your oratrix, and that she be decreed to release the same to your oratrix." Harriet Fowler was a necessary party to the bill. She is a resident of Cook county, and the land in controversy is located in Cook county. The court has before it the party who holds the legal title, and can order the transfer of that title by

the party so holding it to appellant for whom, in equity, it is held in trust. In 1 Story's Equity Jurisprudence (12th Ed.) § 784, it is said: "If a person has in writing contracted to sell land, and afterwards refuses to perform his contract, and then sells the land to a purchaser with notice of the contract, the latter will be compelled to perform the contract of his vendor, for he stands upon the same equity; and, although he is not personally liable on the contract, yet he will be decreed to convey the land in the same manner as his vendor. In other words, he is treated as a trustee of the first vendee." In section 789 of the same book, it is further said: "The general principle upon which this doctrine proceeds is that, from the time of the contract for the sale of the land, the vendor, as to the land, becomes a trustee for the vendee, and the vendee, as to the purchase money, a trustee for the vendor, who has a lien upon the land therefor. And every subsequent purchaser from either, with notice, becomes subject to the same equities as the party would be from whom he purchased." Here Charles H. Fowler contracted in writing to sell this land to the appellant, and afterwards refused to perform his contract, and conveyed the land to his sister Harriet Fowler, who had notice of the contract. It follows that Harriet Fowler can be compelled to perform the contract of her vendor, for she stands upon the same equity as her vendor, Charles H. Fowler. Although she is not personally liable on the contract, she will be decreed to convey the land in the same manner as Charles H. Fowler would be compelled to convey it. In *Pomeroy on Specific Performance* (section 465) it is said: "When the vendor, after entering into a contract of sale, conveys the land to a third person, who has knowledge or notice of the prior agreement, or who does not part with a pecuniary consideration, or who for any other reason is not a bona fide purchaser, such grantee takes the land impressed with the trust in favor of the original vendee, and holds it as trustee for such vendee, and can be compelled, at the suit of the vendee, to specifically perform the agreement by conveying the land in the same manner and to the same extent as the vendor would have been liable to do, had he not transferred the legal title; and such grantee is the proper defendant in the suit, against whom to demand the remedy of a conveyance." The doctrine thus announced by the learned author fits precisely the facts of this case, and Harriet Fowler, the present appellee, is the proper defendant, against whom the remedy of a conveyance may be enforced. In *Bryant v. Booze*, 55 Ga. 438, it is held, in substance, that where a contract for the sale of real estate is made, and subsequently the vendor conveys to a third party, said third party knowing of the prior contract, such third party takes the land impressed with the trust in favor of the original vendee, and

holds it as trustee for such vendee, and can be compelled, at the suit of the vendor, to specifically perform in the same manner and to the same extent as the vendor. We do not concur in the contention of counsel that the court below was without jurisdiction to decree a specific performance against appellee Harriet Fowler, even though it was without jurisdiction to enforce the decree against Charles H. Fowler, who was not personally served with process.

For the reasons above stated, we are of the opinion that the court below erred in sustaining the demurrer to the second amended bill, as amended, and in dismissing the bill. Accordingly the decree of the circuit court is reversed, and the cause is remanded to that court for further proceedings in accordance with the views herein expressed. Reversed and remanded.

(204 Ill. 306)

SUBURBAN R. CO. v. CITY OF CHICAGO et al.

(Supreme Court of Illinois. Oct. 26, 1903.)

MUNICIPAL CORPORATIONS—STREET RAILWAYS—FRANCHISES—MORTGAGE OF LEASEHOLD—NUISANCE—PARTIES—WRIT OF ERROR—ESTOPPEL.

1. Where a defendant in error, whose interests were adverse to those of its codefendant and identical with those of plaintiff in error, did not assign cross-error on a question not raised by plaintiff's assignment of errors, but argued the question fully in its brief, such defendant could not, after an adverse decree, sue out an original writ to review the same question, though the provision in *Prac. Act*, § 78 (*Starr & C. Ann. St. 1896* [2d Ed.] p. 3106, c. 110), that a defendant in error may assign cross-errors be construed as merely permissive.

2. In a cross-bill by a city against a street railroad and its lessee to compel the removal of the railroad tracks, the right to maintain them in the streets having expired, a mortgagee of the leasehold, who is not in possession thereof, is not a necessary party, as the suit is in substance one to abate a nuisance.

Error to Circuit Court, Cook County; M. F. Tuley, Judge.

Bill by the Chicago Terminal Transfer Railroad Company against the city of Chicago and the Suburban Railroad Company, to which the city of Chicago filed a cross-bill making the other parties cross-defendants. From a decree dismissing the original bill and finding for the cross-complainant, the Suburban Railroad Company brings error. Affirmed.

Clarence A. Knight and William G. Adams, for plaintiff in error. Charles M. Walker, Corp. Counsel, and William H. Sexton, Asst. Corp. Counsel, for city of Chicago.

MAGRUDER, J. On April 9, 1902, the Chicago Terminal Transfer Railroad Company, one of the defendants in error, filed its bill in the circuit court of Cook county against the city of Chicago, the other of the defendants in error herein, and the Suburban Railroad Company, plaintiff in error herein,

praying for an injunction against the city of Chicago from interfering with the railroad tracks maintained by the Chicago Terminal Transfer Railroad Company and the Suburban Railroad Company upon the west side of South Fortieth avenue between Taylor street and Randolph street, and upon Randolph street from South Fortieth avenue west to Fifty-Second avenue, formerly known as "Robinson Avenue," in the city of Chicago. Answers were filed to the bill by the city of Chicago and by the Suburban Railroad Company.

On May 24, 1902, in said suit, the city of Chicago filed a cross-bill against the Chicago Terminal Transfer Railroad Company, the complainant in the original bill, and the Suburban Railroad Company, codefendant with the city of Chicago in the original bill, the cross-bill of the city praying that the Chicago Terminal Transfer Railroad Company and the Suburban Railroad Company, who were made defendants to such cross-bill, might be required to make answer not under oath, and that it might be decreed that all the rights and privileges alleged to have been granted by the ordinances passed by the board of trustees of the town of Cicero on October 5, 1887, and on November 5, 1887, as set forth in the original bill, had been forfeited, and had ceased and determined; and that the track upon the aforesaid portions of South Fortieth avenue between Taylor and Randolph streets, and upon the portion of Randolph street between South Fortieth avenue and Fifty-Second avenue, was, and did constitute, a nuisance, and that said nuisance might be abated, and the defendants to the cross-bill be ordered to remove the track. Answers were filed to the cross-bill of the city by the two railroad companies above named. Replications were filed to the answers in both the original and cross-suits.

After hearing had, the circuit court of Cook county entered a decree on July 3, 1902, upon the original bill of complaint as amended, the answers thereto and replications, and upon the cross-bill of the city and the answers thereto, and the replications and the testimony and evidence, and therein decreed that the original bill be dismissed for want of equity; that the equities of the case were with the cross-complainant, the city of Chicago; and that the rights of the two railroad companies to maintain and operate any railroad track or tracks upon the streets above named had been forfeited, and had ceased and determined; and it was also in said decree further ordered that the cross-defendants, the Chicago Terminal Transfer Railroad Company and the Suburban Railroad Company, should proceed forthwith to remove the tracks then maintained by them upon the portions of South Fortieth avenue and Randolph street, above specified. An appeal was prayed from the decree so entered by the circuit court to this court, but the appeal

was never perfected. Subsequently, however, the Chicago Terminal Transfer Railroad Company sued out a writ of error from this court for the purpose of reviewing the decree so entered by the circuit court.

The city of Chicago and the Suburban Railroad Company were defendants in error to the writ of error so sued out by the Chicago Terminal Transfer Railroad Company. The suit so brought to this court by writ or error was argued and submitted to the court at the October term, 1902. At the February term, 1903, this court made a decision, and filed an opinion giving the reasons therefor, affirming the decree so entered by the circuit court. 68 N. E. 99.

The Suburban Railroad Company, one of the defendants in error in the proceeding instituted in this court by the Chicago Terminal Transfer Railroad Company as above set forth, did not assign any cross-errors, although by its counsel it appeared and filed a brief and argued the cause, taking, in the argument, substantially the same positions taken by the Chicago Terminal Transfer Railroad Company, the plaintiff in error therein, and insisting upon a reversal of the decree so rendered by the circuit court.

Since the decision so made by this court at the February term, 1903, the Suburban Railroad Company has sued out the present writ of error for the purpose of reviewing the same decree entered by the circuit court on July 3, 1902, and here, in this proceeding, the city of Chicago and the Chicago Terminal Transfer Railroad Company are defendants in error. The record now brought before us by the present writ of error sued out by the Suburban Railroad Company is the same record which was before us when the Chicago Terminal Transfer Railroad Company sued out its writ of error.

The merits of the present controversy were decided by this court upon the former hearing of the cause. The only questions which we now deem it necessary to consider are these: First, whether the Suburban Railroad Company, having been a defendant in error when the case was here before upon a writ of error sued out by the Chicago Terminal Transfer Railroad Company, and having failed at that time to assign any cross-errors, has now the right to attack the decree of the circuit court entered on July 3, 1902, in this proceeding brought by an original writ of error; and, second, whether the failure of the city, cross-complainant below, to make the Chicago Title & Trust Company, claimed to be a mortgagee under a mortgage executed by the Suburban Railroad Company, a party defendant to the cross-bill, is such an error as will authorize a reversal of said decree affirmed upon the writ of error sued out by the Chicago Terminal Transfer Railroad Company at the suit of the Suburban Railroad Company upon the present writ of error. In other words, the two questions here to be considered are, first, whether a

defendant in error in a proceeding brought to this court by a writ of error, who neglects to file any cross-errors, has the right thereafter to sue out an original writ of error for a review of the decree of the trial court; and, second, whether, under the circumstances of this case as hereafter stated, the decree of the circuit court should be reversed for failure to make the mortgagee above named a party defendant to the cross-bill.

It will be necessary to state some of the facts, in order to understand the questions thus arising upon the present record. Under certain ordinances passed by the town of Cicero, the Chicago, Harlem & Batavia Railway Company secured the right to lay down railway tracks in the streets, or portions thereof, above described. The territory wherein said streets run subsequently became annexed to the city of Chicago after the passage of the ordinances above named. The Chicago, Harlem & Batavia Railway Company conveyed all its property to the Chicago & Northern Pacific Railroad Company. In October, 1893, or thereabouts, the Chicago & Northern Pacific Railroad Company made a mortgage of all of its property to the Farmers' Loan & Trust Company to secure certain bonds. In 1895 the Farmers' Loan & Trust Company filed a bill in the United States Circuit Court for the Northern District of Illinois against the Chicago & Northern Pacific Railroad Company to foreclose said mortgage, and in said proceeding one A. L. Hopkins was appointed receiver. On May 19, 1896, Hopkins, the receiver, leased the Chicago, Harlem & Batavia Railway Company, which appears to have become vested as above stated in the Chicago & Northern Pacific Railroad Company, to the present plaintiff in error, the Suburban Railroad Company, subject to the performance of all the obligations of the owner of said railroad, to wit, the Chicago & Northern Pacific Railroad Company, to the municipalities through which the road extended. Before, however, the receiver made this lease to the Suburban Railroad Company, the Suburban Railroad Company, by mortgage dated March 2, 1896, and recorded December 14, 1896, mortgaged its property to the Chicago Title & Trust Company to secure certain bonds. Subsequently, on June 20, 1896, a decree of foreclosure was entered by the federal court, foreclosing the mortgage executed by the Chicago & Northern Pacific Railroad Company to the Farmers' Loan & Trust Company, and ordering a sale of the mortgaged property. On November 17, 1896, or thereabouts, all the property of said railroad company was sold under said decree to the Chicago Terminal Transfer Railroad Company above mentioned, subject to the lease so made by the receiver; and possession appears to have been delivered on July 1, 1897.

It thus appears that by purchase at a foreclosure sale, or by transfer from purchasers at such foreclosure sale, the Chicago Ter-

minal Transfer Railroad Company became owner of the tracks here in controversy, or of all the interest therein of the Chicago & Northern Pacific Railroad Company, subject to the lease executed by the receiver to the Suburban Railroad Company in the foreclosure proceeding. The Suburban Railroad Company was a mere tenant, and whatever interest it had in the tracks lying in the streets above mentioned, or in the rights and privileges granted by the ordinances above referred to, was a mere leasehold interest. Therefore the mortgage executed by the Suburban Railroad Company to the Chicago Title & Trust Company, if it included these tracks at all, or the rights granted by and under the said ordinances, was a mortgage upon a mere leasehold interest, or the interest of a tenant for a term of years.

When the Chicago Terminal Transfer Railroad Company filed its original bill to enjoin the city from a threatened tearing up of these tracks, it did not make the mortgagee of the leasehold interest, to wit, the Chicago Title & Trust Company, a defendant to its bill, but it only made the city of Chicago and the Suburban Railroad Company, the lessee, defendants to said original bill. When the city of Chicago filed its cross-bill, it made defendants to that cross-bill the parties already in court by reason of the original bill, to wit, the Chicago Terminal Transfer Railroad Company and the Suburban Railroad Company. The city did not make the Chicago Title & Trust Company a defendant to its cross-bill, and thereby bring in a new party, not a party to the original bill.

First. The Suburban Railroad Company, when a defendant in error in this court under the former proceeding, assigned no cross-errors, but through its counsel filed a brief and made an argument, insisting that the court below had erred in not requiring that the Chicago Title & Trust Company, alleged mortgagee of the leasehold interest, be made a party defendant to the cross-bill. In its argument filed in the present proceeding, the city of Chicago, one of the defendants in error herein, states in its brief: "The present plaintiff in error [the Suburban Railroad Company] filed an elaborate brief herein, and among other things argued at great length that the decree of the circuit court was erroneous, because the Chicago Title & Trust Company, alleged trustee, was not made a party to the cross-bill filed by the city." The Suburban Railroad Company, plaintiff in error in this proceeding, also states through its counsel in its brief here filed: "We directed our argument mostly to the question as to whether the trustee was a necessary party."

Upon the former hearing, the present plaintiff in error, the Suburban Railroad Company, urged upon this court that the mortgagee above mentioned should have been made a party defendant to the cross-bill, and seemed to take the ground that it had a right to make this point without assigning any

cross-errors. Of course, no cross-errors were assigned by the city of Chicago upon the former hearing, because the decree below had been in favor of the city of Chicago, and it was not complaining of the decree. Therefore it was unnecessary for the city to assign any cross-error. *City of Chicago v. Weir*, 165 Ill. 582, 46 N. E. 725. Upon the former hearing, the Chicago Terminal Transfer Railroad Company assigned no error to the effect that the mortgagee had not been made a party to the cross-bill, because it was itself originally guilty of the same error by not making the mortgagee a party to the original bill. It appears from the evidence that, upon the trial of the case in the court below, the Chicago Terminal Transfer Railroad Company had in its possession and introduced in evidence the mortgage or trust deed made by the Suburban Railroad Company to the Chicago Title & Trust Company.

In the opinion filed by this court when the case was here upon the former hearing, we said: "A suggestion has been made in the briefs and arguments in this court that a necessary party has been omitted. There is no assignment of error raising the question. The complainant in the bill did not make the alleged mortgagee of the lessee a party, nor did the city do so in its cross-bill. While the question of lack of necessary parties can be raised on appeal, though not raised in the court below (*Gerard v. Bates*, 124 Ill. 150, 16 N. E. 258, 7 Am. St. Rep. 350), still, as the record is presented, we do not feel called upon to determine whether the omitted mortgagee was a necessary party or not." The question, then, as to whether the mortgagee ought or ought not to have been made a party defendant to the cross-bill, was not passed upon by this court at the former hearing, because there was no assignment of error by any of the parties which made that point or embodied that contention. Surely the Chicago Terminal Transfer Railroad Company, not having assigned as error the failure of the city to make the mortgagee a party defendant to its cross-bill, is estopped from making any such contention now. If the decree of the circuit court is now reversed, upon the application of the Suburban Railroad Company under the present writ of error, for failure of the cross-complainant to make such mortgagee a party to the cross-bill, such reversal will inure to the benefit of the Chicago Terminal Transfer Railroad Company, and, notwithstanding its own neglect, it will reap the benefit, in case of such reversal, of the action now taken by the Suburban Railroad Company.

It appears that the interests of the Chicago Terminal Transfer Railroad Company and of the Suburban Railroad Company upon this question, and upon all the questions involved in this case are, and were at the former hearing, the same. The two railroad companies upon the former hearing acted together. Their interests were identical. Indeed,

the former opinion filed by this court states that the city of Chicago, one of the defendants in error at the former hearing, filed its motion to strike the briefs of the Suburban Railroad Company, its codefendant in error, from the files, on the ground that such briefs were not in defense of the decree, but were in aid of the Chicago Terminal Transfer Railroad Company, and therefore not proper to be filed. It would seem to be unjust that the Suburban Railroad Company should be permitted to insist, before this court upon one hearing, that the court below erred in not seeing to it that the mortgagee was made a party to the cross-bill, and, when defeated in that contention, be allowed to make the same point upon this second hearing, to the disturbance of the decision already made. Certainly the Suburban Railroad Company could have assigned a cross-error upon the former hearing, and made the contention which it now makes in the present proceeding; and inasmuch as its interests were identical with those of the Chicago Terminal Transfer Railroad Company upon the former hearing, and it acted with the plaintiff in error on the former hearing, it should abide by the result already reached. It is a well-established principle in pleading that one party cannot complain of an error in the opposite party when it has itself first committed the same error. If the Chicago Title & Trust Company, as mortgagee, had such an interest in these tracks that it was entitled to be heard upon the question of their removal, then, when the Chicago Terminal Transfer Railroad Company filed its original bill to enjoin the city from removing them, it should have made the mortgagee a party to the proceeding. Not having done so, it ought not to be allowed to complain that the city in its cross-bill did not make the mortgagee a party; and the Suburban Railroad Company, occupying a position identical with that of the Chicago Terminal Transfer Railroad Company, ought not to be allowed to complain. If the Suburban Railroad Company, upon the former hearing, sought to make the point as to the absence of the mortgagee from the record as a party, upon the ground that such point could be made at any time upon appeal or writ of error without the assignment of a cross-error, then it made a mistake in selecting its mode of presenting that question to the court upon the former hearing, and ought to be bound by its selection of the remedy which it thought proper to pursue.

Counsel for the present plaintiff in error, the Suburban Railroad Company, claim that the question here under consideration has already been passed upon by this court in the case of *Page v. People*, 99 Ill. 418. The facts, however, in the *Page Case*, will be found upon examination to be very different from the facts in the case at bar. In the *Page Case*, the original writ of error from a judgment of the county court, passing upon

an objection to the rendition of judgment in a tax case, was sued out from the Appellate Court to the county court by the people upon the relation of the collector. At that time it is said that the Appellate Court had jurisdiction to issue a writ of error in such a case. The property owner, when the original writ of error was sued out by the collector, was a defendant in error and assigned no cross-error. Subsequently the property owner sued out an original writ of error, not from the Appellate Court, but from this court, for the purpose of reviewing the judgment. The *Page Case* was not a case where the defendant in error who failed to assign a cross-error was such defendant in error in the same court from which he subsequently sued out an original writ of error. Again, it does not appear in the *Page Case* that the same point raised by the subsequent writ of error was made before the court upon the former writ of error. But in the case at bar the same point, to wit, the failure to make the mortgagee a party defendant to the cross-bill, was elaborately argued upon the first hearing of this case, and the present contention is merely a repetition of the arguments made upon the former hearing. No such state of facts existed in the *Page Case*. Nor did it appear in that case that the interests of the plaintiff in error in the original proceeding were identical with the interests of the defendant in error, who subsequently sued out an original writ of error.

Section 78 of the practice act provides that "In all cases of appeal to the Supreme Court or Appellate Court, or writ of error, the appellee or defendant in error may assign cross-errors; and the court shall dispose of the same as in other cases of assignment of error." 3 Starr & C. Ann. St. 1896 (2d Ed.) p. 3106, c. 110. While we have no disposition to overrule the case of *Page v. People*, supra, in so far as it holds that the words "may assign cross-errors" are merely permissive, and that a defendant in error can omit to assign a cross-error, and then afterwards sue out a writ of error and take the case up a second time, yet we are disposed to limit the doctrine of that case to the facts upon which the statements in the opinion are based. In the *Page Case* the court expressly say that "if, when the record brought up by that writ was before that court, the question raised by the error here assigned was presented, * * * the plea is good." (That is, that the party was estopped from again assigning error after having originally failed to assign a cross-error.)

Second. Even if it be admitted, however, that the present plaintiff in error, the Suburban Railroad Company, has a right now to make the point here under consideration upon this writ of error, although it failed to make the same point upon the former hearing by assigning cross-error, yet we are not satisfied that it was necessary to make the mortgagee a party defendant to the cross-bill.

The cross-bill was substantially a bill to abate a nuisance. The former decision of this court shows that the right of the railroad companies to have their tracks in the portions of the streets already mentioned expired in 1901. The original bill in this case was not filed until April, 1902. The owner of the privileges, granted by the ordinances, and of the tracks laid in the streets, was the Chicago Terminal Transfer Railroad Company. That company stood in the position of a landlord, or owner of the reversion. The Suburban Railroad Company was a mere tenant of the Chicago Terminal Transfer Railroad Company, or of the receiver in the foreclosure suit which had ended in a sale. Both the owner and the tenant were parties to the cross-bill which was filed for the purpose of abating the nuisance. In case of such a bill it is the party that is in possession and obstructing the street or highway by a nuisance who is the proper party defendant to such a bill. The nuisance was the presence of the tracks in the public streets after all right to keep them in the public streets under the ordinances of the city had expired. The mortgagee, the Chicago Title & Trust Company, had not taken possession of the tracks, nor was it exercising any of the privileges or rights granted by the ordinances. The parties maintaining the obstruction in the streets were the two railroad companies who are parties to this proceeding, and not the mortgagee. If the mortgagee had commenced a proceeding to enforce its mortgage, and had taken possession of the tracks and was operating the railroad, another question might arise; but no such question is here presented.

It is shown, in the opinion already filed, that the Suburban Railroad Company had no right to keep its tracks in the streets, because the period for which the city had granted the right so to operate its tracks in the streets had expired in 1901. The Suburban Railroad Company, therefore, had no interest upon which the mortgage could take effect. In *Knopf v. Chicago Real Estate Board*, 173 Ill. 196, 50 N. E. 658, it appeared that the omitted party applied to the court below to come in and be made a party, and the court refused to allow him to do so. In that case, and in other cases referred to by counsel where the courts held that every person having an interest in the subject-matter of the suit should be made a party, it appeared affirmatively that the absent party did have such interest. Here, however, it affirmatively appears that the Suburban Railroad Company had no right to obstruct the streets by keeping the railroad tracks in them. The only interest of the Suburban Railroad Company in the making of the mortgagee a party to the proceeding was to subject the tracks, so far as it owned them, to the payment of the mortgage which it had given. But, as all its interests and rights under the ordinances and in the streets had expired, it possessed no interest which could

be subjected to the payment of the mortgage. The Suburban Railroad Company is the only party here complaining, and that company has no right to complain of any injury, because it has no property right which can be injured. The mortgagee, the Chicago Title & Trust Company, has never asked to be made a party to this proceeding. It does not appear here, nor did it appear in the court below, complaining that its rights were being disposed of without its presence. If it has any interests whatever which are affected by the decree below, then the decree entered in this case cannot deprive it of those interests, it not being a party; consequently, it will have its action against the city if its rights have been in any manner injured or prejudiced.

The rule that all parties who have a substantial interest in property in controversy that may be affected adversely by a decree should be made parties to the suit is oftentimes a rule whose application rests in the sound discretion of the court. In *Elmendorf v. Taylor*, 10 Wheat. 152, 6 L. Ed. 289, Chief Justice Marshall said upon this subject: "This objection does not affect the jurisdiction, but addresses itself to the policy, of the court. Courts of equity require that all the parties concerned in interest shall be brought before them, that the matter in controversy may be finally settled. This equitable rule, however, is framed by the court itself, and is subject to its discretion. It is not, like the description of parties, an inflexible rule, a failure to observe which turns the party out of court, because it has no jurisdiction over his cause; but, being introduced by the court itself, for the purposes of justice, is susceptible of modification for the promotion of those purposes." *Cockburn v. Thompson*, 16 Ves. 321; *Adair v. New River Co.*, 11 Ves. 429; *Attorney General v. Jackson*, 11 Ves. 365; *Harvey v. Harvey*, 4 Beav. 215; *Chicago, Madison & Northern Railroad Co. v. National Elevator Co.*, 153 Ill. 70, 38 N. E. 915.

Here, the mortgage made by the Suburban Railroad Company to the Chicago Title & Trust Company was made before the lease was made by the receiver to the Suburban Railroad Company. It is a question whether the mortgage embraced the after-acquired leasehold interest. But if it did take effect on such after-acquired interest, there was nothing for it to operate upon after that interest expired in 1901. It is a well-settled rule that, in a bill to foreclose a mortgage, all parties having any interest in the land should be made parties defendant. Judgment creditors having liens upon the equity of redemption should be made parties defendant. But if it appears that more than seven years have elapsed after the rendition of a judgment, so that it is no longer a lien upon the equity of redemption, it certainly is unnecessary to make the judgment creditor owning such judgment a party defendant to the foreclosure. After the lien of the judgment has expired, the interest of the judgment creditor in the

premises is gone, and it is not necessary to make him a party. So, here, the period for which the city of Chicago had granted to the railroad companies the right to maintain the tracks in the streets had passed, and all their interest had lapsed; and, therefore, only the owner and the tenant making use of the obstructions were necessary parties. Persons not in possession, and having nothing to do with operating the road or maintaining the obstruction, were not necessary parties, although they may have been proper parties.

We hold now, as we held upon the former hearing, that the decree of the circuit court is right, and the same is affirmed.

Decree affirmed.

(204 Ill. 79)

OFF et al. v. JACK et al.

(Supreme Court of Illinois. Oct. 26, 1903.)

INSOLVENT CORPORATIONS — DIRECTORS AS CREDITORS — ALLEGATIONS OF COLLUSION AND FRAUD — BURDEN OF PROOF.

1. In a suit to enjoin the collection of a judgment, in the absence of proof to sustain the allegations in the bill that the service of summons in the action in which the judgment was rendered was obtained by collusion with defendant therein, and that there was no consideration for the judgment, the bill must be dismissed; the burden of proving the allegations being on the party alleging them.

2. A director of an insolvent corporation, having in good faith obtained a judgment against it on a bona fide indebtedness, may pursue the remedies afforded by law for the collection thereof.

Appeal from Appellate Court, Third District.

Suit by Charles J. Off and others against William Jack and others. From a decree of the Appellate Court (104 Ill. App. 655) affirming a decree dismissing the bill, plaintiffs appeal. Affirmed.

Arthur Keithley, for appellants. Wm. Jack, for appellees.

WILKIN, J. This is a bill to enjoin the collection of a judgment filed in the Tazewell circuit court by appellants against appellees. The bill alleges that a corporation known as the Wesley Coal Company, of Peoria, had become insolvent and ceased to do business for more than two years, and that its property had been sold under foreclosure proceedings; that the company had failed to redeem within a year after the sale; that several judgments had been taken against it, two of which had been assigned to appellants; that appellee William Jack, who was a director of the corporation, by fraud and collusion with one John R. Hillyard, its president, for the purpose of unlawfully advancing his interests and giving him a preference over other creditors, obtained a judgment against the Wesley Coal Company, which was next in point of time to the first judgment held by complainants, and prior to their second judgment;

that the property of the company was to be sold under their first judgment within a few days; and that the defendant Jack would either bid at the sale, under appellants' first judgment, enough to satisfy the amount of that execution and his judgment, or would redeem from the sale, so that complainants would not be able to realize anything on their second judgment without first having to pay the fraudulent judgment of the defendant. The prayer is for an injunction restraining the defendant from proceeding upon his judgment. A temporary injunction was granted on the bill. The defendants afterwards filed an answer admitting the material allegations of the bill, except the alleged fraud in obtaining said judgment, and the want of consideration therefor, which latter allegations were expressly denied. To these answers a replication was duly filed. Subsequently a motion was made to dissolve the injunction, upon the hearing of which it seems to have been stipulated by the parties "that the merits of the case were as set up in the bill and answer"; and it was agreed that, "upon the hearing of the motion to dissolve the temporary injunction in said cause granted, the entire merits of the cause were then and there heard and determined." The injunction was dissolved, and the bill dismissed for want of equity. The evidence, if any was heard, is not preserved in the record. The Appellate Court affirmed the decree of the circuit court, and appellants prosecute this appeal.

Whether the service of summons in the suit of Jack against the company was obtained by collusion with the president, and whether there was a want of lawful consideration for the judgment obtained by appellee Jack, as alleged in the bill, were questions of fact put in issue by the answer, the burthen of proving which was upon appellants. In the absence of proof to sustain those averments of the bill, the circuit court could do nothing less than it did; that is, hold that the allegations of fraud and of no consideration were not sustained.

But counsel contends that Jack, being a director of the corporation at the time he obtained his judgment against it, could not obtain a preference to himself over other creditors of the company. There is nothing in this record, as we understand it, to show that he is in any way attempting to obtain an unlawful preference over other creditors of the corporation. His judgments being obtained in good faith upon a bona fide indebtedness, he certainly had the right to pursue the remedies afforded him by the law for the collection of the same. A director of a corporation may loan it money or render it services, and maintain an action against it therefor. *Beach v. Miller*, 130 Ill. 162, 22 N. E. 464, 17 Am. St. Rep. 291; *Mullanphy Savings Bank v. Schott*, 135 Ill. 655, 26 N. E. 640, 25 Am. St. Rep. 401; *Illinois Steel Co. v. O'Donnell*, 156 Ill. 624, 41 N. E. 185,

¶ 1. See Judgment, vol. 30, Cent. Dig. § 892.

31 L. R. A. 265, 47 Am. St. Rep. 245. It is true, an insolvent corporation cannot prefer a creditor who is at the time an officer thereof, because upon the company becoming insolvent the officers hold the relation of trustees to its creditors, and they are not permitted to take advantage of their official relation in order to secure to themselves a preference. There is nothing in this case, however, to show any such conduct on the part of the corporation, nor, as we have said, is there any allegation in the bill, much less proof, tending to show that appellee Jack was, at the time the bill was filed, attempting to do anything which he had not a clear legal right to do.

Without reference to the point made by the appellees that, at the time Jack obtained his judgment, the corporation had ceased to have any interest in the property here involved, its rights having been cut off by its failure to redeem, and therefore no trust relation could exist in him, we think, for the reasons stated, the judgment of the Appellate Court is clearly right and must be affirmed. Judgment affirmed.

(204 Ill. 142)

BIGGINS et al. v. LAMBERT.

(Supreme Court of Illinois. Oct. 26, 1903.)
FRAUDULENT CONVEYANCE—SUIT TO SET
ASIDE—QUESTION OF FREEHOLD—
DECISION REVIEWABLE.

1. A suit to set aside a conveyance alleged to have been made by a debtor for the purpose of defeating the enforcement of the claim of his judgment creditor does not involve a freehold, and hence an appeal does not lie to the Supreme Court.

Appeal from Circuit Court, Will County; John Small, Judge.

Suit by Daniel Lambert against Elizabeth Biggins and another. From a decree for plaintiff, defendants appeal. Appeal dismissed.

Black & Black and J. W. Downey, for appellants. J. L. O'Donnell, for appellee.

MAGRUDER, J. At the February term, 1903, of this court, a motion was made by appellee to dismiss the appeal upon the alleged ground that no freehold is involved, and that, therefore, this court has no jurisdiction. This motion was reserved to the hearing, and, in order to determine it, it will be necessary so far to consider the facts as to determine the nature of the issue involved.

The bill in this case is filed by the appellee, Daniel Lambert, against John Ward and Elizabeth Biggins, and alleges that on January 12, 1900, John Ward was the owner in fee of 120 acres of land in Will county, and has continued in the possession thereof, using the same as a farm; that he became the owner by virtue of a deed dated January 12, 1900, conveying the same to him, and exe-

cuted by Catherine Ward, executrix of the last will of Daniel Ward, although said deed to him was not filed for record until March 12, 1901; that on April 8, 1901, the appellee commenced a suit at law in the Will county circuit court against John Ward, which was tried before a jury, who rendered a verdict on October 17, 1901, in favor of appellee for \$5,000 damages; that on October 26, 1901, judgment for that amount was entered against said John Ward upon said verdict; that said judgment is still in force and unsatisfied; that appellee sued out execution and fee bill upon the same, and placed them in the hands of the sheriff of Will county for execution, who thereupon levied said execution upon said real estate, but that the same has been in no part satisfied; that on March 11, 1901, John Ward executed a deed, purporting to convey said premises to his sister, the appellant, Elizabeth Biggins, for the pretended consideration of \$8,000, which deed was recorded on March 12, 1901, in the recorder's office of Will county; that the conveyance to Elizabeth Biggins was without consideration, and was for the purpose of avoiding the payment of the liabilities of John Ward; that the pretended consideration was not in fact paid, nor secured to said John Ward. The court found that the cause of action resulting in said judgment was for a tort which accrued prior to March 11, 1901. The prayer of the bill in the case is that the deed of John Ward to his sister, Elizabeth Biggins, dated March 11, 1901, be decreed to be in fraud of the rights of appellee as a judgment creditor, and annulled and set aside, and that so much of the real estate described as may be necessary to satisfy appellee's judgment may be sold by the sheriff free from the lien or cloud created by said pretended deed, the surplus, if any, to be paid over to Elizabeth Biggins; and for further relief. The final decree of the court found that the deed of John Ward to Elizabeth Biggins was a fraud upon the rights of appellee, and that the premises were held in secret trust by her for her brother, John Ward; and it was ordered that the deed be set aside as against the rights of appellee under his judgment. The decree further ordered that appellee be authorized to proceed upon his fieri facias issued upon said judgment, or issue another fieri facias, directing that the sheriff proceed to advertise and sell said real estate thereunder, or so much thereof as might be necessary for the payment and satisfaction of said judgment and costs.

From the foregoing statement of facts it appears that this is a bill filed by a judgment creditor for the purpose of setting aside a conveyance alleged to have been made by the judgment debtor for the fraudulent purpose of defeating the enforcement of the claim of the judgment creditor. Where such a bill is filed, no freehold is involved. Consequently the point made by the appellee that this

¶ 1. See Courts, vol. 13, Cent. Dig. § 559.

court has no jurisdiction, and that the writ of error should be dismissed, is well taken. In *Moshier v. Reynolds*, 155 Ill. 72, 39 N. E. 621, we said: "A bill filed in aid of an execution, or as a creditors' bill, seeking to set aside an alleged fraudulent conveyance made by a judgment debtor, and subject the lands to sale for the payment of the judgment indebtedness, does not involve a freehold." To the same effect are the following cases, to wit: *Conkey v. Knight*, 104 Ill. 337; *Sawyer v. Moyer*, 105 Ill. 192; *Chicago, Burlington & Quincy Railroad Co. v. Watson*, Id. 217; *Blackman v. Preston Bros.*, 119 Ill. 240, 10 N. E. 669; *Hupp v. Hupp*, 153 Ill. 490, 39 N. E. 124; *First Nat. Bank v. Vest*, 187 Ill. 389, 58 N. E. 229. Accordingly, the motion to dismiss the appeal is allowed, and the appeal is dismissed for want of jurisdiction in this court.

Appeal dismissed.

(204 Ill. 228)

LINCOLN PARK CHAPTER, NO. 177.

R. A. M. v. SWATEK et al.

(Supreme Court of Illinois. Oct. 26, 1903.)

CORPORATIONS DE FACTO — ORGANIZATION — STOCKHOLDERS—RIGHT TO DENY—PARTNERSHIP—MISUSE OF POWERS—RIGHTS OF STATE.

1. Where plaintiff subscribed for stock in a corporation, which organized, proceeded to conduct its business, and erected buildings for its use, and thereafter plaintiff with other stockholders participated in a dividend, the corporation was at least a corporation de facto, and the plaintiff was estopped to deny that it was legally organized or to question its use of the powers granted.

2. A stockholder of a corporation cannot maintain a suit to have the same changed into a co-partnership on the ground that it was illegally organized, where there never was any intent on the part of the persons creating the corporation to create a partnership.

3. An objection that the powers conferred on a corporation have not been used, or have been misused, can only be urged by the state.

Appeal from Appellate Court, First District.

Suit by Lincoln Park Chapter, No. 177. Royal Arch Masons, against Matthew J. Swatek and others. From a judgment dismissing the bill, affirmed by Appellate Court (105 Ill. App. 604), plaintiff appeals. Affirmed.

This is an appeal from a judgment of the Appellate Court for the First District affirming the decree of the circuit court of Cook county in a proceeding in equity there instituted by appellant against appellee. Appellant, as complainant, filed its bill below to dissolve the concern known as "The North End Masonic Temple Association," treating it as a partnership, the bill praying for a partition of the real estate and a division of the property among its members. A general demurrer to the bill was sustained by the circuit court.

The bill, as amended, alleges that on No-

vember 6, 1892, Matthew J. Swatek was the owner of certain premises in Chicago known as "615-617 North Clark Street"; that complainant is a fraternal organization, having for its object the working and conferring of the degrees in Royal Arch Masonry, an ancient secret order in the state of Illinois, of which Swatek and others were members; that complainant and various members of the Masonic fraternity were induced to invest money in a building which Swatek and others proposed to erect upon said premises; that, for the purpose of obtaining possession of the money belonging to complainant, the said defendants, on April 17, 1893, organized a pretended corporation under the name of "The North End Masonic Temple Association," which pretended to be formed under the laws of the state of Illinois; that it was stated, in the statement made for obtaining a license for opening books of subscription to the capital stock of such association, that "the object for which it is formed is to encourage social and fraternal relations among its members, and to promote and inculcate the principles of Masonry as sought in the different Masonic bodies, and to provide suitable and permanent accommodations for the same by the erection of such a building as will provide halls, a library, reading rooms, and such other conveniences as are requisite therefor." It is further alleged that the objects stated as the purposes of such corporation were clearly not the objects of a corporation for pecuniary profit; that a certificate was issued by the Secretary of State of the state of Illinois for the organization of such corporation, and that the same was afterwards, on September 6, 1893, recorded in Cook county, Ill.; that, as a part and parcel of the scheme, program, and conspiracy of the said Swatek and associates to obtain possession of the moneys belonging to the complainant, they caused to be executed a pretended lease of all the premises above described, by the said Matthew J. Swatek and Mary L. Swatek, his wife, to the so-called North End Masonic Temple Association, for the term of 99 years, which provides for the payment of ground rent to Matthew J. Swatek of \$1,980 per year, or 6 per cent. upon the valuation of \$33,000; that said premises were not worth to exceed \$18,500; that after the organization of said so-called corporation said appellees and their friends and associates, at a meeting at which less than one-eighth of the members of the complainant were present, and without notice to other members, induced the complainant to invest in the stock of said so-called proposed corporation in the sum of \$3,100; that immediately thereafter said defendants proceeded with the erection of the building upon the premises above described, the rear part of which building was arranged with a lodge hall, dining room, parlors, and dance hall, and the front part of which consisted of two stores, with two flats or living apartments above

¶ 3. See *Corporations*, vol. 12, Cent. Dig. § 1548.

each store, and that on or about the 30th day of April, 1894, the said building was completed and ready for occupancy; that said pretended corporation has, since the completion of said building, rented out the various halls, stores, and flats or apartments to different bodies and individuals, and has never carried on any business whatever except the renting of said apartments and the management of said building; that the said pretended corporation has never since its organization encouraged social and fraternal relations among its members, and has never promoted and inculcated the principles of Masonry as sought in the different Masonic bodies; that the entire control and management of the said corporation has been confined to Matthew J. Swatek and those working in his individual interests in connection with the management, repair, and collection of the rents of said building; that said pretended corporation was organized under the general incorporation law for corporations for pecuniary profit; that said corporation is invalid for the reason that the state of Illinois does not allow or permit the organization of a corporation for the purposes set forth in the charter of said pretended corporation, or for the carrying on of the business which the said pretended corporation has in fact carried on since its organization. It is further set forth that, by reason of the fact that said corporation has never had any legal existence, the complainant and the parties above named, who pretend to be stockholders thereof, are owners of the premises above described in shares in proportion to the amount of money which they have invested in it and in the building and improvements on said premises; that all the acts of said pretended corporation are void; that all of the parties above named, and the complainant, are tenants in common of the said premises, and the building and improvements thereon, in proportion to the value of the land and the amount of money contributed by them, respectively, to the erection of said building; that complainant is the owner of 310 shares of the capital stock of said pretended corporation, and has invested in said premises the sum of \$3,100; that it is very much dissatisfied with the conduct of said business, and the management of said property, and that it is desirous of having said business wound up and a division of the property made between the parties, respectively, interested therein. The bill prays for a winding up and dissolution of the copartnership, the appointment of a receiver, and a partition and division of the property.

Fred H. Atwood, Frank B. Pease, and Charles O. Loucks, for appellant. Arnold Tripp, for appellees.

WILKIN, J. (after stating the facts). This record presents the question whether the appellant is by its bill entitled to any relief in a court of equity, the demurrer admitting

the facts well pleaded. As the holder of a number of the shares of stock in the North End Masonic Temple Association, organized as a corporation, the appellant is seeking to have that institution declared to be no more than a partnership and have the same dissolved, upon the grounds, first, that it was not organized according to law; and second, that it has not used, or attempted to use, the corporate powers conferred upon it by its charter.

It appears from the bill that after the organization of the corporation it erected an extensive building, which it rented to several orders, and to merchants, etc., and in the course of its career it made a dividend of \$600, which was shared by the several stockholders, and in which dividend the appellant participated. The allegations of the bill show the establishment of a corporation de facto, and that its existence as such has been so recognized by appellant. The general rule is that one who deals with a corporation as existing de facto is estopped to deny, as against it, that it has been legally organized. *Bushnell v. Consolidated Ice Machine Co.*, 138 Ill. 67, 27 N. E. 596. The bill seeks not only to question the legal organization of the corporation, but to have the same changed into a copartnership between itself and the other incorporators, and to compel the defendants to account to it and its copartners. As is said in the case cited: "A partnership is never created between parties by implication or operation of law, apart from an express or implied intention and agreement to constitute the relation"—quoting from 1 *Bates on Law of Partnership*, § 3. See, also, *Phillips v. Phillips*, 49 Ill. 437. Having participated in its dividends, its lawful existence is not now open to question on the part of appellant; nor can appellant, for the same reason, question the proper use of the powers granted to it; nor can appellant, by bill in chancery, compel a dissolution of the corporation. It is for the state alone to complain of any misuser or nonuser of the powers conferred in the creation of the corporation. *Coquard v. National Linseed Oil Co.*, 171 Ill. 480, 49 N. E. 563, and cases there cited.

There being no ground for the interposition by a court of chancery, appellant's bill was properly dismissed.

The judgment of the Appellate Court will be affirmed. Judgment affirmed.

(204 Ill. 325)

BARKER et al. v. FITZGERALD.

(Supreme Court of Illinois. Oct. 26, 1903.)

LEASE — RESCISSION — PUTTING PARTIES IN STATU QUO — LACHES — EQUITY — MASTER'S FEES.

1. Where one of the essential considerations of a lease was the adding of two stories by the lessee, without which he could not afford to pay the rent stipulated, and the lessor honestly represented, and the lessee believed, that the building would support the addition, but when, after

the execution of the lease, plans were drawn, it was discovered that such was not the case, the lessee was entitled, in equity, to a rescission.

2. The fact that changes in the rent roll, both in personnel and amount, have occurred since the lease of a building, and that substantial alterations have been made in the structure, so that the lessor cannot be put in statu quo, will not preclude rescission of the lease in equity; a money award being made to compensate for the changed conditions.

3. A lessee agreed to add, within two years and seven months from the date of the lease, two stories to the building leased, without which he could not afford to pay the stipulated rent. Within a year and a few months, he had plans drawn, when he discovered that the building would not support the addition. About two years from the date of the lease, he began suit for rescission. *Held*, that he was not guilty of laches.

4. It is proper to allow a master in chancery the statutory fees for taking testimony, though the parties employ a stenographer, who is paid 50 cents a page for reporting it.

Appeal from Appellate Court, First District.

Suit by William Fitzgerald against Joseph N. Barker and others. From a judgment of the Appellate Court (105 Ill. App. 536) affirming a decree for complainant, defendants appeal. Affirmed.

The following statement of the facts in this case is made by the Appellate Court as a preface to their opinion:

"This is an appeal from a decree of the circuit court canceling a certain lease upon terms and conditions stated in the decree. The testimony taken in the case, and embraced in the record here presented, is very voluminous. From the report of the master to whom the cause was referred, it appears that November 1, 1892, Joseph N. Barker, as trustee, Carrie L. W. Hoops, and Charles H. Hoops executed a lease of the premises known as 167 and 169 Wabash avenue to William Fitzgerald for the term of ninety-nine years, beginning October 1, 1892, at a rental of \$15,000 per annum. The lease contains a recital that lessors, in consideration of rents and \$25,000 to be expended by the lessee in adding two or more stories to present building, and improving same to the extent of that sum, and in consideration of the covenants on the part of the lessee, leased unto him the premises for the term mentioned. The lessee covenanted that he would, within two years from May 1, 1893, expend the sum of \$25,000 upon the premises, by adding thereto two stories upon the building then situated upon 167 and 169 Wabash avenue, and in other betterments and improvements of the then existing building, the plan for such improvements to be submitted and to be made reasonably satisfactory to the lessor, and that, when the said additions and improvements should be made, they were to inure to the benefit of, and become the property of, the lessors, and should be made at the cost of the lessee, free from all mechanics' and other liens on said premises. The master further reported that early in 1894

the lessee had plans of the two additional stories required by the lease, which plans were submitted to the lessors, but were not carried out by the lessee, because his investigation had satisfied him that the existing walls and foundations of the building would not carry two additional stories unless the walls and foundations were re-enforced and strengthened, to do which, he contended, would cost, including the two extra stories, a very large sum of money in excess of the \$25,000 which he had agreed to expend in putting on the two additional stories and other betterments of the building. The master further found that the building in question, owing to the condition of the walls and foundations as the same existed at the time of the making of the lease, would not, with safety, have admitted of the construction of the two additional stories required by the lease; that the existing walls and foundations would not have carried the two additional stories contemplated by the lease, without a large expenditure of money in changing and strengthening the walls and foundations, and that said necessary work would to a great extent have changed the method of the construction of the building, by requiring additional walls and foundations, and interior supports, and that the adding of the two additional stories, including the necessary changes and work of re-enforcing the walls and foundations, could not have been done for \$25,000. The master found that both Barker and Fitzgerald were mistaken as to the condition of the building, its walls, foundations, and supports; that Barker, in negotiations leading to the lease, expressed himself as entertaining no doubt that the building would carry the two additional stories, which opinion he doubtless at that time honestly held, and which opinion unquestionably was an important factor in the mind of Fitzgerald, and tended largely to influence him in the making of the lease. The master found that there was a mutual mistake of fact by the parties as to the strength of the building, and the sufficiency of the existing walls and foundations to carry the two additional stories, and that such mistake of fact was largely induced, on the part of Fitzgerald, by the statements of Barker, honestly made. The master found that, in conversation between Barker and Fitzgerald prior to the making of the lease, both agreed in the opinion that Fitzgerald could not afford to pay the rent agreed upon unless two additional stories were added to the building, so as to produce a larger income for the lessee; that in such conversation it seems to have been taken for granted by Barker that the construction of the building was such as to warrant the placing thereon of two additional stories, without further or other cost than such as would be caused by the construction of those stories, and without re-enforcing or strengthening the existing walls and foundations. As to this the master found that Bar-

ker was mistaken, and concludes that, in his judgment, there was, in law, no such misrepresentation made by Barker, or any of the lessors, as to existing facts relating to the strengthening or condition of the foundation or the walls of the building, which Fitzgerald had a right, in law, to rely upon when he made the lease in question, because the master finds that whatever was said by Barker or any of the lessors as to this matter must be held, in law, to have been the expression of their opinion relative thereto.

"Upon the hearing of the cause it appeared that, after the making of the lease in question, an ordinance of the city of Chicago was enacted, by which Fitzgerald and all other persons were forbidden to increase the height of such a building unless it was converted into a fireproof structure—a thing which, without a complete reconstruction of the entire building, it was practically impossible to do. The court did not altogether agree with the master; the chancellor finding, upon the submission of the master's report to him, that the lease in question was executed under a mutual mistake by the parties as to material facts, and that but for such mutual mistake the parties would not have executed the same, and in consequence of such mutual mistake the minds of the parties never met, and the lease never became the agreement of the parties, and should, as a matter of equity, at the instance of the complainant, be rescinded, canceled, set aside, and for naught held, and be treated in all respects as if it had never existed. The chancellor further found that the subject-matter of the lease is the real estate described, which can be restored to defendants, and the parties thereto can be placed by the decree of this court in substantially the same condition as that occupied by them, respectively, before the execution thereof; that complainant ought to restore the possession of the premises, and pay defendants a reasonable sum for the use and occupation thereof from the date of the lease, October 1, 1892, up to the filing of the original bill, October 6, 1894, and for a reasonable period beyond that time to enable the defendants to place the premises in a tenantable condition, and to secure tenants therefor, which time the court fixes as March 1, 1895; that the reasonable amount to be paid by complainant to defendants for such use and occupation the court finds, from the evidence, amounts in the aggregate to \$27,813.87, and complainant should be credited with all sums he has paid to or for defendants for and on account of his use and occupation of the premises during the period aforesaid, which sum the court finds from the evidence is \$17,841.66, leaving a balance of \$9,972.21 which ought to be paid by complainant to defendants."

Barker, Church & Shepard, Cratty Bros., Jarvis & Latimer, and Chester E. Cleveland, for appellants. A. B. Jenks, John Mayo Palmer, and Fitzgerald & Orr, for appellee.

PER CURIAM. The opinion of the Appellate Court, affirming the decree of the circuit court, is as follows:

"A court of equity will give appropriate affirmative or defensive relief, as may be required by the circumstances, from the consequences of any mistake of fact which is a material element of the transaction concerning which relief is sought, and which mistake is not the result of the mistaken party's own violation of some legal duty, provided that no adequate remedy can be had at law. A mistake is always a mental condition or conception. This may be either active or passive. When active, the mental condition or belief may be that a certain matter or thing exists which really does not exist, or that a subject-matter or thing existed at some past time which did not really exist. *Pomeroy's Eq. Jur.* §§ 852, 854, 856; *Grymes v. Sanders*, 93 U. S. 55, 23 L. Ed. 798; *Hurd v. Hall*, 12 Wis. 125; *Haven v. Foster*, 9 Pick. 112, 19 Am. Dec. 353.

"The mistake found by the master and the court in the present case was that a certain condition then existed which did not exist, namely, that the walls and foundations of the building were then sufficiently strong to admit of the placing of two stories thereon. A mistake, to entitle a party to relief on account thereof, must be material to the transaction, affecting its substance, and not merely its incidents; and the mistake itself must be so important that it determines the conduct of the mistaken party or parties. To warrant a rescission, the evidence of this must be clear and positive. *Kerr on Fraud & Mistake*, 408; *Ewing v. Sandoval Mining Co.*, 110 Ill. 290; *Grymes v. Sanders*, supra; *Carpmael v. Powis*, 10 Beav. 36.

"While reasonable diligence is required of all parties in the transaction of business, it is not enough, to prevent relief in case of a mutual mistake, that the party complainant might, had he done all within his power, have ascertained the truth. *Kelly v. Solari*, 9 Mees. & Wellsby, 54; *Bell v. Gardner*, 4 M. & G. 11; *Newton v. Tolles* (N. H.) 19 Atl. 1092, 9 L. R. A. 50, 49 Am. St. Rep. 593.

"In the present case it has been found by the master and the chancellor, and it clearly appears from the evidence, that the lease in question would not have been made, had not all the parties thereto believed that the walls and foundations of the building were then strong enough to permit the placing thereon of two additional stories. By the placing of these stories, Fitzgerald expected that the rentals of such building would be so increased that he could afford to pay \$15,000 per annum rent; and there is evidence tending to show that both Barker and Fitzgerald expressed the opinion, before the lease was made, that, without such additional stories, Fitzgerald could not pay \$15,000 per annum rent. It was made a condition of the lease that such additional stories should be placed upon said building, all of which was at the

expiration of the term to become the property of the lessors. Appellants forcibly ask, if Fitzgerald and Barker believed that the walls and foundations of the building were strong enough to support two additional stories, and if, but for such mistaken belief, the lease would not have been made, how it happens that such alleged vitally essential condition to the making of a valid and enforceable contract was not inserted in the lease. A similar question might be asked in every case wherein a rescission of a contract is sought upon the ground of a mutual mistake as to a material matter concerning the subject-matter of the contract. One of the illustrations most frequently given in text-books dealing with this question is that of the sale of a ship at sea not existing at the time of the making of the contract. In such case, had the contract provided that it was to be null and void in case the ship was thereafter found not to have been existing when the contract was made, no suit would have arisen. It is perhaps the case that parties never, in the making of a contract, provide for everything then existing, but which, if first ascertained thereafter, may materially affect the obligation of the parties. As before stated, it does not follow that every mutual misunderstanding or mistake as to the subject-matter of a contract will authorize its rescission. The vital question in this matter is, first, was there a mutual mistake as to the condition of the walls of the building; second, was such a mistake so material to the making of the contract—such an inducement to its execution—that but for it the contract would not have been made? A reading of the lease, the written evidence of what the parties agreed to, with the deductions to be drawn from this evidence, tends strongly to the conclusion that, but for the mutual understanding of the parties that the walls of the building were strong enough to support two additional stories thereon, the lease would not have been entered into.

"It is true that by the decree the building, in the condition in which it was at the time of the execution of the lease, is not and cannot be restored to appellants. None of the tenants then occupying it were there at the entry of the decree. The rent roll is variant. The rental value of the building is not the same. Under a receiver appointed, either by mutual agreement or without dissent, substantial changes and alterations have been made in the structure. Nevertheless, it appears that by the restoration of the building and a money decree, in connection with rents heretofore received by appellants, they are placed in substantially the position they were when the lease was made. In the case of the rescission of a sale of improved premises, there can never be a perfect restoration, line for line and corner for corner. The premises, when restored, are altered. They have suffered the decay incident to time and exposure. There may have been decline or

rise in value. The property may have become more or less desirable. The character of the occupation for renting purposes which its situation demands may have greatly changed. As to all these things there cannot be a complete restoration of the status quo, nor does equity demand it. In such a case a court of equity, having come to the conclusion that the party complainant is entitled to a rescission, endeavors to put the parties in the condition they would have been, had not, by reason of their mutual mistake, the contract been entered into; and, as before stated, in order to entitle a party to such rescission, the condition of affairs must be such that a substantial restoration can be made. *Neblett v. MacFarland*, 92 U. S. 101, 23 L. Ed. 471.

"That there was a mutual mistake as to the condition of the walls and foundations of the building, and that but for such mistake the lease would not have been made, as well as that this mistake was as to a material and important matter affecting the substance of that concerning which the contract was, and the contract itself, there was such evidence that we ought not to overturn the conclusions of the chancellor upon the facts in dispute. The evidence of mutual mistake is clear. A case of a mutual mistake of fact as to a material matter affecting the substance of a transaction affords grounds for an application by either party for a rescission. It may therefore be well to consider whether the lessors could have had a rescission, had they so applied. If the lease had been for \$100 per annum, and it appearing, as from the evidence it fairly does, that the placing of two more stories upon this structure, already seven stories high, would have greatly endangered the entire building, and perhaps completely ruined it, appellants would probably have applied to have the contract rescinded, saying that the contract permitting—nay, requiring—the placing of two additional stories thereon would never have been made, had not both parties been, when the contract was entered into, mistaken as to the strength of walls and foundations. To this, what reply, under the evidence and findings in this case, could Fitzgerald have made? Would a court of equity, having before it the record of this case, allow him to go on and break down the building by the weight of the additional stories he had contracted to place thereon? The record does not show such laches upon the part of appellee in calling for a rescission as forbids relief to him.

"An objection is made to the allowance of fees to the master. The court allowed to the master the statutory fees for taking testimony. It appears that by agreement the parties employed a stenographer, and paid him fifty cents a page for reporting the testimony. Thus the master was saved the labor of writing out the testimony. No portion of the fifty cents per page was received in any way by the master. Notwithstanding

that the master did not have to write down the testimony, he had to listen to it, examine and certify to the correctness of every word transcribed by the stenographer, or change the same to correspond with the actual testimony. That done by the parties was not at the master's request, and was doubtless a great saving to the parties in the way of time and solicitor's fees. The instance is entirely unlike that commented upon in *Schnadt v. Davis*, 185 Ill. 476, 57 N. E. 652. We see no reason for interfering with the order of the court as to costs. The decree of the circuit court is affirmed."

We concur in the views above expressed in the opinion of the Appellate Court, and in the conclusion there reached. Accordingly the foregoing opinion is adopted as the opinion of this court, and the judgment of the Appellate Court is affirmed. Judgment affirmed.

(204 Ill. 197)

BEEDLE v. PEOPLE.

(Supreme Court of Illinois. Oct. 26, 1903.)

WITNESSES—IMPEACHMENT.

1. A witness is impeached by direct contradiction, in the sense that his evidence may be disregarded unless corroborated, only when the contradiction goes to the extent of leading the jury to believe that the witness willfully testified falsely on a material matter.

2. A witness is not impeached, in the sense that his evidence may be disregarded unless corroborated, by mere proof of his having made different or contradictory statements elsewhere, but the jury must believe that his testimony was willfully false in regard to material facts before they are authorized to ignore his entire testimony.

Error to Circuit Court, Douglas County; W. G. Cochrane, Judge.

William A. Beedle was convicted of crime, and appeals. Reversed.

J. M. Newman and W. C. Johns, for plaintiff in error. H. J. Hamlin, Atty. Gen., Geo. B. Gillespie, Asst. Atty. Gen., and John H. Chadwick, State's Atty., for the People.

RICKS, J. At the October term, 1902, of the Douglas circuit court, plaintiff in error was indicted for the crime of forgery. Upon trial he was found guilty, and sentenced to the penitentiary for an indeterminate term.

Upon the trial it appeared that on April 16, 1902, defendant applied to the cashier of the Citizens' Bank of Garrett for a loan of \$15, offering to give a note for such amount, with his mother, M. J. Beedle, as security. The cashier informed him that such note would be accepted, and wrote out a note for Beedle to take to his mother to sign. Beedle took it and went out of the bank, stating he would have his mother sign it, and in 15 or 20 minutes brought it back with his name and that of his mother signed to the note, whereupon the cashier discounted it and gave him the proceeds of the note. The same evening, after the discounting of the note, the cashier

of the bank met Mrs. Beedle, and asked her if she had signed a note for Bert (plaintiff in error) that afternoon, and she replied, "No, sir; I did not." He then said to her, "Didn't you sign a note for Bert for \$15 this afternoon?" And she replied, "No, sir; I did not." He then said to her, "Did you give him any authority to sign your name to any note today?" And she answered, "No, sir; I did not." Several persons were present at this conversation, and their evidence is substantially alike. Two days after this conversation the defendant was arrested at his mother's house. There is some dispute as to whether or not the warrant was read to him at that time. However, when he was arrested he asked if the matter could not be fixed up, and the cashier, who was there with the sheriff, replied that he (the cashier) was without power to arrange any settlement of the matter. The defendant then said his mother gave him permission to sign that note, and she said, "Bert, I never. I am not going to lie for you any more;" and he said, "Yes, you did. You said I could have the \$15. Ma, you know you gave me permission to sign that note;" and she said, "No, Bert, I didn't;" and he said, "You told me I might have \$15." It is conceded that M. J. Beedle's name was signed to the note by plaintiff in error. The foregoing constitutes practically all the evidence in behalf of the state tending to prove the want of authority to sign the name of Mrs. Beedle.

From the evidence offered on behalf of the defendant it appears that shortly prior to the foregoing transaction the plaintiff in error desired to purchase a butcher shop for \$50, and had requested his mother to sign a note for that amount, which his mother refused to do. Mrs. Beedle testified that when talking to the cashier she understood he was speaking of the \$50 note, and that in the conversation had with him she had in mind a \$50 note, and that when the sheriff came to her house to arrest the defendant she "had in mind a \$50 note. I understood they were arresting him for the forgery of a \$50 note." She further testified that the defendant came to her house with the \$15 note for her to sign, and as she was very busy she told him to sign her name for her, and, upon her giving him authority so to do, he signed her name to the note in her presence. Julia Ritz, a sister to the plaintiff in error, testified, in substance: "I was present on the 16th day of April, when my brother came in with this note. It was in the afternoon. Mother was in the kitchen, cooking something. He asked ma that he would like to have \$15—if she would sign his note. He asked ma if she would sign a note for \$15 for him, and she told him she was busy, and he could sign her name to it, and he did, and went to the writing desk and signed her name and his own. He showed the note to mother and went back uptown in just a few minutes." This, with the note, was substantially all the evidence offered.

Upon motion for new trial the defendant filed an affidavit of Wesley Darling, a newly discovered witness, in which affidavit Darling states that he is engaged in the butcher business; that on April 16th the mother of the defendant came to the shop and asked if Bert had bought the butcher shop; that affiant said that there was a note to that effect already made out, but not signed, and Mrs. Beedle said: "I do not want him to buy the shop. I have already helped him to borrow \$15 this afternoon."

The court gave the following instructions on behalf of the people: "(5) The jury are instructed that, in determining the questions of fact in this case, they shall consider the entire evidence introduced by the parties thereto; but the jury are at liberty to disregard the statements of all such witnesses, if any there be, as have been successfully impeached, either by direct contradiction, or by proof of such witnesses having made different or contradictory statements at other times as to any material matter in the case, except in so far as such witnesses have been corroborated by other credible evidence or by facts or circumstances proved on the trial. (6) The credit of a witness may be impeached by proof that such witness has made statements out of court contrary to what said witness has testified on the trial, and in this case, if you believe from the evidence that any witness has made statements out of court contrary to what they had sworn upon the trial upon any material matter, then these contradictory statements would tend to impeach such witness, and you would be justified in rejecting her testimony, if from all the other evidence in the case, you believe such testimony to be untrue."

It is assigned for error that the trial court erred in giving to the jury the fifth and sixth instructions above set forth, and that the evidence is not sufficient to support the verdict. As this case must be reversed and remanded for a new trial for error in the instructions, we refrain from commenting on the evidence.

The defense of plaintiff in error was predicated upon the authority given him by his mother to sign her name to the note in question, and this defense rested largely upon the testimony of Mrs. Beedle. If her evidence was believed by the jury, a conviction could not be had in this case. The fifth and sixth instructions plainly were meant to apply to her testimony, and would be so understood to apply by the jury. The fifth instruction, when analyzed, tells the jury, in effect, that a witness may be "successfully impeached by direct contradiction," but does not tell them to what extent the contradiction must go. As we understand the rule, the contradiction must go to the extent that the jury may believe that the impeached witness has willfully sworn falsely upon a material matter, before he is impeached, in the sense that his evidence may be disregarded except there be corroboration. *Howard v. McDonald*, 46

Ill. 123; *O'Brien v. Palmer*, 49 Ill. 72. The mere conflict of testimony is not what is called impeaching evidence. *Baker v. Robinson*, 49 Ill. 299. There is seldom a trial had in court in which the evidence upon some material point is not conflicting, and a statement of one witness absolutely contradicted by another; but the jury, from that circumstance alone, should not be told that if there be two witnesses, and each of them contradicted the other, both are successfully impeached. The term "impeached" means more than that, and goes not only to what the witness testified to, but to the credibility of the witness; and, unless the jury believe that a witness has willfully sworn falsely upon a material matter, they are not authorized to disregard the testimony of the witness. If the instruction in *Miller v. People*, 39 Ill. 457, cited by the people, lays down a rule in conflict with the rule here expressed, it must be held to have been departed from in the more recent cases of *Gulliber v. People*, 82 Ill. 145; *Healy v. People*, 163 Ill. 372, 45 N. E. 230; and *Matthews v. Granger*, 196 Ill. 164, 63 N. E. 658.

By the instruction the jury are further told that, if proof has been made that a witness has made different or contradictory statements at other times as to any material matter in the case, then such witness has been successfully impeached, and the jury are at liberty to disregard the evidence of such witness in so far as such witness has not been corroborated, etc. This is not the law. In *Gulliber v. People*, supra, we said: "The mere fact, however, that he is contradicted as to some material matter, is not enough to warrant the rejection of his evidence altogether, unless the jury believed that, as to the matter in which he has been thus contradicted, he has sworn falsely, and knew his evidence was false." Mrs. Beedle explained to the jury her statements out of court on the ground that she was speaking of and had solely in her mind the \$50 note, and this evidence should have been considered by the jury, and by them weighed. They were the judges of the credibility of the witness, yet the court, in this instruction, informed them that these statements had successfully impeached her testimony, and that the same might be disregarded. The jury are not at liberty to disregard the testimony of a witness merely because evidence tending to impeach has been introduced, nor on the ground that he has made an erroneous statement. It is only where he has been successfully impeached, and where the statements are willfully and corruptly false in regard to material facts, that the jury are authorized to disregard the entire testimony; and it is for the jury, under proper instructions, to say the impeachment has been successful. *Matthews v. Granger*, 196 Ill. 164, 63 N. E. 658. The statement of Mrs. Beedle made to the cashier of the bank may have been made in reference to the \$50 note, and such is her ex-

planation; but by this instruction this explanation is discountenanced, and the jury are told that it is not necessary for them to consider or to weigh her testimony, but that it may be cast aside and totally disregarded.

The sixth instruction given on behalf of the people is almost identical with the instruction given and held erroneous in *Healy v. People*, 163 Ill. 372, 45 N. E. 230 (see, also, *Matthews v. Granger*, supra), and should not have been given in this case. The evidence was conflicting on vital points, and the testimony of Mrs. Beedle was vital to the defense. The defendant was entitled to have the jury correctly instructed, and if these erroneous instructions, discrediting the testimony of his most important witness, had not been given, the jury might have arrived at a different verdict.

For the errors above set forth, the judgment is reversed and the cause remanded for another trial. Reversed and remanded.

(204 Ill. 248)

MARX v. PEOPLE.

(Supreme Court of Illinois. Oct. 26, 1903.)

CRIMINAL LAW—PLEA OF GUILTY—EFFECT—EVIDENCE—NECESSITY—EVIDENCE OF AGE—RECORD—PRESUMPTION—WRIT AUTHORIZING CONFINEMENT—SUFFICIENCY—REVIEW.

1. Where defendant, after the court has explained to him the consequences of his entering a plea of guilty, as required by Hurd's Rev. St. 1901, p. 658, § 424, pleads guilty to an indictment alleging fully the facts necessary to constitute the offense of receiving stolen property, knowing that the same was stolen, and which sets out specifically the articles stolen and received, and their value, testimony to establish the facts or the value of the property is unnecessary.

2. Where the record in a criminal case shows that in the presence of the accused the court heard evidence on two separate days, and as, under the indictment, and plea of guilty thereto, the court had no discretion as to the punishment, the presumption will be indulged in that the court did its duty, and that the evidence heard was as to the age of the accused, and that the sentence to the reformatory was in accordance therewith.

3. It is not error for the court to ascertain the age of defendant on trial for crime, and fix his place of confinement according to his age, without preserving the evidence in the record, or making a special finding based thereon.

4. The question whether one sentenced to a place of confinement on being adjudged guilty of crime is confined by a lawful writ is not reviewable on a writ of error, and can only be considered on habeas corpus.

Error to Criminal Court, Cook County; Frank Baker, Judge.

Ed Marx was sentenced to the reformatory on his plea of guilty, and he brings error. Affirmed.

M. D. Brown, for plaintiff in error. H. J. Hamlin, Atty. Gen., Charles S. Deneen, State's Atty., and F. L. Barnett, Asst. State's Atty., for the People.

RICKS, J. Plaintiff in error, at the February term, 1900, of the criminal court of

Cook county, upon his pleading guilty to the crime of receiving stolen property, knowing the same to have been stolen, was sentenced for an indeterminate period in the Illinois State Reformatory. The indictment sets out specifically the articles stolen and so received, and the value of each article, all aggregating the value of \$57.50. At the April term, 1903, of this court, this writ of error was sued out.

The errors assigned are: (1) There is no evidence in the record to support the conviction and sentence; (2) there is no evidence in the record to show any crime was committed, or that any property was ever stolen or received by plaintiff in error; (3) there is no evidence in the record to show or prove the age of plaintiff in error at the time of conviction and sentence; (4) there is no evidence showing the value of the property received; (5) no warrant of commitment to the State Reformatory was ever issued upon the sentence and judgment of the court upon which plaintiff in error was committed to, or is held in, said reformatory. No complaint is made of the indictment, and an inspection of it shows that it is sufficient in all respects.

Under the plea of guilty, it was not necessary for the court to hear evidence to determine any matter fully set out in the indictment, as the plea, as shown by the record, is that the plaintiff in error is "guilty of receiving stolen property, knowing the same to have been stolen, in manner and form as charged therein." Nor do we think it necessary that the court shall hear evidence as to the value of the property where the indictment charges and specifies the value thereof, and the value is alleged as above \$15, and it is sufficient that the larceny charged, by which the goods were obtained, is grand larceny, and the crime a felony.

When the plea is "Not guilty," and the cause is heard by a jury, the defendant admits nothing, or if upon the trial he admits the larceny—that is, the taking of the goods—he does not admit thereby that they were taken feloniously or that they had any value, nor does he admit any other matter material to his conviction as charged in the indictment, but all matters not expressly admitted must be proved; and in such case the value of the property, being a material part of the case as fixing the grade of the offense, must, under our statute, be proved, and found by the jury, that the court may know that he is justified in imposing the penalty recommended by the jury, as was the practice in this class of cases prior to the enactment of the parole law, or to enable the court to determine what penalty to impose where the same is not fixed by the jury. But where the defendant pleads "Guilty," he pleads to every fact averred in the indictment, and there is neither law, reason, nor necessity requiring proof of the things admitted by the plea. 4 Am. & Eng. Ency. of Law (1st

¶ 1. See Criminal Law, vol. 14, Cent. Dig. § 631.

Ed.) 773; Bassett on Crim. Pl. c. 214, § 188; 1 Bishop on Crim. Proc. § 795; People v. Goldstein, 32 Cal. 432; State v. Walker, 22 La. Ann. 425; Green v. Commonwealth, 12 Allen, 155. In Bassett on Criminal Pleading, supra, it is said: "The plea may be received originally or upon the general issue withdrawn, and it is considered the highest character of conviction admissible in any case, for, while it is but presumptive evidence, the law considers it to rest upon the strong presumption that no innocent person would sacrifice life, liberty, or even reputation, by a declaration untrue and adverse to his personal interest and comfort. 'Confessio facta in iudicio omni probatione major est.' This plea proceeds to the full extent the charges are good, and leaves to the court the simple duty of assessing the penalty and pronouncing judgment, even to the extent of death." In support of this declaration, People v. Noll, 20 Cal. 164, is cited, wherein practically the same language is used; and this pronouncement of the law is in harmony with, and practically in the language of, all the authorities above cited. In State v. Walker, supra, the Supreme Court of Louisiana said: "It is an error on the part of the appellant to say that no value of the articles stolen is alleged or shown. If such allegation and proof be necessary where no distinction is made between grand and petit larceny (and as to this it is unnecessary to express an opinion), the requirements of the law are fully met in this case. The defendant was fully placed on his guard, for the indictment declares that he took money, and that its aggregate value was \$150, and his plea of guilty admits the truth of these averments."

The statute requires that, before such plea shall be allowed to be entered, the court shall fully explain to the accused the consequences of entering it (Hurd's Rev. St. 1901, p. 658, § 424), and the record in this case shows that duty was performed by the court. Under the indictment in question the court must have told the plaintiff in error that if he persisted in his plea it would be the duty of the court to sentence him to the State Reformatory or to the Penitentiary, according to his age. With these facts before him, the plaintiff in error entered his plea; and to require testimony to establish that which the plaintiff in error by his plea admitted would be to require a useless thing, which the law does not indulge.

When the reformatory was established, crimes received a new classification, not based upon their enormity, but upon the age of the offender; and those offenders, with some exceptions, not necessary here to advert to, who are between the ages of 16 and 21 years, are sentenced and committed to the reformatory. It is true that section 10 of chapter 118 of our statutes (Hurd's Rev. St. 1899, p. 1379) requires that "in all criminal cases tried by jury, in which the jury shall find the de-

fendant guilty, they shall also find by their verdict whether or not the defendant is between the ages of ten and twenty-one years." There is no statutory requirement that when a plea of guilty is entered the court shall render any verdict, or shall in any manner, other than by his sentence, preserve his finding as to the age of the offender. The duty of the court, in this class of cases, to ascertain the age of an offender who pleads guilty, arises by construction and from the necessity of the situation, to enable him to know in which of the institutions, penal or reformatory, the offender shall be ordered to be confined. The only express provision in the statute requiring the court to hear evidence upon a plea of guilty is found in section 4 of division 13 of the Criminal Code (Hurd's Rev. St. 1899, p. 634, c. 38), which is: "In all cases where the court possesses any discretion as to the extent of the punishment, it shall be the duty of the court to examine witnesses as to the aggravation and mitigation of the offense." The record here discloses that in the presence of plaintiff in error the court did hear evidence on two separate days. Under the indictment, and the plea thereto, the court had no discretion to exercise, as he formerly had in such pleas, as he could not fix any term of imprisonment or impose any fine. Such being the case, the presumption will be indulged that the court did his duty, and that the evidence that was heard was as to the age of plaintiff in error, and that the sentence to the reformatory was in conformity thereto. Brown v. State, 13 Ark. 96; In re Brown, 32 Cal. 48; People v. Noll, 20 Cal. 164; People v. Barton, 88 Cal. 176, 25 Pac. 1117; Ex parte Woods (Cal.) 41 Pac. 796. In Brown v. State, supra, it is said: "Where the record is silent upon the subject, this court will presume that the court below, in passing sentence upon a person convicted of crime, complied with the provisions of the statute; but, if the court in fact omitted to do so, such omission would be no cause for reversal of the judgment, but a compliance with the statute might be directed." In Re Brown, supra, it is said: "If a defendant pleads guilty to an indictment for murder which does not specify the degree, and the court imposes a sentence of confinement in the State Prison, the judgment is not a nullity, for the presumption is that the court, by the testimony, ascertained the degree of the crime."

Under the statute cited, requiring the court, where discretion was given as to the extent of punishment, to examine witnesses as to the aggravation or mitigation of the offense, it has not, to our knowledge, been insisted or held that the court should preserve the evidence of that examination, or make any special finding concerning the same. In Ex parte Woods, supra, the defendant pleaded guilty to a charge of burglary in the first degree, and the judgment recited that, "whereas defendant has been convicted of the crime

of burglary in the first degree, it is ordered," etc. It was there held that the judgment was valid, though the minutes of the court did not show that any evidence was heard as to the degree; and we are not prepared to say in the case at bar that it was error for the court below to have ascertained the age of the plaintiff in error, and fixed the place of his confinement according to his age, without having preserved the evidence in the record, or making a special finding based upon the same.

The remaining objection, that the plaintiff in error is not held in his present place of confinement by any writ or process running in "the name of the people of the state of Illinois," and concluding "against the peace and dignity of the same," as it is insisted the Constitution requires, does not properly arise upon writ of error. The question as to whether the plaintiff in error is confined now by any writ, or of a writ in such form as is required by law, is one that will properly arise when it is sought by habeas corpus to relieve him from illegal restraint. The issuing of the writ is no part of the judgment complained of, and need not here be considered.

The judgment of the criminal court of Cook county is affirmed. Judgment affirmed.

(204 Ill. 38)

PARMLY v. FARRAR.

(Supreme Court of Illinois. Oct. 26, 1903.)

APPEAL—REVIEW—CONCLUSIVENESS OF VERDICT—REMITTITUR IN APPELLATE COURT—EVIDENCE—EXCLUSION—HARMLESS ERROR.

1. Where there is evidence tending to support the verdict, the judgments of the lower courts, so far as questions of fact are concerned, are conclusive on the Supreme Court.

2. Where four juries, in as many trials, found that a real estate broker was entitled to recover commissions for procuring a sale of real estate, the fact that he was entitled to recover some amount was conclusive.

3. Practice Act, § 81 (3 Starr & C. Ann. St. 1896 [2d Ed.] p. 3108, par. 82), which provides that the Appellate Court, in case of a partial reversal, shall give such judgment as the inferior court ought to have given, and may allow the entering of a remittitur, authorizes the entry of a remittitur in the Appellate Court.

4. The exclusion of proper evidence was not ground for a reversal where the facts sought to be established by the excluded evidence were shown by other evidence.

Appeal from Appellate Court, First District.

Action by J. Hamilton Farrar against Samuel P. Parmly. From a judgment of the Appellate Court (105 Ill. App. 394) affirming a judgment for plaintiff, defendant appeals. Affirmed.

This is an action in assumpsit, brought by J. H. Farrar, a real estate broker, against Samuel P. Parmly, to recover commissions for procuring the sale of the Boone Block, in Chicago, to W. D. Walker. The trial in

the court below resulted in verdict and judgment for \$5,000 in favor of the appellee, Farrar. An appeal was taken from this judgment to the Appellate Court, where, upon compliance by the appellee with an order of that court requiring him to remit \$2,500, the judgment of the superior court has been affirmed for \$2,500. From such judgment of affirmance the present appeal is prosecuted.

Heckman, Elsdon & Shaw, for appellant. Arthur B. Wells and John M. Blakeley, for appellee.

MAGRUDER, J. This suit has been tried four times. The first trial in December, 1890, resulted in a verdict for the appellee for \$3,000, which was set aside, and a new trial was granted. On the second trial there was a verdict in favor of appellee for \$2,500, and a new trial was again granted. The third trial resulted in verdict and judgment in favor of appellee for \$5,000. This third judgment was, upon appeal, affirmed by the Appellate Court (67 Ill. App. 624), but upon appeal to this court it was reversed for error of the trial court in refusing to give an instruction asked by the defendant below (the present appellant), as will be seen by reference to the case of *Parmly v. Farrar*, 169 Ill. 606, 48 N. E. 693. Upon the reversal of the judgment of the Appellate Court by this court, the cause was again docketed in the trial court, and tried a fourth time. The fourth trial resulted in the judgment which it is sought to review by this appeal. When the case was tried the fourth time, the trial court gave for the defendant below the instruction, on account of the refusal of which the judgment rendered on the third trial was reversed by this court. The error, therefore, which resulted in the reversal, set forth in *Parmly v. Farrar*, 169 Ill. 606, 48 N. E. 693, has been obviated upon the last trial by the giving of the formerly refused instruction.

The first two points made by the appellant in favor of a reversal of the present judgment relate mainly to questions of fact, and to a discussion of the opinion of the Appellate Court. It may be said again, as we said in *Parmly v. Farrar*, supra (page 608, 169 Ill., and page 693, 48 N. E.): "Much of the argument has been devoted to a discussion of the evidence introduced by the respective parties in the superior court, but, as we are precluded from passing upon questions of fact, it will not be necessary to allude to that branch of the case."

Section 56 of the practice act (3 Starr & C. Ann. St. 1896 [2d Ed.] p. 3054, par. 57) provides that "no more than two new trials upon the same grounds shall be granted to the same party in the same cause." Prior to the revision of 1874, the statute read as follows: "No more than two new trials shall be granted to the same party in the same cause." In commenting upon this statute, as it was before the revision of 1874, in *Silsbe*

¶ 2. See Appeal and Error, vol. 3, Cent. Dig. § 3953.

v. Lucas, 53 Ill. 479, we said (page 482): "It would seem to be eminently proper, where three juries have found the facts the same way, that there should be an end of the controversy as to what the facts are. The law having constituted the jury the judges of the facts, and only invested the judge with power to set aside the verdict when it is, to his mind, against the evidence, and when the persons authorized to find the facts have three times determined them the same way, the supervisory power of the judge should then cease, and the facts thus found should be conclusive." At the same time it was held in that case that the statute providing that no more than two new trials should be granted the same party in the same cause did not operate to restrain the court from granting any number of new trials upon errors of law. While it is true that this provision of the statute only applies to practice in the circuit court and other courts trying the facts, and not to appellate courts, yet we are inclined to give weight to the fact that there have been four verdicts in favor of the appellee in this case, so far as the facts are concerned. We would not hesitate in any case to reverse a judgment if the record showed that there was no evidence whatever to sustain the verdict. But when there is evidence which tends to support the cause of action, the fact that four juries have, upon four trials, found the facts the same way, makes us disinclined to disturb the judgment upon any considerations which relate merely to the facts in the case. The issue upon the fourth trial was the same as the issue upon the three other trials, to wit, an issue formed by a declaration, consisting only of the common counts in *indebitatus assumpsit*, and the plea of the general issue filed thereto. We agree with what the Appellate Court say in their former opinion rendered in this case: "There was clearly such testimony and documentary evidence as made out a case for the jury to pass upon." *Parmly v. Farrar*, 67 Ill. App. 624. It is unnecessary to enter into a discussion of the evidence. It is sufficient to say that there is evidence tending fairly to support the verdict, and, this being so, we regard the judgments of the lower courts as being conclusive upon us, so far as all questions of fact are concerned.

We also concur with the Appellate Court when they say in their last opinion deciding this case: "Unless material errors of law have intervened, or it is made to appear that passion, partiality, or prejudice have guided the verdict, the facts three times determined the same way should be deemed conclusive. This does not, in the case at bar, apply to the amount of the verdict, for that has varied, as before stated. But that appellee is entitled to recover some amount, we are compelled to conclude as finally settled. It is not to be presumed that passion, partiality, or prejudice have influenced four different

juries in as many trials." *Parmly v. Farrar*, 105 Ill. App. 394.

So far as the entering of a remittitur is concerned, the statute expressly provides (section 81, Practice Act; 3 Starr & C. Ann. St. 1896 [2d Ed.] p. 3108, par. 82) that the "Appellate Court, in case of a partial reversal, shall give such judgment or decree as the inferior court ought to have given, and for this purpose may allow the entering of a remittitur, either in term time or vacation, or remand the cause to the inferior court for further proceedings as the case may require." We have sanctioned the practice of allowing the entry of a remittitur in the Appellate Court. *North Chicago Street Railroad Co. v. Wrixon*, 150 Ill. 532, 37 N. E. 895; *Chicago, Burlington & Quincy Railroad Co. v. Dickson*, 88 Ill. 431.

It is claimed by the appellant that the trial court erred in excluding certain evidence offered by the appellant upon the trial below. The introduction of this evidence was for the purpose of showing that there were other circumstances, outside of the agency of appellee, which brought the appellant and Walker, the purchaser, together in their negotiations. It is true that evidence which tends to prove that the principal was induced to enter into the negotiations by some other agent than the plaintiff suing for his commissions is both competent and material. *Newton v. Ritchie*, 75 Iowa, 93, 39 N. W. 209; *Ellsmore v. Gamble*, 62 Mich. 543, 29 N. W. 97. In the case at bar, appellant owned the Boone Block, upon La Salle street, in the city of Chicago; and Walker, who purchased it from him finally, owned a building adjoining the Boone Block on the south. It is claimed that there were negotiations between appellant and Walker in reference to the erection of a party wall between their buildings, and that Walker was to pay the cost of the party wall, and hold appellant harmless from damage or loss of any kind during the progress of its construction. It is not contended that any other agent than appellee brought appellant and the purchaser, Walker, together, but it is said that they were brought together by the fact that negotiations with reference to the party wall were entered upon between them. While it is true that some of the evidence thus rejected might with propriety have been admitted, yet the facts sought to be established by the excluded evidence were made known to the jury by other testimony, and therefore the appellant was not injured by the rejection of the evidence referred to. We agree with what is said by the Appellate Court in their opinion upon this subject. They say: "It was, we think, competent for appellant to show that other circumstances existed, calculated to bring the parties together, and to effect the sale or exchange; such evidence having a direct bearing upon the question whether appellee's efforts, or other causes, brought it about. It does appear, however, that by appellee's direct testi-

mony the jury were advised of the existence of these conditions. * * * The facts were therefore made known to the jury, notwithstanding the rejection of the evidence referred to." If the excluded evidence had been admitted, it would have been merely a repetition of evidence which had been admitted already.

When the case was here before, it was reversed because the trial court refused to give on behalf of the defendant below the following instruction: "The jury are instructed, as a matter of law, that the plaintiff cannot recover under the declaration in this case unless he has shown by a preponderance of all the evidence in the case a contract fully performed on his part." Although, when the case went back, and the fourth trial took place, this instruction was given to the jury on behalf of the appellant, it is now claimed that the first instruction given for appellee upon the last trial was inconsistent with the instruction which was refused upon the third trial. The instruction refused upon the third trial was the fifth instruction given for the appellant upon the last trial. This claim is properly disposed of by the following statement upon this subject made by the Appellate Court: "The suit was brought under the common counts upon the theory that a special contract had been fully performed, leaving only a simple debt due appellee. This contract, as stated by him, was modified so as to authorize an exchange of the property without the limitation as to price, and without reference to the exact value of the property taken in exchange. We find, therefore, no error in the instruction complained of, and no conflict with the fifth instruction given in behalf of the appellant."

The judgment of the Appellate Court is affirmed. Judgment affirmed.

(204 Ill. 106)

JUVINALL et al. v. JAMESBURG DRAINAGE DIST.

(Supreme Court of Illinois. Oct. 26, 1903.)

DRAINS-DAMAGES-ASSESSMENT BY COMMISSIONERS-JURY TRIAL-CONSTITUTIONAL LAW-WAIVER-ASSESSMENT OF DAMAGES.

1. So much of Act May 29, 1879, § 37 (2 Starr & C. Ann. St. [2d Ed.] pp. 1519, 1520, c. 42, par. 68), as permits the assessment of damages to land by reason of the construction of a drainage ditch to be made by the commissioners of the drainage district in lieu of a jury, is in contravention of Const. art. 2, § 13, providing that compensation for private property taken for public purposes shall be ascertained by a jury, when such compensation is not made by the state.

2. Where a property owner whose land has been condemned for a drainage ditch does not specifically object to confirmation of the commissioners' report of damages and benefits on the ground that the assessment was made by the commissioners, and not by a jury, he waives his right to have the damages ascertained by a jury.

3. In making out an assessment roll in proceedings for the construction of a drainage ditch it is error not to consider damages as well as benefits, where it appears that land will be taken for the ditch.

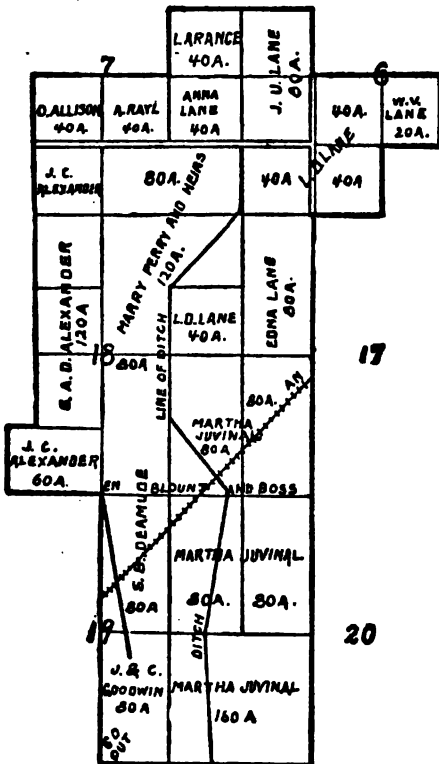
Appeal from Vermillion County Court; S. Murray Clark, Judge.

Proceedings for the establishment of the Jamesburg Drainage District. From an order of the county court confirming a corrected assessment roll of benefits by the commissioners, Martha Juvinal and others appeal. Reversed.

This is a petition, filed in the county court of Vermillion county on July 25, 1902, to establish a drainage district under the provisions of the statute known as "An act to provide for the construction, reparation and protection of drains, ditches and levees, across the lands of others, for agricultural, sanitary and mining purposes, and to provide for the organization of drainage districts," approved and in force May 29, 1879. 2 Starr & C. Ann. St. (2d Ed.) p. 1500. After notices given, an order was entered by the county court on October 6, 1902, reciting due notice by posting and publication, that there was a hearing, that the facts recited in the petition were true, that the same contained the requisite number of signatures, that the proposed ditch was necessary, etc.; and ordering that G. W. Dodson, J. D. Leonard, and A. J. Sinkhorn be appointed commissioners "to lay out and construct the work proposed in said petition"; and requiring the commissioners to take the oath and examine the land of the petitioners proposed to be drained, and the lands upon which the work is proposed to be constructed, and determine and report, first, the route; second, the probable cost; third, the annual expense of keeping in repair; fourth, what lands will be injured, and probable amount of such damages; fifth, what lands will be benefited, and probable amount of such benefits; sixth, whether any other lands will be damaged or benefited. After such appointment the commissioners proceeded to examine the lands, and made a report. The report so made by the commissioners was filed on November 10, 1902, and in it the commissioners stated, first, that the proposed district would embrace all the lands that might be benefited by such drainage, except certain described tracts aggregating 260 acres, which they added; second, the report recommended that an open ditch of the width of 5 feet at the bottom and 17 feet at the top, with a uniform grade, etc., be built and constructed along the route described in the petition, and on and through the east half of the southeast quarter of section 19, town 21 north, range 12 west of the section line at the south end of the same; third, the report estimated the probable cost of keeping the ditch in repair, after the completion of the same, at \$100 a year; fourth, it estimated the probable cost of the construction of the ditch to be about \$7,000; fifth, the report stated that none of the lands mentioned in the petition, and none of the lands added to the district, and none of the lands abutting the district would sustain any damage because of or on account of

the construction of the proposed ditch; and, sixth, the commissioners reported that in their belief all the lands lying in said district, as described by the petition, and all the lands added to the district, would be benefited by such drainage as proposed, and that, in their judgment and opinion, the aggregate amount of said benefits would exceed the cost of constructing the proposed ditch, including all incidental expenses and costs of proceedings; and the commissioners to their report attached a plat, plan, profile, and specifications of the proposed drainage district and ditch, as determined upon by them in their report, and made the same a part of their report, and stated that the appropriate starting point, route, and termini of said ditch and drainage district, and dimensions of the same, were as set forth.

A copy of the plat so attached by the commissioners to their report is as follows:



On due notice being given, the report of the commissioners was confirmed, and at the December term, 1902, an order was entered confirming said report, and finding that the work proposed in the petition to be done would be useful for agricultural purposes to the owners of the land in said district; that a majority of the persons of lawful age, representing one-third of the land to be affected by said drainage work, signed the petition; that said drainage district of the corporate name mentioned in said petition, to wit, "The Jamesburg Drainage District of the towns of Ross and Blount," be duly estab-

lished as provided by law; and further ordering and directing that said commissioners "shall first take and subscribe the oath as required by law, and, in lieu of a jury, shall proceed to lay out, make, and construct aforesaid ditch in accordance with the statute in such cases made and provided." The commissioners took an oath that they would faithfully and impartially perform the duties required of them to the best of their understanding and judgment, and "make assessments of damages and benefits in favor of or against the land in the aforesaid district according to law." An original assessment roll was made by the commissioners and filed on March 18, 1903, which, in its caption, states that it is an assessment roll of benefits. In the blank form upon which the assessment roll is set out the word "damages" is struck out, and the roll, being entitled "Assessment Roll of Commissioners," begins as follows: "We, the commissioners appointed and sworn to make assessments of benefits, which will be sustained by, or will accrue to, the land to be affected by the work proposed in said petition, do make such assessments in the words and figures following." The columns headed "Amount of Damages Allowed," "Excess of Damages Over Benefits," and "Excess of Benefits Over Damages," are left blank. The certificate at the close of the assessment roll states that it is an assessment of benefits, and recommends a division into three installments, one due on confirmation, one in 12 months, and one in 24 months, with interest at 6 per cent. per annum. The appellants, limiting their appearance, filed objections. The hearing of objections was set for March 31, 1903. The court referred the objections, which questioned the amount of benefits, to the commissioners, and overruled the others. The objections overruled were (1) that there was no such drainage district; (2) that the attempted description of boundary lines in the order of the December term, 1902, was uncertain, insufficient, and void; (4) that there was no order directing the commissioners to make any assessment; (5) that the alleged order was not in conformity with the statute; (6) that it did not direct damages to be assessed for lands taken, nor for lands damaged, but not taken, nor allowed damages to lands not taken as an offset to benefits; (8) that the report does not set out damages to lands through which the ditch passes, nor damages to lands not taken; (9) that the report was uncertain as to whether any such damages were considered; (12) that no report or estimate was ever made of the amount of damages to be paid for lands taken for making the improvement, nor has such cost been included in this assessment, nor has any release been obtained, nor has the compensation for the lands taken been in any way fixed; (14) that no notice has been given to the railroad company or commissioners of

highways; (17) that the proceedings and assessments were illegal, irregular, without authority of law, and void.

A hearing was had before the commissioners, and evidence was heard on both sides, and a corrected roll was made out and filed, which changed the assessments on nearly every 40-acre tract of the appellant Juvinal's land, but made the aggregate exactly the same as in the original assessment roll. On April 1, 1903, the court entered an order confirming the corrected assessment roll, to which exceptions were taken by the objectors. The present appeal is prosecuted from such judgment of confirmation.

Winter & Rearick and John W. Webster, for appellants. Wilson & Kent and Kimbrough & Meeks, for appellee.

MAGRUDER, J. (after stating the facts). It is evident from the statement which precedes this opinion that the questions of damages to lands taken were ignored by the commissioners in making the assessments. The objectors offered to show, on the hearing before the commissioners, in support of their objections, that they had lands which were taken, and also lands that were damaged, but not taken; but the trial court refused to allow the proofs so offered to be made, and entered an order overruling the objections, which raised the point. The proceedings, however, show that land belonging to the appellant Juvinal was taken for the construction of the proposed ditch. The plat upon its face shows that the ditch ran north and south across the land marked with the name of Martha Juvinal, and belonging to her. Although the commissioners took an oath to make assessments of damages and benefits, they seem to have considered benefits alone. The ditch extending across the land of the appellant Juvinal was 5 feet wide at the bottom and 17 feet at the top, and extended across two tracts of 80 acres each, lying north and south of each other, and across a tract of 160 acres lying south of both of the 80-acre tracts. It is clear, therefore, that a portion of the land belonging to appellant Juvinal, 17 feet wide at the top and 5 feet wide at the bottom, was taken for the purpose of constructing the drain or ditch in question. There is nothing in the evidence to show, so far as our attention has been called to it, what the value of the strip of land thus taken for the improvement was. Inasmuch, however, as the land embraced in the strip was actually taken, the commissioners must have deducted the value of the land taken from the benefits to be derived from the improvement, in order to reach the amounts which they assessed as benefits; or they assessed benefits without taking into consideration at all the value of the land taken.

By the assignment of errors, the order confirming the assessment is attacked on

several grounds, namely, the unconstitutionality of the statute, the void description of the boundary lines of the district, the want of an order directing the commissioners to make an assessment, and the failure to consider damages as well as benefits. We deem it necessary only to consider the first and last of these grounds of attack, to wit, the unconstitutionality of the statute, and the failure to consider damages as well as benefits.

Section 16 of the drainage act, above referred to, provides, among other things, as follows: "And thereupon the court shall empanel a jury of twelve men, having the qualifications of jurors in courts of record; or may, as provided by section 37 of this act, direct that the assessment of benefits herein named shall be made by the commissioners of said district." 2 Starr & C. Ann. St. (2d Ed.) p. 1508, c. 42, par. 44. Section 37 provides, among other things, as follows: "Provided, that when the right of way of the proposed ditches, drains or other work within any district has been released by the owners of the lands, over which the same is located, or when the owners of the lands in such district, about to be assessed, agree thereto, or in case the court so orders, the commissioners of said district may make any assessments of benefits, or damages and benefits, in lieu of a jury; and all the proceedings required of a jury in such cases by this act, shall be required of and observed by the commissioners as near as may be in making such assessments." *Id.* pp. 1519, 1520, par. 68. In the case at bar the order entered at the December term, 1902, of the county court, was made in pursuance of the foregoing provision in section 37, and directed that the commissioners, "in lieu of a jury, shall proceed to lay out, make, and construct aforesaid ditch in accordance with the statutes in such cases made and provided." We regard that portion of section 37 which confers upon the commissioners the power to assess damages for land taken, in lieu of a jury, as clearly unconstitutional. Section 13 of article 2 of the Constitution of 1870 provides as follows: "Private property shall not be taken or damaged for public use without just compensation. Such compensation, when not made by the state, shall be ascertained by a jury, as shall be prescribed by law." We have held that corporations existing for drainage purposes are public corporations, and that, where land is sought to be taken for the purpose of a ditch, it is for a public purpose, and compensation must be made before land of an individual can be taken for such public use. *Payson v. People*, 175 Ill. 267, 51 N. E. 588, and cases there cited. It clearly appears from this record that a portion of the land of the appellant Juvinal has been taken for the purpose of constructing this drain or ditch, apparently without any compensation to her, unless in the form of benefits; and that such compensation, if

awarded at all, has been fixed or awarded by three commissioners, instead of by a jury. The language of the Constitution is clear and imperative that not only shall private property not be taken or damaged for public use without just compensation, but that compensation, when not made by the state, shall be ascertained by a jury. Here, if it was ascertained at all, it was not ascertained by a jury, but by three commissioners, who had no power under the Constitution to act in the matter of fixing such compensation.

We have recently held in the case of *Wabash Railroad Co. v. Drainage District*, 194 Ill. 310, 62 N. E. 679, that the sections of this act of May 29, 1879 (Laws 1879, p. 120), which attempt to provide for the assessment of damages by a jury, are unconstitutional, as not designating for that purpose such a jury as is contemplated by the organic law. In the case of *Wabash Railroad Co. v. Drainage District*, supra, we held that the body of men brought together in the mode prescribed by section 16 of the levee act did not constitute a legal jury; that the course of proceeding directed by section 17 of the act to be pursued in determining compensation was not such judicial ascertainment of such compensation as was contemplated by the constitutional provisions bearing on the subject; that such section is, in that respect, in violation of the Constitution, and inoperative and void; and that the provisions of sections 20 and 21 of the act, granting the property owner the right to appear before the jury and object to their report, did not secure to such owner a fair and impartial judicial ascertainment of the just compensation to be paid for his property, that was to be appropriated to the uses of the drainage district. Surely, if the jury provided for by the above-mentioned sections of the act do not constitute such a legal jury as was contemplated by the Constitution, and if those sections were for that reason unconstitutional, then section 37, which ignores altogether the impaneling of a jury, and provides for action by the commissioners of the district, is also unconstitutional. It will not do to say that damages for the land taken were offset against the benefits, and deducted from the benefits. We have held that under the Constitution the compensation to be paid to the owner for private property must be in money alone, disregarding all benefits to the portion of the land not taken, and that it is not within the power of the Legislature to disregard this provision, and to take property without compensation, or to provide for paying it in benefits. *Ginn v. Moultrie Drainage District*, 188 Ill. 305, 58 N. E. 988; *McCaleb v. Coon Run Drainage District*, 190 Ill. 555, 60 N. E. 898. In *Ginn v. Moultrie Drainage District*, supra, we said: "The entry upon land and the construction of a ditch for drainage purposes constitute, in law, a tak-

ing and appropriation of a perpetual easement and interest in the land, which is protected from invasion even as against the owner of the land. The same rules for ascertaining the damages which prevail in proceedings for the condemnation of private property for public use apply to cases arising under the drainage statute. *Chronic v. Pugh*, 186 Ill. 539, 27 N. E. 415. * * * No benefits can be set off against compensation for land actually taken." In the *Ginn* Case we held that "corporations organized for drainage purposes cannot take private property for constructing any drainage ditch without making compensation to the owner of such property in money, and not in benefits." The provision of the statute here under consideration ignores the right of the property owner to a trial by jury.

Counsel for appellee seem to anticipate fatal consequences to drainage districts already organized if this statute, providing for action by commissioners instead of a jury, is held to be unconstitutional. No such result can follow, because, unless the property owner files an objection setting forth specifically the denial of the right to a trial by jury, the right is waived, and the judgment of confirmation is conclusive. *McCaleb v. Coon Run Drainage District*, supra. We are of the opinion that the county court erred in not sustaining the objections based upon the unconstitutionality of the statute, and the failure to consider damages as well as benefits.

In what is here said we have only considered the questions raised and discussed as applicable to the lands of the appellant Martha Juvinall, inasmuch as the other appellant, S. B. Deamude, has dismissed his appeal to this court.

For the reasons above stated, the judgment of the county court is reversed, and the cause is remanded to that court for further proceedings in accordance with the views herein expressed. Reversed and remanded.

(204 Ill. 540)

GLOS et al. v. PATTERSON.

(Supreme Court of Illinois. Oct. 26, 1903.)

EJECTMENT—RIGHT TO MAINTAIN ACTION—DEFENDANT IN POSSESSION UNDER LEASE FROM RECEIVER—PARTIES—NONJOINDER—EFFECT—HARMLESS ERROR.

1. In ejectment, a plaintiff claiming the fee of the premises, and alleging the wrongful withholding thereof by defendant, is not precluded from maintaining the action by the fact that she acquired title while defendant was in possession under a lease executed by a receiver appointed for the premises in proceedings to foreclose a mortgage thereon, where it does not appear that defendant's possession had not become wrongful as against her, and by default he admits the allegations of her declaration to be true.

2. Nonjoinder of defendants can only be availed of, where the defect does not appear on the face of plaintiff's pleading, by plea or answer, and in the absence thereof the objection will be deemed waived.

¶ 2. See Parties, vol. 37, Cent. Dig. § 171.

3. Under Hurd's Rev. St. 1901, p. 757, § 6, providing, "If the premises for which the action is brought are actually occupied by any person, such actual occupant shall be named defendant in the suit; and all other persons claiming title or interest to or in the same may also be joined as defendants," the failure, in ejectment, to join as defendant an occupant of certain rooms in the house on the premises, was a mere technical error, in no way prejudicial to the right of a defendant never in possession or occupancy of the property, and having no interest in the omitted party's possession or right of occupancy.

Appeal from Circuit Court, Cook County; R. W. Clifford, Judge.

Ejectment by Catherine Patterson against Adam S. Glos and another. Judgment for plaintiff, and defendant Glos appeals. Affirmed.

F. J. Griffin and Enoch J. Price, for appellant. William Gibson and F. W. Becker, for appellee.

WILKIN, J. Appellee recovered a judgment in ejectment against appellant and one George Lotz in the circuit court of Cook county, to reverse which Glos alone appeals.

The declaration was in the usual form, averring, as provided by section 11, c. 45, Hurd's Rev. St. 1901, entitled "Ejectment," that on the 28th day of November, 1898, plaintiff was possessed of lot 24, block 11, etc., in the city of Chicago, which she claimed in fee, and that the defendants afterwards, on the 9th day of the same month, entered into such premises, and unlawfully withheld the same from the plaintiff, etc. Appellant filed a plea of the general issue, and also a special plea, denying that he was then, or ever had been, in possession of the tenements, or any part thereof. A general demurrer was sustained to the special plea, and no error is assigned upon that ruling of the trial court. The defendant Lotz was defaulted, and the case tried by jury upon the general issue alone. At the close of all the evidence the defendant Glos asked the court to direct a verdict in his favor, which was refused, and a peremptory instruction given to find the defendant guilty, and that the plaintiff was seised of an estate in fee simple in the premises described in the declaration. A verdict being returned in obedience to that instruction, judgment was entered accordingly. After the verdict, but before judgment, defendant entered a motion to have the evidence heard as to the payment of taxes at the tax sale at which he purchased the premises, and subsequent taxes paid by him, in order that the court might give him a judgment therefor as a condition to the plaintiff's having judgment for the premises, but that motion was overruled.

The material facts of the case are these: On a bill of foreclosure against John Kuhl and wife, a former owner of the lot, one Charles A. Sturtevant was appointed receiver, and ordered to take possession of and lease the premises, which he did. In the meantime, on October 26, 1896, Kuhl and wife conveyed the

property, by quitclaim deed, to appellee, Catherine Patterson. On the 9th of the following month the foreclosure suit was dismissed on the motion of the complainant in that bill, and thereafter, on the same day, this suit was begun. There was a frame building on the lot, and the defendant Lotz occupied a front room in the same at that time under a lease by the receiver, Sturtevant. Evidence was offered on behalf of the defendant Glos to the effect that certain back rooms in the building were also for a time occupied by one Emil Oberg. From whom he got possession, whether he paid rent, or how long he occupied the rooms, does not appear; but the testimony at least fairly tended to prove that he was an "actual occupant" of a part of the house when the suit was begun, and that his occupancy was in no way connected with that of Lotz. As a matter of fact, the defendant Glos was never in possession or occupancy of the property, or any part of it; the action being brought under section 6 of the chapter on "Ejectment," Hurd's Rev. St. 1901, p. 757, which provides: "If the premises for which the action is brought are actually occupied by any person, such actual occupant shall be named defendant in the suit; and all other persons claiming title or interest to or in the same, may also be joined as defendants."

When the case was first submitted, it was insisted, among other grounds for a reversal, that the trial court erred in refusing to hear evidence as to the amount paid by appellant at the tax sale at which he became purchaser, and for subsequent taxes, and to give him a judgment therefor, to be paid as a condition precedent to the recovery of possession by the plaintiff. That question was disposed of in the case of *Glos v. Patterson*, 195 Ill. 530, 63 N. E. 272, adversely to this contention, and the point is no longer insisted upon.

In the argument of the case upon the present rehearing only two grounds of reversal are urged. The first ground is that appellee could not maintain the action against the defendant Lotz, because, by accepting the deed for the premises while he was in possession of the front room of the building under a lease executed by the receiver, plaintiff below became the landlord of Lotz, and he became her tenant. Conceding the premises to be true—that is, that Lotz was in possession at the time the suit was brought, as her tenant—the conclusion by no means follows. There is nothing to show that his possession had not become wrongful as against her, and, if it had, she could unquestionably maintain ejectment against him. By his default he admitted the allegations of her declaration to be true.

The second ground of reversal insisted upon is that Oberg was a necessary party to the suit; the contention being that the language of said section 6, "if the premises for which the action is brought are actually occupied by any person, such actual occupant shall be named defendant in the suit," requires that all actual occupants shall be made parties de-

defendant, as a condition to making all other persons claiming title or interest to or in the same, defendants. It is a general rule that nonjoinder of defendants can only be availed of where the defect does not appear upon the face of the plaintiff's pleading by plea or answer, and that in the absence of such plea or answer the objection will be treated as waived. Counsel for appellee insist upon the rule as applicable to this alleged ground of reversal, and cite *Clason v. Baldwin*, 129 N. Y. 183, 29 N. E. 228, as sustaining their position. It was held in that case, which was ejectment, under a statute similar to our own, that where the land sued for was in the possession of the defendant's tenant, who was not made a party to the action, the defendant could not avail of that objection without pleading the nonjoinder, but it was also held that the plaintiff was not entitled to judgment for possession of the premises. Section 19 of chapter 45 of our statute provides that under the plea of not guilty "the defendant may give in evidence any matter that may tend to defeat the plaintiff's action, except as hereinafter provided." Under this statute, if the plaintiff could only maintain her action by making all actual occupants defendants, jointly with appellant, defendant could, under this section, prove that Oberg was an actual occupant. We do not, therefore, regard the objection as being within the general rule as to nonjoinder of parties.

A more serious question is whether it was necessary, under the facts in this case, to join Emil Oberg as a party defendant. The house upon the lot, though consisting of several rooms, was a single building, and notwithstanding but one room was occupied by the tenant, Lotz, it is clear that under section 6 the plaintiff could have maintained the action even if all the other rooms had been unoccupied; that is, she would not, in that case, have been required to bring two actions—one under section 6, and another under section 7. Both these sections of the statute are intended to enable a plaintiff in ejectment to try and settle the title to premises claimed by him as against other persons claiming title or interest therein who are not in possession, and the real question in this case, upon the trial, was one of title between Catherine Patterson and Adam S. Glos. He had no interest whatever in Oberg's possession or right of occupancy.

In *Hennessey v. Paulsen*, 147 N. Y. 255, 41 N. E. 516, the action was ejectment under a statute substantially like section 6, *supra*, and an attempt was made to raise the question that all the actual occupants of the premises were not made defendants. Gray, J., rendering the opinion of the Court of Appeals, said: "The answer, as a separate defense, alleges that there is a defect of parties defendant herein, in that at the time of the commencement of this action one John Mulhall was, and now is, an occupant of a part of the premises described in the com-

plaint, as tenant of one Rachael Duffy, who was and still is the legal owner and in possession of the whole of said premises, and neither of said persons has been made parties defendant herein. To that defense the plaintiff demurred as being insufficient in law, and his demurrer was overruled at the special term. Upon appeal the general term reversed the decision of the special term, and sustained the demurrer. That such a defense is insufficient in law cannot be doubted.

* * * Passing over what seems to be defective in the allegations constituting this defense in the answer to the complaint, the question arises whether the plaintiff in ejectment is obliged to make all those who may be occupants of the premises described, parties defendant. Section 1502 of the Code of Civil Procedure provides that 'if the property is actually occupied the occupant thereof must be made defendant in the action.' That language is hardly open to the reading that all the occupants must be sued in one action. Undoubtedly the plaintiff may make every occupant a defendant in his action, but I do not think he is obliged to do so by the Code. We may read the words in section 1502,—'the occupant thereof,' as meaning an occupant, and not all the occupants. It is difficult to perceive any good reason for permitting these defendants to object to the nonjoinder of another defendant, when such joinder could in no wise benefit them or be necessary for the determination of their rights. We can see how Mulhall, as an omitted party, might claim the right to be made a party to the action if he deemed his interests in the real property to be imperiled; but how the defendants, who are alleged to be wrongdoers with respect to the plaintiff's property rights, have any interest which the law will recognize in having another or other wrongdoers joined with them as defendants, we do not perceive."

At most, the failure to make Emil Oberg a joint party defendant in this case, which is objected to for the first time in this court, was the merest technical error, in no way or manner prejudicial to the rights of the appellant, Glos.

Upon a re-examination of the record, and a careful consideration of the briefs and arguments of counsel on both sides, we are convinced there is no reversible error in the judgment of the circuit court, and it will accordingly be affirmed. Judgment affirmed.

(204 Ill. 571)

TINKER et al. v. BABCOCK et al.

(Supreme Court of Illinois. Oct. 26, 1903.)

EXECUTORS AND ADMINISTRATORS—CLAIMS—FAILURE TO PRESENT—HEIRS—LIABILITY—JUDGMENTS—CONCLUSIVENESS—DEFENSES—ABATEMENT—ANOTHER ACTION PENDING.

1. Where testator signed a note as joint maker with plaintiffs, and testator's personal estate was amply sufficient to discharge all claims against it, and his liability on the note was capable of being adjudicated during the settle-

ment of his estate, but the note was not presented as a claim against the estate, a bill by the other signers to be relieved from liability thereon, to which the executor was not made a party, could not be maintained against testator's heirs and devisees.

2. Where joint makers of a note brought suit against the payee to be relieved from liability by reason of the latter's failure to present it as a claim against a deceased joint maker's estate, a judgment in favor of defendant was conclusive against the maintenance of another suit for the same relief on the ground that the failure to present the note was by an agreement between the payee and the attorney for such deceased maker's estate.

3. Where surviving joint makers of a note filed a bill against the payee to be relieved from liability on the ground that the payee had failed to file the note as a claim against the deceased maker's estate, in which a decree was entered dismissing the bill and holding that complainants were principal makers with the deceased, from which an appeal was taken, plaintiff could not, during the pendency of such appeal, maintain another bill against the payee to be relieved from liability on the ground that the note was not presented against the deceased maker's estate by reason of an agreement between the payee and the attorney for such estate.

Appeal from Appellate Court, First District.
Suit by Robert H. Tinker and others against Annie C. Babcock and others. From a decree in favor of defendants (107 Ill. App. 78), plaintiffs' appeal. Affirmed.

This is a proceeding in chancery by Robert H. Tinker and F. G. Tibbitts, who are the appellants here, against Thomas D. Catlin and the heirs and devisees of Benjamin H. Campbell, deceased, seeking to discharge appellants' liability upon a promissory note. In the circuit court of Cook county, where this proceeding was begun, the court sustained a demurrer to the bill. An appeal was prosecuted to the Appellate Court for the First District to reverse the decree sustaining the demurrer. From a judgment of affirmance there, this appeal is prosecuted.

The note was made October 1, 1890, for the sum of \$34,290.05, payable to the order of Catlin, six months after its date, and signed by Sidney A. Stephens, Benjamin H. Campbell, Robert H. Tinker, and F. G. Tibbitts. In November following the date of the note Campbell died, leaving a large estate, which he disposed of by will. His executor was duly qualified, and administered upon the estate in the probate court of Cook county. The holder of the note, upon its maturity, sold certain collateral which had been taken as an additional security, reducing the amount of the indebtedness to about \$18,000, for which balance he recovered a judgment against Stephens, Tinker, and Tibbitts, the surviving makers of the note. No claim was presented by the holder of the note against the estate of Campbell, and nothing was done by him with reference thereto within the two years except to file a petition praying to have the executor file an inventory, in which petition the petitioner stated that he had a claim against said estate of over \$18,000.

The bill in this case, after alleging the fore-

going facts, in substance avers that after the recovery of the judgment against complainants, and its affirmance upon appeal to the Appellate and Supreme Courts, a proceeding in chancery was instituted by them against Catlin and the heirs of Campbell, in 1894, to vacate said judgment as against them, praying for a perpetual injunction against the enforcement of the same; that a decree was entered in that cause dismissing the bill as to the heirs and devisees of Campbell, and holding that "as to the defendant Thomas D. Catlin, Benjamin H. Campbell and the complainants, as signers of the said note of October 1, 1890, were principal makers, and the said defendant Thomas D. Catlin did not, by his failure to present his claim upon said note to the probate court of Cook county for allowance against the estate of Benjamin H. Campbell, etc., within two years after the letters testamentary therein, release or discharge the complainants, or either of them, from their liability upon said note or the debt evidenced thereby or the judgment rendered thereon."

The present bill further alleges that the holder of the note failed to press his claim against the estate of Campbell by reason of some arrangement or agreement between the holder and the estate, and concludes with the prayer, first, that the complainants, by reason of said arrangement, be discharged from liability on the note; second, or that the filing of the petition in the probate court by the holder of the note to cause the executor to file an inventory be adjudged a filing of the claim of Catlin against the estate of Campbell, and that the said heirs and devisees pay the same.

Kretzinger, Gallagher & Rooney, for appellants. Bentley & Burling, for appellee Catlin. Harlan & Bates, for appellees heirs of Campbell.

WILKIN, J. (after stating the facts). The demurrer admitting all facts well pleaded, the question for our determination is whether or not the bill, upon its face, presented such a case as would give appellants a standing in a court of equity. Relief is sought against the heirs and devisees of Campbell on the one hand, and against Catlin on the other. As to the former, they are not proper parties to the bill. The liability of Benjamin H. Campbell, by virtue of his signing the note in question, is a claim which could only be presented against his estate. The executor of that estate, its legal representative, not being made a party, and it appearing that the personal estate was amply sufficient to discharge all claims and liabilities against it, and that the claim here in question was then in existence capable of being adjudicated, in no event could the relief asked for against the heirs and devisees be granted. *Hoffman v. Wilding*, 85 Ill. 453; *People v. Brooks*, 123 Ill. 246, 14 N. E. 39.

Nor could the relief asked be granted in this proceeding against Catlin. The former proceeding in chancery, set forth in this bill,

has already determined complainants' liability to Catlin, the decree holding that as to him appellants were not sureties, but principal makers with Campbell. The former adjudication, which, as alleged, is still pending upon appeal, fixes appellants' liability as makers, in common with Campbell, so far as the present bill is concerned. So, treating their liability to Catlin as determined by the former decree, it clearly cannot be denied in this proceeding.

It is also alleged in this bill that the holder of the note and the attorney for the estate of Campbell entered into a "certain arrangement and agreement, * * * the exact terms of which * * * complainants have been unable to learn," the purpose being to enforce the collection of this claim from complainants by not presenting it to Campbell's estate within the two years in which such claims could be presented, and this arrangement, it is insisted, ought in equity to discharge complainants from liability to Catlin. Aside from the fact that the allegation is wholly insufficient, the terms and conditions of the contract not being set forth, and therefore not capable of being either admitted or denied, we think enough appears upon the face of the bill to show that this defense was urged in the former chancery proceeding to defeat the collection of the judgment. It will certainly not be contended that complainants may, by a second proceeding in chancery between the same parties, again submit that question to judicial determination. Appellants' counsel seem to contend that in the former proceeding this defense was not urged. Even if the present bill failed to sufficiently show that the defense was urged in the other proceeding, complainants would still be precluded from insisting upon it here, for the reason that it was the duty of complainants, having knowledge thereof, to set forth all facts, and urge in one proceeding all their equitable defenses against the collection of said judgment. The former suit involved the same subject-matter between complainants and Catlin. The decree in that case is final and conclusive, "not only as to the matter which the parties might have litigated and have had decided as incident to or essentially connected with the subject-matter of the litigation, and every matter coming within the legitimate purview of the original action, both in respect to matters of claim and defense." Freeman on Judgments (2d Ed.) § 249; Harmon v. Auditor, 123 Ill. 122, 13 N. E. 161, 5 Am. St. Rep. 502, and cases cited.

For the reason that it appears from the face of the bill that the executor of the estate of Benjamin H. Campbell is not made a party to the bill, and that as to Catlin, the other party against whom relief is sought, the same subject-matter of this cause is pending in another chancery proceeding, we think the circuit court properly sustained the demurrer.

The judgments of the Appellate and circuit courts will be affirmed. Judgment affirmed.

(204 Ill. 158)

HARTER v. PEOPLE.

(Supreme Court of Illinois. Oct. 26, 1903.)

HOUSE OF PROSTITUTION — PERMITTING UNMARRIED FEMALE TO LIVE THEREIN—INSTRUCTIONS—MOTION FOR NEW TRIAL—CONTINUANCE.

1. The application for a continuance of the trial of one charged with being a keeper of a house of prostitution and suffering an unmarried female under the age of 18 years to live therein, which averred that it could be shown that the female was married; that her husband was absent, and his whereabouts unknown; that, if the cause was continued, accused, by the next term of court, could procure the record of the marriage—did not show due diligence, and was properly denied.

2. On a prosecution of the keeper of a house of prostitution for permitting an unmarried female under the age of 18 years to live therein, an instruction that one of the defenses was that defendant did not know that the female was unmarried and under the age of 18 years was not erroneous where it appeared from the testimony that the alleged marriage of the female was a defense.

3. A motion for a new trial of one found guilty of being a keeper of a house of prostitution and suffering an unmarried female under the age of 18 years to live therein, based on the affidavit of the female averring that she was married; that she and her husband went to some town in Michigan, and were married by a minister; that the minister gave to the affiant a marriage certificate, which was in the possession of the husband; that on the trial she testified that she was not married through fear of getting him into trouble if she told the truth, and that on a new trial she would testify that at the time of living in the house of prostitution she was married—was properly denied where on the trial the affiant testified that she was an unmarried woman when at the house of defendant, and her father and mother testified that she was 14 years of age and unmarried, and the father further stated that he had not given his consent to her marriage.

Error to Circuit Court, Vermilion County; H. Van Sellar, Judge.

Jennie Harter was convicted of crime, and brings error. Affirmed.

Fred Draper, for plaintiff in error. H. J. Hamlin, Atty. Gen., and John W. Kessler, State's Atty. (W. M. Acton, of counsel), for the People.

MAGRUDER, J. At the January term, 1903, of the circuit court of Vermilion county, plaintiff in error was indicted by the grand jury upon the following charge: "Being a keeper of a house of prostitution, and suffering one Grace Relk, an unmarried female under the age of eighteen years, to live, board, and room therein." 1 Starr & C. Ann. St. 1896 (2d Ed.) p. 1228, par. 7b; section 3 of "An act to prevent the prostitution of females." The case was tried before a jury, and resulted in a verdict of guilty. A motion for new trial was made and overruled, and plaintiff in error was sentenced to the

penitentiary at Joliet until discharged according to law.

Three errors are assigned for reversal of the judgment. The first is the denial of the court below to grant plaintiff in error's application for a continuance of the cause. There was no dispute in the evidence as to the facts that plaintiff in error kept a house of prostitution, and that she permitted Grace Reik to live, board, and room therein. The application for a continuance was based upon the claim by plaintiff in error that she could produce evidence as to the marriage and age of Grace Reik. The affidavit does not claim that plaintiff in error can show that Grace Reik was not under 18 years of age, but it is claimed that it could be shown that she was married, and was the wife of one Bert Helms. An affidavit for a continuance must state facts, and not conclusions. A party filing an affidavit for a continuance must show in such affidavit facts which will enable the trial court to see that due diligence has been used to be ready for trial, and that, if a continuance were granted, the attendance of the desired witness could be procured at a future time. In the present case the affidavit merely shows that the affiant has some information and a certain belief, but suggests no facts from which the court could decide that such information or belief is well founded. The affidavit states that Bert Helms is absent, and that plaintiff in error does not know where he now is, but she says that, if the cause is continued, she can find him, and procure his attendance at the next term, and that he would then testify that at the time charged in the indictment he was the husband of the prosecuting witness, Grace Reik. Inasmuch as her affidavit shows that she does not know the whereabouts of Bert Helms, she should state the facts upon which she bases her conclusion that she would be able to find him by the next term. No such facts are stated. She states that by the next term she can obtain a certified copy of the record of such marriage, but gives no reason why, if such record exists, it was not produced upon the trial of the cause. It is not stated in the affidavit where the record of the marriage is, and upon what facts the plaintiff in error bases her statement that she can obtain a certified copy of it. We do not think that the affidavit shows due diligence on the part of the plaintiff in error in the matter of securing testimony as to the age or marriage of the prosecuting witness. Therefore the court committed no error in refusing to continue the cause.

The second error assigned is that the trial court gave improper instructions to the jury on behalf of the state. Complaint is made against the second instruction given for the prosecution on account of the use therein of the following words: "The court instructs the jury that one of the defenses relied upon in this case is that the defendant did not

know the prosecuting witness, Grace Reik, was an unmarried female under the age of eighteen years." Counsel for plaintiff in error says that want of knowledge, on the part of plaintiff in error, as to Grace Reik being an unmarried female, was not offered as a defense, but for the purpose of showing to the jury that the prosecuting witness claimed that she was both over 18 years of age and married. We think, however, that it sufficiently appears from the testimony, and from the questions asked by counsel for the defense, that her alleged marriage was relied upon as a defense. There was no error in the instruction in this regard. Instructions numbered 1 and 2 given for the prosecution are also objected to upon the alleged grounds that they assume that the prosecuting witness was under 18 years of age, and unmarried. Neither of the instructions can be fairly construed as assuming the facts of marriage or age. On the contrary, the instructions clearly tell the jury that it must be proven beyond a reasonable doubt that the witness Grace Reik was at the time in question under the age of 18 years, and an unmarried woman.

The third error assigned is that the court denied the defendant below a new trial. Upon the motion for a new trial an affidavit was produced, purporting to be made by Grace Reik Helms, who, upon the trial of the case, testified under the name of Grace Reik. The affidavit, produced in support of the motion for a new trial, and made by the prosecuting witness, stated that on September 29, 1902, she, in company with Bert Helms, went from Danville to some town in Michigan, and that they were there married by a minister of the gospel; that said minister gave to the affiant a certificate of such marriage, which is in the possession of Bert Helms; that she is now, and ever since said marriage has been, the wife of said Bert Helms, and was such wife at the time she was arrested at the home of Jennie Harter, in December, 1902; that she testified at the trial of the above cause that she was not married to said Helms, through fear of getting him into trouble if she told the truth; that, if a new trial is granted, she will testify therein that at the time charged in the indictment she was the wife of said Bert Helms. Upon the trial of the case, Grace Reik swore that she was an unmarried woman when she was at the house of plaintiff in error. Her father and mother both testified upon the trial that she was 14 years of age, and that she was unmarried; and her father further testified that he never gave his consent to her marriage. Three witnesses, including herself, testified upon the trial that she was not a married woman. She substantially confesses in the affidavit made in support of the motion for a new trial that she perjured herself upon the first trial, and gave false testimony, and that upon another trial she will give testimony contradicting what she said upon the first trial.

The general rule is that a new trial will not be granted merely for the purpose of admitting cumulative evidence, or to impeach a witness. It has been held, however, in some cases, as an exception to this rule, that, where the principal witness for the state in an affidavit states that her evidence given on the trial was incorrect, and her mother, by affidavit, stated that she was unreliable, a new trial will be granted upon the ground of subsequently discovered evidence. *Fletcher v. People*, 117 Ill. 184, 7 N. E. 80; *Aholtz v. People*, 121 Ill. 560, 13 N. E. 524. But we do not think that such cases have any application to the facts of the case at bar. The excuse given by the prosecuting witness why she stated upon the first trial that she was unmarried is not sufficient to explain her testimony. She gives no reason why she supposed that her telling the truth about her marriage would get Bert Helms into trouble. She does not state that he swore falsely as to her age in order to get a marriage license. She does not state in her affidavit that any marriage license was issued. She does not state the name of the town in Michigan where she was married, although, if she was married on or about September 29, 1902, only about five months had elapsed before the trial of this cause. It is singular that she should forget the name of the town where she was married. She does not give the name of the minister who performed the ceremony, nor does she state any facts by which the place where she was married could be ascertained, or by which the truthfulness or falsity of her statement could be determined.

A new trial will not be granted on the ground of newly discovered evidence which is merely cumulative, and which is not decisive, or when there has been a want of proper diligence to procure the evidence on the trial. The additional testimony which is claimed to be procurable upon another trial must be such testimony as will be conclusive of the result. *Bean v. People*, 124 Ill. 576, 16 N. E. 656. The nature of newly discovered evidence in such cases should be of such a kind or quality as, when considered with all the other evidence, would probably have resulted in a verdict of not guilty had it been introduced on the trial. In other words, it should be of a conclusive character. *Klein v. People*, 113 Ill. 596. The affidavit in support of the motion for new trial complies with none of the requirements thus indicated. The evidence in the case at bar as to the guilt of the plaintiff in error was substantially uncontradicted. Counsel for plaintiff in error says in his brief, "There is very little conflict in the evidence." Plaintiff in error was the keeper of a house of prostitution, and allowed Grace Reik to stop at such house. The evidence of the father and mother of the girl to the effect that she was only 14 years old and that she was not married was quite conclusive. Evidently the trial judge was not satisfied from the affida-

vit of the prosecuting witness, presented on the motion for new trial, that the testimony upon the second trial would overcome the clear and convincing evidence given upon the first trial.

We are of the opinion that there is no error in the record which would justify us in reversing this judgment. Accordingly, the judgment of the circuit court of Vermillion county is affirmed. Judgment affirmed.

(204 Ill. 44)

WILLIAMS et al. v. WILLIAMS et al.

(Supreme Court of Illinois. Oct. 26, 1903.)

EQUITY—ACTION BY MINOR—JURISDICTION TO COMPROMISE—TESTAMENTARY CAPACITY—EVIDENCE.

1. A court of chancery has power to authorize the settlement of a suit brought by a minor to set aside a will, upon terms which, in the opinion of the court, are advantageous to the minor.

2. On a will contest, evidence examined, and held to show testamentary capacity.

Appeal from Circuit Court, Cook County; Frank Baker, Judge.

Suit by Alan H. Williams and others against Lucian M. Williams and others. From a decree authorizing settlement of the suit, defendants appeal. Affirmed.

This is a bill filed on July 1, 1902, by Annie D. Williams, the widow of John M. Williams, deceased, and Alan H. Williams, an infant son of said John M. Williams, deceased, suing by his next friend, to set aside the will of the said John M. Williams, deceased, upon the alleged ground that the testator was not of sound mind and memory at the time of making his will, but was of such great age and infirmity, and his mind and memory were so impaired, as to render him wholly incapable of making a just and proper distribution of his estate. The bill prays that the will and the codicils thereto may be set aside and declared to be null and void, and that the estate may be distributed among the heirs according to law. The answer of the adult defendants was filed on September 29, 1902, admitting all the material allegations of the bill, except the charge that the testator was not of sound mind and memory, etc., which latter charge was denied by the answer. Two of the defendants below are minors, and answered by their guardian ad litem. Replication was filed to the answer of the adult defendants. While the cause was pending upon the issue made by the bill and answers thereto as to whether the testator was of sound mind and memory, or not, when he made his will, a petition of Alan H. Williams, by P. Shelley O'Ryan, his next friend, was filed, on December 19, 1902, setting up that a conference had been held between the next friend of the infant petitioner and the defendants, and that a settlement and compromise of the matter at issue had been made between them. The petition states the nature and terms of the

compromise, and prays that the defendants may answer the petition, and that the question whether the settlement proposed is for the best interests of the infant petitioner should be referred to a master in chancery, to take evidence, and report his conclusions of law and fact to the court. Answer was filed on behalf of the minor defendants by their guardian ad litem, and an answer was filed on behalf of the adult defendants, admitting that they had made the offer of compromise set forth in the petition, in the interest of peace and family harmony, and in the belief that an acceptance of said offer would be beneficial to petitioner, and stating their readiness and willingness to carry out the compromise, if the same should be finally approved and confirmed by the court as being for the best interest of the petitioner. The defendants joined in the prayer for a reference. The minor defendants, John M. Williams and Margaret Williams, filed a petition setting up the same facts as are contained in the petition of Alan H. Williams, and stated that their interest in the proposed settlement is identical with that of their adult codefendants, and praying that, as they are minors, the question whether the proposed settlement is to their interest be passed upon by the court.

The material facts, as gleaned from the pleadings and the master's report, and the evidence accompanying the same, and the decree of the court below, are substantially as follows:

John M. Williams died testate on March 9, 1901, in the seventy-ninth year of his age, in California, leaving, him surviving, Lucian M. Williams, his son; Isabella W. Blaney, his daughter; Helen Williams Husser, his daughter; John M. Williams and Margaret Williams, the only heirs at law of Walter Williams, a deceased son; Jessie Williams Simmons, his daughter; Edith Williams Kirkwood, his daughter; Nathan W. Williams, his son—all named as defendants to the bill herein, and the complainant Alan H. Williams, his son, and the complainant Annie D. Williams, his widow. The persons above named were his only heirs at law and next of kin. His will was executed and dated on August 10, 1896. On November 19, 1896, he executed a codicil thereto, and on April 5, 1897, he executed a second codicil thereto, and on the 11th day of July, 1898, he executed a third codicil thereto. His will was admitted to probate in the probate court of Cook county on April 16, 1901, and letters testamentary thereon were issued to the said Lucian M. Williams, Nathan W. Williams, and Parke E. Simmons, as executors thereunder.

The deceased was twice married. The defendants in the bill, and appellees in this court, are his children by the first marriage, and his two grandchildren, John M. Williams and Margaret Williams, who are also infants, are the children of a deceased son,

Walter, by the first marriage. On April 1, 1897, the testator made up his mind to marry a second time, and entered into an antenuptial contract with Annie E. Dearborn, now Annie D. Williams, and one of the appellants herein. Accordingly, on April 5, 1897, after his marriage to Annie E. Dearborn, he made a second codicil to his will, making the recitations therein as hereinafter set forth. By the terms of the original will, executed on August 10, 1896, before his second marriage, he divided his property equally between his children and grandchildren above named. By the terms of the second codicil, of April 5, 1897, he made provision for such child as should be born of his second marriage, to the amount of \$50,000. Ten thousand dollars of this was to be used in the education and maintenance of such child, who turned out to be the present appellant, Alan H. Williams, and, of the remaining \$40,000, \$10,000 was to be paid to such child upon his reaching the age of 21 years, and \$30,000 thereof was to be set aside and invested, and the net income thereof paid over to such child; but it was further provided that \$10,000 should be paid to the child when it should attain the age of 24 years, another \$10,000 when it should attain the age of 27 years, and another \$10,000 when it should attain the age of 30 years. It is unnecessary to set forth the provision made for the widow, Annie D. Williams, as, being an adult, she was competent to make a contract with the donors. The settlement and compromise offered to the infant child, Alan H. Williams, or his guardian and next friend, proposed to pay him, or to trustees for his benefit, an additional sum of \$50,000, making the total amount to be realized by him out of his father's estate the sum of \$100,000. The sum of \$50,000, by the terms of the settlement, was to be held by a trust company to be named by the court, for the use and benefit of petitioner, and to be invested in a certain specified manner by said trust company, with the approval of the mother of the petitioner, Annie D. Williams; the income to be collected by said trust company until the petitioner should attain the age of twenty-one years, unless he and his mother should sooner die; the net income so collected to be paid to Annie D. Williams to be expended for petitioner's use, and, in the event of her death, to his legally appointed guardian, monthly or quarterly; with a provision that, if the petitioner should die before reaching the age of 21 years, and his mother be not living, then the trust to terminate, and the trust fund to go to the donors, and if, before attaining the age of twenty-one years, petitioner should die, and his mother should survive him, the income to be paid to her during her lifetime, and upon her death the trust to cease, and the property to go to the donors, the children and grandchildren of the testator, but, in the event petitioner attained the age of 21 years, the trust should cease and

determine, and all the trust property should belong to and vest in him, and be transferred to him by the trust company. There were other provisions embraced in the terms of the settlement, but it is unnecessary to state the same more fully.

The cause was referred to a master in chancery, who took testimony and made a report. The master's report, which was filed on February 18, 1903, stated that seven witnesses, who had known John M. Williams, and had come into intimate contact with him, had been examined; that they all testified unanimously that they knew him at and about the time of his death, and that he was not only of sound mind and memory, and in such a condition as to be wholly capable of making a just and proper distribution of his estate, but that he was a man of unusual and keen observation, of very sound judgment—a man who followed his large business interests carefully, determining at times upon costly investments. Besides the testimony of witnesses, a large number of letters were introduced in evidence before the master, written by the testator during the last years of his life to his son and son-in-law in reference to his business matters. In his report the master found that the compromise and settlement offered by the defendants below, and recommended by the next friend and the widow herself, was eminently reasonable and fair to all the interested parties, and should be effectually carried out under the guidance and directions of the court, and the master recommended that a decree be entered in accordance with the findings. Accordingly, on February 26, 1903, the circuit court rendered a decree confirming the report of the master, and therein finding that the proposed settlement was a just and advantageous settlement for the minor complainant and for the minor defendants, and that it was for their best interest that the litigation should be compromised by the making of said settlement. The decree further finds that the evidence tended strongly to prove that, at the time the will and the codicils thereto were made, John M. Williams was of sound mind and memory, and well capable of making a just and proper distribution of his estate, and that the will and codicils were in law and in fact his will and codicils; and it was decreed by the court that a contract in writing, embodying the terms of the settlement, should be prepared by one of the masters in chancery of the court, and, when signed by the adult defendants and the trust company therein named, and upon the payment to said trust company of the money provided for by the settlement, should be executed by the master on behalf of the minors; and the court, by the decree, appointed the Union Trust Company of San Francisco, Cal., as the trust company to be named in and to execute the trust, and it was further ordered that the contract, when executed and delivered, should be effectual to create a lien

upon the real estate therein described, as security for the payment of the annuity thereby created, and that the executors and trustees under the will of the testator were authorized and directed to convey to complainant Annie D. Williams certain real estate in the state of California. The decree further ordered that the contract of settlement should forever and finally preclude the minor complainant, Alan H. Williams, from attacking the validity of the will, and it was further decreed that said will was in truth and in fact the valid will of the deceased John M. Williams.

The second codicil of the testator of April 5, 1897, making provision for the child of his second marriage, begins with the following recital: "Whereas it is my desire to make provision for any child or children from said marriage; but I do not feel that any child of said marriage should share in my estate in the same way as, and on an equality with the children of her, by whose frugality and watchfulness over the affairs of my household for many years, it has been made easier and possible for me to have accumulated the property I now possess." The testimony showed that the property of John M. Williams in Illinois was appraised, for the purpose of the inheritance tax, at the sum of \$1,970,813.28, and that he had other property, in the state of Minnesota, estimated by his son and son-in-law, who are his executors and trustees, to be worth about \$1,500,000, so that the whole estate amounted to about \$3,500,000.

D. Ryan Twomey, for appellants. Wilson, Moore & McIlvaine, for appellees.

MAGRUDER, J. (after stating the facts). Two questions are submitted for the decision of this court by the present record. The first question relates to the power of a court of chancery to authorize the settlement of a suit brought by a minor to set aside a will upon terms which, in the opinion of the court, are advantageous to the minor. The second question is whether the compromise, which has been approved by the lower court in the present case, was for the best interests of the minor, Alan H. Williams.

1. It is well settled that courts of chancery exercise a superintendence over infants and their property, as a branch of their general jurisdiction. The protection of the rights of infants is one of the duties of courts of equity, and those courts from the earliest period have been vested with a broad and comprehensive jurisdiction over the persons and property of infants. In suits begun in courts of chancery in reference to the persons and property of infants, the infant is treated as a ward of the court, and under its special cognizance and protection. *Ames v. Ames*, 148 Ill. 321, 36 N. E. 110; 2 Story's Eq. Jur. c. 35. The question now under consideration has never been directly decided by this court, but the right of a court of chancery to sanc-

tion a compromise made for the benefit of an infant has been indirectly and impliedly recognized by this court. In *King v. King*, 15 Ill. 187, where a decree had been entered, setting apart to a widow in a partition proceeding a certain gross sum as the value of her dower, and where the guardian, not being satisfied with the result, appealed the case to this court, we said: "We will not say that the court of chancery may not have jurisdiction to enter into or to sanction a compromise on behalf of infants who are suitors before it, so as to satisfy the claim of the widow for dower by cash, but such a power should always be exercised with great care and circumspection, and only where it is clearly and manifestly to the interest of the infants to do so." In *Pittsburg, Cincinnati, Chicago & St. Louis Railway Co. v. Haley*, 170 Ill. 610, 48 N. E. 920, it was held that a parent had no implied authority, by reason of the existence of the parental relation, to compromise and settle a minor child's cause of action, and that one appointed by the court as next friend of an infant, or recognized by the court as acting in that capacity, had no power to settle the infant's cause of action without leave of court; but the plain inference is that such settlement might be made with leave of the court, and upon showing made that it was for the interest of the minor to make it. In *Tripp v. Gifford*, 155 Mass. 111, 29 N. E. 208, 31 Am. St. Rep. 530, where the defendant in a suit brought by a minor offered to show in bar that the father of the minor, while acting as his next friend, had in good faith made a settlement, and the amount agreed upon had been paid, it was held that the evidence was inadmissible, as the father, as his next friend, had no right to compromise the litigation; but it was there said: "It may well be considered to be within his official duty to negotiate, if possible, a fair adjustment, without subjecting the plaintiff to the expense and risk of a trial. When, however, he assumes finally to conclude a settlement out of court, and to discharge the cause of action by an agreement in pais, under which he accepts less than the plaintiff's entire demand, he does more than is clearly within his authority to prosecute the action, and more than we think ought to be allowed, with due regard to the protection of the infant. Unless such a settlement is affirmed, either in terms, if brought to the attention of the court, or by an entry of judgment in regular course, it may fairly be held invalid. If it is not of such a nature as to commend itself to counsel, to whom, as well as to the next friend, the infant has a right to look for protection, it ought not to stand, unless sanctioned by the court."

These and other cases recognize the jurisdiction of courts of equity in matters pertaining to the rights of infants. *Hale v. Hale*, 146 Ill. 227, 33 N. E. 858, 20 L. R. A. 247. It would seem to be reasonable that, upon a bill filed by an infant to contest a will, a court

of chancery should have the power to compromise and settle the issues, and by its decree sustain the will, and establish peace between the parties. It cannot be that such a litigation must continue, probably to the disruption of the family, and perhaps to the bankruptcy of the estate, because some of the parties are not sui juris. In the case of *Worthington v. Worthington* (Ky.) 35 S. W. 1039, the parties to a controversy concerning a will, among whom were infants, agreed to a compromise; and, the chancellor having adopted the agreement as the judgment of the court, the judgment, on appeal, was affirmed. In *Reynolds v. Brandon*, 3 Helsk. 593, the court said: "The jurisdiction of a court of equity to enforce and ratify contracts for the compromise of doubtful rights is too well settled to require to be supported by authorities. * * * Whenever a court of chancery is called upon to sanction and enforce a contract of compromise, which involves the rights and interests of minors, it is bound, in the exercise of its general superintendence and protective jurisdiction over the persons and property of infants, to see that their rights and interests are not injuriously affected by such contract. They must have their day in court. They must be represented by guardians ad litem. The proof must satisfy the conscience of the chancellor that their rights and interests are promoted and secured by the compromise. When these requisites are complied with, it is not simply the right, but the duty, of the chancellor to uphold and enforce such compromises, especially where they settle family disputes and put an end to litigation as to doubtful rights. If the chancery court could not exercise its jurisdiction for the protection of the rights and interests of minors in such cases, the law extends to them less protection than it extends to adults." And in the case last quoted from, the decree, approving the compromise, was affirmed, and a former decision of the court was referred to with approval, which held as follows: "In the cases of family compromises, all that need be said here is that agreements affecting them are upheld with a strong hand, and an equity has been administered in regard to them which has not been applied to agreements generally, upon the ground that the honor and peace of families make it just and proper to do so."

Where such compromises have been carried into effect by courts of equity, the methods employed vary with the circumstances, but there must be a full disclosure of the facts where infants are concerned, and their best interests are the chief ends which are sought to be secured. In *In re Birchall*, L. R. 16 Ch. D. 43, it was said by Jessel, M. R.: "The court can approve a compromise on behalf of infants, but it cannot force one upon them against the opinion of their advisers. The practice, followed by myself, and by Lord Romilly before me, at the Rolls, has been to require not only that the compromise should be assented to by the next friend or

guardian of the infant, but that his solicitor should make an affidavit that he believes the compromise to be beneficial to the infant, and that his counsel should give an opinion that he considers it to be so." In *Brooke v. Lord Mostyn*, 10 Jur. (N. S.) 554, it was said: "If, in the course of a suit or any other proceeding in this court, a compromise is proposed between one or more adult persons and one or more infants, the court takes steps to ascertain whether it will be for the benefit of the infants that the proposal should be accepted. * * * In dealing with such a question, it is the duty of the judge * * * to consider carefully the facts, and to determine, upon such consideration, what is best to be done for the infant, in like manner as a father would act for a son under similar circumstances. No doubt, in such cases, especially when the result of this evidence is doubtful, the court is much influenced by the opinion of the nearest relatives and guardians of the infant, who have no interest in the matter, except to promote the advantage of the child. When this has been done, and the court has decided in favor of the arrangement, and the arrangement has been thereupon carried into execution, the whole thing is concluded." The case of *Brooke v. Lord Mostyn*, supra, was taken to the chancery division of the Appellate Court by appeal (10 Jur. [N. S.] 1114), and it was there said: "The rights of infants and incapacitated persons must in many cases be sacrificed, if the power [to approve compromises] be not maintained; and acts which have been done under it cannot be disturbed without property to a great amount being affected by the disturbance;" and it was there held that a compromise under such circumstances would not be disturbed on any less ground than would disturb a similar compromise between adults—such as, for instance, actual fraud—it being there further said: "The question whether this compromise was fairly and honestly made at the time depends, as it seems to me, upon the facts as they were laid before the master, and through the master before the court—upon whether all that was material to be stated, and was within the knowledge of the parties, was fairly and honestly stated; for I desire distinctly to be understood as not intending to proceed on any error in judgment either on the part of the master or on the part of the court."

The authorities, so far as they have been called to our attention, accord to a court of equity the power to authorize a compromise of litigation brought on behalf of a minor, where the evidence shows that there is a proper case for such a compromise.

2. The second question which arises here is whether it was for the interest of the appellant minor to make the compromise sustained by the decree of the court below. The bill filed by the minor attacked the will of the testator upon the sole ground that

he was not of sound mind and memory when he made the will, but that he was at that time of such great age and infirmity, and his mind and memory were so impaired, as to render him wholly incapable of making a just distribution of his estate. The bill makes no charge whatever that any undue influence of any kind was exercised by anybody over the testator. After a careful examination of the testimony, we are satisfied that the conclusion reached by the master and by the chancellor below in his decree is sustained by such testimony. The only issue being whether the testator was of sound mind and memory when he made his will, the evidence is overwhelming that he was a man of sound mind and memory at that time. William Holabird, an architect in Chicago, testified that he had known the deceased for some 14 years before his death, and that during the summer and fall of 1897, when the witness was erecting a building for the deceased in Chicago, he had ample opportunity to judge of his business ability, and he testified that he considered the deceased one of the ablest men he had ever met; that, during the time he had business with him in 1897, Mr. Williams was capable of understanding and transacting business matters. Robert E. Ismond, a real estate dealer in Chicago, had business dealings with the deceased, and testified that all matters of business were finally submitted to him for his decision, and that he had the final determination in all matters concerning which the witness had business with him, and that he perfectly understood his business matters, and was thoroughly competent to transact the same. Frederick J. Thielbar, superintendent of building construction, testified that he met the deceased frequently in connection with the construction of a building in 1897, and that at such meetings the details and arrangements of the building were discussed, and that deceased showed good judgment in everything he did, and was fully capable of understanding and transacting his business. Graham Taylor, a professor in the Chicago Theological Seminary, testified that he was well acquainted with the deceased, and advised with him from 1892 up to a time shortly before his death, and found him unusually alert and entirely capable of understanding and transacting his business. Edward H. Webster, a physician in Evanston, testified that he had been the deceased's consulting physician; that he had known him since 1867, and had seen him during the last years of his life; that he saw no evidence of mental failure at that time; that during the year 1897 he was as capable of understanding and transacting ordinary business matters as ever in his life; that "he was able to do that sort of thing better than the average man all his life." The testimony of these witnesses is corroborated by the testimony of one of the deceased's sons and one of

his sons-in-law, and, while they were interested parties, yet their evidence shows that the deceased exercised control and management over his business matters up to the time of his death, and that all matters connected with his property were submitted to him for decision. There is other convincing evidence of the mental capability of the testator, in the letters written by him during the last years of his life to his son and son-in-law concerning his business matters. About a dozen of these letters are in the record, and show that the mind of the deceased was clear and fully capable of understanding any business matter which was brought before him. No evidence whatever has been produced showing that the deceased was incapable of making a valid will, and the reasonable conclusion would seem to be that such evidence could not be obtained.

In view of the testimony thus presented, the conclusion is almost irresistible that, if the suit brought to set aside the will of John M. Williams should be allowed to continue, his inability to make a will by reason of unsoundness of mind and memory could not be established by proof. Therefore we are of the opinion that the compromise made, which is shown to be satisfactory to the mother of the infant and to his next friend, and to those who have his interests at heart, was properly sustained by the decree of the circuit court.

Accordingly the decree of the circuit court is affirmed. Decree affirmed.

(204 Ill. 527)

SUPREME LODGE ORDER OF MUTUAL PROTECTION v. MEISTER.

(Supreme Court of Illinois. Oct. 26, 1903.)

MUTUAL BENEFIT SOCIETY—PROOF OF DEATH—WAIVER—LOCAL LODGES—AGENCY—NON-PAYMENT OF ASSESSMENTS—FORFEITURE—ACTION ON CERTIFICATE—APPEAL—QUESTIONS OF FACT—JUDGMENT OF APPELLATE COURT.

1. The judgment of the Appellate Court upon questions of fact fairly supported by the evidence is binding on the Supreme Court.

2. Where, after the death of assured, the local lodge of which he was a member issued a circular letter, with the approval of the president and secretary of the society, and under its seal, and mailed the same to its sister lodges, soliciting aid for the widow and children of the assured, in which her inability to recover upon the benefit certificate held by assured was placed on the ground of his failure to pay an assessment, it constituted a waiver of the society's by-law requiring proof of death to be made within a specified time.

3. It is not compulsory upon the beneficiary of a deceased member of a benefit society to submit her claim on the certificate for adjudication to the tribunal provided for in the by-laws of the society before suing on such certificate.

4. The relation of principal and agent exists between a benefit society and its local lodges, and money in the possession of a local lodge, belonging to a member, sufficient to pay an assessment on his certificate, is in the possession of the society.

5. Where, an assessment on a benefit certificate having been paid twice, there remained in the treasury of a local lodge a sum sufficient to pay a subsequent assessment, it was the duty of the society to apply such sum to the payment thereof, and the certificate could not be forfeited for nonpayment of the assessment while the local lodge held such sum in its treasury.

Appeal from Appellate Court, First District.

Assumpsit by Mathilda Meister against the Supreme Lodge Order of Mutual Protection. From a judgment of the Branch Appellate Court for the First District (105 Ill. App. 471) affirming a judgment of the circuit court in favor of plaintiff, defendant appeals. Affirmed.

Cratty Bros. and Jarvis & Latimer, for appellant. Goldzier, Rodgers & Froehlich, for appellee.

HAND, C. J. This is an action of assumpsit, commenced in the circuit court of Cook county by the appellee against the appellant, to recover the amount of a benefit certificate issued by the appellant on the 19th day of April, 1889, upon the life of her husband, who died June 14, 1894, she being named as beneficiary therein. A trial was had before the court and a jury, and resulted in a verdict and judgment in favor of the appellee for the sum of \$2,625, which judgment has been affirmed by the Branch Appellate Court for the First District, and a further appeal has been prosecuted to this court.

At the close of all the evidence the appellant moved the court to peremptorily instruct the jury to find for the defendant, and the action of the court in declining to so instruct the jury has been assigned as error. It is conceded by the appellant that all assessments upon said benefit certificate made prior to the month of May, 1894, had been paid, but it is contended an assessment for \$2, payable during the month of May of that year, was not paid, and for that reason the benefit certificate became forfeited on the 31st day of that month, and was not in force at the time of the death of the insured. It appears from the evidence that during the summer of 1893 the assured was in feeble health and financially embarrassed; that one Miller, who was the treasurer of the local lodge of which the assured was a member, advanced for the assured the money with which to pay two or more assessments as they fell due; that afterwards the assured was suspended for nonpayment of assessments; that in December of that year he was reinstated in accordance with the by-laws of the appellant, at which time he paid to the financial secretary of the local lodge the sum of \$21.50, which was supposed to be the total amount then due for assessments and dues, including the amount advanced by Miller. The assured thereafter paid the assessments falling due in the months of January, February, March, and April, but failed to pay the

¶ 2. See Insurance, vol. 28, Cent. Dig. § 1987.

May assessment, and died during the following month, and the main controverted question of fact upon the trial was whether or not, at the time of his reinstatement in December, there was due from the assured for assessments and dues, including the amount advanced by Miller, the sum of \$21.50; it being contended by appellee that the assessment for the month of May, 1893, which was included in said sum of \$21.50, had been paid by her husband, or some one else on his behalf, other than Miller, and that the sum of at least \$2—that being the amount of that assessment—was improperly included in the sum found to be due at the time of said reinstatement, and that said sum remained in the treasury of the local lodge, and should have been applied in payment of the assessment for May, 1894, and that all of the assessments due upon said benefit certificate at the time of her husband's death had been paid, and said benefit certificate remained in full force at the time of his death. There is some evidence in the record which fairly tends to sustain the contention of appellee, and, the Appellate Court having found upon that question in her favor, this court cannot disturb that finding. The judgment of the Appellate Court upon questions of fact, where there is evidence in the record fairly tending to support its findings, is binding upon this court. *Birdsell Mfg. Co. v. Oglevee*, 187 Ill. 149, 58 N. E. 231. The trial court did not err in declining to direct a verdict for the appellant.

It is also urged that the appellee is barred of a right to recover by reason of a failure to file proof of death according to the by-laws of the appellant. The local lodge of which the assured was a member shortly after his death issued a circular letter, with the approval of the president and secretary of the appellant, and under its seal, and mailed the same to its sister lodges, soliciting aid for the appellee and her children, in which the inability of appellee to recover upon said benefit certificate was placed upon the ground that the assured had failed to pay the May, 1894, assessment. This amounted to a waiver of the provisions of the appellant's by-laws requiring proof of death to be made within a specified time. It is clear the appellant had notice of the death; and when such notice was received by it, and it placed its want of liability upon the ground of the nonpayment of the May, 1894, assessment, it waived the condition requiring the proof of death. *Covenant Benefit Ass'n v. Spies*, 114 Ill. 463, 2 N. E. 482; *Knickerbocker Life Ins. Co. v. Pendleton*, 112 U. S. 696, 5 Sup. Ct. 314, 28 L. Ed. 866. Neither was it compulsory upon the appellee that she submit her claim for adjudication to the tribunal provided for in the by-laws of the appellant before she could resort to the courts by instituting suit upon said benefit certificate. *People v. Order of Foresters*, 162 Ill. 78, 44 N. E. 401.

The relation of principal and agent existed between the local lodge and the appellant (*Grand Lodge A. O. U. W. v. Lachmann*, 199 Ill. 140, 64 N. E. 1022), and the evidence justified the conclusion that the local lodge, through which the appellant provided its members should pay their assessments, had in its possession and under its control sufficient funds belonging to the assured with which to pay all assessments due upon said benefit certificate up to the time of the death of the assured. The court did not err in holding said benefit certificate was not forfeited for the nonpayment of said May assessment. In *Girard Life Ins. Co. v. Mutual Life Ins. Co.*, 97 Pa. 15, the court held that, where an insurance company has in its possession dividends belonging to a policy holder more than sufficient to pay an assessment, it cannot declare a forfeiture for nonpayment on the ground that the law does not favor forfeitures, and never enforces them cheerfully, and will decline to enforce them when they are against equity and good conscience, and that it is not conscionable for a company to forfeit a policy when it has in its treasury more than enough of the assured's money to pay the assessment. And in *Elliot v. Grand Lodge*, 2 Kan. App. 430, 42 Pac. 1009, it was held that, where money sufficient to pay an assessment is in the treasury of the subordinate lodge, even though the latter may have made an appropriation of the fund which would show the assured in arrears, no forfeiture can be declared. And *Niblack on Benefit Societies* (section 271) summarizes the law upon the subject as follows: "It has been held that a society which has money in its possession belonging to a member, and the power to apply it, must pay out of such money an assessment due from the member to save a forfeiture of the contract, and it is not necessary in such a case that the member shall authorize the society to so appropriate the money. It is against the policy of the law to permit a society to forfeit a contract for nonpayment of an assessment when it has in its possession the money of a member to an amount covering the assessment and has the power to apply the money as a payment." The assessment for May, 1893, having been paid twice, there remained in the treasury of the local lodge, of the assessment fund, the sum of \$2 at the time the May, 1894, assessment was made, which was the amount of said assessment; and when that assessment was made it was the duty of the appellant to apply said fund to the payment of said assessment, and the benefit certificate could not be forfeited while said local lodge held sufficient funds of the assured belonging to the assessment fund in its treasury to pay said assessment.

Numerous objections are made to the rulings of the court in the admission of evidence and the instructions given to the jury. We have read the briefs with care, and examined the authorities therein referred to, and are of

the opinion the rulings of the court in the matters complained of were substantially correct, and that there is no reversible error in this record.

The judgment of the Appellate Court will be affirmed. Judgment affirmed.

(204 Ill. 515)

MUREN COAL & ICE CO. v. HOWELL.

(Supreme Court of Illinois. Oct. 26, 1903.)

MASTER AND SERVANT—DEATH OF SERVANT—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—EVIDENCE—INSTRUCTIONS—DAMAGES.

1. Evidence in an action for the death of an employé engaged as a coal driver in a mine, claimed to be due to defendant's failure to remove slate and other materials which had fallen from the roof of the mine and obstructed the track, *held* to show that defendant's negligence in failing to remove such obstructions was the cause of the accident.

2. Evidence in an action for the death of an employé engaged as a coal driver in a mine, claimed to be due to defendant's failure to remove slate and other materials which had fallen from the roof of the mine and obstructing the track, *held* to show that the employé was in the exercise of due care at the time of the accident.

3. An instruction in an action for the death of an employé that the "jury may give such damages as they may deem a fair and just compensation with reference to the pecuniary injuries resulting from such death to the widow and next of kin, and that the jury, in assessing plaintiff's damages, may take into consideration the pecuniary injuries resulting to his widow and next of kin, * * * and give to plaintiff such a sum as, in your judgment, will fairly compensate the widow and next of kin," not exceeding the amount sued for, is erroneous.

Appeal from Appellate Court, Fourth District.

Action by Herbert Howell, administrator of August Schmidt, deceased, against the Muren Coal & Ice Company. From a judgment of the Appellate Court (107 Ill. App. 1) affirming a judgment for plaintiff, defendant appeals. Reversed.

This is an action in case, brought in the circuit court of St. Clair county against the appellant company to recover damages for the death of the appellee's intestate, August Schmidt. The trial resulted in verdict and judgment in favor of the appellee. An appeal was taken to the Appellate Court, where the judgment was affirmed, and the present appeal is prosecuted from such judgment of affirmance.

The amended declaration, filed on April 21, 1902, to which the plea of not guilty was filed, and upon which issue the case was tried, consists of two counts, which, as set forth in the abstract of the record filed herein by the appellant, are as follows:

"The first count alleges, as the previous declarations had, that the defendant was the owner of a coal mine, and operating it; that August Schmidt was in the employ of the defendant as a coal driver, his duties requiring him to haul empty coal cars from the bottom, and distribute them throughout the coal mine wherever needed, and to pull

loaded coal cars from the entries and rooms to the bottom of the shaft, so that they might be hoisted; that there were prior to said date a large number of entries and rooms in said coal mine, with laid tracks for the transportation of coal; that it was the practice of defendant, and consistent with good mining, to clear away and remove slate, clod, and other substances from both sides of the track therein for a sufficient distance to allow drivers hauling coal over said railways to pass around the sides of coal cars on said railway tracks wherever there was room between the sides of said railway tracks and the sides of the entry, without coming in contact with slate, dirt, etc., thereby endangering such drivers while in the discharge of their duties in said coal mine; that said drivers had knowledge of said practice, relied on it, and expected defendant to keep and maintain the said railway tracks free and clear of obstructions; that on the 28th day of March, 1900, a large lot of slate, clod, dirt, etc., fell from the roof of the eighth west entry, leading off the main south entry in said mine on the railway track at a point where there was ample room between said railway track and the 'rib side' of said entry to allow the drivers to pass between said coal cars on said railway track and the 'rib side' of said entry, and obstructed all that portion of said entry lying between said railway track and the 'rib side' of said entry so as to prevent drivers hauling coal therein from passing around coal cars on said side of said railway track, which rendered the said railway track unsafe and dangerous to drivers hauling coal through said entries over said railway track; that defendant had notice of the fall of said slate, and that same was an obstruction to that part of the said entry and the said railway track, and would prevent drivers passing through said entry from passing around coal cars on said track at that point on that side of said entry, and that it rendered said entry unsafe and dangerous; that defendant failed to remove said obstructions and abate said dangerous conditions, but negligently permitted the same to remain there until said August Schmidt was injured, well knowing said obstructions rendered said entry unsafe and dangerous; that August Schmidt on said date was hauling two loaded coal cars along said railway track to said entry, exercising due care, and without notice or knowledge that said slate, etc., had fallen from the roof of said entry, or that said entry was obstructed, and that when he reached said obstructions he discovered a coal car on said railway track immediately in front of him, and, seeing that a collision between said cars he was hauling and said car standing on said railway track was inevitable, and that he would be likely to be injured, attempted to escape said collision and injury by trying to get off said railway track on the side so obstructed, but came in contact with the slate and other ob-

structions which had fallen from the roof, and which prevented said August Schmidt from escaping in that direction, and threw him back on the railway track between said cars, and allowed said cars to crush him, from the effects of which he afterwards died; that the death of the said August Schmidt was the direct result of the negligence of defendant in permitting said railway track and entry in said coal mine to be and remain obstructed as aforesaid—and alleges administration and next of kin, etc.

"The second count alleges, as the other counts, that the defendant was the owner of a coal mine, and operating it, and then avers there were a large number of railway tracks in certain entries, cross-cuts, and rooms, used by defendant in transporting coal by means of draught animals and coal cars in charge of a driver; it was the duty of the defendant to keep said roadways and railway tracks, over which the driver was compelled to pass, in a reasonably safe condition and free from obstructions; that the defendant negligently allowed and permitted a coal car to stand on a certain railway track, and a large amount of coal, slate, etc., to remain on the side of said railway track, near the said standing car, obstructing the same, and making it dangerous and unsafe for the driver to pass there while in the discharge of his duties; that on the 28th day of March, 1900, one August Schmidt was in the employ of the defendant as a driver in charge of a mule and box cars in said coal mine; his duties were to drive said mule and cars over said railway track, and while he was hauling two loaded cars along said railway track in said mine, near said obstruction, in the discharge of his duty, and in the exercise of due care, and without notice of said obstructions near said standing car, said two cars, being hauled, collided with said standing car, catching him between said two cars and said standing car, crushing and injuring him so that he died from his injuries; that, upon seeing said standing car, said August Schmidt undertook to escape said collision by going from said railway track on the side thereof that was so obstructed, and was thereby prevented and thrown back upon said railway track and between said cars by reason of said obstructions, and was killed." Then follows an averment that plaintiff is administrator, and that he left next of kin, etc.

Other pleas besides the general issue were filed to the declaration, but as no errors have been assigned in regard to the issues made upon these other pleas, and as no question upon the record arises upon them, they will not be here noticed.

Wise & McNulty, for appellant. Webb & Webb and Dill & Wilderman, for appellee.

MAGRUDER, J. (after stating the facts).

1. When the plaintiff rested, and at the close of all the testimony, the appellant asked the court to instruct the jury in writing to find the appellant not guilty as to the first count of

the declaration, which request was refused; and appellant also requested the court to instruct the jury to find the appellant not guilty as to the second count of the declaration, which request was also refused. To such refusal the appellant then and there excepted. The question is thus raised whether or not the evidence tends to establish the cause of action; that is to say, whether or not the evidence tends to show that the appellant was guilty of such negligence as caused the injury which resulted in the death of August Schmidt, and whether or not the deceased, August Schmidt, was in the exercise of due care for his own safety when the injury that resulted in death occurred. In their opinion deciding this case, the Appellate Court say: "The evidence, as a whole, with the reasonable inferences deducible therefrom, fairly and clearly tends to prove that appellant owned and operated a coal mine, in the underground workings of which there were many entries and rooms; that it was the practice, in the operation of the mine, to clear away the fallen slate and debris from both sides of the track wherever there was sufficient room for a driver to go in case of danger, and this work was usually performed by a servant of appellant denominated a 'slate shifter'; that deceased knew of such practice, and was governed in his conduct thereby; that the part of the entry in which he was injured was new; that two days before the injury a large quantity of slate and other substances had fallen from the roof, completely blocking the entry, and extending for a distance of about twenty feet lengthwise of it; that the superintendent saw this condition, and, with full knowledge of it, left the mine and went to Springfield; that two miners from an adjacent room and another employé of appellant shoveled the debris off the track sufficiently to allow cars to pass along it, but, in doing so, left slabs of slate and part of the debris standing and piled against the wall on the 'rib side' of the track, obstructing the space between the track and the wall; that deceased had never been in that part of that entry, and knew nothing of the conditions, when, on March 28, 1900, he was directed to go in there and bring out some cars; that there was no light, except from his lamp, and from that of a miner sitting on one side of the entry, some distance from him; that the darkness was such as to greatly obscure the surroundings; that, when he had taken his mule in and hitched onto two cars and started out, on a down grade, he collided with a car which another driver had left on the track, and, discovering his peril as the cars were about to strike, he attempted to escape on the 'rib side,' but was prevented by the slate and debris which obstructed the space on that side, and, before he could cross to the opposite side, was caught and crushed between the cars." In view of the facts, which the evidence thus tends to establish, there was evidence tending to prove that the appellant was guilty of negligence,

and that the deceased was in the exercise of due care. Therefore the court committed no error in refusing to instruct the jury to find the appellant not guilty.

2. Appellant claims that the trial court erred in giving certain instructions asked by the appellee, and in refusing to give certain instructions asked by the appellant. Among the instructions, given for the appellee, was the following instruction, numbered 29, to wit: "The court instructs the jury that whenever the death of an individual is caused by the negligence or carelessness of a person, company, or corporation, and is not the result of his own carelessness or negligence, then and in every such case the company, person, or corporation guilty of such carelessness or negligence is liable to an action for damages, and the amount recovered in every case is for the widow and next of kin of such deceased person, and in every such case the jury may give such damages as they may deem a fair and just compensation with reference to the pecuniary injuries resulting from such death to the widow and next of kin of such deceased person, not to exceed, however, the sum of \$5,000; and, if you believe from the evidence in this case that August Schmidt, while in the employ of the defendant, was killed, and that his death was due to the carelessness or negligence of the defendant, as charged in the plaintiff's declaration, or in the first or second count, and that his death was not the result of his own carelessness or negligence, and that he left a widow and next of kin, who suffered pecuniary injuries by reason of his death, then your verdict should be in favor of the plaintiff; and, if you believe, and from the evidence find, the defendant guilty, then it will be the duty of the jury to assess the plaintiff's damages, and, in doing so, you may take into consideration the pecuniary injuries resulting to the widow and next of kin, if from the evidence you believe there is a widow and next of kin, and that they have suffered pecuniary injury or loss on account of the death of said August Schmidt, and give to the plaintiff such a sum as, in your judgment, will fairly compensate the widow and next of kin for such pecuniary injury or loss, not to exceed, however, the amount sued for in this case." The above instruction must be regarded as erroneous, under previous decisions made by this court. In *Keightlinger v. Egan*, 65 Ill. 235, which was an action of trespass on the case, the court gave to the jury an instruction which told them that they "should find for the plaintiff such damages as, in their judgment, from the evidence in this cause, the plaintiff ought to recover, not exceeding the sum of \$3,000"; and in regard to this instruction we there said (page 238): "The instruction was wrong, upon the point of damages, in telling the jury they might find for the plaintiff such damages as, in their judgment, from the evidence in the cause, the plaintiff ought to recover.

This left the jury free scope to give such damages as, according to their individual notions of right and wrong, they might think the plaintiff ought to recover, unguided by any legal rule of damages, and without regard to the damages sustained." In *Waldron v. Marcler*, 82 Ill. 550, an instruction was held to be erroneous which directed the jury, "If they found for the plaintiff, to allow such damages as they believed from the evidence she was entitled to;" and we there said (page 553): "It should have been such damages as she had sustained, and not have given to the jury the wide latitude of allowing her such damages as they might deem that she was entitled to." In *Chicago, Rock Island & Pacific Railroad Co. v. Austin*, 69 Ill. 426, the court gave to the jury the following instruction: "The jury are instructed that, by the statute of Illinois, the plaintiff in this case cannot recover more than \$5,000, and if they believe, from the evidence, that the plaintiff is entitled to recover, they will render a verdict for no more than that amount;" and in regard to this instruction we there said (page 428): "By all the rules of philology, that is but telling the jury they must render a verdict for \$5,000. It is true, the jury did not render such a verdict, but was it not a strong, persuasive argument addressed to them by the court to render a large verdict? The court say to the jury, in effect, 'You cannot render a verdict for more than \$5,000, but it is expected you will render a verdict for that amount.' Such an instruction could not fail to have had an improper influence on the jury, and, in a doubtful case like this, the verdict, rendered either way, not subject to be disturbed, to tell the jury they must find to the extent of the law, was improper, and ought to prejudice the finding." In *City of Freeport v. Isbell*, 83 Ill. 440, 25 Am. Rep. 407, the jury were instructed as follows: "The jury should give the plaintiff such damages as they, under their oaths, can say will be a fair compensation for said injury, not exceeding, however, the sum of \$10,000, the amount claimed in the plaintiff's declaration;" and in regard to this instruction we there said (page 443, 83 Ill., 25 Am. Rep. 407): "The law required the jury to determine the liability of the defendant from the evidence, and from that alone, and an instruction which would permit them to enter into an open field of investigation cannot be sustained. The instruction should have been modified, or the court should have refused it." In *Cleveland, Cincinnati, Chicago & St. Louis Railway Co. v. Jenkins*, 174 Ill. 398, 51 N. E. 811, 66 Am. St. Rep. 296, where an instruction told the jury that, under certain contingencies, "you should find for the plaintiff, and fix his damages at such sum as you think right, not exceeding the amount claimed in the declaration," we said in regard to the instruction (page 409, 174 Ill., page 815, 51 N. E., 66 Am. St. Rep. 296): "No reference is made to the

evidence in the case: This form of instruction is erroneous, and has been frequently condemned by this court."

The case at bar is close upon the facts, and the testimony is conflicting. It was important, therefore, that the jury should be correctly instructed as to the rule of damages applicable to the case. *Dady v. Condit*, 188 Ill. 234, 58 N. E. 900. No other instruction was given on either side which can be said to have corrected or modified in any way the errors contained in the above-quoted instruction, numbered 29.

For the error in giving the twenty-ninth instruction, the judgments of the Appellate Court and of the circuit court are reversed, and the cause is remanded to the circuit court for further proceedings in accordance with the views herein expressed. Reversed and remanded.

(204 Ill. 72)

FRIEDERICH v. WOMBACHER et al.

(Supreme Court of Illinois. Oct. 26, 1903.)

WILLS—BEQUEST TO WIFE—STATUTORY RIGHTS—ELECTION.

1. A testator bequeathed to his wife all that had been given to her by antenuptial agreement, and in addition all his personal property. The antenuptial agreement stipulated that on the death of the testator the wife should be paid \$2,500 in cash, to be in lieu of her dower, widow's award, and homestead right. *Held*, that the acceptance of the bequest by the wife estopped her from claiming under the statute; *Starr & C. Ann. St. p. 313, c. 3, par. 76*, merely providing that the right of a widow to her award shall not be affected by her renouncing or failing to renounce the benefits of the provisions made for her in her husband's will.

2. A minor son living with his widowed mother has no such right in the widow's award or homestead right as will prevent her from electing to take under her husband's will in lieu of those claims.

Appeal from Circuit Court, St. Clair County; B. R. Burroughs, Judge.

Suit by George F. Wombacher, as executor of the will of Michael Friederich, deceased, and others, against Matilda Friederich. From a decree in favor of complainants, defendant appeals. Affirmed.

Appellees, as the executor and legatees under the last will and testament of Michael Friederich, deceased, filed this bill against appellant, the widow of the deceased, for the purpose of having her rights under his will settled and determined. The bill sets up an antenuptial contract between the testator and appellant, which, in effect, provided, among other things, that in case of his death she should have no interest in his estate, except "there should be paid to her the sum of \$2,500 in cash money, to be in lieu of her dower, widow's award and homestead right or interest, and any and all other rights which she would have in his estate as his widow," she expressly agreeing to "accept and receive and take said sum of \$2,500 in lieu of her dower, widow's award and homestead right or interest, and any and all other

interests which she might have, as the widow of the said Michael, in case she should survive him, said sum of \$2,500 to be paid at his death." It is also averred in the bill that said contract was duly acknowledged before a justice of the peace, and all right of homestead properly waived. The subsequent marriage of the parties; the birth of a son, Alfred L. J. Friederich, who by his next friend is one of the complainants in the bill; the death of said Michael, leaving certain real estate, a part of which was at the time of his death occupied by himself and family as a homestead, and since by his said widow and infant son; the making of his last will and testament, and the probating of the same—are facts properly alleged in the bill. The second clause of the will, a copy of which is set forth, is as follows: "I give and bequeath unto my beloved wife, Matilda, all that has by antenuptial agreement been given to her, and in addition to this I give her all my personal property, all of my household furniture, all horses, cow, and all other personal property of which I am seized at my death." By other provisions the balance of testator's property is divided among his children and a grandchild. It is also alleged that after an unsuccessful attempt to contest the will the executor proceeded to sell the real estate, as authorized by the will, but was notified by the defendant that she would claim the amount of \$1,132 theretofore estimated as her award, and also a homestead in the property occupied by her husband and family at the time of his death, and by herself and son since, in addition to the personal property and the \$2,500 named in the antenuptial agreement, and thereupon an agreement was made whereby the property was to be sold, and her claims transferred to the proceeds; that the executor has tendered to her the sum of \$2,500, with interest from the date of the testator's death, on condition, however, that she would receive the same, as specified in said antenuptial contract as approved and adopted in the last will and testament of said Michael Friederich, in lieu of homestead, dower, and widow's award in the estate of the said Michael Friederich, deceased, but that she refused such tender. It is further alleged that she has never renounced the will as such widow. The prayer is that the will be construed as limiting her right to the personal property of the deceased and the sum of \$2,500, which latter sum is brought into court for her use, and to abide the order and decree of the court. The defendant, by her answer, admits all the material allegations of the bill, but claims, first, the \$2,500, with interest from the death of her husband; second, the personal property given her by the will; third, the award; fourth, the homestead; and prays a decree in her favor for each of said claims. The court found in favor of the complainants, limiting the defendant's right to the personal estate and the sum named in the antenuptial agree-

ment, with 5 per cent. interest thereon from the date of testator's death, and denying her claim of homestead and widow's award. To reverse that decree, she prosecutes this appeal.

Dill & Wilderman and Peter W. Lill, for appellant. Turner & Holder and Louis Klingel, for appellees.

WILKIN, J. (after stating the facts). It may be admitted that the antenuptial agreement, in and of itself, under the facts in this record, will not defeat appellant's claim either to a homestead or the widow's award. *Zachmann v. Zachmann*, 201 Ill. 380, 66 N. E. 256, and cases cited. The case, however, is not to be decided upon that contract alone, but must turn upon the effect to be given to appellant's acceptance of the provisions of her husband's will for her benefit.

Counsel for the appellant, in their brief, lay down the proposition that "the antenuptial contract and will must be construed together, as constituting one document, the contract being incorporated into the will and becoming a part thereof," to which proposition counsel for appellees assent. The position is undoubtedly supported by the authorities, and, when applied to this case, makes the second clause of the testator's will read, in effect, as follows: "I give and bequeath to my beloved wife \$2,500 cash money, to be in lieu of her dower, widow's award and homestead rights or interest, and any and all other rights which she would have in my estate as my widow." In other words, that clause of the will is to be construed as giving her the amount named in the antenuptial agreement upon the conditions stated in the agreement. Although a husband cannot, against the consent of his wife, deprive her of her statutory right to homestead and a widow's award by will or mere private contract, yet, if he does by will give her money or property in lieu of those rights, and she elects to accept the same, she will be concluded by such election and acceptance. "It is a familiar principle that one claiming under a will must accept its provisions as a whole, or not at all. While he is seeking to enforce such provisions as are favorable to himself, he cannot be heard to question other provisions which are against his interests. In such case the party is put to his election whether he will take under the will or not. If he accepts anything under it, he must submit to whatever it takes from him. In other words, he must accept it as a whole, or reject it altogether." *Woolley v. Schrader*, 116 Ill. 29, 4 N. E. 658. In *Gorham v. Dodge*, 122 Ill. 528, 14 N. E. 44, we quoted with approval the following language of Chief Justice Shaw in *Hyde v. Baldwin*, 17 Pick. 303: "It is now a well-settled rule in equity that, if any person shall take any beneficial interest under a will, he shall be held thereby to confirm and ratify every other part of the will, or, in other

words, a man shall not take any beneficial interest under a will, and at the same time set up any right or claim of his own, even if otherwise legal and well founded, which shall defeat or in any way prevent the full effect and operation of every part of the will." In *Fry v. Morrison*, 159 Ill. 244, 42 N. E. 774, we announced the same rule, citing *Stunz v. Stunz*, 131 Ill. 210, 23 N. E. 407, and *Cowdrey v. Hitchcock*, 103 Ill. 262, and said (page 252, 159 Ill., and page 776, 42 N. E.): "Appellant insists the two last cases are in conflict with the statute, and opposed to the legislative enactments in force in this state. A careful examination of the reasoning on the part of appellant's counsel does not tend to cause us to qualify those cases." See, also, *Van Schaack v. Leonard*, 164 Ill. 602, 45 N. E. 982, and *Buchanan v. McLennan*, 192 Ill. 480, 61 N. E. 448.

In *Cowdrey v. Hitchcock*, 103 Ill. 262, the devise was: "I give, devise and bequeath to my wife the equal one-third of all my real and personal estate in lieu of dower rights, and of all other rights, interests and claims which she might have or claim in or to my estate, or any part thereof." The balance of the estate was devised to other persons, and we held that the provision made for the widow was in lieu of any claim to her specific award under the statute, and to any estate of homestead, and that she, having elected to take under the will, was only entitled to the one-third given her by that instrument, and said (page 271): "The testator had the right to devise his property to any person he saw proper, and upon such lawful terms as his judgment might dictate. It is true, the widow was under no obligation to accept the provisions of the will. She could reject the provisions of the will and take under the statute, but when she elected to take under the will she could take only upon the terms imposed by the testator." Speaking of the right of homestead in the widow, it was further said: "The premises 888 Prairie avenue were occupied by the deceased as a residence at the time of his death, and since that time they have been occupied by the widow; and it is claimed that in a division of the estate she ought not to be required to account for the rents of the property, as she is entitled to an estate of homestead therein, although she accepts the provisions of the will. It is true that a homestead, under the statute, is exempt from the laws of conveyance, descent, or devise, except as therein provided; but if the testator devised certain property to his wife in lieu of dower and homestead, and she accepted the provision of the will, she cannot claim a homestead in the property." It could not be, and is not, seriously contended by counsel for appellant that the *Cowdrey Case* is not decisive against the claims of appellant under the terms and provisions of her husband's will. The soundness of that decision seems to be questioned, however, upon the ground that it is in con-

sist with the express language of paragraph 76 of chapter 3 of our statutes (Starr & C. Ann. St. p. 313). That section provides that "the right of a widow to her award shall in no case be affected by her renouncing or failing to renounce the benefit of the provisions made for her in the will of her husband, or otherwise." It was not the mere failure of the widow to renounce the benefits of the provisions made for her in the will of her husband which determined the right of the widow in that case, nor does the question of renunciation, or failure to renounce, enter into the merits of this case. There the widow was concluded by the fact that she had elected to take under the will, and accepted the benefits accruing to her under its provisions, and so here appellant seeks to accept the benefits of the will in so far as it gives her the \$2,500 and the personal property, and at the same time defeat the provisions against her. Under section 76 a widow cannot be deprived of her award by the will of her husband merely because she fails to renounce the benefits of the provisions made for her, but, when she accepts the benefits given her in lieu of her award, she can take only that which the will gives her. She has already taken the whole of the personal estate, amounting to \$483.20, and also claims the \$2,500. If she should be allowed, in addition thereto, \$1,132 as a widow's award and the homestead, the bequest to the children and grandchild of the testator would to that extent be defeated, and the full effect and operation of that part of his will prevented. This, under the foregoing authorities, cannot be permitted. The fact that the testator left a minor son, living with his mother, the appellant, cannot relieve her of the effect of her election to take under the will. The son has no vested interest in the claims which she makes. His right thereto is only incidental to that of his mother, she having the absolute right to dispose of it as she sees fit. *Weaver v. Weaver*, 109 Ill. 225. As a matter of fact, it appears from this record that his interests will be much more fully subverted by the decree below than they would by allowing the claims insisted upon by his mother. But without reference to that fact, we think it clear that he has no such interest, either in the widow's award or right to a homestead, as would prevent her from electing to take under the will in lieu of those claims.

The decree of the circuit court, being in conformity with the views here expressed, will be affirmed. Decree affirmed.

(204 Ill. 504)

SEITMAN v. SEITMAN.

(Supreme Court of Illinois. Oct. 26, 1903.)

EQUITY—PAROL CONTRACTS—SPECIFIC PERFORMANCE—STATUTE OF FRAUDS—PART PERFORMANCE—CONTRACT TO DEVISE LANDS—ABANDONMENT—EVIDENCE.

1. A parol contract will not be specifically enforced unless certain and definite in its terms,

and established by evidence which is free from doubt.

2. To take a case out of the statute of frauds on the ground of part performance, all acts done thereunder must be referable exclusively to the contract.

3. Where a son was to work on his father's farm and care for the latter and his wife during their lifetime, without immediate compensation, the land, on the father's death, to descend to the son, and the son, subsequent to the making of the agreement, farmed the lands, paying as rent therefor one-third of the crops, except the hay and pasture land, which he received free of charge, this clearly indicated an abandonment of the agreement.

4. Evidence examined, and held to show failure of complainant to comply with the terms of an alleged agreement with his father, whereby the latter, in consideration of complainant's farming his lands and caring for him and his wife during their lifetime, was to leave the lands on his death to complainant.

Appeal from Appellate Court, Fourth District.

Bill by Bernard H. Seitman for an injunction restraining Bernard Seitman from incumbering or selling certain real estate. From a judgment of the Appellate Court for the Fourth District (106 Ill. App. 671), affirming a decree of the chancellor denying the relief prayed, except in part, complainant appeals. Affirmed.

This is a bill for an injunction, filed by the appellant, Bernard H. Seitman, the son and only child of the appellee, Bernard Seitman, in the circuit court of Effingham county, against the appellee, to restrain him from selling or incumbering any part of his real estate, consisting of a farm of 365 acres, in that county.

The bill alleges that in 1876, the complainant having reached his majority the year previous thereto, the father made an agreement with him that if he, with his wife, would remain on the premises and work and assist defendant in the care of the farm without compensation, the latter would not sell, incumber, or convey the same away, and complainant should have the real estate as his own forever; that since the making of the agreement the work and labor of complainant have been done for the purpose of carrying out the agreement on his part in good faith. After praying for an order restraining defendant from conveying any part of the land during his lifetime, the bill asks, in case that relief is denied, that an accounting be taken, under the direction of the court, of the value of the labor performed by complainant and his wife on the premises, and of the improvements made thereon, and that a sufficient amount of land be conveyed by the father to complainant to compensate him therefor.

The father answered, admitting that at the time alleged an agreement was made that if complainant would remain with defendant, assist in taking care of the farm and affairs of the household, and work on said farm, the land of which the defendant might be seised at his death should descend to the son, and

that as a part of said agreement the son and his wife should live with and care for defendant and wife during their lifetime, there being no agreement that the defendant should not have the liberty to convey and incumber any portion of the real estate belonging to him; that, in pursuance of the agreement set up in the answer, complainant and his wife continued to reside with defendant for two years, until the death of complainant's wife; that thereafter complainant continued to reside there for the period of three years, when he remarried, and he and his second wife continued to live with defendant and labor upon the farm for the further period of nine years, ending in 1889, when he and his wife removed from defendant's home and rented a farm a mile distant therefrom, at which time the agreement theretofore existing was canceled and an equitable division was made between the father and son of all the property accumulated on the farm, complainant taking with him horses and other stock and farming implements, which he accepted in discharge of all obligations of defendant to him, since which time the son continued to work for himself. After answering, the defendant also filed a cross-bill, alleging the facts set forth in the answer, and averring that in 1897 he (the father) consented that complainant might build a new house upon a part of the home farm, which the latter still occupies as a residence, and which the father prays may be delivered up to him. The cross-bill also pleads the statute of limitations. The answer of complainant denied the right to the relief sought by such cross-bill, and as a defense thereto set up the statute of frauds.

Upon a hearing in open court the chancellor rendered a decree denying the relief prayed by the original bill, except as to certain improvements, the house, etc., made by the complainant, for which he was allowed \$1,100 and given a lien upon a part of the lands for the payment of that amount. From a judgment of affirmance in the Appellate Court for the Fourth District this further appeal is prosecuted. Further facts material to the decision of the case are stated in the opinion.

R. C. Harrah and Barney Overbeck (Benson Wood, of counsel), for appellant. Chas. H. Kelly and Sylvester F. Gilmore, for appellee.

WILKIN, J. (after stating the facts). The agreement alleged in the bill is that appellant should work on the farm without compensation, assisting appellee to care for the premises, in return for which the land should descend to him. Appellee, in his answer, says that a part of that agreement was that the appellant should care for him and his wife during their lifetime—quite another and different contract from that set up in the bill, and the only agreement which finds support

in the evidence, appellant himself, as well as appellee, testifying thereto. That contract, if it can be called such, is very general and indefinite in its terms. The rule is well settled that a parol contract will not be specifically enforced in a court of equity unless it appears to be certain and definite in its terms and is established by evidence which is free from doubt, and that, to take a case out of the statute of frauds upon the ground of part performance, all acts done thereunder must be clear and definite and referable exclusively to the contract. *Regan v. Regan*, 192 Ill. 589, 61 N. E. 842; *Erringdale v. Riggs*, 148 Ill. 403, 36 N. E. 93; *Worth v. Worth*, 84 Ill. 442.

The evidence in this record shows that about a year after appellant became of age he married, and he and his wife resided with his parents about two years, until the death of his wife. Within two or three years thereafter the son remarried and brought his second wife to his parents' home, where they resided as one family until 1890, when the appellant, with his second wife, moved to another farm, to which, by consent of his father, he took stock, farming implements, and other property, but continued to farm the lands of his father, paying as rent therefor one-third of the crops, except the hay and pasture land, which he received free of charge. Instead, therefore, of receiving no compensation for his labor, he received two-thirds of the crops, and this clearly indicated an abandonment of the contract relied upon by complainant. In 1896 the appellant obtained permission from his father to erect a house on a portion of the farm about a quarter of a mile from the homestead, which, with other improvements made by him, amounted to about \$1,200 in value. Upon the completion of the new house the son and his wife took possession of it, and continued to make it their home. In September, 1900, the appellant's mother died. Appellee, the father, being left entirely alone, then requested the son to move into the old home with him, which he refused to do, but desired him to come to the new house and there live with him, offering to give him a room to himself, but the father declined to accept the offer. The evidence fails to show any especial care for the father on the part of the son—at least, no more than a son should render without the hope or expectation of remuneration. Nor has he done anything by way of repairing or caring for the property, especially the homestead, where the father has spent the greater portion of his life, and where he desires to end his days. Instead of performing his alleged contract in that regard, it appears from his own testimony that, as far back as the time when he and his wife removed to the other farm, the old house where his father lived was "too damp and rotten" to be a safe place in which to dwell. Within the last few years, after the mother's death, upon the father

asking the son to come back to the old place, live with and care for him and make necessary repairs upon the house and barn, he refused to do so. The father, then, has the undoubted right to dispose of a part or all of the land, and with the proceeds purchase from strangers the care and attention which the son had agreed to furnish him, but when he threatened to do so, according to the allegations of the bill, a court of equity is asked to enjoin him.

We are satisfied that in awarding appellant compensation for the house he built upon a part of the land the circuit court dealt liberally with him. It is by no means clear from all the testimony that appellant paid for that house entirely. His own evidence tends to show that a part, at least, of the material was furnished by the father. In short, the alleged contract as to the preservation of the inheritance, relied upon by appellant as a basis for the relief asked in his original bill, is not supported by the evidence, and that contract, as well as the one relating to the care of his parents, as set forth by appellee in his answer, clearly appears to have been abandoned.

We do not wish to be understood as holding that a contract such as the complainant in the original bill attempted to set up—that is, a contract by a father not to sell, convey, or incumber his real estate, but permit the same to descend at his death to a particular person, however definite, specific, and certain in its terms—is such an agreement as a court of equity would enforce. Many reasons will readily occur to the legal mind against compelling a performance of such a contract; but, from what we have already said, it is clear that the relief here sought could not be allowed for the reasons stated. To say the least, appellant has no cause, legal or equitable, to complain of the decree below.

In so far as the original bill prays an accounting, we think the decree of the circuit court remitting the complainant to his remedy at law, without prejudice, is as favorable to him as he has any right, upon the evidence in this record, to ask or expect.

The judgment of the Appellate Court sustaining the decree of the circuit court will be affirmed. Judgment affirmed.

(205 Ill. 32)

NORTH CHICAGO ST. R. CO. v. JOHNSON.

(Supreme Court of Illinois. Oct. 26, 1903.)

STREET RAILWAYS—PERSONAL INJURIES— OPERATION OF CAR—MEASURE OF CARE—INSTRUCTIONS.

1. In an action against a street car company for injuries to a child on the track, an instruction that it is the duty of the company's servants, in operating its cars, to take reasonable measures to avoid injuries to persons on the street, is not objectionable as calculated to give the jury to understand that the rights of the injured person in the street were superior to

those of the street car company, or as requiring the gripman to look in any particular direction.

Appeal from Appellate Court, First District.

Action by Charles S. Johnson, as administrator, against the North Chicago Street Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

John A. Rose and Louis Boisot (W. W. Gurley, of counsel), for appellant. Jno. F. Waters, for appellee.

WILKIN, J. Appellee, in an action against appellant in the superior court of Cook county, recovered a judgment for causing the death of his intestate. The deceased was a boy 4 years old, and while crossing the track of appellant at the crossing of Center and Sedgwick streets and Lincoln avenue, in the city of Chicago, on the 23d day of October, 1894, was struck and killed by one of appellant's cars. There have been three trials of the case, each of which resulted in a verdict for plaintiff, the first being set aside by the trial court and the second reversed upon appeal to the Appellate Court. The third trial resulted in a verdict for \$3,500, upon which, after a remittitur of \$750, judgment was rendered for \$2,750. From a judgment of affirmance rendered by the Appellate Court, appellant prosecutes this further appeal.

The sole ground of reversal here urged is that the trial court erred in its instructions to the jury. The second and fourth instructions given to the jury at the request of the plaintiff are objected to. The second is to the effect that it is the duty of the company's servants, in operating its cars upon the public streets, "to be on the lookout and to take reasonable measures to avoid injuries to persons on the streets." It is in conformity with the law as announced by this court in *Chicago City Railway Co. v. Jennings*, 157 Ill. 274, 41 N. E. 629, and *North Chicago Electric Railway Co. v. Peuser*, 190 Ill. 67, 60 N. E. 78. The instruction is not calculated to give the jury to understand that the right of the deceased in the street was superior to that of the street car company, as contended by counsel for the appellant, nor did it require the gripman who was in control of the car to look in any particular direction, as is assumed in the argument. It imposed upon the company the duty of recognizing the fact that persons had a right to the lawful use of the street, and in running its cars to take reasonable care to discover such persons and avoid injury to them. There was no error in giving the second instruction. The fourth relates to the damages, and is almost a literal copy of an instruction approved by this court, adopting the opinion of the Appellate Court, in *Baltimore & Ohio Southwestern Railway Co. v. Then*, 159 Ill. 535, 42 N. E. 971. It was properly given.

The judgment of the Appellate Court will be affirmed. Judgment affirmed.

(204 Ill. 170)

GLOVER v. PEOPLE.

(Supreme Court of Illinois. Oct. 26, 1903.)

CRIMINAL LAW—THREATS TO KILL—EXTORTION—INDICTMENT—OBJECTIONS—EVIDENCE—OTHER OFFENSES—FAILURE TO LIMIT—REQUEST—STATE'S ATTORNEY—MISCONDUCT—VERDICT—TERM OF IMPRISONMENT—OBJECTIONS AT TRIAL—NECESSITY—REVIEW.

1. Under 1 Starr & C. Ann. St. 1896 (2d Ed.) p. 1389, providing that every indictment shall be deemed sufficiently technical which states the offense in the terms of the statute creating it, an indictment for attempting to extort money by threats to kill, drawn in the language of Cr. Code, § 93, creating such offense, was sufficient, though it failed to state the precise words of the threat.

2. Where an indictment for extorting money by means of threats to kill averred that defendant did then and there threaten to kill and murder W., with intent then and there unlawfully and feloniously to extort money from him, the said W., such averment indicated that the threats proceeded from defendant and were within the hearing of W., and the indictment was therefore not objectionable for failure to show to whom the threats were made.

3. Cr. Code, § 93a, provides that whoever verbally, maliciously, and willfully threatens to kill another, with intent thereby to extort money from him, shall be imprisoned. *Held*, that an indictment under such section was not objectionable for using the word "malicious" in lieu of the word "willful."

4. In a prosecution for making threats for the purpose of extorting money, evidence tending to show the relations of the parties existing at the time and before the threats were made, for the purpose of characterizing the conduct of the parties and the language used, was admissible, though it tended to show that defendant had been guilty of another offense.

5. Where, in a prosecution for making threats for the purpose of extorting money, evidence tending to show defendant guilty of another crime was admitted for the purpose of characterizing his conduct and language at the time, failure of the court to limit such evidence by proper instruction was not error, in the absence of a request therefor.

6. Defendant obtained \$100 from prosecutor without his consent, by threats to kill prosecutor, while defendant was holding prosecutor with one hand, and had his other hand in one of his pockets. Defendant, in order to obtain the money, not only terrorized prosecutor and other citizens who were present, but defied the constable and justice of the peace, who attempted to interfere. *Held*, that such fact justified a conviction for maliciously threatening to kill another, with intent thereby to extort money from him, in violation of Cr. Code, § 93a.

7. Where no objection was made to the closing argument of the state's attorney in a criminal prosecution at the time, and the question was first raised by affidavits filed with a motion for a new trial, such misconduct cannot be reviewed on appeal.

8. In a prosecution for threats with intent to extort money, it is not necessary that the jury fix the time of defendant's imprisonment by their verdict of guilty.

Error to Circuit Court, Moultrie County; W. G. Cochran, Judge.

Frank Glover was convicted of maliciously threatening to kill another, with intent to extort money from him, and he brings error. **Affirmed.**

The grand jury, at the September term of the circuit court of Moultrie county, returned an indictment against Frank Glover, con-

sisting of three counts. The first count charged robbery from the person of one Joseph Wiley by violence; the second, by intimidation; and the third, a violation of section 93a of the Criminal Code, which reads as follows: "Whoever, either verbally or by written or printed communication, maliciously and willfully threatens to * * * kill or murder another person, * * * with intent thereby to extort any money, goods, chattels, or other valuable thing, shall be imprisoned in the penitentiary not less than one nor more than twenty years" (Laws 1901, p. 144), and was, omitting the formal part, in the following language: "That Frank Glover, late of said county, on the first day of September, in the year of our Lord one thousand nine hundred and two, at and within the said county of Moultrie, and state of Illinois, aforesaid, knowingly, feloniously and maliciously, verbally did then and there threaten to kill and murder one Joseph Wiley, with intent then and there upon the part of him, said Frank Glover, by means of the threat so made by him, the said Frank Glover, thereby then and there unlawfully and feloniously to extort money from him, the said Joseph Wiley." A motion was made to quash the indictment and each count thereof, which was overruled, and, a plea of not guilty having been entered, a trial was had, and the defendant was found guilty under the third count of the indictment; and, after overruling a motion for a new trial and in arrest of judgment, the court sentenced him to the penitentiary for an indeterminate period, and a writ of error has been sued out from this court to reverse said judgment.

The facts upon which the conviction was based were substantially as follows: A feud between the Wiley and Glover families, who were neighbors, in Moultrie county, had existed for many years. Some time prior to the difficulty out of which this indictment arose, a fight had occurred between Wiley and the defendant. A prosecution was instituted by Wiley against Glover, and he was fined a considerable amount. Thereafter they met near their homes, and the defendant demanded of Wiley that he pay to him the sum of \$500 to reimburse him for the amount he had paid out in fines and attorney's fees growing out of said prosecution. Wiley refused to pay said claim, and said he had paid out a considerable sum himself, and had lost an eye in the difficulty, to which Glover replied, "If you think more of \$500 than you do of your life and your family's life, go ahead." This meeting was in April. In the following August the parties met in Allenville, when Glover demanded of Wiley that he pay to him \$200, which he claimed they had agreed was to be paid him by Wiley in settlement of all matters in difference between them. After they had had a few words with reference to the payment of said money, Wiley started to run, and called for help. Glover ran after him. Wiley

jumped on the platform in front of McCabe's store. Glover followed him, and got between him and the store door. After they were upon the platform, Glover took Wiley by the right arm with his left hand, during which time he had his right hand in the right-hand pocket of his sack coat. Two witnesses testified that about that time they saw what they thought was a revolver in the right-hand coat pocket of Glover. As they stood upon the platform, the defendant still holding Wiley by the arm, with his right hand in his coat pocket, he said to him: "You big Irish son of a bitch! You promised me \$200, and she's got to come." At that time, Wiley was begging the bystanders to assist him. Glover, still holding him by the arm, said: "You've got to get it. It's got to come. This is Frank Glover a-hold of you. You've got to get me that money. It's got to come. I mean business." At that time McCabe came out of the store, and ordered them from the platform. J. R. Martin, a justice of the peace, ordered Glover to desist, and directed the bystanders to arrest him. No one interfered, although six or eight men were present. A constable who was present testified he did not interfere because he was unarmed. Wiley said to those present: "I want you to help me, boys. He is going to kill me. I have got to get away from here. I have got to have some help." He further testified that "just at that time I heard him cock his gun. I did not see his gun. I thought I heard it." He also testified Glover said, "The first son of a bitch that lays hands on me, I will kill you." Wiley then called to McCabe to bring him \$100. McCabe brought that amount of money from the store and gave it to Wiley, and Wiley gave it to Glover, when Glover released him and went away.

John R. Eden, John E. Jennings, and Frank Spittler, for plaintiff in error. H. J. Hamlin, Atty. Gen., W. K. Whitfield, State's Atty., and George B. Gillespie, Asst. Atty. Gen. (Emery Andrews, of counsel), for the People.

HAND, C. J. (after stating the facts). It is assigned as error that the court erred in overruling a motion to quash the third count of the indictment, and in arrest of judgment. The count was substantially in the language of the statute creating the offense, and was sufficient. Section 6 of division 11 of the Criminal Code (1 Starr & C. Ann. St. 1896 [2d Ed.] p. 1389) provides: "Every indictment or accusation of the grand jury shall be deemed sufficiently technical and correct which states the offense in the terms and language of the statutes creating the offense, or so plainly that the nature of the offense may be easily understood by the jury." In *Strohm v. People*, 160 Ill. 582, 43 N. E. 622, the indictment charged a violation of the statute prohibiting the selling, giving, or showing to minors

of any publication principally made up of criminal news; and it was held sufficient to describe the offense in the language of the statute, without setting out the supposed prohibited matter, or excusing a failure so to do. In *Honselman v. People*, 168 Ill. 172, 48 N. E. 304, the indictment charged the defendant with having committed the "crime against nature," and it was held, the offense having been charged in the language of the statute, the indictment was good. In *White v. People*, 179 Ill. 358, 53 N. E. 570, it was held that an indictment for an attempt to commit burglary, which stated the offense in the language of the statute, and described the overt act to be that the accused "did then and there attempt to push back the lock on the door of said dwelling house," was sufficiently plain in its description of the offense. In *Cannady v. People*, 17 Ill. 158, it was said: "Where statutes create offenses, indictments should contain proper and sufficient averments to show a violation of the law. * * * Great niceties and strictness in pleading should only be countenanced and supported when it is apparent that the defendant may be surprised on the trial, or unable to meet the charge or make preparation for his defense, for want of greater certainty or particularity in the charge. Beyond this, it tends more to the evasion than the investigation of the charge, and becomes rather a means of escaping punishment for crime, than of defense against the accusation."

It is, however, urged that the indictment is insufficient in this: that it does not set out the words constituting the threats. Such averment was unnecessary. 21 Ency. of Pl. & Pr. p. 673; *Commonwealth v. Moulton*, 108 Mass. 307; *State v. O'Mally*, 48 Iowa, 501. In *Commonwealth v. Moulton*, supra, it was said: "This indictment is for attempting to extort money by the threat of a criminal accusation. Gen. St. 1860, c. 160, § 28. It was moved to quash it because the language in which the alleged verbal threat was made is not set forth. But it is charged that the threatened accusation was of having committed the crime of adultery with a certain person whose name is given. This is sufficient. The precise words of the threat need not be set out. It is enough if the substance is stated. If the indictment attempted to give the words used, yet it would only be necessary to prove the allegation substantially." And in *State v. O'Mally*, supra, on page 502, it is said: "Counsel for the defendant insist that the indictment is bad for the reason that, as it does not set out the threatening words used by defendant, it alleges a legal conclusion. The language of the indictment is that defendant did, 'willfully and maliciously, verbally threaten to kill and murder Zenana Staats and F. S. Wood.' This is not the allegation of a legal conclusion, but of the act of the defendant, and is sufficient, without setting out the words used. The words of the defendant were not

the gist of the offense, which is found in the intention of defendant to convey thereby a threat. The threat should be averred, and may be shown by the words used."

It is also said the indictment does not show to whom the threat was made. It is averred the defendant "did then and there threaten to kill and murder one Joseph Wiley, with intent then and there * * * unlawfully and feloniously to extort money from him, the said Joseph Wiley." This averment clearly indicates for whom the threat was intended, and that it was within the hearing of Wiley. *State v. Waite*, 101 Iowa, 378, 70 N. W. 596.

It is further urged that the word "willful," used in the statute, is omitted from said count of the indictment. The word "malicious" is used in lieu of the word "willful," and was sufficient. In 1 Bishop on Criminal Procedure (3d Ed.) § 613, it is said: "'Willful,' in a statute against libel, is covered by 'malicious' in the indictment, the latter meaning all that the former does, and more." If an indictment is so specific that the defendant is notified thereby of the charge which he is to meet, and is able to prepare his defense, and evidence of the charge upon which he has been tried is preserved in the record so that he will be protected from a subsequent prosecution for the same offense, and the offense may be easily understood by the jury, and the court may be enabled to pass sentence upon him in case of conviction, the indictment, according to all the authorities, is sufficient. We do not think the court erred in overruling the motion to quash and in arrest of judgment.

The court, over the objection of the defendant, permitted the state's attorney, in his opening statement, to state to the jury the previous unfriendly relations existing between the prosecuting witness and the defendant; that the defendant had been arrested upon the complaint of Wiley and fined; that he had demanded of Wiley payment to himself of the sum of \$500 to reimburse him for the amount he had paid out for fines and attorney's fees, and upon Wiley's refusal to pay said sum the defendant said to him, "If you think more of \$500 than you do of your life and your family's life, go ahead." Proof was also permitted, upon the trial, of the previous unfriendly relations existing between the parties, the arrest of the defendant upon the complaint of Wiley, the demand for money made by him upon Wiley, and the threat that followed his refusal to pay. The defendant has assigned as error the action of the court in permitting such statement to be made to the jury, and the introduction of said proof. The rule is general, where a person is indicted for an offense, evidence of another or different offense is not admitted. It, however, has its exceptions, and, if the evidence tends to prove the charge in the indictment, the mere fact that it may tend to prove an-

other crime does not make it inadmissible. *Williams v. People*, 166 Ill. 132, 46 N. E. 749. In this case the charge was that of making threats for the purpose of extorting money, and we think it was proper to show the relation which existed at the time, and before the threats were made, between the parties, for the purpose of characterizing the conduct of the parties and the language used by the defendant at the time it was claimed the money was extorted. If the defendant had threatened to kill Wiley upon a former occasion unless he paid him money, and they were enemies, Wiley would be much more easily terrorized and part with his money much more readily by reason of a subsequent threat than though the relation of the parties theretofore had been friendly. The jury, in order to understand the effect upon Wiley of what occurred between the parties at the time of the alleged offense, should know their previous relations, and the evidence was properly admitted for that purpose. *Farris v. People*, 129 Ill. 521, 21 N. E. 821, 4 L. R. A. 582, 16 Am. St. Rep. 283; *Williams v. People*, supra; *Henry v. People*, 198 Ill. 162, 65 N. E. 120. If the evidence was properly admitted, it was not error for the state's attorney to call the attention of the jury thereto in his opening statement. The court, upon the request of the defendant, should have limited the effect of said proof by a proper instruction. The defendant, however, did not ask such an instruction. We are of opinion the assignment of error is not well made, and that the judgment should not be reversed by reason thereof.

It is next assigned as error that the court improperly instructed the jury on behalf of the defendant in error, improperly modified the instructions offered on behalf of the plaintiff in error before giving them to the jury, and improperly refused certain instructions offered on his behalf. We have examined the instructions given, modified, and refused, and are of the opinion the jury were instructed substantially correctly. When the court can clearly see that substantial justice has been done, a case will not be reversed because of some inaccuracy in an instruction, which, it is clear, had no effect to produce the verdict rendered in the case. Especially is this true if the jury, upon the entire charge, have been fairly instructed as to the law.

It is assigned as error that the verdict is not supported by the evidence. We think it is. While there is a conflict in the evidence as to just what was said and done at the time the plaintiff in error obtained the \$100 from Wiley, it cannot be disputed that Glover obtained the money from Wiley without the consent of Wiley, and by reason of what he did and said at the time he obtained the money. In order to force Wiley to pay to him said sum of money, he not only terrorized Wiley and the other citizens

who were present, but defied the officers of the law. Whether he was armed or not makes no difference. Wiley's conduct shows that he thought Glover was armed, and whether Wiley had agreed to pay him \$200 or not is wholly immaterial. The law will not suffer creditors to collect their debts by force and intimidation. Neither can the defendant excuse himself by proof that he did not use the word "kill," or any other set phrase of speech, if by his language, coupled with his conduct, he caused Wiley to believe he intended to take his life unless he satisfied his demand.

The trial court's attention was not challenged to the closing remarks of the state's attorney at the time they were made, and a ruling requested thereon. That question was first raised by affidavits filed with the motion for a new trial; hence no question as to their propriety is before this court for decision. *Mayes v. People*, 106 Ill. 306, 48 Am. Rep. 698.

The statute did not require the jury to fix the time of the imprisonment of the defendant in the penitentiary by their verdict. *Hagenow v. People*, 188 Ill. 545, 59 N. E. 242.

We find no reversible error in this record. The judgment of the circuit court will therefore be affirmed. Judgment affirmed.

(204 Ill. 418)

POEHLMANN v. KERTZ.

(Supreme Court of Illinois. Oct. 28, 1903.)

BREACH OF MARRIAGE PROMISE—MEASURE OF DAMAGES—SEDUCTION—TRIAL—EVIDENCE—OBJECTION MADE TOO LATE.

1. In an action for breach of marriage promise, defendant introduced evidence to show that plaintiff was unchaste; and plaintiff, having testified on rebuttal that she had never had intercourse with one of defendant's witnesses who had testified that he had intercourse with her, was asked if she ever had intercourse with any one, and replied that she had with defendant. *Held*, that an objection to such evidence by motion to strike was too late.

2. In an action for breach of marriage promise, evidence that defendant seduced plaintiff is admissible on the measure of damages, though seduction is not alleged.

Appeal from Appellate Court, First District.

Action by Barbara Kertz against John W. Poehlmann. From a judgment of the Appellate Court (105 Ill. App. 249) affirming a judgment for plaintiff, defendant appeals. Affirmed.

Oscar Hebel, for appellant. McClellan & Spencer, for appellee.

WILKIN, J. This is an action for breach of promise of marriage, begun by Barbara Kertz, the appellee, against John W. Poehlmann, the appellant, in the superior court of Cook county. In accordance with the verdict of the jury, a judgment was entered for

the plaintiff for \$2,500. From an affirmance of that judgment in the Appellate Court for the First District, the appellant prosecutes this further appeal.

The appellant was a florist in Chicago, and was a widower, with two small children. In 1894 he became acquainted with Barbara Kertz, who was employed at his brother's home as a domestic. Four years later their acquaintance became more intimate, and they talked of marriage, and she testified that there was a positive agreement to become husband and wife. She then made a visit to her father's home, at Port Washington, Wis., and while there received from appellant several letters, the language of which plainly indicates that a promise of marriage had been made. Appellant visited her there, and presented her with a ring. After his return to Chicago, she heard nothing further from him. Some time thereafter she came to Chicago, and called to ascertain why the correspondence had ceased, and was then informed he had changed his mind; he giving her to understand that their marriage would never take place, but assigning no reason for his conduct.

Upon the hearing, after plaintiff had made her proof, showing the facts substantially as herein set forth, the defendant, while testifying that no marriage contract had even been entered into between himself and the complainant, undertook to justify his refusal to marry her upon the ground that he learned she was a woman of unchaste character, having had sexual intercourse with one Weirich, who appeared as a witness for the defendant, and testified that he had on two or more occasions had illicit intercourse with her. She, in rebuttal, denied the statement made by Weirich, and was then asked by her counsel, "Did you ever have sexual intercourse with any man?" And she answered, "Mr. Poehlmann." Counsel for defendant objected, and asked that the answer be stricken out on the ground that the declaration contained no allegation of seduction. The court refused to strike out the answer, saying: "If you had objected to the question, I would have sustained the objection; but, having waited until the answer came, it is too late." Counsel for the defendant then, upon cross-examination, drew out the fact that she had yielded to the defendant only after his promise of marriage.

It is first contended that the court erred in permitting the testimony as to seduction, because the declaration contained no charge of that kind. Having waited too long before objecting to the question, as well as pursuing the witness with other questions on that subject, counsel for the defendant cannot now, as a matter of practice, complain of the evidence. But aside from this consideration, it was competent, under the pleadings, to prove the seduction, if it occurred in consequence of the promise. It is permitted, in such a case, to be shown in aggravation of

¶ 2. See *Breach of Marriage Promise*, vol. 8, Cent. Dig. §§ 25, 48.

the damages. *Tubbs v. Van Kleeck*, 12 Ill. 446; *Fidler v. McKinley*, 21 Ill. 308. As is said in the case last cited (page 313): "In a case of a breach of promise, accompanied with a seduction, the injury is infinitely greater than where there is only a breach of promise. When there is a seduction there is a total loss of character, and all hopes of future happiness and usefulness are blighted, and certain degradation and future misery, if not crime, are its consequences. And when this is produced by a breach of promise, and the fraud perpetrated upon the woman by the man entering into the engagement only to accomplish her seduction, the injury resulting therefrom is the immediate result and consequence of the breach of promise. If he were in good faith to perform his engagement and keep his promise, such consequences would not result; but, when he fails to do so, every consideration of justice requires him to repair the injury, as far as it may be done, by adequate damages." Counsel argues that seduction is not the natural result of a promise of marriage. Certainly not; but, when seduction follows in consequence of the promise, degradation, loss of character, and happiness are the direct result of a breach of that promise. In other words, the injury results from the breach, not the making of the contract. While there is a conflict of authority on the question as to whether evidence of seduction is admissible without an allegation in the declaration, this court is fully committed to the rule here announced. The foregoing decisions of *Tubbs v. Van Kleeck* and *Fidler v. McKinley*, supra, were referred to with approval in *Judy v. Sterrett*, 153 Ill. 94, 38 N. E. 633.

Counsel for appellant complains of the court's refusal to give certain instructions offered in his behalf, which sought to confine the damages merely to actual, and not exemplary or punitive, damages, and to exclude all evidence as to seduction, upon the ground that the declaration was not broad enough to include the latter, containing no count as to seduction. This contention is answered by what has been said as to the admissibility of evidence, the count or allegation not being necessary to sustain that element of damages.

The rulings of the court in giving certain instructions asked on behalf of the plaintiff, and in modifying some of those requested by the defendant, are urged as reversible error. A very large number of instructions to the jury were submitted to the court on either side, and were given. We have carefully examined the instructions upon which this objection is based, and, while we are constrained to repeat what we have often said as to the propriety of giving a great number of instructions in a case involving but few and simple questions of law, we cannot say there was in this case any misdirection of the jury which, under the evidence, could have

worked an injury to the defendant. The modification of those asked by the defendant was proper, though in most instances they might well have been refused altogether.

Neither do we find substantial merit in the objections made to the remarks of plaintiff's counsel in his address to the jury. We are satisfied the court exercised a proper supervision of the argument of counsel.

The assumption that appellant was justified in breaking his promise of marriage because of appellee's intimacy with Welrich is unwarranted. It raises a question of fact, which the jury have passed upon, and the judgment of the Appellate Court has rendered conclusive. They have decided no such intimacy existed.

The judgment of the Appellate Court will be affirmed. Judgment affirmed.

(204 Ill. 254)

PITTSBURG, C. & ST. L. RY. CO. v. ROBSON.

(Supreme Court of Illinois. Oct. 26, 1903.)

RAILROADS — ACCIDENT AT CROSSING — EVIDENCE — SUFFICIENCY — ORDINANCES — REASONABLENESS — ALLOWING STEAM TO ESCAPE — TRIAL — INSTRUCTIONS.

1. In an action against a railroad company for personal injuries received in an accident at a railroad crossing, evidence considered, and held sufficient to support a finding that defendant was guilty of negligence, and that plaintiff was in the exercise of due care.

2. Rev. Code Chicago, art. 2, § 1736, providing that no railroad company shall cause or allow the cylinder cock, safety valve, or other valves of any locomotive to be opened so as to permit steam to escape at any time while running along any railroad track, or where the engine is within 100 feet of any street or crossing, provided that when such engine shall be standing, and for six revolutions of the driving wheel after being put in motion, the cocks may be opened for the purpose of allowing condensed steam to escape, is not void as unreasonable.

3. Rev. Code Chicago, art. 2, § 1736, provides that no railroad company shall allow the cylinder cock, safety valve, or other valves of any locomotive to be opened so as to permit steam to escape where the engine is within 100 feet of any street crossing. In an action for personal injuries, in which plaintiff claimed that defendant railroad company was negligent, under the ordinance, in allowing steam to escape near a street crossing, it appeared that a portion of the street was within the limits of stockyards, and that people were not allowed to travel thereon without permit of the authorities of the stockyards, but that stock, as well as people, were constantly passing on the street from it, and that the street was used by all the employees of the stockyards and those who frequented the stockyards on business. Held, that the question of whether or not it was a street, within the meaning of the ordinance, is one of fact for the jury.

4. In an action against a railroad company for personal injuries alleged to have been caused by defendant's negligence in running its train across a street crossing on which plaintiff was leading a number of horses, plaintiff claimed that defendant was also negligent in allowing steam to escape in violation of Rev. Code Chicago, art. 2, § 1736, prohibiting railroad companies from allowing steam to escape while a locomotive is within 100 feet of any street crossing, etc. Held, that a requested instruction stating that the escape of steam was not wrong-

ful was properly refused, that question being one for the jury.

5. In an action against a railroad company for personal injuries alleged to have been caused by defendant's negligence in running its train across a crossing where plaintiff was engaged in leading a number of horses, an instruction that defendant had the right to run its engine and train at the time and place in question, and thereby to create such noise, smoke, and steam as were usual and customary, was properly refused, as invading the province of the jury.

6. Where, in an action for personal injuries, each one of the three counts in the declaration stated a cause of action, an instruction permitting a recovery under any one of the counts was not objectionable.

7. By pleading to the declaration, defendant waives any objection thereto, unless it is so defective that it will not sustain the judgment.

8. In an action for personal injuries, the fact that plaintiff failed to procure the presence as a witness of a physician who treated him for his injuries did not entitle defendant to a new trial; it appearing that the plaintiff's counsel made all reasonable effort to procure the witness.

Appeal from Appellate Court, First District.

Action by Joseph Robson against the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company. From a judgment of the Appellate Court affirming a judgment for plaintiff, defendant appeals. Affirmed.

This is an action on the case, begun in the superior court of Cook county on April 27, 1900, by the appellee against the appellant company to recover damages for a personal injury. The Union Stockyards & Transit Company and the Chicago Junction Railway Company appear to have been codefendants below with the appellant, but the suit was dismissed against them, and allowed to stand as against the appellant. The trial resulted in verdict and judgment in favor of the appellee, which judgment, upon appeal to the Appellate Court, has been affirmed. The present appeal is prosecuted from such judgment of affirmance.

The declaration consisted of three counts—one original count and two additional counts. The original count alleges that on March 2, 1900, upon certain railroad tracks crossing Laurel street, a much-used thoroughfare at the stockyards in Chicago, appellant was operating a switch engine, with certain cars attached; that appellee, who was employed in unloading and yarding stock at the stockyards, with certain other men, was leading horses in a bunch, fastened together in fours—one man having charge each of four horses—northward on Laurel street toward and across the said railroad tracks; that when a part of the horses had crossed the tracks to the north, and as plaintiff, with other men, was leading the other horses toward and near the tracks, the appellant, through its servants, approached the crossing with a switch engine; that the flagman stationed there signaled the engine to stop, so as to permit appellee and the other men to get the horses over the crossing; that, by reason of

the large number of horses—there being about 36—and of the manner in which they were being led across the tracks, it was appellant's duty to stop the engine until the horses had passed, but that it recklessly, carelessly, and improperly ran the engine through the middle of said bunch of horses, leaving some on the north and some on the south side of the track; that, as the engine reached the crossing, its steam commenced to blow off, causing great noise, which so frightened the horses that they ran away, and appellee, while attempting to hold them, and while in the exercise of ordinary care for his own safety, was thrown to the ground and kicked and trampled upon by the horses, and thereby permanently injured, etc.

The first additional count of the declaration alleges that on March 2, 1900, the Union Stockyards & Transit Company operated a railroad at the stockyards, within the limits of the city of Chicago, and appellant, with the consent of said company, operated a certain engine and cars upon the railroad, which crossed a thoroughfare known as Laurel street; that section 1736 of article 2 of an ordinance entitled "Steam Railways," of the Revised Code of Chicago, which was then and there in full force, provided that "no railroad company or person in charge of any locomotive engine shall cause or allow the cylinder cock or cocks, safety valve or other valves of any locomotive engine, to be opened so as to permit steam to escape therefrom at any time while running upon or along any railroad track, or where the engine is within one hundred feet of any street or railroad crossing or viaduct; provided, however, that, when such engine shall be standing at such point in said city, and for six revolutions of the driving wheel after being put in motion, the said cocks may be opened for the purpose of allowing condensed steam to escape"; that appellee was employed by the Chicago Junction Railway Company in unloading and yarding stock at said yards, and earned \$55 per month, and while he, with other men, was leading a large number of horses, attached together in fours, along Laurel street, towards and with the intention of crossing the railroad tracks, and while some of the men leading the horses were in the act of crossing the tracks, and as appellee, leading four horses, was approaching and close to the tracks, exercising ordinary care for his own safety, the appellant ran its locomotive engine along said track up to and across Laurel street, and, while doing so, wrongfully and unlawfully caused and allowed the safety valve of the engine to become open, and the steam to escape therefrom in large volume and with great noise, and, as a direct result thereof, the horses led by appellee broke away, throwing appellee down, and he was thereby kicked, dragged, and trampled upon, and his back and spine seriously injured, etc.

¶ 7. See Pleading, vol. 39, Cent. Dig. § 1353.

The second additional count avers appellee's employment as above stated, and that while he at the time in question, in the discharge of his duty, together with other men, was leading a large number of horses, attached together in fours, along Laurel street, for the purpose of crossing said railroad tracks, and as certain of the men were in the act of crossing the tracks, and as he, leading four horses, was approaching close to the tracks, in the exercise of ordinary care for his safety, the appellant, through its servants, so recklessly, negligently, and carelessly ran said locomotive engine upon and over the crossing, through said bunch of horses, leaving some upon one side of the track and some upon the other, and permitted the steam of the engine then and there to escape in such large volume and with such great noise, that, as a direct result thereof, the four horses which appellee was leading were frightened and ran away, and the plaintiff was thereafter injured and damaged, etc.

Geo. Willard, for appellant. James C. McShane, for appellee.

MAGRUDER, J. (after stating the facts). Upon the conclusion of all the evidence upon the trial below, the appellant asked a written instruction instructing the jury, "as a matter of law, that, the pleadings and all the evidence considered, the plaintiff is not entitled to recover in this action. You will therefore return a verdict finding the defendant not guilty." The court refused to give this instruction, and such refusal is complained of by the appellant as error. It was not error to refuse the instruction, if there was evidence tending to sustain the cause of action. In order to determine whether there was evidence sustaining the cause of action, it is necessary to refer briefly to the material facts. In order to entitle the appellee to recover, it was necessary to show that he was in the exercise of ordinary care for his own safety, and that the appellant was guilty of such negligence as caused the injury.

1. Was the appellant guilty of such negligence as caused the injury? Laurel street was a narrow street, not more than 25 or 30 feet wide, running north and south within the limits of what are called the stockyards. North and beyond the limits of the stockyards, and south and beyond the limits of the stockyards, the street is known as Morgan street, as we understand the evidence. Persons were not allowed to travel upon so much of Laurel street as was within the limits of the stockyards without a permit from the authorities of the stockyards company. But stock, consisting of horses and cattle and teams, as well as people, were constantly passing up and down Laurel street across the tracks every day. Just before appellee was injured, an engine pushing some 12 or 15 empty refrigerator cars approached Laurel street on the middle of the four or five tracks which cross it at that point, coming from the west and going

towards the east. About the same time nine men, including appellee, were coming from the south on Laurel street, and approaching the tracks towards the north, leading about thirty-six horses in bunches each of four horses. Appellee was leading four of the horses, and was leading the third bunch from the end of the nine bunches. In other words, there were six bunches, of four horses each, north of appellee, and two bunches, of four horses each, south of him. The horses were heavy draft horses, and were tied from halter to halter, with their heads close together. As we understand the evidence, appellee was leading four of these horses by the halter which tied their heads together. The evidence shows that this was the customary way of leading the horses. At this time the men leading the horses were taking them from the stables of the company to certain chutes along the railway tracks for the purpose of shipping the horses. Laurel street was a planked street. There was a flagman stationed at the point where the railroad tracks crossed Laurel street, in the employ of the stockyards company, and in charge of the crossing, and whose duty it was to regulate the trains on the tracks and the traffic on the street. As the train, pushed by the engine at the west end of it, approached Laurel street, the flagman signaled it to stop, and it did so; but, before the horses had all passed over the crossing, the train crew, or engineer, or whoever was in charge of the engine and the cars, started across Laurel street, and refused to stop, although cautioned to do so by the flagman. All the horses, except twelve, or three bunches thereof, succeeded in crossing the tracks, some of them at the rear narrowly escaping injury from the train. Twelve of the horses, four of which at the head were led by appellee, did not succeed in getting across, and, while the engine was upon the crossing, or very near thereto, the engine blew off steam from the safety valve, making a very loud noise, which frightened all three bunches of horses, so that they ran away. The horses led by appellee, in breaking loose, knocked him down and ran over and trampled upon him.

There was evidence tending to show that the appellant company was guilty of negligence, because its train crew ran over the crossing at the time and place in question before all the horses had passed over, and in disregard of the flagman's signal and command. The flagman says that he was at the crossing at the time; that his business there was to flag the crossing, and see that stock went across carefully, and that no accident happened; that teams or horses or cattle or people passed over there every second, probably; that the Panhandle men backed their train east; that the engine was a switch engine; that the cars were east of the engine, about 12, 13, or 16 of them; that they stopped probably 150 feet west of the crossing when he flagged them to stop. The flagman says that there were one or two men on tops of the cars, and he

also says: "He started up again, and I tried to stop him. He says, 'I won't stop.' I said, 'You better stop.' * * * They shoved all the cars and engine over the crossing, and when the engine got on the crossing it blowed off steam pretty strong. * * * They made a pretty loud noise." And he says the steam came from the safety valve.

Another witness says that there were two trainmen on top of the cars, and that his attention was directed to the remark of the flagman, who shook his flag, and said: "The next time I tell you to stop, you'll stop." Still another witness, who was leading some of the horses, says: "I just got across the tracks. I seen the train backing down, and the flagman was trying to stop the train, so that we could get across. I just got across, and the others were cut off. When he was trying to stop them, I was just about on the crossing." The same witness also says, speaking of the flagman: "He motioned for him to stop, and he wouldn't stop. When they came along, they were exhausting steam, and it would scare any horse in the city of Chicago, if they were forty rods away from them—it made that loud a noise."

There was also evidence, tending to show negligence on the part of the appellant company, or its servants, in permitting the steam to escape from the safety valve in violation of the city ordinance set forth in the declaration, and introduced in evidence, and set out in the statement preceding this opinion.

In the second place, in order to entitle the appellee to recover, it was necessary show that he was in the exercise of due care for his own safety. Upon this point the evidence is substantially undisputed. When appellee had approached from the south within some twenty or thirty feet of the southernmost track, he was signaled to by the flagman to stop, and he did stop. We discover nothing in the evidence to indicate that he was guilty of any want of due care for his own safety. As is well said by the Appellate Court in their opinion: "There is no contention but that the plaintiff is shown by the evidence to have been in the exercise of ordinary care for his own safety prior to and at the time of the injury, nor * * * is there any argument or statement as to any deficiency in the proof bearing on the negligence alleged in the declaration. * * * The pushing of the train over the street crossing, in direct violation of the flagman's signal, while the steam was escaping, with a loud noise, as the evidence clearly tends to show, was the proximate cause of plaintiff's injury." In view of what has been said in regard to what the evidence tends to prove, we are of the opinion that the trial court committed no error in refusing to instruct the jury to find for the appellant.

2. Appellant's objection to the admission of evidence, and its criticism upon the first refused instruction asked by the appellant, involve the same point, which relates to the

ordinance in question. It is claimed that the court erred in admitting the ordinance, and in refusing the first instruction, which told the jury that the ordinance was applicable to public highways, but not to private roadways or passageways, such as Laurel street, so called, where the accident took place.

It is said that the ordinance in question was unreasonable, and therefore void. The ordinance, as we understand the position of counsel, is said to be unreasonable upon the alleged ground that it was necessary to open the valves and allow the steam to escape in order to prevent an explosion, and that the ordinance cannot be otherwise construed than as prohibiting absolutely the escape of steam from the safety valves at the times and places specified in the ordinance. We do not think that the ordinance is capable of any such construction. The safety valve was provided in case of emergency, and the steam can be prevented from escaping by opening the fire box, thereby reducing the heat in the fire box, if the steam is found to be getting too high. The ordinance authorizes the opening of the cylinder cocks when the engine is started, and while making a given number of revolutions. The fireman can regulate the pressure of steam by the character of fire he keeps in the fire box, but if, for any reason, the pressure runs up, he can reduce it or regulate it by opening the fire-box door. The evidence tends to show that there was no necessity, upon the occasion in question, for the engine to carry such high pressure, as the train crew were not moving more than half a train load of cars, and were moving slowly on a level track. The evidence of the engineer tends to show that they did not usually allow the steam to "pop off," and there would seem to have been no good reason why it was permitted to "pop off" upon the occasion in question. It is highly dangerous in cities to permit engines to blow off steam in this manner, and the common council had an undoubted right, in the exercise of its police powers, to pass an ordinance forbidding it. When the pressure of the steam can be so easily regulated, and its escape avoided, the ordinance forbidding its escape cannot be said to be unreasonable. It is only "an extreme case of oppression or outrage that would justify" the court in holding an ordinance unreasonable. *Chicago & Northwestern Railway Co. v. Town of Cicero*, 154 Ill. 656, 39 N. E. 574. It must be made clearly to appear that it is unreasonable, before the court can so declare. *Myers v. City of Chicago*, 196 Ill. 591, 63 N. E. 1037. In *Illinois Central Railroad Co. v. Gilbert*, 157 Ill. 354, 41 N. E. 724, it was held that an ordinance requiring the ringing of a bell on an engine running within the limits of a city would not be an unreasonable requirement.

The ordinance does not use the words "public street," but the word "street." While Laurel street may not have been a public street in the sense in which a street in a

city, used by all the inhabitants thereof, is called a "public street," it was yet used by all the employes of the stockyards company, and those who frequented the stockyards upon business. Although it may have been in a certain sense a private street, the traffic on it was so great that it was necessary to maintain a flagman at the crossing in question. Whether or not it was a public street in such a sense as to make the ordinance applicable to it, was a question of fact largely for the jury. *Pittsburg, Ft. Wayne & Chicago Railway Co. v. Callaghan*, 157 Ill. 406, 41 N. E. 909; *Chicago & Alton Railroad Co. v. O'Neil*, 172 Ill. 527, 50 N. E. 216. The ordinance was designed for the protection of life and property, and was as necessary at the street in question, whether public or private, as it was at any other street or crossing having the same amount of traffic.

In addition to what has been said in regard to the ordinance, it is to be noted that the prohibition of the ordinance is against permitting "steam to escape therefrom at any time while running upon or along any railroad track" within the city of Chicago. In the present case the cars, which were being pushed eastward by the engine in question, and the engine itself, were certainly upon a railroad track. By the terms of the ordinance, steam may be allowed to escape while the engine is "standing, and for six revolutions of the driving wheel after being put in motion." For the reasons above stated, we are of the opinion that the ordinance is not an unreasonable one.

It is also urged that the court below erred in refusing to give the second instruction asked by appellant. We do not think that there was any error in this regard, for the reason that the instruction ignores any violation of the ordinance in question, and expressly states that the issuance of steam from the valve under the circumstances disclosed by the evidence was not wrongful, whereas the question should have been left to the jury. The instruction also states that appellant had the right to run its engine and train at the time and place in question, and thereby to create such noise, smoke, and steam as were usual and customary. The evidence tended to show that it did not have the right to run its engine and train across this crossing at the time in question, in view of the large number of horses then passing over it, and in view of the flagman's express warning not to do so. Even if it did have such right, it does not follow that it had the right to create such noise, smoke, and steam as are usual and customary, for the condition that confronted appellant here was not a usual or customary condition. At any rate, it was a question for the jury to determine whether appellant was or was not negligent in running the train across this crossing at that time under the circumstances.

Complaint is also made that the court modified the third instruction asked by the ap-

pellant, and gave it as so modified. We concur with what is said upon this subject by the Appellate Court in their opinion, when they say: "The instruction as modified and given by the court, we think, was more favorable to the appellant than it was entitled to; and the modified instruction does not as is contended by appellant, leave the jury to put their own construction upon the ordinance, but only to say whether the evidence was sufficient to show that it was violated."

It is also contended by the appellant, that an instruction given by the court of its own motion was erroneous, upon the alleged ground that it limits appellee's care to the precise time and place of the accident. This objection is not well taken, for the reasons set forth in the following cases: *Chicago & Alton Railroad Co. v. Fisher*, 141 Ill. 614, 31 N. E. 406; *Lake Shore & Michigan Southern Railway Co. v. Ouska*, 151 Ill. 232, 37 N. E. 897; *Lake Shore & Michigan Southern Railway Co. v. Johnsen*, 135 Ill. 641, 26 N. E. 510.

Appellant complains of the first instruction given by the trial court for the appellee, upon the ground that it permits a recovery under either one of the three counts in the declaration. We see no reason why each count of the declaration does not state a cause of action, and hence the instruction was unobjectionable on this ground. The count setting up the ordinance of the city hereinbefore referred to is objected to for the reasons urged against the validity of the ordinance, as above stated. But as we hold the ordinance valid, we do not regard the count as defective for this reason. The evidence tended to sustain each count, and appellant failed to demur to the declaration, but filed the general issue. "By thus pleading it waived any objection to the declaration, unless the declaration is so defective that it will not sustain the judgment." *Himrod Coal Co. v. Clark*, 197 Ill. 514, 64 N. E. 282. The declaration here cannot be said to be so defective as not to sustain the judgment.

3. The trial court is said to have erred in refusing to grant a new trial. This contention is based upon certain matters set forth in an affidavit filed in favor of the motion for new trial. This affidavit has reference to the alleged failure of the appellee to procure the presence, as a witness at the trial, of a certain physician who treated plaintiff for his injuries. The Appellate Court properly dispose of this objection in the following words: "It appears that plaintiff's counsel made all reasonable effort to procure the presence of the doctor in court before he closed his case; and while, no doubt, his evidence would have had an important bearing upon the extent of plaintiff's injuries, we see no reason why any inference unfavorable to the plaintiff's case should be drawn from the fact that the doctor was not called to testify in his behalf."

After a careful examination of the record,

we find no error which would justify us in reversing the judgment of the Appellate Court. Accordingly that judgment is affirmed. Judgment affirmed.

(204 Ill. 626)

RODERICK v. McMEEKIN et al.

(Supreme Court of Illinois. Oct. 28, 1903.)

MORTGAGES—FORECLOSURE—TITLE OF MORTGAGOR—CONVEYANCE—CONSTRUCTIVE NOTICE—ESTOPPEL—KNOWLEDGE OF AGENTS—EVIDENCE—BILL—DISMISSAL—CROSS-COMPLAINANT—OBJECTION AT TRIAL—NECESSITY.

1. Where, at the time of the execution of a mortgage to secure a building loan, the record title was in the mortgagor, and he made all the contracts for the construction of the building, and was present on the property from time to time in conjunction with plaintiff, to whom it was alleged he had contracted to convey the property before the mortgage was made, plaintiff's presence on the lot for the purpose of setting out shrubbery, superintending the construction of the cellar, cleaning of windows, etc., was not exclusive, and was therefore not notice to the mortgagee of her alleged interest in the property.

2. Under 1 Starr & C. Ann. St. 1896 (2d Ed.) p. 924, § 11, providing that, if a mortgage contains the words "and warrants," the same shall be construed as if full covenants of seisin, good right to convey, against incumbrances, of quiet enjoyment, and general warranty had been fully written therein, where a mortgage contained such words the mortgagor was estopped to deny that he was the owner of the property at the time he made the mortgage.

3. A mortgagee cannot be charged with notice of facts tending to show that the mortgagor did not have title to the property mortgaged, within the knowledge of the mortgagee's agent, which the latter acquired while acting as agent for another.

4. Where, in an action to foreclose a mortgage to secure a building loan, it appeared that the mortgagee placed her money in the bank, with instructions to the cashier to pay it out to E. for the mortgagor as the building progressed, and she gave to E. certificates of deposit in small amounts indorsed to him by her for the purpose of enabling him to obtain the money from the bank for the mortgagor, and the building, after completion, was turned over to the mortgagor after the mortgage was executed, E. was the agent of the mortgagor, and not the mortgagee, so as to charge her with E.'s knowledge of facts tending to show that the mortgagor did not have title to the property.

5. Where a cross-complainant filed no objections to the findings and conclusions of a master, in a suit to foreclose a mortgage, that the bill of a subsequent mortgagee should be dismissed without prejudice, and the court thereupon entered a decree dismissing such bill, which recited that no objection was made thereto by the cross-complainant, she was not entitled to object to such dismissal for the first time on appeal.

Error to Circuit Court, Boone County; Chas. E. Fuller, Judge.

Action by Catherine McMeekin and another against Mary E. Roderick. From a judgment in favor of plaintiffs, defendant brings error. Affirmed.

These consolidated causes are two bills, each to foreclose a mortgage.

On December 18, 1900, the defendant in er-

ror Catherine McMeekin filed her bill in the circuit court of Boone county against Howard H. Hicks, Mary E. Roderick (the plaintiff in error), Isaac Sandall, Elias Cleveland, S. N. Burdick, Frank Reed, and Frank Campbell, to foreclose a mortgage, dated September 4, 1893, and recorded on September 5, 1893, executed by Howard H. Hicks, a widower, of Belvidere, Ill., conveying lot 4 in H. H. Hicks' first subdivision of a part of the southwest quarter in the northwest quarter of section 25, township 44 north, range 3 east of third principal meridian, for the purpose of securing a note dated September 4, 1893, for \$900, executed by said Hicks, payable to the order of Catherine McMeekin three years after date, with interest at the rate of 7 per cent. per annum, payable semi-annually. The bill alleged that the principal sum was due, and interest thereon from September 4, 1900. It also alleged that Mary E. Roderick was in possession of the premises, and that Isaac Sandall had a mortgage thereon, made by Hicks, and that the other defendants were judgment creditors of Hicks. Default was entered against the judgment creditors, who made no defense.

Mary E. Roderick on January 31, 1901, filed her answer to the bill, denying the allegations thereof, and setting up that she (Mary E. Roderick) was in possession of the premises; that on or about February 20, 1893, by a contract between her and Hicks, who then owned the premises, she purchased the same from Hicks, and paid for the same; that, by the terms of her contract, she was to have immediate possession, and Hicks was to execute to her a deed of the same; that on February 20, 1893, she went into possession, and has been ever since in the continuous, open, and adverse possession, of said premises; that, after taking possession, she began to erect a dwelling house thereon, and since its completion, in August, 1893, has lived therein as her home; that since that time the premises have been assessed in her name, and she has paid the taxes; that she has kept the building insured in her name, and has paid the insurance; that thereafter Hicks had no interest in the premises, but the same were owned exclusively by her, and were under her charge and control; that she is a woman not familiar with the ways of doing business, and relied upon Hicks to give her the deed, which he promised to do, and which she supposed he had done, so as to give her a good title of record; that the first knowledge she had that the deed from him to her had not been recorded was after the present suit was begun, and she had been served with summons in the same; that she did not know that Hicks had made the mortgage to McMeekin until she was served with summons; that her rights are superior to those of McMeekin under the mortgage. On the same day Hicks filed an answer denying that he made the note and mortgage mentioned in the bill, and setting up substan-

¶ 2. See Principal and Agent, vol. 40, Cent. Dig. §§ 686, 688.

tially the same facts in regard to the contract with Mary E. Roderick and her possession as are set up in her answer.

On the same day Mary E. Roderick filed a cross-bill, in which she set up that she had bought the premises from Hicks in consideration of certain real estate owned by her which she was to convey to him, and in further consideration of about \$600 to be paid to him; that she made a deed of her real estate to Hicks, and paid him the \$600; that thereupon he delivered the possession to her, and she has continuously occupied the premises since; that he was to have made her a deed, and filed the same for record, but failed to do so; that she was unaware of that until the present bill was filed. The cross-bill also sets up that the cross-complainant erected a house upon the premises, and took up her residence therein; that, at the time the mortgage from Hicks to McMeekin was made, cross-complainant was in the open and exclusive possession of the premises as owner, and Hicks had no interest therein and no right to mortgage the same; that she thereafter paid the taxes and insurance. The cross-bill alleges that the mortgage from Hicks to McMeekin is a cloud upon the title of the cross-complainant, Mary E. Roderick, and that the judgments of said judgment creditors, if any exist, are subject to the rights of the cross-complainant, and are also clouds upon her title. The cross-bill prays that the mortgage to McMeekin and the interests of the other defendants may be declared to be clouds upon her title, and may be removed.

On February 9, 1901, Catherine McMeekin, the cross-defendant, filed her answer denying the execution of the alleged contract between Howard H. Hicks and Mary E. Roderick, and the terms thereof, as set up in the cross-bill, and denying that Hicks was to make cross-complainant a deed. The answer also denies that the cross-complainant at any time began the erection of a house upon the premises, but avers that the house was erected by Hicks, and that the money for which said mortgage for \$900 was given was money which cross-defendant, McMeekin, loaned to Hicks for the purpose of erecting said house. The answer also denies that cross-complainant was in the open and exclusive possession of said premises as owner, and alleges that the mortgage lien of Catherine McMeekin should be held superior to any lien or demand of the cross-complainant.

On December 10, 1900, Isaac Sandall, of Belvidere, filed a bill in said court, praying for a foreclosure of a mortgage dated April 1, 1894, acknowledged on April 25, 1894, and recorded April 26, 1894, executed by said Howard H. Hicks for the purpose of securing two notes, one for the sum of \$200, due one year after date, and the other for the sum of \$300, due two years after date, with interest at 7 per cent. per annum, payable semiannually to the order of Fred J. Evans.

The bill alleges that on April 20, 1894, said notes and mortgage were duly assigned by said Evans to the complainant Isaac Sandall, and alleges that the principal sum of the notes, with interest from April 1, 1895, less certain small payments, is due. The bill also claims \$50 as a reasonable solicitor's fee to be included in the foreclosure decree, and as being allowed by the terms of the mortgage. This bill also alleges the possession of Mary E. Roderick, and the interest of the parties above named as judgment creditors.

The bill of Isaac Sandall was answered by Mary E. Roderick on January 31, 1901, who denied all the allegations of the bill, and set up her alleged contract with Hicks and her possession as above set forth. Hicks also filed an answer to the bill of Sandall, making substantially the same denials and allegations as are made in the answer of Mary E. Roderick. Mary E. Roderick, in this suit by Sandall, filed a cross-bill setting up substantially the same allegations as were set up in her cross-bill in the other suit, and praying that the mortgage of Sandall and the claims of the judgment creditors be removed as clouds upon her title. Sandall answered the cross-bill, denying the material allegations thereof.

Replications were filed to the answers in the original suits, and also in the cross-suits.

On January 31, 1901, the foregoing causes—the one a bill of foreclosure filed by Catherine McMeekin, and the other a bill of foreclosure filed by Isaac Sandall—were consolidated, and ordered to proceed under the title of Catherine McMeekin and Isaac Sandall v. Howard Hicks, Mary E. Roderick et al. On February 18, 1901, the consolidated causes were referred to a master in chancery to take and report proofs, together with his findings thereon. Evidence oral and documentary was introduced before the master. On June 24, 1902, the master filed his report, and found that the notes and mortgages were executed as alleged in the bills, and that the second mortgage was assigned by Evans to Sandall. He also found the amounts due upon the two mortgages, and that the matters and things set up in the answers and cross-bills of Mary E. Roderick were not sustained or established by the proofs, and that Mary E. Roderick did not make out her defense against the mortgage of Catherine McMeekin, as set up in her answer. The master found in his report that the mortgage of defendant in error Catherine McMeekin was at the time of filing her bill a valid lien upon the mortgaged premises, and that she was entitled to the usual decree of foreclosure. The master closed his report as follows: "I further report that, at the argument of said case before me, the solicitor for the said complainant Isaac Sandall stated to me that he did not claim or ask any findings or report of any right of the said complainant Isaac Sandall to any relief in this cause; and

I therefore find and report that the said complainant Isaac Sandall is not entitled to any relief herein, and that his said bill should be dismissed for want of equity." Seven lengthy objections were filed to the master's report by Mary E. Roderick, as defendant and cross-complainant, which objections were overruled by the master, and subsequently filed as exceptions to the report. These exceptions were overruled, and the master's report was approved and confirmed by the court. Thereupon, on June 24, 1902, the court rendered a decree finding the amount due upon the mortgage executed by Hicks to defendant in error McMeekin to be \$1,076.58, and the sum of \$50 to be due for attorney's fees, and rendering the usual decree of foreclosure and sale in case of a default in the payment of the amount so found due. The decree also contained the following: "It further appearing to the court from the said master's report filed in this cause that, at the argument of said cause before the said master in chancery, the said solicitor for the complainant Isaac Sandall stated to him that he did not ask any finding or report in favor of the said complainant Isaac Sandall, and the said master in chancery having so reported to the court that he therefore found that the said complainant Isaac Sandall was not entitled to any relief in this cause, and that his said bill of complaint which was consolidated with the bill of complaint of said complainant Catherine McMeekin should be dismissed for want of equity; and the court further finds that the said solicitor for the said Isaac Sandall, having here in open court stated that he asks for no relief upon the said bill of complaint filed by the said Isaac Sandall on account of the matters and things set forth and averred by him in his said bill of complaint, it is therefore, on motion of the solicitor for the said complainant Isaac Sandall, ordered, adjudged, and decreed by the court that no findings whatever of the matters and things involved herein be made, so far as the said Isaac Sandall is concerned, but that this proceeding be dismissed without prejudice to him, to which dismissal no objection is made."

William L. Pierce, for plaintiff in error.
Robert W. Wright, for defendants in error.

MAGRUDER, J. (after stating the facts). The main and material controversy in this case is between the defendant in error Catherine McMeekin, holding a mortgage upon the property in question executed by Howard H. Hicks, and Mary E. Roderick, claiming to have been a purchaser of said premises from Hicks. The question is whether the mortgage is entitled to priority over the interest or equity of the alleged purchaser. Hicks executed the mortgage to defendant in error McMeekin on September 4, 1893, and the same was recorded on September 5, 1893. At that time the title of record stood in Hicks, and there was no title whatever in plaintiff in error,

Mary E. Roderick. The note and mortgage executed by Hicks to McMeekin were given to secure \$900 loaned by McMeekin to Hicks for the purpose of erecting a house upon the mortgaged premises. The mortgage was taken by Mrs. McMeekin in good faith, and its validity and binding force have always been admitted and recognized by Hicks, who paid the interest thereon from September, 1894, to September, 1899. There is no evidence that, when Hicks executed the mortgage to Mrs. McMeekin, she had any actual notice of any interest of Mrs. Roderick in the property. But it is claimed by the latter that she was in the open, notorious, and adverse possession of the premises when Mrs. McMeekin took her mortgage, and that such possession operated as constructive notice to Mrs. McMeekin, and put her upon inquiry as to the rights of Mrs. Roderick. Substantially the only question in the case of any importance is whether the possession claimed to have been held by Mrs. Roderick operated as notice to the mortgagee, or in such a way as to put the mortgagee upon inquiry.

In the first place, it may be well to consider the nature of the claim to the property, or the interest in the property, as set up by Mrs. Roderick. It is not altogether clear to our minds that she really had such an interest as she claims to have had. The plaintiff in error, Mrs. Roderick, was the sister of Howard H. Hicks, who was a widower and lived with his sister. Mrs. Roderick lived in a house in South Belvidere, the title to which stood in her or her husband. Her testimony, as first given in the case, shows conclusively that her brother Howard H. Hicks lived with her in this house in South Belvidere, and was a member of her family, and that he continued to be a member of her family up to the time the house was erected upon the premises here in controversy. It is true that when testifying a second time, some two months after her first testimony was given, she sought to qualify, if not deny, her statements upon this subject, but the balance of the testimony is in favor of the contention that her brother was and continued to be a member of her household. She says that on February 20, 1893, the premises in question, being in North Belvidere, and which were then vacant, were sold to her by her brother, and that a contract in writing was executed, embodying the terms of such sale. The terms, according to her evidence, were these: That she should deed to her brother the house in which she lived in South Belvidere, subject to two mortgages thereon, one for \$500, and the other for \$150, making \$650 in all, and that she should allow her brother to retain \$600, claimed to have been her share in her deceased mother's estate, and claimed to be in the hands of her brother as administrator of that estate. Her claim is that her equity in the house in South Belvidere was worth \$700. In return for the \$600, and for a deed of the South Belvidere house, subject to the mortgages aforesaid, her

brother Howard H. Hicks was to deed to her the lot here in controversy, after having erected a house upon the same, and that she was to receive the deed when the house should be completed. Her brother, it is conceded, never did execute to her a deed of the premises here in controversy. The alleged contract of February 20, 1893, between herself and her brother, was not produced. He is unable to say whether there was any contract in writing or not, and, if there was, she was unable to find it.

Whether or not \$600 were coming to plaintiff in error from her mother's estate is a matter left somewhat in doubt by the testimony. No papers or records are produced to show that Howard H. Hicks was ever appointed administrator of his mother's estate, or that he ever settled with such estate, or that he ever had any money belonging to such estate. It is said that the mother lived in Arkansas, and there owned a plantation, and that this plantation was sold; but Mrs. Roderick, who must have been one of the heirs, does not remember that she made any deed of the plantation, nor does it appear what the plantation was worth. At one time in her testimony, Mrs. Roderick says that her mother's estate was worth \$2,000, and at another time that it was worth \$3,000, and that there were seven heirs—herself and six brothers. One of her brothers testifies that the plantation was turned over to the wife of a deceased brother, and did not belong to the mother at the time of her death. If the estate was only worth \$2,000 or \$3,000, it is difficult to understand how the share of the plaintiff in error amounted to \$600. But she says that it was agreed among her brothers that she should have \$600 out of the estate. She says that her brother executed to her a receipt for the sum of \$600, which was in his hands, but she was unable to produce the receipt, and it was not introduced in evidence.

Even if it be admitted, however, that she did make the contract in question with her brother for the conveyance to her of the property here in controversy, we are of the opinion that her possession was not of such a character as to operate as notice to Mrs. McMeekin, or to put her upon inquiry. The evidence leaves it doubtful when the house erected upon the premises in question was completed, or when it was begun. Plaintiff in error admits that it was a part of the contract that her brother was to build a house for her upon the lot in question. The testimony tends to show that, just before or about the time when the erection of this house was begun, the plaintiff in error and her son and her husband were upon the lot, and set out some shrubbery, and set the stakes for a cellar. But the evidence is quite clear that Howard H. Hicks built the house upon the lot in controversy. He employed the contractor and other workmen who erected the house, and paid them, and was in possession of the house up to the time of its completion. Plaintiff in error's testimony, as originally

given, and that of the contractor, was that Howard H. Hicks, her brother, made the bargain with the carpenters for building the house; that he made the bargains for the lumber; that he made the bargain for digging the cellar; that he made the bargain for the stone and mason work; that he made the bargain for all of the work that was performed in the building of the house. She also states that her brother Howard paid the workmen, and paid for the erection of the house. He was there every day, and talked with the men while they were building the house, and gave instructions in regard to the erection of the same, although he permitted certain changes to be made in accordance with suggestions made by her. The contractor who did the carpenter work states that in constructing the house he made the contract with Howard H. Hicks; that Hicks furnished him the plans and specifications, and paid him for his work and materials; and that he delivered the house to Hicks when it was completed. The testimony is quite clear that Hicks was in charge of the construction of the house, and was the person to whom all questions that arose were ultimately referred to be decided. The evidence is not altogether clear just when the house was completed. The mortgage was finally executed on September 4th, and recorded on September 5th, and it is not proven that the house left the possession of Howard H. Hicks before the mortgage was executed. A man named Fred J. Evans was active in obtaining the money from Mrs. McMeekin for Hicks, in order to build the house, and to him various installments of the money were paid in order to be used in the construction of the house. Mrs. McMeekin had \$900 deposited in a bank in Belvidere, and had a certificate of deposit for the same. The banker says that she did not have an account current. The money was paid out as the construction of the house proceeded, and certificates of deposit for various amounts were issued by the bank, payable to the order of Mrs. McMeekin, and by her indorsed. One of these certificates of deposit is in evidence. It is for the sum of \$245, dated September 1, 1893, and, according to the stamp of the bank on the face of it, was paid on September 4, 1893. What was there in the character of the possession of the house to give the mortgagee any notice that Howard H. Hicks was not the owner of the property? The title of record stood in Hicks. The money for the erection of the house was paid to Hicks. He was in possession of the house in person and through the contractors and workmen employed by him, and was present upon the premises every day, superintending the construction of the house. The mortgagee had a right to suppose not only that he was the owner, because the record showed him to be the owner, but that he was in possession, because he was using the money paid to him by her to build the house. If it be a fact that

Mrs. Roderick was upon the premises, setting out shrubbery, or superintending the construction of the cellar, or cleaning the windows, her possession, as indicated by such acts, cannot be regarded as anything more than a joint possession with her brother. Possession, to be notice, must be not only open and visible, but exclusive. A possession which is held jointly with another person is not such a possession as is exclusive, or operates as notice or to excite inquiry. *Travers v. McElvain*, 181 Ill. 382, 55 N. E. 135; *Truesdale v. Ford*, 37 Ill. 210; *Mason v. Mullahy*, 145 Ill. 383, 34 N. E. 36; *Harris v. McIntyre*, 118 Ill. 275, 8 N. E. 182; *Hoover v. Redmond*, 15 Ill. App. 427.

We do not regard the testimony of Hicks himself, to the effect that he was not the owner of these premises at the time when he executed the mortgage, as having any weight. He represented himself to be the owner when he executed the mortgage, and in the mortgage he states that he mortgages and warrants the property to the mortgagee. By the use of the words "and warrants," the mortgage executed by him is to be construed as if full covenants of seisin, good right to convey, against incumbrances, quiet enjoyment, and general warranty were fully written therein. 1 *Starr & C. Ann. St. 1896* (2d Ed.) p. 924; section 11, *Conveyance Act*. Inasmuch as, by the terms of his deed, he said that he had title, and covenanted to defend and make it good, he was estopped from denying that he had title when he made the mortgage. *Beasley v. Phillips*, 20 Ind. App. 188, 50 N. E. 488; *Dobbins v. Cruger*, 108 Ill. 188. In *Dobbins v. Cruger*, supra, we said: "The principle is, a warrantor will not be permitted to assail a title he has solemnly covenanted to maintain. It would be a solecism to say a party may destroy that which at the same instant he must uphold." It is well settled that, "when one gives a mortgage upon land to secure a debt, he is estopped by the recitals in his contract creating the lien from denying his title to the mortgaged premises." *Hill v. O'Bryan*, 104 Ga. 143, 30 S. E. 996; *Wagnon v. Pease*, 104 Ga. 436, 30 S. E. 895. In *Wagnon v. Pease*, supra, it is said: "The general rule is that a mortgagor is estopped from setting up, in resistance to a foreclosure proceeding, that he had no right or title to the mortgaged premises."

It is said, however, that the defendant in error McMeekin had notice of the alleged interest of the plaintiff in error, because Fred J. Evans was her agent, and he had such notice. Leaving for the present the question whether Evans was really the agent of Mrs. McMeekin, it may be well to inquire what the evidence shows as to any notice to Evans of the interest of plaintiff in error in the premises. Plaintiff in error, the first time she took the witness stand, testified that she insured the property in 1893 for 10 years with Fred J. Evans. It is said that, inasmuch as he insured the property in her

name, he was affected with notice that she claimed to own it, and that, when subsequently he acted, if he did act, for Mrs. McMeekin, in the matter of lending her money, she was affected with the notice of plaintiff in error's rights which is said to have been thus previously acquired by the agent of Mrs. McMeekin. At a subsequent date plaintiff in error testified that she did not know whether she had ever seen Evans about the insurance or not. She also testified at another time that the property had been insured with another agent than Evans, but she was unable to tell when. No policy of insurance or document of any kind was produced to prove the fact that the property had been thus insured in her name. On the contrary, an insurance policy is produced, dated September 19, 1900, showing that the premises on that date were insured in the name of Howard H. Hicks as owner. If the plaintiff in error had obtained insurance upon the premises for 10 years from 1893, the 10 years would not expire until 1903; and, this being so, it is difficult to understand why the premises were insured in the name of her brother Howard H. Hicks in 1900, before the 10 years expired. Even if it were true, however, that Evans did have notice of plaintiff in error's claim to the ownership of the property, for the reason already stated, and even if it be true that he afterwards was the agent of Mrs. McMeekin in the loaning of her money, still it is not clear that his knowledge thus obtained would bind Mrs. McMeekin. We have held that "a party cannot be charged with notice of facts within the knowledge of his attorney, of which the latter acquired knowledge while acting as the attorney of another person." *McCormick v. Wheeler*, 36 Ill. 114, 85 Am. Dec. 388; *Herrington v. McCollum*, 73 Ill. 476. We are inclined to think, however, that the evidence shows that Evans was rather the agent of Hicks to procure the loan of the money, than the agent of Mrs. McMeekin to lend her money for her. She placed her money in the bank, with instructions to the cashier of the bank to pay it out to Evans, for Hicks, as the building progressed; and she gave to Evans certificates of deposit in small amounts, indorsed to him by her, for the purpose of enabling him to obtain the money from the bank for Hicks. The testimony of the contractor shows that the building was turned over to Hicks when it was completed, and his testimony, in connection with the documentary evidence in the record, tends strongly to show that the building was not completed before the mortgage was executed. The general rule is that the knowledge of the agent must be acquired during his agency, and in the course of the same transaction from which the principal's rights and liabilities arise, in order to affect the principal with notice, or, in other words, that, where an agent has acquired information before the commencement of his agency, the principal

will not be charged with constructive notice thereof. An exception to this rule is where the information obtained by the agent in a former transaction is so precise and definite that it is or must be present to his mind and memory while engaged in the second transaction. *Snyder v. Partridge*, 138 Ill. 173, 29 N. E. 851, 32 Am. St. Rep. 130; *Burton v. Perry*, 146 Ill. 71, 34 N. E. 60. No such state of facts exists here as would tend to affect Mrs. McMeekin with knowledge acquired by Evans by reason of the circumstances already mentioned.

It is furthermore claimed by the plaintiff in error that the court erred in dismissing the original bill filed by Isaac Sandall for the foreclosure of the second mortgage while the cross-bill of the plaintiff in error was on file. The statute provides that "no complainant shall be allowed to dismiss his bill after a cross-bill has been filed without the consent of the defendant." *Chancery Act*, § 36; 1 Starr & C. Ann. St. 1896 (2d Ed.) p. 584. By the express terms of this statute the complainant may dismiss his bill after a cross-bill has been filed, if the defendant consents thereto. It was evidently the view of the trial court that in this case the defendant and cross-complainant did consent to such dismissal of the original bill, or that her conduct was such as, in the opinion of the court, to amount to a consent to such dismissal. The master found in his report, as a matter of fact, that Sandall did not claim or ask any findings or report of any right to any relief in the case, and that he was therefore not entitled to any relief, and recommended that his bill be dismissed for want of equity. Plaintiff in error filed no objection before the master, nor any exception before the court, calling in question this finding of the master's report. Accordingly the court, in its decree, found that the proceeding should be dismissed without prejudice to Sandall, and in the decree used these words: "To which dismissal no objection is made." Plaintiff in error was silent upon this subject when the master's report came in, and was silent when the decree of the court was entered, and such silence must be construed as giving consent. Undoubtedly it is not required by the rules of chancery practice that exceptions should be taken to the various decisions of the court made in the progress of a chancery cause. *Miller v. Whelan*, 158 Ill. 544, 42 N. E. 59, and cases there cited; *Von Tobel v. Ostrander*, 158 Ill. 499, 42 N. E. 152. But where a cause is referred to a master to report the proofs, with his findings thereon and his conclusions therefrom, and the party appears by counsel and takes part in proceedings before the master in reference to the matters referred to him, without objection thereto, such party ought not to be permitted to raise the objection for the first time in this court. "The master's report must be held conclusive of all questions covered by it, not excepted to." *Cheltenham Improvement Co.*

v. Whitehead, 128 Ill. 279, 21 N. E. 569; *Whittemore v. Fisher*, 132 Ill. 243, 24 N. E. 636; *Gehrke v. Gehrke*, 190 Ill. 166, 60 N. E. 59. Where, on a reference before a master, both parties treat a matter as one upon which the master has the power to pass, they must both be held to have voluntarily submitted such question to the master; and, where no objection to the finding of the master in relation thereto is made before him or before the trial court, it is too late to make it in this court. *Gehrke v. Gehrke*, *supra*, and cases there cited.

We find no error in the record sufficient to justify us in reversing the decree. Accordingly the decree of the circuit court is affirmed. Decree affirmed.

(304 Ill. 58)

SEITZINGER v. MODERN WOODMEN OF AMERICA.

(Supreme Court of Illinois. Oct. 26, 1903.)

LIFE INSURANCE—INSANITY—SUICIDE—DEATH BY HIS OWN HAND.

1. Where a certificate of membership in a beneficial society provided that if any member should, within three years after becoming a member, "die by his own hand, whether sane or insane," his certificate should become void, there could be no recovery on the certificate of a member who committed suicide within the time limited, though he was wholly insane, and incapable of forming an intention of taking his own life.

Appeal from Appellate Court, Fourth District.

Action by Emma Seitzinger against the Modern Woodmen of America. From a judgment of the Appellate Court (106 Ill. App. 449) affirming a judgment for defendant, plaintiff appeals. Affirmed.

This is an appeal from a judgment of the Appellate Court for the Fourth District affirming a judgment of the circuit court of White county. Appellant filed her declaration in assumpsit against appellee, the Modern Woodmen of America, on a certificate of membership in that order dated January 19, 1901, and issued to Eli B. Seitzinger, her husband, for the benefit of herself and children. The declaration is in the usual form, setting up the certificate in *hæc verba*, and averring that the insured departed this life on the 11th day of November, 1901. To the declaration appellee filed two special pleas. The first special plea avers that in and by the application for membership and by the benefit certificate issued to the insured "it was stipulated and agreed by and between the said Eli B. Seitzinger and the said Modern Woodmen of America that the said society or order did not indemnify against death from suicide, whether sane or insane; and if the said Eli B. Seitzinger should, within three years after becoming a beneficial member of said society, die by his own hand,

¶ 1. See Insurance, vol. 28, Cent. Dig. §§ 1159, 1160, 1956.

whether sane or insane, said certificate should become null and void and of no effect," and that said Eli B. Seitzinger did, within three years after becoming a beneficial member, commit suicide, and die by his own hand. The second special plea avers that the insured was subject to all the by-laws, rules, and regulations of the order, and that at the time he became a member, and at the time of his death there was in full force a by-law of the order as follows: "If any member holding a benefit certificate heretofore or hereafter issued by this society shall, within three years after becoming a beneficial member of this society, die by his own hand, whether sane or insane, his benefit certificate shall become null and void by reason of such act, and the payments thereon shall be absolutely forfeited," and that the insured did die by his own hand within three years after becoming a beneficial member. Appellant replied that Seitzinger at the time of his death "was wholly insane, totally unconscious of the manner of his death, and wholly and totally incapable, by reason of such insanity, of forming an intention of taking his own life, and did not at the time comprehend or understand the physical nature and result of his act, and did not intend to take his life, and that the death was not the result of any intentional act of his." Appellee demurred to the replication, and the circuit and Appellate Courts have sustained the demurrer, and to reverse that ruling appellant prosecutes this appeal.

N. C. Bainum and C. S. Conger, for appellant. J. W. White and Ross Graham, for appellee.

WILKIN, J. (after stating the facts). The question is here presented whether any degree of insanity whatever will justify a recovery upon a contract of life insurance which contains a clause exempting the insurer from liability in case the insured "shall die by his own hand, whether sane or insane." The pleadings in this case admit that the insured, Eli B. Seitzinger, took his own life, and that at the time he did so he was wholly insane, totally unconscious of the manner of his death, and by reason of his total insanity was incapable of forming an intention of taking his life, and did not comprehend the physical nature and results of his act.

It is contended by appellant that the insurer cannot escape liability under this contract when such a condition of insanity exists as is admitted in this case. In support of her contention she cites the cases of *Grand Lodge I. O. M. A. v. Wieting*, 168 Ill. 408, 48 N. E. 59, 61 Am. St. Rep. 123, *Charter Oak Life Ins. Co. v. Rodel*, 95 U. S. 232, 24 L. Ed. 433, *Manhattan Life Ins. Co. v. Broughton*, 109 U. S. 121, 3 Sup. Ct. 99, 27 L. Ed. 878, and other like cases. These cases rest mainly upon the decision of the Supreme Court of the

United States in the case of *Mutual Life Ins. Co. v. Terry*, 15 Wall. 580, 21 L. Ed. 236—a suit on a policy in which the condition was that if the insured shall "die by his own hand," the policy should be void, and in which that court said: "We hold the rule on the question before us to be this: If the assured, being in the possession of his ordinary reasoning faculties, from anger, pride, jealousy, or a desire to escape from the ills of life intentionally takes his own life, the proviso attaches, and there can be no recovery. If the death is caused by the voluntary act of the assured, he knowing and intending that his death shall be the result of the act, but when his reasoning faculties are so far impaired that he is not able to understand the moral character, the general nature, consequences, and effects of the act he is about to commit, or when he is impelled thereto by an insane impulse which he has not the power to resist, such death is not within the contemplation of the parties, and the insurer is liable." Conceding that to be the rule in the class of cases cited by appellant, we think the case at bar is clearly distinguishable from each of them, in none of which does the "sane or insane" clause appear in the contracts of insurance. In the case of *Bigelow v. Berkshire Life Ins. Co.*, 93 U. S. 284, 23 L. Ed. 918, which is quoted from by the appellant, but not cited in her brief, wherein the policy contained a provision for a different settlement in case the insured "should die by suicide, sane or insane," the court held that the pleadings did not aver such a case of insanity as that the insured did not comprehend the physical nature and consequences of his act. In discussing the "sane or insane" clause in that policy the court said: "It is unnecessary to discuss the various phases of insanity in order to see whether a possible state of circumstances might not arise which would defeat the condition. It will be time to decide that question when such a case is presented. For the purposes of this suit it is enough to say that the policy was rendered void if the insured was conscious of the physical nature of his act." We have not been able to find a case in the Supreme Court of the United States in which the possible state of circumstances referred to in the foregoing case has directly arisen. Policies containing similar provisions to that of the one here sued on—that is, containing the sane or insane clause—were before that court in *Traveler's Ins. Co. v. McConkey*, 127 U. S. 661, 8 Sup. Ct. 1360, 32 L. Ed. 308, but the validity or proper construction of such a provision was not decided. It was, however, said in the opinion of the court: "If he [the insured] committed suicide, then the law was for the company, because the policy, by its terms, did not extend to or cover self-destruction, whether the insured was at the time sane or insane." And again, in *Home Benefit Ass'n v. Sargent*, 142 U. S. 691, 12 Sup. Ct. 332, 35 L. Ed. 1160, the policy containing a provision that the insurer should not be liable if the insured died

"by his own hand or act, whether voluntary or involuntary, sane or insane," the decision turned mainly on the competency of testimony, and the liability of the defendant upon the contract was not discussed or decided. In the still later case of *Connecticut Mutual Life Ins. Co. of Hartford v. Akens*, 150 U. S. 475, 14 Sup. Ct. 157, 37 L. Ed. 1148, the condition was, "suicide, the self-destruction of the assured in any form, except upon proof that the same is the direct result of disease or of accident occurring without the voluntary act of the assured." The company was held liable notwithstanding the self-destruction of the insured, on the doctrine announced in *Mutual Life Ins. Co. v. Terry*, 15 Wall. 580, 21 L. Ed. 236, the court saying in its opinion: "The clause contains no such significance or decisive words as 'died by suicide, sane or insane,' as in *Bigelow v. Insurance Co.*, 93 U. S. 284 [23 L. Ed. 918], or 'by suicide, feloniously or otherwise, sane or insane,' as in *Insurance Co. v. McConkey*, 127 U. S. 661 [8 Sup. Ct. 1360, 32 L. Ed. 308]."

Nor has the question raised by the issues in this case ever been passed upon by this court. In the late case of *Supreme Lodge Order of Mutual Protection v. Gelbke*, 198 Ill. 365, 64 N. E. 1058, the contract of insurance sued upon contained the condition that, if the death of the insured should be caused by or result directly or indirectly by his own suicidal act, sane or insane, neither he nor any of his beneficiaries should be entitled to participate in the widows' and orphans' protection fund. But the defendant company treated the contract as simply providing against liability in case the insured should commit suicide, and asked the trial court to instruct the jury that, although the insured, at the time of his death, was insane, yet that, if he was capable of forming an intention, and if he did intentionally commit suicide, the plaintiff could not collect more than the amount of the assessment, with 4 per cent. interest thereon (which was provided for in the policy), but the court changed that instruction so as to make it read that if the insured was, at the time of his death, insane, but the jury believed from the evidence that, irrespective of such insanity, he, at the time of his death, "was capable of forming a rational intent, and that he did with rational intent commit suicide, then the plaintiff in this case cannot recover any greater sum than the amount of assessments paid, * * * with four per cent. interest thereon." The modification of the instruction was held to be error, and the judgment of the court below reversed; and we said (page 370, 198 Ill., and page 1060, 64 N. E.): "The changes in the instruction required the formation of a rational intent, abrogating the agreement of the parties that the act should exempt the defendant although he might be insane. A rational intent is one founded on reason, as a faculty of the mind, and opposed to an irrational purpose." It was not decided in that case that under the contract of insurance there

declared upon the insurer might not insist upon its nonliability upon proof that the insured came to his death by suicide, even though the degree of insanity was such that he was "wholly insane, totally unconscious of the manner of his death, and wholly and totally incapable, by reason of such insanity, of forming an intention of taking his own life, and did not at the time comprehend or understand the physical nature and result of his act, and did not intend to take his life," as was attempted to be urged by the plaintiff in this case under the replication.

The Appellate Courts for the Second, Third, and Fourth Districts have in well-considered opinions held such provisions as the one under discussion valid, and as constituting a complete defense to an action upon the policy where the insured died by suicide, his own hand, or self-destruction, though insane, without reference to the degree of his insanity. *Supreme Tent Knights of Macca-bees v. Hammers*, 81 Ill. App. 560; *Supreme Lodge Knights of Pythias v. Clarke*, 88 Ill. App. 600; *Supreme Court of Honor v. Peacock*, 91 Ill. App. 632; *Northwestern Mutual Ins. Co. v. Churchill*, 105 Ill. App. 159. The case of *Supreme Lodge Knights of Pythias v. Clarke*, supra, was brought by appeal to this court, and the judgment of the Appellate Court was reversed, without discussion as to the merits, because that court had failed to remand the case. *Clarke v. Supreme Lodge Knights of Pythias*, 189 Ill. 639, 60 N. E. 39. There seems to be a general consensus of opinion in the several courts of last resort in this country in which the question has arisen that, where a policy contains the condition that, if the insured dies by his own hand, commits suicide, self-destruction, etc., "whether sane or insane," and he does die by his own act, the insurer is not liable; that "the word 'insane' implies every degree of unsoundness of mind, and the liability of the insurer is not affected by the degree of insanity." The case of *De Gogorza v. Insurance Co.*, 65 N. Y. 235, is generally cited as the leading case on the subject. Speaking of the condition "sane or insane," it is there said: "We have, therefore, only to consider the interpretation to be given to the language of the contract of insurance, for no question is made but that it was fully understood and agreed to by both parties. It can scarcely be doubted that an insurer of the life of a person may, by apt language, guard himself from liability for all disasters if the exemption does not contravene public policy. He may provide that if the assured shall die of the smallpox, or any other specified disease of the body, he would not be liable; and there appears to be no reason why he may not guard himself against liability if death results from any disease of the mind. Indeed, it is said by Rapallo, J., in *Van Zandt v. Insurance Co.*, 55 N. Y. 169 [14 Am. Rep. 215], 'that no rational doubt can be entertained that a condition exempting the in-

suror from liability in case of the death of the assured by his own hand, whether sane or insane, would be valid if mutually agreed upon between the insurer and the insured'; and then, in substance, adds that, if nothing is said with respect to insanity, the result is that a party does not 'die by his own hand' if his death happens from the involuntary act of a madman. This view of the question is but a very concise and accurate statement of the law as announced in cases previously adjudged. * * * The word 'insane' or 'insanity' ordinarily implied every degree of the unsoundness of mind; and in this case we assume that the assured was in the very last degree mad or insane, so that the mere act of self-destruction was wholly involuntary. * * * We prefer to base our decision upon the ground that the words of the proviso in the policy before us by plain rules of interpretation exempt the insurer from liability." To the same effect are *Spruill v. Northwestern Mutual Life Ins. Co.*, 120 N. C. 141, 27 S. E. 39, citing numerous cases; *Scarth v. Security Mutual Life Society*, 75 Iowa, 346, 39 N. W. 658; *Tritschler v. Keystone Mutual Benefit Ass'n*, 180 Pa. 205, 36 Atl. 734; *Sargeant v. National Life Ins. Co.*, 189 Pa. 341, 41 Atl. 351; *Keefer v. Modern Woodmen of America (Pa.)* 52 Atl. 164. Other cases are to the same effect, and we have found none to the contrary.

In the recent case of *Clarke v. Equitable Life Assurance Society*, 118 Fed. 374, 55 C. C. A. 200, the Circuit Court of Appeals for the Fourth District construed the condition, and held that in that case the provision "self-destruction, sane or insane," was a risk not assumed by the society in the contract. In that case the evidence showed the insured shot himself in the head with a pistol. Plaintiffs, in their replication admitting the shooting, averred that the mind of the assured "was so impaired and affected by insanity that he was not conscious of the physical nature and consequences of the act he then committed, and did not intend to cause his death, but was moved to commit said act by irresistible impulse." The lower court sustained a demurrer to the replication, and the Circuit Court of Appeals affirmed the judgment. In its opinion by Brawley, District Judge, the following cogent reasoning is used: "If it was an open question, there is much to be said of the injustice of contracts of this nature, for a person ought no more to be held responsible for the loss of his life when taken by himself under the ravings of delirium or impelled by the hallucinations of melancholy than if he dies from ordinary disease or from an accident. But that question is not before us, and it seems to be well settled that insurance companies may avoid altogether this class of risks, and that, being at liberty to stipulate against hazardous occupations, unhealthy climates, or deaths from consumption or other excepted diseases, they may also contract not to

assume a risk of a certain mode of death; and presumably the premiums are calculated on the elimination of that risk. If the assured is informed in apt words of the extent of the limitation, it is not perceived that there is any good reason why such contract should not be governed by the same rules of interpretation as control courts in all other cases of contract, and why plain and unambiguous words should be frittered away by casuistry and refinement." The opinion then takes up a discussion of the cases of *Mutual Life Ins. Co. v. Terry*, supra, *Bigelow v. Berkshire Life Ins. Co.*, supra, and other similar cases, and continues: "It will be observed that the proviso under consideration contains no words limiting its operation to intentional suicide. The company contracted that it would not assume the risk of self-destruction, sane or insane. The contention of appellant is that self-destruction avoids the policy if the insured lacked the intelligence to know that his act was wrong, but that it is not avoided if he did not understand the physical nature of his act. To sustain such a contention would require us to believe that the deceased shot himself through the head because he did not know that it would kill him. Instead of giving to the words of the proviso the plain meaning for which they were manifestly intended—that the insurer intended to guard itself from liability if the insured came to his death from any physical movement of his own, whether sane or insane—we would lose ourselves in the consideration of the different phases of insanity, be compelled to split it into degrees, and to hold that, if he was so entirely insane as not to understand the physical consequences of his act the proviso would be avoided, while a lesser degree of insanity would make the company liable."

In the case at bar the replication confesses the cause of death, and seeks to avoid the condition in the contract by setting up the insanity of the insured. It is not denied that an insurance company may contract to avoid liability if death results from any disease of the mind, just as it may if death results from any specified bodily disease, if the contract is embodied in apt language. Nothing can be clearer than that the words "sane or insane" were introduced in the certificate by the insurer for the purpose of excepting from its operation any self-destruction, whether the insured was of sound mind or in a state of insanity. There is no qualification of the varying degrees of insanity, but the language is simply "sane or insane." These words have a precise, definite, well-understood meaning. No reasonable mind could be misled by them, and no expansion of language could more clearly express the intention of the parties. In the construction of ordinary words in a contract they are to be given the meaning which they convey to the ordinary mind, and to permit, in cases of this kind, the discussion and proof and a differentiation

of the degrees of insanity would be to do violence to words having a generally accepted significance, and to do that which the parties themselves never contemplated. By the plain rules of interpretation appellee is exempt from liability under this contract.

This view is in harmony with that of the Appellate Court, expressed in its opinion by Creighton, J., and its judgment will accordingly be affirmed. Judgment affirmed.

(204 Ill. 266)

DAVIS v. THORNLEY et al.

(Supreme Court of Illinois. Oct. 26, 1903.)

CONTRACTS — MENTAL CAPACITY — INTOXICATION — EVIDENCE — SUFFICIENCY — INADEQUACY OF CONSIDERATION.

1. Evidence on a petition to set aside an order of distribution of an estate under agreement by heirs and administrators examined, and held sufficient to support a finding that petitioner was not incapable of entering into the agreement by reason of intoxication and mental disease.

2. The payment of \$5,370 for an inheritance valued at \$25,000 was not so grossly inadequate as to create a conclusive presumption of fraud, in view of the fact that other heirs claimed the entire estate under a will admitted to probate, and that litigation had been instituted which if carried on would cost the heir one-half of whatever he recovered in attorney's fees, and that the attorney of the heir was at first inclined to the view that the share of the heir was but one-fourth of \$25,000.

Appeal from Appellate Court, Third District.

Proceedings by Thomas Kershaw against James E. Thornley and others to set aside an order of distribution of an estate. From a judgment of the Appellate Court reversing a judgment in plaintiff's favor, his administrator, John R. Davis, appeals. Affirmed.

Samuel Thornley, a resident of Morgan county, died on the 26th day of March, 1901. A will executed by him on the 24th day of September, 1875, was produced and offered for probate. After providing for the payment "of all just debts and funeral expenses," the will, save the attestation and subscription clauses, was as follows:

"First item. I give, devise and bequeath to my brother Hugo Thornley, his heirs and assigns, all the moneys of which I am now possessed or may be hereafter; also all the goods and chattels, and implements of husbandry and farming utensils, of which I am now or may hereafter be possessed. And lastly I do nominate and appoint Hugo Thornley to be the executor of this my last will and testament."

Hugo Thornley, mentioned as the devisee and legatee in the will, a brother of the testator, departed this life some two years prior to the death of the testator. The testator left surviving him neither widow, child, children, nor descendants thereof, or living brother or sister. He left as his only heirs at law sixteen nieces and nephews, viz., the seven appellees herein, being the children of

his said deceased brother, Hugo Thornley; Thomas Kershaw, the appellant's intestate, the only child of Ann Kershaw, a deceased sister; six children of a deceased sister, Bettie Wood; and two sons of another deceased sister, a Mrs. Waggoner. After a contest the will was admitted to probate in the county court of Morgan county. James E. Thornley and E. H. Thornley were appointed administrators with the will annexed. They accepted the trust, qualified, received letters of administration, and entered upon the work of administering the estate. The Kershaw, Wood, and Waggoner heirs entered into contracts to release and assign all of their interests in and to the property and estate of every kind to the heirs of said Hugo Thornley, deceased, and executed the necessary instruments to carry into effect such an assignment. Some months afterward Thomas Kershaw filed in the county court a petition, in which he set up that the sale and assignment of his interest for \$5,370 were procured at a time when he was, by reason of intoxication and mental disease, incapable of contracting, and that appellees, by fraud and deception as to the value of his interest in the estate, procured him to make an assignment of the same to them. He asked that the order for distribution be set aside, that he be permitted to file objections to the report of the administrators, and that they be ordered to pay him the one-fourth interest inherited by him, less the \$5,370 already paid. Answer was filed to the petition and a hearing had. The county court sustained the prayer of the petition, and ordered that on distribution the administrators should pay to Kershaw one-fourth of the amount to be distributed, less the amount of \$5,370 which he had received from the appellees. The cause was removed to the circuit court of Morgan county by appeal, and was again there heard, and an order entered in affirmance of the judgment which had been entered in the county court in probate sitting. By a further appeal the cause came into the Appellate Court for the Third District, where the judgment of the circuit court was reversed, and the cause remanded to that court, with directions to dismiss the petition. While the cause was pending in the Appellate Court, the death of the petitioner, Thomas Kershaw, was suggested, and John R. Davis, his administrator, was substituted as a party. This is an appeal prosecuted by the administrator from the judgment of the Appellate Court.

John A. Bellatti, for appellant. Mills & McClure, for appellees.

BOGGS, J. (after stating the facts). We have carefully read the abstract of the testimony heard in the trial court, and agree with the Appellate Court that it is not sufficient to uphold the finding that Kershaw was, at the time of the execution of the assignment to the appellees, mentally incapable

of executing the instrument, or that the execution thereof was obtained by misrepresentations or other fraud. Kershaw was of the age of about 52 years. He resided in St. Louis, Mo., and had lived there for nearly 20 years. He was the father of five children, whose mother died about 12 years before the trial. His occupation was that of a "tuck pointer." The work of a tuck pointer is to replace mortar in the mortar joints between the brick or stones in the walls of buildings, chimneys, smokestacks, and other structures. It appeared that he had indulged in drinking intoxicating liquors more or less during the greater part of his life, and that at times he drank immoderately; but it did not appear that his excesses were such as to prevent him from continuing the labor of his calling, though he was thereby required to stand and move about on scaffolds or supports at high and dangerous elevations. The proof also falls far short of showing that he was in any degree incapacitated by reason of intoxication on the day when he contracted to dispose of his interest in the estate and executed the instrument to effectuate the assignment thereof to the appellees. The contention seems rather to be that by reason of long-continued and excessive indulgence in intoxicants his mental faculties had become permanently impaired. Witnesses were produced who expressed opinions to that effect, but cross-examination developed that few, if any, of these witnesses regarded him as mentally wanting in power to transact the ordinary business affairs of life, though some thought him so incapacitated during temporary periods of actual intoxication. These witnesses, except his son and daughter, resided in central Illinois, and their opportunities to meet with him and observe his conduct and habits within the last 20 years had been slight and infrequent. That he was rational and competent to comprehend and transact business affairs was testified to by a number of witnesses, among others, Joseph Schiereck, whose business is that of examining titles as an employé of the Title Guarantee & Trust Company of St. Louis; John C. Gilbert, superintendent of the Morgan Brass Foundry Company of St. Louis; F. M. Wedding, a grocer in St. Louis; and Frank Nonn, a grocer and saloon keeper, also of St. Louis. These witnesses were all residents of the city of St. Louis, knew Kershaw, met him frequently, had social and business relations with him, and frequent and ample opportunity to form correct opinions as to his mental condition. Their testimony was entirely irreconcilable with the contention that he was wanting in mental power to understand and transact business affairs. Facts and circumstances disclosed by the testimony of a number of other witnesses are also inconsistent with that view. It was proven he came to Jacksonville for the purpose of looking after his interests in the property of

his deceased uncle. Others of the nephews and nieces of the deceased testator who had like interest with himself in preventing the entire property of the testator from passing to the Thornley heirs, the appellees, under the will, had employed counsel to resist the admission of the will to probate. He entered into a written contract with the same counsel to appear for him, and his cause has been conducted in all the courts, including this hearing, by such counsel so employed by him. The legal adviser so engaged was of the opinion that as Hugo Thornley, the legatee and devisee in the will, had died prior to the death of the testator, the legacy and devise would be held to have lapsed, and the estate regarded as intestate, but expressed to the petitioner the view that the nephews and nieces of the testator would share the estate in equal parts, share and share alike; that is, the heirs of the testator would take per capita and not per stirpes. The petitioner, though understanding the legacy would be deemed to have lapsed, did not accept the view that he would only be entitled to share per capita and receive only a one-sixteenth part of the estate, but insisted that his mother, if alive, would have inherited an undivided one-fourth interest of all the property of which the testator died seised, and that he was entitled to stand in the shoes of his mother and take her part, he being her only heir. Further reflection and investigation convinced his counsel that this position was correct. Counsel presented objections to the admission of the will to probate, and a hearing of such objections was had. The court overruled the objections, and the will was admitted to probate. This was on the 13th day of May, 1901. The nephews and nieces of the testator were present, except one, who resided in Texas, and after the court had decided to admit the will to probate propositions looking toward a settlement or compromise of the contentions involved in the litigation were advanced and discussed between them. The heirs of Hugo Thornley contended the legacy and devise were valid, and invested the title and right to all the property in them. No settlement was, however, reached, but it was agreed that the parties should meet at Virginia, in Cass county, on the 21st day of the month to adjust their contentions, and, if possible, avoid litigation. The petitioner executed a power of attorney conferring on his uncle, Thomas Kershaw, Sr., of Jacksonville, authority to act for and represent him. The petitioner returned to St. Louis. It was afterwards rumored that the attorney in fact for the petitioner had determined not to attend the meeting of the parties at Virginia, and E. Hierman, whose wife was one of the nieces of the testator, and Eli Wood, a nephew of the testator, were so informed by said Thomas Kershaw, Sr., and, understanding the Thornley heirs were disinclined to compromise or buy out a portion only of the

contestants of the will, went to St. Louis to urge the petitioner to be present at Virginia, and he returned with them on the day fixed for the meeting. The petitioner met a number of persons at Virginia on that day before he entered into the contract to assign to the Thornley heirs his interest in the estate. We think the testimony of these persons, together with that of the petitioner and of Wood and Hierman, established beyond doubt that he was not on that day incapacitated by reason of intoxication.

It appeared from the testimony of the petitioner, and that of all others who had any knowledge of the facts, that the petitioner demanded the amount he received, and that he well knew that it was for all of his interest in the property of the estate, and that he directed the banker through whom the payment to him was made to pay him \$370 in currency, and for the remainder to give him a bank draft for \$5,000. He was paid in this manner, and, returning to St. Louis, put his money in the bank. He made gifts of small sums to his two children, and told his son he had put \$3,000 of the amount in the bank, and it was not to be touched. Soon after, he took his son and his daughter with him on a visit to another son, who lived in Canada, and defrayed the expenses of the party in the greater part. After he returned to St. Louis he engaged in business as a saloon keeper at the corner of Ninth and Palm streets, and conducted the saloon in his own name for about 16 months, and was engaged in that business when the petition was filed herein. A few days before he appeared as a witness he gave up the business. Whether he was successful or why he withdrew from the saloon business was not disclosed by the testimony. A thorough study of the evidence leads to the conviction he had full and complete comprehension of his acts, and that to hold that his transactions should be avoided on the plea that he had not the mental power demanded by the law to enable him to bind himself by his contracts would be to raise the standard of contractual capacity to such a height that the power to contract would be denied to a very large class who have heretofore enjoyed that right without question.

We have considered the argument, pressed with much force, that the amount paid to and accepted by the petitioner for his interest in the estate was so grossly inadequate as not only to indicate lack of contractual power, but also to create a conclusive presumption of fraud. It is said the estate is worth \$100,000, and that the legacy lapsed, and the estate became intestate, and descended to the heirs at law of the intestate per stirpes; that the mother of the petitioner, a sister of the intestate, would, had she been living, have become entitled, as heir, to one-fourth of the entire estate, and that the petitioner, the only heir of his mother, inherited such one-fourth, or \$25,000; that he disposed of it for the grossly inadequate sum of \$5,370. It

seems to be accepted by all parties that the estate will prove to be of the value of \$100,000, less, of course, funeral expenses, costs of administering, etc. The situation which presented itself to the petitioner must, however, be kept in view. The owner of the estate, in his lifetime, had executed a will showing an intention to bestow the entire estate on Hugo Thornley. An effort to prevent that will from being admitted to probate had failed. The heirs of Hugo Thornley were insisting the devise operated to pass the whole estate of the testator to them under a proper construction of the will, and, further, that, if the devise to their father had lapsed and become ineffectual, the property would descend to all the heirs at law of the testator, share and share alike—that is, per capita—which view, if true, entitled the petitioner to but a one-sixteenth part of the estate. The heirs of Mrs. Waggoner and Mrs. Wood, while differing with the Thornley heirs as to the legality of the devise and bequest, joined them in the insistence that the estate would descend to all the heirs of the testator in equal parts. Counsel employed by the petitioner advised him at their first interview that the estate would descend per capita, and not per stirpes, and that he would take but a one-sixteenth part. It is true that counsel afterwards, on reflection, changed his view on this point, and so advised the petitioner; but the will had been admitted to probate notwithstanding the objection urged in the probate court in behalf of the petitioner, the Wood heirs, and the Waggoner heirs against the probate thereof, that the only devise and bequest therein had lapsed by reason of the death of Hugo Thornley before the death of the testator. A compromise suggested by a portion of the heirs, to give the Thornley heirs \$9,000 and then divide the estate into 16 equal parts, had been rejected by the Thornley heirs. Other efforts toward a compromise had failed, and to avoid litigation another meeting of the heirs had been agreed upon. Litigation involved also the payment of attorney's fees under a contract which would leave the petitioner but one-half of whatever should be recovered. He paid but \$500 attorney's fees out of the amount which he received on the settlement of his claims. He could but know the testator, his uncle, did not intend he should receive any part of the estate. That the petitioner, under such circumstances, on the day fixed by the heirs, accepted \$5,370 in full for his interest could not be declared to show either that he was lacking in mental power, or the amount be deemed so grossly inadequate as to stamp the transaction as fraudulent.

The evidence left no foundation for the charge in the petition that the Thornley heirs were guilty of entering into a conspiracy to defraud the petitioner. The testimony of the petitioner refuted the principal charge of fraud, i. e., that he was plying with intoxicating liquor in order to render him incapable

of understanding what he was doing. It is clear he was not kept in ignorance of any material fact necessary to be known for the proper protection of his interests, nor does it appear he was deceived as to any such fact. There is nothing in the record to warrant the court in declaring the Thornley heirs did not in good faith believe the legacy had not lapsed, or that the estate, if intestate, would not descend to them in equal parts with the petitioner. Counsel representing the different parties seem, at the outset, to have concurred in the view that petitioner could in any event receive no more than a one-sixteenth portion, and counsel for the Thornley heirs still insist that such is the true rule of law applicable to the contention, and in this court present a brief in support of that view, in which they have collected, with much labor and research, the many authorities upon which they base their contention. The view we have taken of the case makes it unnecessary we should consider and determine that question, and we only advert to it for the reason it bears upon the question which we do decide in the case. Courts are inclined to favor amicable adjustment of contested claims between litigants, and, finding that neither lack of contractual mental power nor the intervention of fraud entered into the settlement here made, our conclusion is, as was that of the Appellate Court, that it should stand.

The judgment of the Appellate Court is therefore affirmed. Judgment affirmed.

(204 Ill. 69)

CITY TRUST, SAFE DEPOSIT & SURETY CO. OF PHILADELPHIA v. LEE.

(Supreme Court of Illinois. Oct. 26, 1903.)

EMPLOYEE—BOND—CONSTRUCTION—LIABILITY—APPLICATION—REPRESENTATIONS.

1. In an application to a bonding company for an employee's bond, it was stated in answer to the question as to the salary or compensation to be paid the applicant that he was to receive \$85 per month as salary or commission, while in fact he was to receive \$10 a week, the use of a flat worth \$20 a month, and 2½ per cent. commission for collecting rents amounting to about \$1,000 per month. *Held*, that the answer was a fair statement of the applicant's earnings, and was not evasive or fraudulent.

2. A bonding company guaranteed an owner against loss by a collector, receiving his pay partly in commissions, sustained through "the dishonesty or any act of fraud" of the collector "amounting to larceny or embezzlement." *Held*, that the company was liable for a conversion of rent by the collector, though this did not amount to larceny or embezzlement, as the words "amounting to * * * embezzlement," did not qualify the word "dishonesty."

Appeal from Appellate Court, First District.

Action by Edward W. Lee against the City Trust, Safe Deposit & Security Company of Philadelphia. From a judgment of the Appellate Court (107 Ill. App. 263) affirming a judgment for plaintiff, defendant appeals. Affirmed.

Louis L. Dent, for appellant. Rice & O'Neil (Walter M. Howland, of counsel), for appellee.

HAND, C. J. This is an appeal from a judgment of the Appellate Court for the First District affirming a judgment of the superior court of Cook county in favor of the appellee for the sum of \$1,075 upon a bond given by the appellant to indemnify the appellee from loss by reason of the dishonesty or fraud, amounting to larceny or embezzlement, of Thomas J. Morrow, who was in the employ of appellee as a collector. It appears from the evidence that appellee was the owner of certain buildings located in the city of Chicago, and that he employed Morrow to collect the rents thereon, which amounted to about \$1,000 per month, for which service Morrow was to receive \$10 per week in cash, the use of a flat in which to live, worth \$20 per month, and a commission of 2½ per cent. on the amount of rent collected. The application for the bond was in writing, and stated that Morrow was to receive as salary or commissions the sum of \$85 per month, and provided the answers to questions contained in said application should be construed as warranties, and form the basis of the guaranty. It further appears that Morrow collected and failed to turn over to appellee rents to the amount of the judgment, converted the same to his own use, and absconded, and, appellant having failed and refused to indemnify appellee, this suit was brought.

The first defense interposed by appellant was that the answer contained in the application as to the compensation which Morrow was to receive for his services was false, and by reason thereof there could be no recovery, and it requested the court to instruct the jury that if they found appellant was induced to sign the bond by reason of the answer as to the amount of salary or commissions to be paid Morrow, that such answer was false, and that the defendant did not know that it was false at the time it issued the bond, then they should find for the defendant. This the court refused to do. The total amount of Morrow's compensation amounted to at least \$85 per month, and under the answer "\$85 per month" to the question, "State amount of salary or commission to be paid the applicant," the compensation of Morrow might have been properly payable in a gross sum in cash or all as commissions, and the answer been truthful. The information sought to be elicited by the answer to the question was the amount of Morrow's earnings, and the answer given was a fair answer to the question, and not evasive or fraudulent. We think the instructions were properly refused, as there was no evidence in the record upon which to base them.

The loss guaranteed was that sustained by the appellee through the dishonesty or any

act of fraud of Morrow amounting to larceny or embezzlement, and it is argued that the conversion of the rents collected by Morrow did not amount to larceny or embezzlement, under the authority of *McElroy v. People*, 202 Ill. 473, 66 N. E. 1058, as he had an interest in the funds to the extent of his commissions; hence it is said there could be no recovery on the bond. We do not agree with such contention, as we think it clear the phrase, "amounting to larceny or embezzlement," does not qualify the word "dishonesty," and that the appellant is liable upon the bond for any financial loss sustained by the appellee through the dishonesty of Morrow, even though the conversion of the rents collected by him to his own use would not subject him to an indictment and conviction for larceny or embezzlement. It is apparent the appellee, by the bond, sought to protect himself from financial loss from the dishonesty of Morrow, even though the act by which the loss was occasioned was not criminal. The bond was prepared by the appellant, and under a well-settled rule of construction will be most strongly construed against it, and in our view was intended to protect appellee from financial loss from just such dishonest acts of Morrow, namely, the failure to account for and pay over rents collected, as the proof in this record shows him to have been guilty of, and the fact that he could not be convicted of larceny or embezzlement for the conversion of said rents will not relieve the appellant from liability on the bond. In the construction of written instruments a qualifying phrase is to be confined to the last antecedent unless there is something in the instrument which requires a different construction. This rule has been enforced in many cases. *Zimmerman v. Willard*, 114 Ill. 364, 2 N. E. 70; *Dearborn v. Inhabitants of Brookline*, 97 Mass. 466; *Cushing v. Worrick*, 9 Gray, 382; *State v. Jernigan*, 7 N. C. 18.

Finding no reversible error in this record, the judgment of the Appellate Court will be affirmed. Judgment affirmed.

(204 Ill. 275)

PERKINS v. KNISELY.

(Supreme Court of Illinois. Oct. 26, 1903.)
 REPLEVIN—CREDIBILITY OF WITNESS—INSTRUCTIONS—REMARKS BY COURT
 —PREJUDICIAL ERROR.

1. An instruction that if the jury believed that any witness had testified falsely as to any material matter in issue the jury might disregard the whole testimony of such witness, except so far as he was corroborated, etc., authorized the jury to disregard the testimony of the witness if he testified falsely, without requiring them to find that he had willfully and knowingly sworn falsely, and was therefore erroneous.

2. Where in replevin there was a direct conflict in the testimony of plaintiff and that of defendant's witness as to the ownership of the property, an erroneous instruction as to the jury's right to disregard the evidence of a witness who might have testified falsely was prejudicial.

3. In replevin, on plaintiff introducing a bill of sale to certain property, defendant's attorney objected to the same, stating, "It is a manufactured piece of paper," whereupon plaintiff's attorney moved that such statement be stricken out, and the court said: "I presume this was manufactured. Sustain objection to it." Held that, since the jury might have inferred that the court agreed that the bill of sale was manufactured evidence, the remark could not be disregarded on the ground that it was jocular, and intended to mean only that the paper on which the instrument was written was manufactured.

Error to Appellate Court, First District.

Action by Alonson D. Perkins against John A. Knisely. From a judgment in favor of defendant, affirmed by the Appellate Court (102 Ill. App. 502), plaintiff brings error. Reversed.

This was originally an action of replevin brought on September 21, A. D. 1899, in the superior court of Cook county, by the plaintiff in error, Alonson D. Perkins, as plaintiff, against the defendant in error, John A. Knisely, as defendant. Only a small portion of the property covered by the writ was found by the sheriff, and thereupon plaintiff in error filed a declaration in trover. The declaration in the case was for the recovery of the value of horses, harness, blankets, livery suits, signboards, clocks, reminders, and other property usually used in a livery business. An order was entered that the goods described in the writ might be left in the possession of the defendant in error, Knisely, on condition that he enter into bond, on good and sufficient security, conditioned on the paying of any judgment which might be rendered in the case in favor of the plaintiff in error. This bond was given. The defendant below pleaded the general issue, and, upon the issue thus formed by the declaration in trover and the plea of the general issue, the case was tried. There was a verdict in favor of the defendant below, upon which judgment was entered in favor of the defendant against the plaintiff for costs. A writ of error was prosecuted to the Appellate Court, where the judgment of the court below was affirmed. Plaintiff in error now prosecutes the present writ of error for the purpose of reviewing the judgment of affirmance so entered by the Appellate Court.

On May 20, 1898, the defendant in error conveyed by bill of sale to the plaintiff in error the property with which the livery business was conducted, on the south side in the city of Chicago; and thereupon, on May 20, 1898, plaintiff in error executed to defendant in error a chattel mortgage upon the property to secure purchase money notes of plaintiff in error, aggregating \$15,000. Subsequently, on January 12, 1899, plaintiff in error executed a bill of sale of the property to the Palace Stables & Acme Storage & Van Company, a corporation organized under the laws of the state of Illinois, subject to said mortgage and interest thereon. Some of the property, however, embraced in the last-mentioned bill of sale is described therein as being free and

clear of incumbrance of any kind. On September 4, 1899, a bill of sale appears to have been executed by said corporation to the plaintiff in error, bargaining and selling to him, in consideration of his services to said company, some of the property connected with the livery business.

In June, 1899, defendant in error took possession of the property described in the chattel mortgage, and continued the livery business until September 21, 1899, when the present suit was instituted.

William Eugene Brown, for plaintiff in error. Bulkley, Gray & More, for defendant in error.

MAGRUDER, J. (after stating the facts). Upon the trial of this case no instructions were asked by, or given for, the plaintiff in error. The court gave five instructions at the request of the defendant in error. Among the instructions so given for the defendant in error was instruction numbered 4, as follows, to wit: "The court instructs the jury that, if they believe from the evidence in this case that any witness or witnesses has or have testified falsely as to any material matter in issue upon the trial of this case, then the court instructs you, as a matter of law, that you have the right to disregard the whole of the testimony of such witness or witnesses, excepting in so far as such witness or witnesses may or have been corroborated by other credible evidence or facts and circumstances proven in the case." This instruction was clearly erroneous, and, in view of the many decisions by this court declaring such an instruction to be erroneous, it may be said here, as it was said in *Swan v. People*, 98 Ill. 610: "In the face of these decisions it would not be expected such an instruction would have been asked." The defect in the instruction is that it allows the jury to disregard the testimony of a witness if he "testified falsely," instead of requiring the jury to find that he shall have willfully and knowingly sworn falsely.

In *Chittenden v. Evans*, 41 Ill. 251, we said (page 253): "It is not only necessary that a witness should swear falsely, but it must be knowingly or corruptly false in some material matter, before the jury are at liberty to disregard the testimony of the witness as a matter of law. If a witness from mistake, accident, or want of memory should make a false statement without any corrupt intention, it would not follow that his entire evidence should therefore be rejected as unworthy of belief. * * * Again, a witness might even corruptly swear falsely to a material fact, and, if other portions of his evidence were properly corroborated by circumstances indicating the truth of such testimony, it would not necessarily follow that all of his testimony should be disregarded." See, also, *United States Express Co. v. Hutchins*, 53 Ill. 44.

In *Pope v. Dodson*, 58 Ill. 360, where an instruction told the jury that, if a witness "has sworn falsely in any material statement," the jury might disregard the entire statement of the witness, except so far as it was corroborated, it was held that such instruction was "palpably erroneous." And it was there said (page 365): "A witness cannot be discredited simply on the ground of an erroneous statement; it is only where the statements of a witness are willfully and corruptly false in regard to material facts that the jury are authorized to discredit the entire testimony. The most candid witness may innocently make an incorrect statement, and it would be monstrous to hold that his entire testimony, for that reason, should be disregarded." To the same effect are the following cases: *Pollard v. People*, 69 Ill. 148; *Gullilher v. People*, 82 Ill. 145; *Brennan v. People*, 15 Ill. 511; *City of Chicago v. Smith*, 48 Ill. 107; *Swan v. People*, 98 Ill. 610; *Pennsylvania Co. v. Conlan*, 101 Ill. 93; *Hoge v. People*, 117 Ill. 35; *Otmer v. People*, 76 Ill. 149.

In *Swan v. People*, supra, it was held that an instruction was erroneous which failed to "inform the jury that, to authorize them to reject all of a witness' evidence, he must have knowingly and intentionally made misstatements as to some material point in the case." In *Hoge v. People*, supra, an instruction was held to be erroneous which "omits the very material qualification that the false testimony shall have been wilful."

The fourth instruction, given for defendant in error upon the trial below, omits the very material qualification that the false testimony as to material matter was knowingly and corruptly or willfully false. We are unable to see that the plaintiff in error was not injured by the giving of this erroneous instruction. It is well settled that, where the evidence is conflicting, the jury should be accurately instructed. This rule that, where the evidence is conflicting, the jury should be accurately instructed, has been applied to cases, like the case at bar; where a given instruction is defective for the reason above stated, as will be seen by reference to the cases of *Chittenden v. Evans*, supra, and *Swan v. People*, supra.

In the case at bar it was material for the plaintiff in error, as plaintiff below, to show that he was the owner of the property in question. It is well settled that in an action of replevin a plaintiff must recover upon the strength of his own title, and, where his title is denied, the burden of proof is upon him to show a general or special property in the goods themselves. *Pease v. Ditto*, 189 Ill. 465, 59 N. E. 983, and cases there cited. Several witnesses were produced who swore that the plaintiff in error had stated to them that he was not the owner of the property in question. Plaintiff in error swore that he did not make the statements which were attributed to him by these witnesses. Here,

then, was a direct conflict between the testimony of plaintiff in error and the testimony of some of the witnesses of defendant in error upon the question of the ownership of the property. In this conflict of the testimony plaintiff in error was entitled to have the jury correctly instructed, and a correct instruction would have required them to find not only that his testimony in the respect thus indicated was false, but that it was willfully and corruptly and intentionally false.

In addition to this, the plaintiff in error introduced in evidence the bill of sale, mentioned in the statement preceding this opinion, executed by the Palace Stables & Acme Storage & Van Company to plaintiff in error, which bill of sale was marked "Exhibit 15." In reference to this exhibit the record shows as follows: Plaintiff's attorney: "We offer Exhibit 15 in evidence." Defendant's attorney: "There is an objection to this; it is a manufactured piece of paper." Plaintiff's attorney: "I move that statement be stricken out." The Court: "I presume this was manufactured. Sustain objection to it. Plaintiff excepts to the ruling of the court." As we understand this excerpt from the record, the attorney for the defendant below expressly charged that this bill of sale, when it was introduced by plaintiff below, was manufactured evidence. It is said that the remark of the court, to the effect that he presumed it was manufactured, was merely playful, and was intended to mean only that the paper, upon which the instrument was written, was a manufactured piece of paper. There is nothing upon the face of the record to show that such was the meaning of the remark of the court. On the contrary, the jury might well have inferred, when the court said, "I presume this was manufactured; sustain objection to it," that the court agreed with counsel for defendant below in making the statement that the document introduced was manufactured as evidence. There is nothing in the record to sustain the charge that the bill of sale was manufactured testimony, and hence the remark of counsel, apparently indorsed by the trial court, was highly improper, and the statement should have been stricken out in accordance with the motion of defendant's attorney. In view of the discredit thus thrown upon the testimony introduced by the plaintiff below, there was, besides the conflict in the testimony already noticed, an additional reason why the instructions given to the jury should have been correct and accurate as to the law of the case.

Because of the error in giving the fourth instruction given for the defendant below, the judgments of the Appellate Court and of the superior court of Cook county are reversed, and the cause is remanded to the latter court for further proceedings in accordance with the views herein expressed.

Reversed and remanded.

(204 Ill. 444)

MILLER et al. v. RICH et al.

(Supreme Court of Illinois. Oct. 26, 1903.)

ADMINISTRATORS—PURCHASE OF PROPERTY BELONGING TO ESTATE—ACCOUNTING—LIMITATIONS—COLOR OF TITLE—SUIT—TIME OF COMMENCEMENT.

1. An administrator furnished his son money with which to buy up outstanding claims against the estate, and on sale of realty for the purpose of paying debts the administrator announced that the property was to be sold subject to the claims held by the son. The property was bought by the son at less than its real value, and paid for by turning over the purchased claims and giving a note. Later the son sold the property to his mother, receiving therefor her note, which he turned over to his father in settlement of the money borrowed from him to buy the outstanding claims against the estate. The mother then deeded the property to her husband, the administrator, receiving as consideration the note which she had given her son. *Held*, that the transaction was in fact a purchase of the property by the administrator, and consequently void.

2. Where property of a decedent's estate, sold for the purpose of paying debts, was purchased at the administrator's sale, by the administrator's son, with money furnished by the father, and the property was afterwards deeded by the son to his mother, and by her to her husband, none of the deeds constituted color of title made in good faith so as to bring the case within the seven-year statute of limitations.

3. A docket entry recited the commencement of a suit, giving the title and the nature of the action, stating the latter to be a bill to set aside a sale by an administrator. The record showed that defendants demurred to the bill, and also filed an answer within a few months after the bill was filed, and an amended answer about a year later. Several years later an order was entered allowing complainants to supply lost papers. Thereunder a copy of the bill was filed, and the cause was finally submitted on such supplied bill and the other pleadings. *Held*, that the suit was begun at the time the first bill was filed, and not at the time of the filing of the supplied bill.

4. Where a sale made by an administrator to himself is set aside on bill filed by the heirs, the administrator, as trustee, is entitled to have an account stated, in which he should be charged with rents and profits received from the property, and credited with moneys paid out in discharge of valid debts against the estate, and for taxes and such improvements as have substantially benefited the estate.

Error to Circuit Court, Union County; Joseph P. Roberts, Judge.

Suit by William I. Miller and others against William C. Rich and others. From a decree for defendants, plaintiffs bring error. Reversed.

This is a bill in chancery filed by the heirs of Isaac Miller, deceased, to set aside a deed made by the defendant William C. Rich, Sr., as administrator of the estate of said Miller, to his son, Will J. Rich, and to set aside a deed made by said Will J. Rich to his mother, Milly C. Rich, and to set aside the deed from the said Milly C. Rich to her husband, William C. Rich, Sr., the original administrator of the estate, and for an accounting between the complainants and defendants for the rents and profits. The bill was answered by the three defendants be-

low, and upon a final hearing the court below found the equities of the case with the defendants, and dismissed the bill at the cost of the complainants, to which exception was taken by the complainants. The present writ of error is sued out for the purpose of reviewing such decree.

The original bill in the case was filed on March 10, 1893, and the original answer thereto was filed on December 4, 1893, and the replication to that answer was filed on June 26, 1894. Subsequently, upon motion of the complainants, leave was granted to them to supply the lost papers, and, under an order of court, complainants filed a copy of the original bill, which was lost.

The pleadings and proofs show substantially the following facts: Isaac Miller died on January 9, 1880, leaving Surelda E. Miller, his widow, and the following children, to wit: Christina Lewis, Sarah A. James, George Miller, Clarinda E. Smith, Malinda Sides, Joshua Miller, and Easter A. Miller, afterwards Easter A. Armstrong; and the following grandchildren, to wit: Robert Collier and Andrew Collier, children of a deceased daughter, named Mary Collier, and William I. Miller and John Miller, children of a deceased son, named Alexander Miller. After Isaac Miller's death his son George Miller died, leaving a daughter, Easter A. Miller, and after his death Sarah A. James died, leaving two children, to wit, William James and George James; and after her father's death Christina Lewis died, leaving a son named William Allen Lewis; and on June 15, 1892, Joshua Miller, the son of Isaac Miller, died at the age of 18 or 19 years.

When the original bill was filed on March 10, 1893, the following were the children of Isaac Miller, deceased, to wit: Easter A. Armstrong, Clarinda E. Smith, and Malinda Sides; and the following were his grandchildren, to wit: William I. Miller, John Miller, Easter A. Miller, William James, George F. James, William Allen Lewis, Robert Collier, and Andrew Collier. Four of these children were minors when the original bill was filed, and sue by their next friends.

At the time of his death, Isaac Miller owned 360 acres of land in Union county, where he lived, described as follows: The north half (or the northeast quarter and the northwest quarter) of section 11, and the southeast quarter of the southwest quarter of section 2, all in township 12 south range 3, west of third principal meridian, in Union county. At the time of his death he was the head of a family, and resided upon these premises with his widow and three of his minor children, to wit, Clarinda Miller, afterwards Clarinda Smith, Easter Adeline Miller, afterwards Easter A. Armstrong, and Joshua Miller. The widow and the three minor children last named lived on said premises as their homestead until the death of the widow about December 20, 1880. The three minor children were living on the land

at the time of the administrator's sale hereinafter mentioned, which took place on August 20, 1881. The homestead of the minors was not ascertained or adjudicated upon by the county court, nor was a homestead ever set off to them in any way. The present bill was filed March 10, 1893, about nine months after the death of Joshua Miller, who died on June 15, 1892, at the age of 18 or 19 years.

Before his death, Isaac Miller and his wife executed a mortgage dated August 18, 1879, upon the northwest quarter of the northeast quarter of said section 11, to secure a note for \$426.47, dated August 18, 1879, and payable to the order of Seth Tripp, guardian; on September 7, 1880, the note for \$426.47 was assigned by Seth Tripp, guardian, to A. Polk Jones.

In his lifetime, Isaac Miller and his wife executed another mortgage in 1868, or in 1878, to the board of school trustees of township 12, etc., to secure a certain note made by Isaac Miller for \$233 upon the northeast quarter of said section 11. There was a foreclosure of this mortgage and a decree of sale entered on September 5, 1879, and on January 31, 1880, the northeast quarter of section 11 was sold under said decree by the master in chancery to A. Polk Jones for \$110.41, and a certificate of sale was issued by the master to the purchaser, A. Polk Jones, bearing date January 31, 1880. Special executions were issued on April 13 and May 20, 1881, in favor of certain creditors, for the purpose of redeeming from said master's sale, and under said executions the northeast quarter of said section 11 was sold by the sheriff on May 28, 1881, to William C. Rich, Sr., for \$240, and a certificate of purchase was issued to him, which certificate of purchase he subsequently assigned to his son, Will J. Rich. Thereafter, on January 10, 1882, a sheriff's deed was issued to Will J. Rich, conveying the northeast quarter of section 11, which sheriff's deed was recorded on January 28, 1882.

On the 23d day of June, 1879, and in the lifetime of Isaac Miller, all of said 360 acres, to wit, the northeast quarter and the northwest quarter of said section 11, and the southeast quarter of the southwest quarter of said section 2, were sold for taxes to one Frank J. Hanners, who subsequently assigned his certificate of purchase to said Will J. Rich, and on January 28, 1882, a tax deed was issued to Will J. Rich, conveying said premises to him, which deed was recorded on March 8, 1882.

Taylor Dodd and R. A. Peery, for plaintiffs in error. Monroe C. Crawford and P. E. Hilleman, for defendants in error.

MAGRUDER, J. (after stating the facts). Isaac Miller died on January 9, 1880, owning the 360 acres of land here in controversy, and William C. Rich, Sr., was appointed ad-

ministrator of his estate on March 26, 1880. On May 9, 1881, William C. Rich, Sr., administrator of the estate of Isaac Miller, deceased, filed his petition in the county court of Union county for the sale of said 360 acres for the purpose of paying the debts of the estate. The petition alleged that the claims against the estate probably amounted in the aggregate to about \$2,301.07, including the widow's award; that the amount of the personal property, as appraised, was \$376.80, which was taken by the widow, and that the amount of the deficiency was probably about \$1,922.07. The testimony tends to show that the figures in the petition were incorrect, and that the claims against the estate were only about \$1,461.43, and the personal assets were about \$395.36, leaving a deficit, outside of the cost of administration, of \$1,066.07. On July 19, 1881, an order was entered directing a sale of the property to pay the debts. On August 20, 1881, the administrator sold all the property at public sale to his son, Will J. Rich, for the sum of \$215, for which amount Will J. Rich gave his promissory note for \$215, with one Willard as security, payable in 12 months, drawing 6 per cent. interest, and also secured by a mortgage on the 360 acres sold to him. At the sale the administrator stated that the amount of the bid must be so much over and above the claims against the estate which were held by his son.

On December 23, 1880, A. Polk Jones assigned to Will J. Rich the note for \$426.47, secured by mortgage upon the property. This note was held by Will J. Rich at the time of the administrator's sale on August 20, 1881. On the same day, December 23, 1880, the master's certificate held by A. Polk Jones, and issued to him as purchaser at the sale of the northeast quarter of section 11 on January 31, 1880, under the decree of September 5, 1879, was assigned by Jones to Will J. Rich. When the administrator's sale took place on August 20, 1881, Will J. Rich held the sheriff's certificate of sale, which had been assigned to him by his father, William C. Rich, Sr., who purchased the property at the execution sale made on May 28, 1881, conveying the northeast quarter of said section 11. When the administrator's sale was made on August 20, 1881, Will J. Rich also held, by assignment, the certificate of purchase, which had been issued to the purchaser at the tax sale, and upon which he subsequently received a tax deed on January 28, 1882. The proof tends to show that the amount for which the property was sold at the administrator's sale to Will J. Rich was \$1,027.19. This amount was made up of the \$215 bid by Will J. Rich at the administrator's sale, and \$812.19 of claims then held by him against the estate. These claims were the amounts paid out for the Seth Tripp note, and for taxes, and for the certificate of purchase issued at the sheriff's sale, at which his father was the purchaser. The proof

shows that all the money used by Will J. Rich to buy up these claims against the estate, amounting to \$812.19, and to pay the amount of his bid over and above these claims, to wit, \$215, was advanced by William C. Rich, Sr. An administrator's deed was made out to Will J. Rich, the son, by William C. Rich, Sr., as administrator, dated August 20, 1881, when the administrator's sale was made. Evidently, bidders were deterred from bidding at the sale by the statement that the purchaser must buy the property subject to claims held by Will J. Rich. The testimony of the defendants tends to show that the premises were, at the time of the sale on August 20, 1881, worth from \$1,000 to \$1,300, but the testimony of the complainants tends to show that they were worth from \$3,000 to \$3,600.

First. It thus appears that Will J. Rich, the son of the administrator, used money furnished to him by the administrator himself to buy up the claims against the estate and to make his bid upon the property. We discover no evidence in the record that Will J. Rich ever paid any money upon his bid made at the sale on August 20, 1881. He not only owned the note and mortgage upon the property, which had been executed to Seth Tripp, guardian, but he held three deeds to the property, to wit, the administrator's deed executed to him by his father on August 20, 1881, conveying the 360 acres; a sheriff's deed conveying the northeast quarter of section 11, and executed on January 10, 1882; and a tax deed executed to him, and bearing date January 28, 1882, conveying all the property.

On November 24, 1882, Will J. Rich executed a deed to his mother, Milly C. Rich, the wife of William C. Rich, Sr., conveying to her the whole 360 acres. It is claimed by Will J. Rich that his mother paid him \$100 in cash, and gave him her note for \$1,400, making altogether \$1,500. It appears that, when the petition to sell the land was filed by the administrator in the county court of Union county, Will J. Rich was at first made a defendant, but before the order was made directing the property to be sold the petition was dismissed as to him, so that his attitude in relation to the property was not presented to the county court. Will J. Rich says in his testimony: "At the time of the land sale I owned the Seth Tripp note, the tax certificate, and the sheriff's certificate; my father advanced me the money paid on all the claims, and I paid him after I made the sale to mother when we settled; I don't know how much I paid him when we settled; I don't know what became of the Seth Tripp note and tax certificate."

In his testimony, W. C. Moreland, a lawyer and son-in-law of William C. Rich, Sr., says that Will J. Rich and his father had a settlement in December, 1882. At this settlement Will J. Rich turned over the note for \$1,400 which his mother had given him

to his father, to reimburse his father, as he claims, for the money which his father advanced to him to purchase the claims against the estate and to buy the property at the administrator's sale.

On July 5, 1886, Milly C. Rich executed a deed conveying all the premises to her husband, William C. Rich, Sr. William C. Rich, Sr., claims to have bought the premises of his wife, but he made the purchase by turning over to his wife her note for \$1,400, which she had given to their son, and which their son had turned over to William C. Rich, Sr., his father, the administrator. That William C. Rich, Sr., advanced the money to his son to buy these claims is stated by him in his report of sale to the county court. When the note for \$1,400 executed by Milly C. Rich to her son was turned over to William C. Rich, Sr., the latter was still administrator of the estate.

The record presents a case where the administrator of an estate sells property belonging to the estate at a price largely less than its value to his own son, he furnishing all the money used by his son in purchasing the property, and where the son, not long after he gets his deed from the administrator, transfers the property to his mother, the wife of the administrator, in exchange for his mother's note, and where the mother subsequently conveys the property to her husband, the administrator, in exchange for her own note. Clearly, the case is one where an administrator has purchased property of the estate, of which he is administrator, at his own sale. The facts proven lead to no other conclusion. A court of equity will not sustain such a transaction.

The heir has a right to file a bill in equity to set aside a sale of land by the administrator where the latter has made the purchase for himself. It makes no difference in such case that the intentions of the administrator are honest, and that there is no fraud in fact. The sale will be set aside upon the general ground that trustees and others occupying fiduciary relations cannot purchase on their own account the property intrusted to their management. Administrators act in a fiduciary capacity in the sale of property and settlement of estates. In *McCreedy v. Mier*, 64 Ill. 495, we said: "An administrator who procures an order of sale of realty cannot be permitted to become himself a purchaser at the sale. That position would be inconsistent with his fiduciary relations."

In *Miles v. Wheeler*, 43 Ill. 123, it was held that the purchase of real estate belonging to the deceased by an administrator, through the intervention of a third party at his own sale, is fraudulent per se; that it matters not that the sale was at public auction for a fair price, and made through the medium of a third party as a bidder, and to whom the administrator conveyed; that the law forbids all administrators, executors, and others sustaining a fiduciary relation from deal-

ing on their own account with the thing or the persons falling within that trust or relation; that it avails nothing to show that the intentions of the administrator were honest, and that there was no fraud in fact; that the law shields him from all temptation by the inflexible rule that he cannot buy at his own sale; that the reason of the rule is that the interests of the buyer and seller of the same property are necessarily antagonistic, and the only safe rule is one which absolutely forbids a trustee to occupy two positions inconsistent with each other.

In *Lagger v. Mutual Union Loan Ass'n*, 146 Ill. 283, 33 N. E. 946, we said: "The law forbids an administrator to purchase at his own sale, whether the purchase is in his own name, or in the name of another for his use."

Second. The defendants claim that they have been in possession of the property under claim and color of title, made in good faith, for seven successive years, and paid all the taxes upon the property during the years in question. The statute of limitations in regard to possession for seven years under color of title cannot be used as a defense in a case like this. Neither the administrator's deed, nor the sheriff's deed, nor the tax deed can be regarded as color of title made in good faith. The administrator's deed to Will J. Rich was a fraudulent deed, and, so far as the amounts paid for the sheriff's deed and the tax deed are concerned, it was the duty of the administrator and his son, under the circumstances of this case, and in view of the relations which they bore to the estate, to pay the money necessary to redeem from the sheriff's sale, and from the tax sale, for the benefit of the estate. In equity they were trustees, holding the titles which they had for the benefit of the estate, and therefore they cannot use the deeds, conveying to them such titles, as color of title made in good faith. *Hodgen v. Henrichsen*, 85 Ill. 259; *Hardin v. Gouveneur*, 69 Ill. 140; *Dalton v. Lucas*, 63 Ill. 337; *Oswald v. Wolf*, 129 Ill. 200, 21 N. E. 839; *Burton v. Perry*, 146 Ill. 71, 34 N. E. 60; *Coleman v. Billings*, 89 Ill. 183.

The first deed obtained by Will J. Rich was the administrator's deed of August, 1881. The next deed was his deed to his mother in November, 1882. The deed from Milly C. Rich to her husband, the administrator, was made in 1886. Even if the deed by the administrator to Will J. Rich, and the deed from the latter to his mother, could be regarded as supporting a color of title made in good faith, surely the deed made by Milly C. Rich to her husband, the administrator, cannot be regarded as claim or color of title made in good faith, because it was a deed which conveyed to him, as administrator, the property belonging to the estate of which he was administrator. But if this were not so, the proof shows that there was not a payment of taxes for a full period of seven years before March 10, 1893, when the original bill in this case was filed. There was no proof of the payment of

taxes, except by receipts given by the tax collector. There is no receipt in the list for the year 1887, and the receipt for the year 1889 is not signed by the collector. In view of these breaks in the continuity of the payments, there was no full period of seven years during which the taxes were paid, even if there were no fraud in the case, either actual or constructive, which deprived the deeds in question of the good faith required to make them valid claim and color of title. As we read the record, the position of the counsel for defendants in error, that no objection was made to the receipts for the years 1887 and 1889, is not well taken. The record shows that the complainants objected to each and every one of the tax receipts offered for the purpose of proving title and payment of taxes. Whatever admission was made was merely in reference to such of the tax receipts as actually showed a payment of taxes on the land in controversy.

Third. It is claimed by defendants in error that this suit must be regarded as having been begun at the June term, 1899, when the lost papers, including the bill and answer, were restored. We think the record fairly shows that the original bill in this case was filed on March 10, 1893, and that the copy which was subsequently filed in 1899 or 1900 was a copy of the lost bill filed on March 10, 1893, and was filed in the place of the lost copy pursuant to an order of court permitting it to be so filed. The docket entry on the first page of the record shows that there was an entry on the general docket giving the general number of the cause, and that the suit was commenced on March 10, 1893, giving the title of the suit, and the names of the attorneys and the nature of the action, which was a bill to set aside a sale by an administrator. This docket entry was as much a part of the record as any portion of it certified by the clerk. It is admitted by counsel for defendants in error that "there is no way of beginning a chancery suit but by filing a bill." The statement on the record, therefore, that suit was commenced on March 10, 1893, is a statement that a bill was filed on that day. The paper in the record, described as the supplied bill of complaint, is the document upon which the defendants below went to trial without objection; and an order of court was entered at the November term, 1900, allowing complainants below to supply lost papers; and an order of court was made at the March term, 1902, allowing the complainants to file copy of bill, which order also shows that the cause was submitted on bill, answer, and replication. Another order in the record shows that the cause was submitted to the presiding judge in the court below on the supplied bill at the March term, 1902. The record affirmatively shows, not only that the original bill was filed on March 10, 1893, but that the defendants below demurred to the bill, and were ruled to answer the same at the November term, 1893; and it also shows that they did

file their original answer on December 4, 1893, and that replication was filed on June 26, 1894, and the amended answer on June 29, 1895. The defendants appeared at the return term of court, November, 1893, and entered their appearance, and demurred to and answered the bill, and contested the case up to the final hearing. We are therefore of the opinion that the record shows that the original bill in this case was filed on March 10, 1893, and that the supplied bill was a copy of the original bill lost or destroyed.

Fourth. We have held that, where a sale made by an administrator to himself is set aside upon bill filed by heirs for that purpose, the administrator is a trustee, and as such is entitled to have an account stated, and that, in stating the account, he should be charged with the rents and profits received from the property, and credited with moneys paid out in discharge of valid debts against the estate, and with moneys paid out for taxes, and such improvements as have substantially benefited the estate, in accordance with the principles laid down in *Lagger v. Mutual Union Loan Ass'n*, supra, and the cases therein referred to.

Accordingly, the decree of the circuit court of Union county dismissing the bill is reversed, and the cause is remanded to that court with directions to proceed in accordance with the views herein expressed.

Reversed and remanded.

(204 Ill. 549)

ROYAL CIRCLE v. ACHTERRATH.

(Supreme Court of Illinois. Oct. 26, 1903.)

FRATERNAL INSURANCE—CERTIFICATES—INCONTESTABLE CLAUSE—CONSTRUCTION—ESTOPPEL—LOSS OF GOOD STANDING—WHAT CONSTITUTES—SUICIDE—CONFORMITY TO LAWS OF ORDER—CONSTRUCTION.

1. In an action on a life insurance policy, where the defense is suicide, the presumption, in the absence of evidence on the subject, is that insured was sane when he committed the deed.

2. A clause in a fraternal certificate of life insurance that it is to be incontestable after a certain date from the issuance of the policy is to be liberally construed in favor of the insured.

3. A provision in the constitution of a fraternal insurance society that a certificate issued to a member shall be incontestable after a certain date from the issuance of the policy, provided that the member continue in good standing and fully comply with the laws and rules of the association, and that all dues and assessments be paid as required, estops the society from contesting the certificate on the ground of suicide of the member, which, under another clause of the constitution, is declared to avoid the certificate.

4. A provision in the constitution of a fraternal insurance society, that if the member "continue in good standing" the certificate shall be incontestable after a certain date from the issuance thereof, refers to such good standing as exists up to the time of death, and hence suicide, though elsewhere declared to avoid the certificate, does not involve loss of good standing.

5. Where the constitution of a fraternal insurance society provides for a trial and con-

¶ 1. See *Insurance*, vol. 23, Cent. Dig. § 1663.

viction to establish loss of good standing, the commission of suicide by a member, which is elsewhere forbidden by the constitution, does not involve loss of good standing within the meaning of a clause providing that the certificate should be incontestable after a certain date, the member continuing in good standing.

6. Where the constitution of a fraternal insurance society provides for a forfeiture of certificates, in one clause, through a loss of good standing, to be determined by trial and conviction, and in another clause by suicide, the distinct enumeration of the two causes of forfeiture indicates that the latter was not intended to be included in the former, and hence a clause making the certificate incontestable where the member was in good standing is available to the beneficiary of a member who committed suicide.

7. A fraternal insurance contract provided that the certificate should be void if the member should die in consequence of the violation or attempted violation of the laws of any state or territory. *Held*, that suicide is not a crime under the statutes of this state.

8. One who actually accomplishes the commission of suicide is not guilty of an attempt to commit suicide.

9. An application for membership in a fraternal insurance society contained an agreement in one clause that the order should not be liable if the member committed suicide, and in another clause that he would make punctual payment of all dues and assessments and conform to the "constitution, laws, and rules" of the order. One section of the constitution of the society substantially stated the provisions of the first of the above sections of the application, and another section of the constitution provided that if the member should pay all dues and assessments and conform to the "laws and rules"—thus omitting the word "constitution"—of the order, the certificate should be incontestable after a certain date. *Held*, that the "laws and rules" of the order to which the member was to conform in order that the certificate should be incontestable were those mentioned in the latter of the above clauses of the application, and did not include the former clause of the application, which was an independent cause of forfeiture, nor the similar clause of the constitution.

Appeal from Appellate Court, Third District.

Action by Elizabeth Achterrath against the Royal Circle. From a judgment of the Appellate Court (106 Ill. App. 439) affirming a judgment for plaintiff, defendant appeals. Affirmed.

This is an action of assumpsit brought in the circuit court of Hancock county by the appellee, Elizabeth Achterrath, against the Royal Circle, a fraternal insurance society, to recover on a certificate issued by said society to one William Achterrath, husband of plaintiff below.

The certificate sued upon was dated January 19, 1899, and provides as follows: "This certificate is issued to William Achterrath, a member of Augusta Circle No. 194, The Royal Circle, located at Augusta, Illinois, upon evidence received from said circle that said member is a contributor to the benefit fund of this order, upon condition that the statements and representations made by said member in the petition for this membership in said circle, and the statements certified to by him to the worthy medical examiner, both of which are filed in the supreme secretary's office, be made a part of this contract, and

upon condition that the said member complies in the future with the laws, rules and regulations now governing the said circle and fund, or that may hereafter be enacted by the supreme circle to govern said circle and fund. These conditions being complied with, the supreme circle of the Royal Circle hereby promises and binds itself to pay out of its benefit fund to Elizabeth Achterrath, wife, not to exceed \$2,000.00 in accordance with and under the provisions of the laws governing said fund, upon satisfactory evidence of the death of said member, and upon the surrender of this certificate; or not to exceed \$1,000.00, in accordance with and under the provisions of the laws governing said fund, upon satisfactory evidence of the permanent total disability of said member by accident; or not to exceed \$500.00 in the event of the loss of a foot or a hand by accident; provided always, that said member is in good standing in this order at the time of said death or disability; and provided also, that this certificate shall not have been surrendered by said member, and another certificate issued at the request of said member, in accordance with the laws of this order." The certificate was signed by the supreme president and the supreme secretary, and the corporate seal was attached; and written upon the same were the following words, to wit: "I accept this certificate on the conditions named herein." On November 22, 1899, the sum of \$500 was paid on the certificate on account of the loss of one hand by the insured, as appears from an indorsement on the certificate, leaving \$1,500 due thereon.

May 8, 1901, William Achterrath, the insured, came to his death by suicide, he having shot himself in the head with a revolver at his home in Augusta township.

The declaration sets out the certificate in *hæc verba*, and avers, among other things, that William Achterrath died on May 8, 1901, and that he was at that time in good standing, and had complied with all the laws, rules, and regulations of the society; and that his widow within a reasonable time furnished appellant with satisfactory evidence of his death, and offered to deliver up the certificate upon payment to her of the amount due thereon, etc.

The defendant below filed a plea of the general issue, and two special pleas. The second plea averred that it was provided in the contract of insurance that if the insured should die by self-destruction the certificate should be null and void, and that William Achterrath did die by self-destruction, and therefore the certificate and contract were of no binding effect on the defendant, and that defendant was thereby released from said contract. The third plea alleged that, in and by the application for membership signed by William Achterrath, which was a part of the contract of insurance, it was provided that if he should die by suicide, whether sane or insane, the defendant should not

be held liable under the contract; and avers that he did commit suicide, whether sane or insane, and therefore the contract and certificate were wholly null and void. Issue was joined upon the plea of general issue.

Two replications were filed to the second plea, the first denying that it was provided in the contract that self-destruction of Achterrath should render the contract void, and the second setting up that Achterrath did not die by self-destruction. The defendant below joined issue upon these replications. To the third plea a replication was filed to the effect that Achterrath did not make application for membership, in which it was agreed if he should die by suicide, whether sane or insane, the defendant should not be held liable; and the further replication was filed that Achterrath did not commit suicide. Issue was joined upon these replications.

The appellee, the plaintiff below, filed a replication, spoken of as replication No. 6, to the second and third pleas. In this replication, after referring to the organization of the society or order, and to its adoption of a constitution and by-laws, and after referring to section 1 of article 1 of the constitution, providing for the name and location of the association, and to section 1 of article 4, providing that the supreme circle may grant authority to organize any number of local circles, etc., and after setting forth that in article 2 of the constitution the object of the society was stated to be, first, for social and fraternal benefits to all acceptable white persons between the ages of 18 and 59 years; second, to provide for the families of the deceased members, and to assist the disabled from old age or accident by equitable assessments upon its members; and, third, to provide death benefits to all its beneficiary members, etc.; and after referring to section 1 of article 3 of the constitution, providing that white persons of either sex who shall pass the required medical examination may become beneficial members by complying with all the laws and regulations of the order as set forth in its by-laws and the benefit certificate, it is then averred that by section 1 of article 16 of the constitution of the order it is provided that, "after two years from the date of a certificate, the member continuing in good standing, the only conditions binding upon the member are the agreements as to his full compliance with the laws and rules of the association, and that all dues and assessments shall have been paid as required. In all other respects the payment of any sum due under any certificate, issued to a member, shall be indisputable and incontestable." The sixth replication then avers that William Achterrath became a member of the order under the provisions of the constitution and by-laws in force at that time, and at the time the certificate was issued, and so remained during his lifetime; that he was in good standing in the order at the time of his death, and that, under said section 1 of ar-

ticle 16, the amount due plaintiff is incontestable and indisputable by defendant, and that defendant is estopped from refusing payment on account of Achterrath's death by self-destruction.

The plaintiff below filed a further replication, spoken of as replication No. 7, to the second and third pleas, averring that, after the defendant knew of Achterrath's death by self-destruction, it collected and accepted from the plaintiff 85 cents, the full amount of one assessment levied against Achterrath, and still retains the money, and thereby waived the provision against suicide, and cannot claim exemption on account thereof.

The defendant below, appellant here, filed a rejoinder to the sixth replication, averring that, while it admitted its incorporation, and that the constitution and by-laws provided the things set forth in the replication, yet Achterrath did not make full compliance with the laws, rules, and regulations, in that he committed suicide or self-destruction; that he died by his own hand, willfully and intentionally shooting himself with a pistol; and that, therefore, section 1 of article 16 is not binding on the defendant, but rendered the contract null and void, wherefore Achterrath lost his good standing, and was not at his death in good standing; and that the defendant was discharged from liability under the contract. The plaintiff below demurred to this rejoinder to the sixth replication, and the demurrer was sustained. The defendant below then filed its amended rejoinder to the sixth replication, therein admitting the incorporation of the plaintiff under the laws of Illinois, and that its constitution and by-laws provided the things set forth in the replication, but alleging that William Achterrath was not in good standing at the time of his death. To this rejoinder plaintiff added the smiliter.

Defendant below filed a rejoinder to plaintiff's seventh replication, setting up that it was provided by section 1 of article 12 of the constitution and by-laws of defendant, which were a part of his contract, that all assessments are due and payable to the local secretary of the circle to which the member belongs on the first day of each month, and that the assessment referred to in the seventh replication was due and payable on May 1, 1901, prior to the death of Achterrath; that defendant had a right to accept it; that defendant had no knowledge of the manner of Achterrath's death until after the assessment was due and payable, and, by receiving it, did not waive any part of the contract providing that self-destruction should avoid the contract. Plaintiff joined issue upon this rejoinder.

The cause was tried before the court and a jury. The jury found a verdict for the plaintiff below, and assessed her damages at \$1,500. Motion for new trial was sustained, and the verdict was set aside. A second trial then took place with the same result, to wit,

verdict and judgment in favor of plaintiff below for \$1,500 and costs. The motion for new trial after the rendition of the second verdict was overruled. Upon appeal to the Appellate Court the judgment of the circuit court in favor of plaintiff for \$1,500 and costs has been affirmed. The present appeal is from such judgment of affirmance.

Upon the trial, the plaintiff below not only introduced the benefit certificate already set forth, but also the application of William Achterrath for membership in the circle, and the constitution and by-laws of the circle in force January 21, 1901. She also introduced in evidence the proofs of loss, signed by her and made under oath to the supreme circle, in which she gave suicide as the cause of the death of her husband, to which proofs of loss was attached the sworn statement of the physician, procured by her to make medical proof of the death, which statement also gave suicide as the cause of the death. It also appeared in evidence that the original verdict of the coroner's jury was that the insured "came to his death by two wounds in the head inflicted by his own hand," etc.

The eighth clause of the application of the deceased for membership in the order was as follows: "I further agree that this order shall not be responsible under this contract, if my health shall become impaired by the use of narcotics, or alcoholic, vinous, or malt liquors, or shall die in consequence of a duel, or by suicide, whether sane or insane, or by the hands of a beneficiary hereunder, (except by accident), or in consequence of the violation or attempted violation of the laws of any State or Territory of the United States." The ninth clause of the application, following immediately after the eighth clause above set forth, is as follows: "I agree to make punctual payment of all dues and assessments for which I may become liable, and to conform in all respects to the constitution, laws, rules and usages of this order now in force, or which may hereafter be adopted by the supreme circle thereof."

Section 5 of article 10 of the constitution of the order is as follows: "If a member dies in consequence of a duel, or by the hands of justice, or by the practice of any pernicious habit that obviously tends to shorten life, or by self-destruction, or by the use of intoxicating liquor, or by or on account of the violation of any criminal law of any State, province or municipality, then, in all such cases, the certificate of membership shall be null and void, but the board of directors, if in their judgment the circumstances attending such death warrant it, may, at their option, without prejudice, pay any sum not exceeding the full amount thereof."

Section 1 of article 14 of the constitution provides as follows: "If a member becomes intoxicated or commits an offense against a member or the good name of the order, or

violates the constitution or the laws of the order, or commits any dishonorable act, or is known to have had dishonorable or unchaste character or reputation at the time of his or her admission into the order, the person knowing it shall communicate the facts in writing, and the names of all the witnesses, to the worthy ruler of the local circle to which the offending member belongs, who shall at once appoint a committee of five discreet persons, members of the local circle, who shall proceed to investigate the matter, and report in writing the testimony, and all the facts bearing upon the case, whereupon the worthy ruler shall instruct the secretary to notify all the officers of the local circle to meet as a committee, and hear all the testimony on both sides. The accused shall be notified to appear to defend himself with witnesses. This committee of officers shall report their recommendations to the next meeting of the local circle, when final action will be taken. The committee's recommendation, adopted by a majority vote of the local circle, shall be final, but no such vote shall be taken unless notice of such meeting be sent to each member of the local circle."

Don E. Minor, Dunn & Kenney, and Risse & Risse, for appellant. Apollos W. O'Haria and Sterling P. Lemmon, for appellee.

MAGRUDER, J. (after stating the facts). In the case at bar, the proof shows that William Achterrath, to whom the benefit certificate sued upon was issued, died by his own hand. While the affirmative proof in the case does not show whether the deceased was sane or not at the time of his death, yet there is no proof that he was in such a state of mind as to be unconscious of the physical nature of the act of self-destruction, and therefore, in the absence of any proof as to his insanity, all the presumptions are in favor of his sanity. Grand Lodge I. O. M. A. v. Wieting, 168 Ill. 408, 48 N. E. 59, 61 Am. St. Rep. 123; Dickerson v. Northwestern Mutual Life Ins. Co., 200 Ill. 270, 65 N. E. 694. It follows that, under the terms and provisions of the benefit certificate, and of the application for membership, and of the constitution and by-laws of the appellant association, except those contained in section 1 of article 16 of the constitution of the order, the appellant would not be liable to the appellee in this suit. Consequently, the real and substantial, and only material, question in the case, is whether the remaining \$1,500 due upon the face of the benefit certificate is indisputable and incontestable by the appellant on account of the provision contained in section 1 of article 16 of the constitution, that section being indisputably a part of the contract between the society and the insured. In other words, is the appellant estopped from refusing payment on account of Achterrath's death by suicide, by reason

of the "incontestable clause" quoted in the statement preceding this opinion as section 1 of article 16 of appellant's constitution?

Section 1 of article 16 provides that "after two years from the date of a certificate, the member continuing in good standing, the only conditions binding upon the member are the agreements as to his full compliance with the laws and rules of the association, and that all dues and assessments shall be paid as required. In all other respects the payment of any sum, due under any certificate issued to a member, shall be indisputable and incontestable."

Before proceeding to consider the proper meaning and interpretation of this incontestable clause, it may be well to refer to some of the authorities which have considered the force and effect to be given to such clauses. Courts have frequently recognized the validity of clauses making policies of life insurance and benefit certificates in benevolent associations incontestable by the company or association under certain conditions. Stipulations to the effect that a policy or certificate shall become incontestable for fraud in procuring the same after the lapse of a specified period from the date of its issue have been held valid as creating a short statute of limitations in favor of the insured, and as giving the insurer a limited period for the purpose of testing the validity of the policy. In such cases the company or association cannot set up fraud as a defense if the period so fixed is sufficient to enable the company or association, by the exercise of proper diligence, to ascertain whether fraud has been practiced or not. Such clauses, making a policy or certificate incontestable for fraud, have fixed such period at from one to three years from the date of the issuance of the policy or certificate. *Massachusetts Life Assn. v. Robinson*, 104 Ga. 256, 30 S. E. 918, 42 L. R. A. 261; *Patterson v. Natural Premium Mutual Life Ins. Co.*, 100 Wis. 118, 75 N. W. 980, 42 L. R. A. 253, 69 Am. St. Rep. 899; *Wright v. Mutual Benefit Life Assn.*, 118 N. Y. 237, 23 N. E. 186, 6 L. R. A. 731, 16 Am. St. Rep. 749; *Clement v. New York Life Ins. Co.*, 101 Tenn. 22, 46 S. W. 561. "It has been held that where a policy provides that it shall be incontestable after a certain period, except for certain causes, death by suicide not being one of the excepted causes, such clause will apply in case of the death of the insured by suicide, notwithstanding the policy contains another clause providing that death by suicide is not a risk which the company assumes." 19 Am. & Eng. Ency. of Law (2d Ed.) p. 80; *Mareck v. Mutual Reserve Fund Life Assn.*, 62 Minn. 39, 64 N. W. 68, 54 Am. St. Rep. 613; *Goodwin v. Provident Savings Life Assurance Assn.*, 97 Iowa, 226, 66 N. W. 157, 32 L. R. A. 473, 59 Am. St. Rep. 411; *Simpson v. Life Ins. Co.*, 115 N. C. 393, 20 S. E. 517; *Mutual Reserve Fund Life Assn. v. Payne* (Tex. Civ. App.) 32 S. W. 1063; *Mur-*

ray v. State Mutual Life Ins. Co., 22 R. I. 524, 48 Atl. 800, 53 L. R. A. 742; *Kline v. National Benefit Assn.*, 111 Ind. 462, 11 N. E. 620, 60 Am. Rep. 703. In interpreting incontestable clauses, several well-known rules of construction are adopted as being peculiarly applicable to contracts of this class. One of these rules of construction is that such contracts are to be liberally construed in favor of the insured. In *First National Bank v. Insurance Co.*, 95 U. S. 673, 24 L. Ed. 563, it was said that, "the policy having been prepared by the insurers, it should be construed most strongly against them." In *Thompson v. Insurance Co.*, 186 U. S. 297, 10 Sup. Ct. 1019, 34 L. Ed. 408, it was said: "If a policy is so drawn as to require interpretation, and to be fairly susceptible of two different constructions, the one will be adopted that is most favorable to the insured." See, also, *Massachusetts Life Assn. v. Robinson*, 104 Ga. 277, 30 S. E. 918, 42 L. R. A. 261. In the *American & English Encyclopedia of Law*, vol. 19 (2d Ed.) p. 80, it is said: "In regard to matters which would have the effect of defeating or destroying the contract, if there is a reasonable doubt as to the extent of the application of the incontestable clause it must be solved in favor of the beneficiary, and stipulations in the policy to the contrary must yield. Thus it has been held that a clause in the policy providing that 'if the terms of this contract be complied with it shall be incontestable after one year from its date,' though the meaning is somewhat doubtful, will relieve the insured from the effect of a false warranty after the expiration of one year. * * * So it has been held that where a policy omits the 'suicide clause,' but contains a clause making it absolutely incontestable from the date of its delivery and acceptance, except for nonpayment of premiums or misstatement of age, intentional suicide while sane, although technically a crime, cannot be set up as a defense under another clause of the policy in effect providing that death 'in consequence of or in violation of law' is not a risk covered by the policy."

So, in *Mareck v. Mutual Reserve Fund Life Ass'n*, supra, it was said: "If there is a reasonable doubt as to the extent of the application of the 'incontestable clause,' it must be solved in favor of the beneficiary. This clause was inserted in the contract by the company itself. * * * Another reason why the insured might well understand the clause as meaning this [that is, that the company agreed to waive the condition as to suicide after five years], and why the company itself may have intended it to have that meaning, is the fact that it is the custom of many life insurance companies to limit the operation of conditions as to suicide to a fixed period, and to make their policies thereafter incontestable on that ground." In the case last referred to, of *Mareck v. Mutual Reserve Fund Life Ass'n*, there was

written in ink across the face of the policy, and forming a part of it, the following: "After five years from the date of this certificate, it is incontestable for any cause, except nonpayment of dues or mortuary assessments at the times and places, and in the manner herein provided, the age of the member being correctly stated in the application for this certificate." The age of the insured was correctly stated in his application, and all dues and mortuary assessments were duly paid up to the time of his death, and more than five years after the date of the certificate the insured came to his death by his own hand; and it was there held that the incontestable clause applied, and that the company was liable for the full amount named in the life insurance policy. In *Goodwin v. Provident Savings Life Assurance Ass'n*, 97 Iowa, 234, 66 N. W. 159, 32 L. R. A. 473, 59 Am. St. Rep. 411, it appeared that by the terms of the policy it was incontestable after two years from its date, except for fraud in procuring it, subject, however, to stipulations regarding payments of premiums and extrahazardous occupations, and it was there said by the court: "The tenets established for the guidance of courts in such matters are well understood, and no one is better established than that in all cases the policy must be liberally construed in favor of the assured, so as not to defeat, without a plain necessity, his claim for indemnity. And when the words used may, without violence, be given two interpretations, that which will sustain the claim and cover the loss should be adopted. * * * The proper construction of this policy, taken in connection with the application, we think, is that the policy does not cover death by suicide occurring within two years from the date of its delivery, but that after two years it is incontestable except upon the grounds stated therein. This construction will give effect to all the provisions of the policy, and, as such a result is always sought for by courts in interpreting all classes of contracts, we are quite content with it. We are the better satisfied with this conclusion because it seems that, in life insurance, certain companies limit the operation of the conditions as to suicide to a fixed period, and make their policies incontestable on that ground thereafter."

An application of the rules thus announced in relation to these incontestable clauses in policies of insurance and benefit certificates leads to the conclusion that the appellant is estopped from denying its liability to the appellee upon the benefit certificate, here sued upon, by reason of the provision contained in section 1 of article 16 of the constitution. It is claimed by the appellant that William Achterrath did not continue in good standing by reason of the fact that he committed suicide. When the constitution provides that "after two years from the date of a certificate, the member continuing in

good standing, the only conditions binding upon the member are the agreements," etc., it is not meant that by the act of taking his life the member does not continue in good standing. The meaning is that he must continue to be in good standing during the period of two years after the issuance or date of the certificate, and up to the time of his death. The loss of good standing, as here contemplated, is not such loss as that occurring by the act of death, but the reference is to such good standing as exists up to the time of the death. The life of the insured is ended the moment the act of suicide is performed, and there is no interval for loss of good standing in the order. In the next place, section 1 of article 14 of appellant's constitution, as quoted in the statement preceding this opinion, provides for affirmative action to be taken by the order in case of any offense against the order being committed by the member. The accused must be given an opportunity to be heard, and evidence must be taken by a committee, and a report made to the lodge, and a vote had upon the report or recommendations of the committee. As the loss of good standing of the member must be established by a trial and conviction of the offense charged against him, it cannot be said that suicide is such a loss of good standing as is contemplated by section 1 of article 16, as no investigation or trial could occur to establish the loss of good standing after a member's death.

When a certificate of membership is issued to a member, that certificate is evidence of his good standing at the time of its issue, and such good standing will be presumed to continue until there is proof that it no longer exists. A member is said to be in good standing when he complies with the laws, rules, usages, and regulations of the order. Such compliance necessarily includes punctual payment of all dues and assessments for which the member may become liable. Good standing also means good conduct, that is, freedom from the violation of those requirements which indicate the benevolent purposes of the society, or express its intention to insist upon a high standard of character among its members. *Independent Order of Foresters v. Zak*, 136 Ill. 185, 26 N. E. 593, 29 Am. St. Rep. 318; *Royal Templars of Temperance v. Curd*, 111 Ill. 284. The words of the certificate here sued upon are as follows: "Provided always that said member is in good standing in this order at the time of said death." In relation to words of a similar kind we said, in *Independent Order of Foresters v. Zak*, supra: "Under such a constitution as that of appellant, the loss of good standing must be shown by some official action on the part of the organization. * * * The order is a corporate body. The attitude of a corporate body towards one of its members can only be known through its action as such corporate body. The only proper evidence of such action will be the records or proceedings of the organiza-

tion itself." It is clear that, inasmuch as loss of good standing on the part of a member must be thus established by corporate action, such loss of good standing does not include the act of the member in committing suicide. See, also, Niblack on Accident Insurance and Benefit Societies (2d Ed.) §§ 155-157, inclusive; also § 323. At section 323 of the second edition of Niblack's work on Accident Insurance and Benefit Societies, the author says: "Proof that the society recognized the decedent as a member up to a short time before his death, in connection with the presumption that all persons follow such laws, rules, and regulations as they are subject to, is sufficient evidence of the good standing of decedent to maintain the action." It is not denied in this case that the deceased, William Achterrath, paid all his dues, and conformed in every respect to such requirements of the society as entitled him to a good standing up to the time of his death, independently and outside of the fact that he died by his own hand. 2 Bacon on Benefit Societies and Life Insurance (2d Ed.) § 414.

Again, the constitution and by-laws of the appellant society, which are a part of the contract made by it with the deceased, recognize a distinction between loss of good standing in the society, and self-destruction. A member's certificate may become void by his loss of good standing in the order, but such loss of good standing is determined, as a general thing, by a trial and conviction in the order. When, however, a member takes his own life, no trial can be had, and none is required by the constitution of the order. The act of suicide works a forfeiture of the certificate, not because the member is thereby deprived of his good standing in the order at the time of his death, but because, aside from all question of good standing, it is especially provided that suicide in and of itself shall defeat a recovery. If the intention was that loss of good standing in the order always occurred when death was from self-destruction, then there would be no occasion for providing especially against suicide. In such case it would only be necessary to provide generally that loss of good standing should work a forfeiture of the policy, and, if the commission of suicide is included in the loss of good standing, the special provisions against suicide would be unnecessary.

Counsel for appellant, however, claim that suicide is a crime, and that, therefore, the appellant is not liable under the provisions of its constitution, which make the certificate null and void if a member dies on account of the violation of any criminal law of any state, province, or municipality. But suicide is not a crime under the statutes of this state. In New York, although suicide is not a crime, an attempt to commit suicide is a crime, but it has been held in that state that the fact that a member killed himself is not a defense to an action under a provision of the contract that it should be void if he should die "in

violation of, or attempt to violate, any criminal law." *Darrow v. Family Fund Society*, 116 N. Y. 537, 22 N. E. 1093, 6 L. R. A. 495, 15 Am. St. Rep. 530. In *Kerr v. Minnesota Mutual Benefit Ass'n*, 39 Minn. 174, 39 N. W. 312, 12 Am. St. Rep. 631, where a policy of insurance provided that "if the assured shall die in, or in consequence of, the violation of any criminal law of any country, state, or territory in which the assured may be, this certificate shall be null and void," it was held that death by suicide is not, within the proper meaning of the policy, to be considered as the violation of law therein referred to; and in that case it was said by the Supreme Court of Minnesota: "And under the general language here used, which must be construed favorably to the assured and strictly as against the company, the violation of law referred to in the policy ought not, we think, to be construed to mean or include suicide. Suicide, though strictly a crime, is not reckoned among offenses or violations of law, such as the language of the policy would be commonly understood to refer to."

Counsel for appellant also say that, while suicide itself may not be a crime, yet the attempt to commit suicide is a crime. But "an attempt to commit crime imports a purpose not fully accomplished to commit it. It is the attempt to commit suicide that is the crime, while the taking of one's own life is no violation of the criminal law. * * * While the attempt to commit suicide is a crime, the accomplishment of the purpose to do so is not." *Darrow v. Family Fund Society*, supra. In the case at bar, suicide was actually accomplished, and therefore it cannot be said that the deceased was guilty of the attempt to commit suicide. "If the act fails to accomplish its purpose, it constitutes an attempt; but, if the result of it is the consummation of the purpose, the act is not commonly designated as an attempt." *Darrow v. Family Fund Society*, supra.

The benefit certificate issued to the deceased was issued January 19, 1899, and his death took place May 8, 1901, more than two years after the issuance of the certificate. Inasmuch as he continued to be in good standing up to the time of his death, the question arises as to the meaning of that part of section 1 of article 16 which reads as follows: "The only conditions binding upon the member are the agreements as to his full compliance with the laws and rules of the association, and that all dues and assessments shall be paid as required. In all other respects the payment of any sum due under any certificate issued to a member, shall be indisputable and incontestable." After the expiration of the two years from the date of the certificate, the only conditions binding upon William Achterrath were the agreements as to his full compliance with the laws and rules of the association, and that all dues and assessments should have been paid as required. It is not denied that he paid all dues

and assessments as required; and the only question remaining is whether the agreements as to his full compliance with the laws and rules of the association include or exclude the provisions in regard to suicide and self-destruction.

The certificate in this case provides that the statements and representations made by Achterrath in the petition or application for his membership in the circle shall be made a part of the contract embodied in the certificate. When we look at the application for membership, we find two agreements embodied in the eighth and ninth clauses of the application, and following the one upon the other. By the first of these agreements, Achterrath says: "I further agree that the order shall not be responsible under this contract, if * * * I shall die * * * by suicide, whether sane or insane," etc. By the terms of the second agreement, embodied in clause 9, he says: "I agree to make punctual payment of all dues and assessments for which I may become liable, and to conform in all respects to the constitution, laws, rules, and usages of this order now in force, or which may hereafter be adopted by the supreme circle thereof." By agreeing that the order shall not be responsible under the contract if he should die by suicide, whether sane or insane, he made an agreement which stood by itself, and was not dependent upon anything in the constitution, laws, rules, or usages of the order. It is not to be presumed that, when he made the agreement embodied in the ninth clause of the application, it was intended to repeat what was agreed to in the eighth clause. Therefore, when by the ninth clause he agreed to conform in all respects to the constitution, laws, rules, and usages of the order, the intention evidently was to refer to such parts of the constitution, laws, rules, and usages of the order as were not embraced in what was agreed to by the terms of clause 8. If the language in clause 9 was broad enough to cover the agreement that the order should not be responsible in case of his death by suicide, then it was unnecessary to make the separate agreement in regard to dying by suicide which is embodied in clause 8. In construing two clauses of a contract following one upon the other, a construction will not be adopted which makes one a repetition of the other. It is true that, by section 5 of article 10 of the constitution, it is provided that "if a member dies * * * by self-destruction * * * the certificate of membership shall be null and void." But all upon this subject that is embodied in section 5 of article 10 of the constitution is contained in the agreement made by the insured in clause 8 of the application. It is therefore to be presumed that the agreement in clause 9 of the application did not refer to that part of section 5 of article 10 of the constitution which refers to self-destruction.

When, now, we come to section 1 of article 16 of the constitution of the order, we find

substantially the same language which is embodied in clause 9 of the application. This application is made out upon a blank furnished by the order itself. Sections 1 and 3 of article 6 of the constitution refer to the subject of filling out the blank application by the applicant and the signing of it by him, and to the report of the committee upon the application, and to the indorsement to be made upon the application, and to the approval of the application by the supreme medical director, and the return of the same to the office of the supreme secretary; and it is specifically stated that "each application for membership and indemnity must be in writing on blanks furnished by the order." The agreements, embodied in clauses 8 and 9 of the application in the present case, are parts of a printed blank furnished by the order. Unquestionably, the language of this printed blank was in the mind of the order when it framed section 1 of article 16. The following words in that section, to wit, "the agreements as to his full compliance with the laws and rules of the association," are substantially the same as the language used in clause 9 of the application. It is to be presumed, therefore, that the reference in section 1 of article 16 of the constitution is to the agreement embodied in clause 9 of the application, and not to the agreement embodied in clause 8 of the application. This conclusion receives indorsement from the fact that in clause 9 the agreement is "to conform in all respects to the constitution, laws, rules and usages of this order," etc. The language in section 1 of article 16 is "the agreements as to his full compliance with the laws and rules of the association." It will be observed that in section 1 of article 16 the word "constitution" is left out, and the words "laws and rules" are used. The provision that, "if a member dies * * * by self-destruction, * * * the certificate of membership shall be null and void," is a part of the constitution of the order; that is to say, it is section 5 of article 10 of the constitution. But the agreements mentioned in section 1 of article 16 do not refer to the constitution, but only to the laws and rules of the association. It cannot be supposed, therefore, that section 1 of article 16 referred to that provision of the constitution embodied in section 5 of article 10. It is true that the word "rules" is sometimes used in a sense sufficiently broad to embrace such rules as are embodied in the constitution as well as in the by-laws. But the omission of the word "constitution" from section 1 of article 16, when the same was used in clause 9 of the application, possesses a peculiar significance with reference to the interpretation of the language now under consideration.

It is thus apparent that if, after two years from the date of the certificate, the member continued in good standing—and such was the fact in regard to William Achterrath—the only conditions after that date binding

upon him were the agreements as to his full compliance with the laws and rules of the association, and not such other agreements as were made independently and outside of the laws and rules of the association. It follows that the words "in all other respects the payment of any sum due under any certificate, issued to a member, shall be indisputable and incontestable," were intended to mean that the benefit certificate should be incontestable after two years, except for certain conditions, among which suicide was not embraced. Our opinion is that here the incontestable clause applies even though the insured came to his death by suicide. The only conditions binding upon the member remaining in good standing after the lapse of the two years did not embrace any agreements in regard to suicide or death by his own hand. At any rate, the language of section 1 of article 16 leaves it doubtful whether such was the case or not. This being so, the rule applies that, where there is a reasonable doubt as to the extent of the application of the incontestable clause, it must be solved in favor of the beneficiary.

The action of the trial court in ruling upon the evidence, and in the giving and refusal of instructions, was in accordance substantially with the views here announced. The judgments of the Appellate and trial courts were based upon the theory that, under section 1 of article 16, the appellant was estopped from refusing payment on account of Achterrath's death by self-destruction. We think that they adopted the correct theory, and gave the correct interpretation to section 1 of article 16. Accordingly, the judgment of the Appellate Court is affirmed.

Judgment affirmed.

(204 Ill. 468)

ELMWOOD CEMETERY CO. v. PEOPLE.

(Supreme Court of Illinois. Oct. 26, 1903.)

TAXATION—CEMETERIES—EXEMPTION—JUDGMENT—ISSUES—VALIDITY OF TAX—ESTOPPEL—SUIT FOR TAXES—EVIDENCE—FORFEITURE—PRIMA FACIE CASE.

1. Where, in an action under Hurd's Rev. St. 1899, p. 1433, c. 120, § 230, to recover taxes due on forfeited property, the tax judgment, sale, forfeiture, and redemption record were introduced in evidence, showing forfeiture at regular tax sales, it would be presumed that there was an offer of the property for sale, and a failure to sell for want of bidders, and hence a prima facie case of forfeiture was established.

2. Where the court, on application for judgment for the general taxes for a certain year and prior years sustained objections to the effect that the premises in question were used exclusively as a graveyard, and hence exempt, the judgment was a bar to a suit based for the same taxes, and brought under Hurd's Rev. St. 1899, p. 1433, c. 120, § 230, to recover taxes on forfeited property.

3. A judgment against land by default for delinquent taxes is not conclusive against the owner as to the legality of the taxes, and he may show such fact in a collateral proceeding.

4. Const. 1870, art. 9, § 3, declares that property used for cemetery purposes may be exempted from taxation, and such exemption is

created by Hurd's Rev. St. 1899, p. 1393, c. 120, § 2. Laws 1879, p. 253, § 224, provides that a judgment for the sale of real estate for delinquent taxes shall estop all parties from raising any objections thereto which could have been presented as a defense, "except in cases where the real estate is not liable to the tax." Held, that an objection that certain real estate was used exclusively as a cemetery, and hence exempt, was an objection that it was not liable to the tax, and might be made on an application for judgment of sale.

Appeal from Circuit Court, Cook County; Richard S. Farrand, Judge.

Suit by the people against the Elmwood Cemetery Company to recover taxes. From a judgment in favor of plaintiff, defendant appeals. Reversed.

This is an action of debt, begun on July 29, 1901, in the name of the people of the state of Illinois against appellant, the Elmwood Cemetery Company, to recover the amount alleged to be due for taxes upon certain real estate, for the nonpayment of which the land was forfeited to the state. As originally instituted, the suit was for taxes for the years 1896, 1897, 1898, and 1899, and the sum of \$1,446.87 was alleged to be due for said taxes, penalties, interest, and costs. A plea of nil debet was filed, and afterwards there were filed certain additional pleas, alleging, first, that the land in question during each of the years named was used exclusively as a graveyard, or ground for burying the dead, and by virtue of the statute was exempt from taxation; second, that no action could be maintained for the taxes of 1896, because at the July term, 1897, of the county court of Cook county, the county treasurer and collector of that county had made application for judgment of sale of the land for delinquent taxes for the year 1896 and prior years, and, upon objections being filed by the owner setting up the exemption aforesaid, the county court had sustained such objections, and refused the application for sale; third, that no action could be maintained for the taxes of 1897, 1898, and 1899, because at the July term, 1900, of the county court of Cook county, application was again made by such treasurer and collector for judgment of sale of said land for delinquent taxes for the year 1899 and prior years, and, upon objections being filed setting up the exemption aforesaid, the objections were again sustained, and the application for judgment was again refused—all of which proceedings in the county court it is alleged took place prior to the commencement of the present suit. Replications to these pleas were filed, denying that the land in question was exempt, and denying that the land was used solely and exclusively as a graveyard, and setting up sundry proceedings, which it is alleged resulted in the forfeiture of the land in the years 1896, 1897, 1898, and 1899. A general demurrer was interposed to the replications to said second and third pleas, and was sustained; and thereafter, on February 21, 1902, an amended declaration was filed, in all respects similar

to the original declaration, except that it contained no claim on account of the taxes of 1896 and 1899, and relied solely upon the alleged forfeitures of 1897 and 1898, the amount alleged to be due being \$835.04. The defendant pleaded, first, the general issue; second, that the land was exempt from taxation by reason of its use for burial purposes; and, third, the proceedings above mentioned in the county court at the July term, 1900, were set up, wherein the county collector's application for judgment of sale of the land for the delinquent taxes for the year 1899 and prior years was refused.

It was admitted of record that the defendant below, the Elmwood Cemetery Company, owned the land in question on the 1st day of May and the 1st day of April, 1897 and 1898, and still owns the same. The land is described as follows: "(Except railroad and except north two acres of the east half of the south-west quarter of the south-west quarter) the north-east fractional quarter of section 26, town 40 north, range 12, containing 158.84 acres."

The people, plaintiff below, offered in evidence certified copies of the warrants to the collector for the taxes for the years 1897 and 1898, and a certified copy of tax judgment, sale, redemption, and forfeiture record for the year 1899, to the introduction of which objection was made, but it was received subject to such objection. The defendant below introduced a transcript of the record of the county court of Cook county in the matter of the application of the county treasurer and ex officio county collector for judgment for delinquent taxes for the year 1899 and prior years, which contains the objections filed by the Elmwood Cemetery Company on July 9, 1900, to the entry of judgment against the land aforesaid. Among the reasons urged in support of said objections were the following: "(1) Said premises above noted, at the time of levying and assessing said taxes, were and are, and consist of, lands used exclusively as graveyards and grounds for burying the dead. (2) Said Elmwood Cemetery Company is a corporation organized under the laws of the state of Illinois for the purpose of owning, managing, and conducting graveyards or places for burying the dead, and said premises comprise and constitute the entire real estate holdings of said Elmwood Cemetery Company, all of which are used and set apart to the sole and exclusive purpose of interment or burying the dead. (3) Said premises have, by permits in due form from the proper authorities, been established as graveyards or places of burial. (4) Said premises have not at any time since the assessment or levying of said tax been used for or appropriated to any other use or purpose than for such graveyards or grounds for burying the dead." Other objections were made, substantially the same as those above quoted, but applying more particularly to the tax for the year 1899.

Still other objections are made, which it is unnecessary to mention in order to decide the present controversy. In the proceedings of July, 1900, introduced by the defendant below, an order was entered on July 20, 1900, by the county court, wherein, after reciting that the cause came on to be heard upon the foregoing application and the objections thereto, it was ordered by the court that said objections, in so far as they related to the property of the cemetery company as hereinbefore described, "be and are hereby sustained, and said application for judgment is hereby refused as to said property." In the present proceeding here sought to be reviewed, and on February 28, 1903, the court entered a judgment order wherein it "found the issues in favor of the plaintiff and assessed the plaintiff's damages at the sum of \$835.04, to which finding of the court the defendant then and there excepted." The defendant made a motion for a new trial, which was overruled, and thereupon judgment was entered upon the finding, to the entry of which an exception was taken. The present appeal is prosecuted from the judgment so entered by the county court on February 28, 1903.

Donald L. Morrill, for appellant. Robert S. Iles, Robt. Delos Martin, and Stillman B. Jamieson, for the People.

MAGRUDER, J. (after stating the facts). This action of debt is brought under section 230 of the revenue law, which provides as follows: "The county board may, at any time, institute suit in an action of debt in the name of the people of the state of Illinois in any court of competent jurisdiction for the whole amount due on forfeited property; or any county, city, town, school district or other municipal corporation, to which any such tax may be due, may, at any time, institute suit in an action of debt in its own name, before any court of competent jurisdiction, for the amount of such tax due any such corporation on forfeited property, and prosecute the same to final judgment. * * * And in any such suit or trial for forfeited taxes, the fact that real estate or personal property is assessed to a person, firm or corporation, shall be prima facie evidence that such person, firm or corporation was the owner thereof, and liable for the taxes for the year or years for which the assessment was made, and such fact may be proved by the introduction in evidence of the proper assessment book or roll, or other competent proof." Hurd's Rev. St. 1899, p. 1433, c. 120.

1. It is first claimed by the appellant that the evidence produced in behalf of the appellee is insufficient to sustain the judgment of the court. The principal point made under this general objection is that, while the documentary proof introduced by the appellee tends to show a substantial compliance with some of the requirements essential to

establish a forfeiture for unpaid taxes, it does not contain any evidence showing that the land in question was ever offered for sale for the unpaid taxes of 1897, or for the unpaid taxes of 1898, and that the same was not sold for want of bidders. "To create a forfeiture there must have been a judgment, a process in substantial conformity with the requirements of the statute authorizing the sale of the property, an offer of the property for sale, and a failure to sell for want of bidders." *People v. Henckler*, 137 Ill. 580, 27 N. E. 602, and cases cited. It is true that no affirmative evidence was introduced by the appellee upon the trial below showing an offer of the property for sale and a failure to sell for want of bidders. But the amended declaration in the case alleges that the land in question was forfeited to the state for the taxes of the years 1897 and 1898, and the tax judgment, sale, forfeiture, and redemption record was introduced in evidence by the appellee, and showed that the lands in question were forfeited for the years 1897 and 1898 at the regular tax sales. This evidence was not contradicted by the appellant, nor rebutted in any way. The collector's tax warrant, together with the tax judgment, sale, forfeiture, and redemption record, unrebuted, was sufficient evidence of the assessment and levy of the taxes, the amount property which has been forfeited to them of the same, the years in which they were assessed and levied, and that the taxes were due and unpaid, and that the lands in question were forfeited to the state as therein shown. *Carrington v. People*, 195 Ill. 484, 63 N. E. 163; *Gage v. Parker*, 103 Ill. 528; *Mix v. People*, 86 Ill. 312; *Durham v. People*, 67 Ill. 414; *Chiniquy v. People*, 78 Ill. 570. In *Carrington v. People*, supra, we have recently held that in an action of debt to recover taxes, costs, and penalties due on property which has been forfeited to the state for want of bidders at the tax sale a prima facie case is made by introducing in evidence a certified copy of the tax judgment, sale, redemption, and forfeiture record, together with proof that the defendants were the owners of the property in the years for which the unpaid taxes were levied. The documentary records introduced in evidence by the appellee upon the trial below show a forfeiture, and, until the contrary is proven, it will be presumed that the antecedent steps which precede the forfeiture were taken in accordance with the requirements of the statute. That is to say, it being established that there was a forfeiture, it will be presumed that there was an offer of the property for sale and a failure to sell for want of bidders. It was admitted upon the trial that appellant was the owner of the property on the 1st days of May and the 1st days of April, 1897 and 1898, and that it still owned the land at the time of the trial. Therefore, all the requirements to establish a prima facie case for the purpose of showing that the

property had been forfeited to the state were established by the evidence. Appellant introduced no evidence to overthrow the prima facie case thus made, nor did it introduce any evidence to show that the property in question was used for burial purposes in the years 1897 and 1898.

2. But upon the trial below the appellant introduced certain proceedings which took place in the county court of Cook county in July, 1900, wherein, on July 20, 1900, that court, upon the application of the county collector for judgment of sale for the general taxes of the year 1899 and prior years, sustained objections to the effect that the premises in question, at the time of levying the taxes for the years 1897 and 1898, as well as 1899, were used exclusively as graveyards and grounds for burying the dead, and on that account were exempt from taxation; and in sustaining such objections refused the application of the collector for judgment as to the property in controversy. The exemption of the land on account of its use for burial purposes was the question at issue under the objections in the proceeding in July, 1900. The parties to that proceeding were the same as the parties to the present proceeding, and, the question being the same, we see no reason why the judgment rendered on July 20, 1900, is not conclusive upon the same parties in this proceeding. In *Graceland Cemetery Co. v. People*, 92 Ill. 619, an application was made to the county court for judgment for taxes, and among the objections filed why the application for judgment should be denied was a claim on the part of appellant that the lands in question were, under the provisions of the company's charter, exempt from taxation. This in that case was the main question upon the hearing—indeed, the only one to which the evidence was directed or relied upon in the argument; and we held in that case that the determination of the county court upon an application for an order for the sale of land for taxes due thereon was a judgment whether the same was adverse or in favor of the party resisting the same, and that such judgment was conclusive upon the parties, where the court had jurisdiction, until it was reversed or set aside by some legal proceeding instituted for that purpose. It was also held in *Graceland Cemetery Co. v. People*, supra, that the judgment of the county court, holding that lands are not liable to taxation for certain years, on application for judgment against the same, is a conclusive bar, until reversed, as against a second application for judgment for the taxes of the same year.

It cannot be said that there was any want of jurisdiction in the county court which rendered the judgment of July 20, 1900, sustaining the objection that the property was exempt from taxation. If that judgment was erroneous, the present appellee should have taken proceedings to reverse the same. In this collateral proceeding it is conclusive up-

on the parties. The proceeding of July, 1900, as it is presented in the present record, involved a trial upon the merits, and the court had jurisdiction of the persons and of the subject-matter of the suit. We are unable to see why the doctrine of the case of *Grace-land Cemetery Co. v. People*, supra, is not applicable to the case at bar. See, also, *Riverside Co. v. Howell*, 113 Ill. 256; *Belleville Nail Co. v. People*, 98 Ill. 399; *Gage v. Bailey*, 102 Ill. 11; *Stamposki v. Stanley*, 109 Ill. 210. The judgment of the county court, acting within its jurisdiction, cannot be collaterally attacked. *Hammond v. People*, 169 Ill. 545, 48 N. E. 573; *Riebling v. People*, 145 Ill. 120, 33 N. E. 1090. It cannot be here contended that the county court, in rendering the judgment sustaining the objections in question in July, 1900, could not consider the question whether the judgments for taxes entered in 1897 and 1898 were valid or not. The appellant was not estopped, in the proceedings of July, 1900, from raising the question that the land was exempt as burying land, on account of the judgment entered against the land in the year 1899, for the reason that that judgment was entered by default; and it has been held by this court that a judgment against land by default for delinquent taxes is not conclusive against the owner as to the legality of all the taxes included in the judgment, and he may show that a part of the tax is illegal, and thus defeat the sale in a collateral proceeding—as in ejectment to recover under a tax deed; and that such judgment is to be distinguished from a judgment affirming a special assessment, which is conclusive upon the landowner. *Riverside Co. v. Howell*, 113 Ill. 256, and cases there referred to; *Gage v. Goudy*, 141 Ill. 215, 30 N. E. 320.

There is another reason why the appellant was not estopped from raising the question here under consideration in the application for judgment in July, 1900, and that is that the real estate against which judgment was applied for in that case was not liable to the tax sought to be enforced against it. It is contended that, under the amendment to the revenue law passed in 1879, as contained in section 224 thereof, the judgment of the county court, whether rendered with or without the appearance of the landowner, should be held conclusive of this or any other objection to the entry of judgment which might have been interposed before the judgment was entered. But in *Gage v. Goudy*, supra, we said, in answer to this contention (page 224, 141 Ill., and page 322, 30 N. E.): "We have frequently held, both before and since the passage of said amendment, that, where a judgment for taxes includes either illegal taxes or illegal costs, and the landowner does not appear and contest the entry of judgment, these objections may be raised by way of a collateral attack upon the title to lands claimed through a sale under such judgment, and that the judgment is in such case

no estoppel. And this is the settled doctrine of this court. [Referring to cases.] The theory upon which cases of this character have proceeded since the adoption of said amendment is that they come within the exception made by the amendment, viz., cases where 'the real estate was not liable to the tax or assessment.'" Said section 224 (Laws 1879, p. 253) provides that: "Any judgment for the sale of real estate for delinquent taxes rendered after the passage of this act * * * shall estop all parties from raising any objections thereto or to a tax title based thereon, which existed at or before the rendition of such judgment, and could have been presented as a defense to the application for such judgment in the court wherein the same was rendered, and, as to all such questions, the judgment itself, shall be conclusive evidence, of its regularity and validity in all collateral proceedings, except in cases where the tax or special assessments have been paid, or the real estate was not liable to the tax or assessment." *Carrington v. People*, supra.

The case at bar comes within the exception specified in the amendment, because the objection that the land here in controversy was exempt because of its use as a burying ground is tantamount to the objection that it was not liable to the tax sought to be imposed upon it. The Constitution of 1870 (article 9, § 3) provides that "such other property as may be used exclusively for agricultural and horticultural societies, for school, religious, cemetery and charitable purposes, may be exempted from taxation; but such exemption shall be only by general law." In pursuance of this constitutional provision the Legislature passed a revenue law, the second section of which provides that "all property, described in this section to the extent herein limited, shall be exempt from taxation, that is to say: * * * Third, all lands used exclusively as graveyards or grounds for burying the dead." *Hurd's Rev. St.* 1899, p. 1393, c. 120.

In view of the fact that the objection here under consideration comes within the exception mentioned in the amendment of 1879 to the revenue law, such cases as *People v. Smith*, 94 Ill. 226, and *Biggins v. People*, 106 Ill. 270, cannot be held to apply. The objection here made, to the effect that the land was exempt from taxation altogether, cannot be regarded as a mere irregularity, so far as the former judgments rendered in 1897 and 1898 are concerned. In regard to such judgments it cannot be said that in rendering the same there was a failure to observe a mere formality, such as is mentioned in the two cases last referred to.

While we are inclined to hold that the first objection made by appellant, to the effect that the evidence produced by appellee is insufficient to sustain the judgment below, is not well taken, we are yet of the opinion that the second objection, as to the conclusiveness of the judgment of the county court rendered

in July, 1900, is well taken. Therefore the judgment of the county court is reversed, and the cause is remanded to that court for further proceedings in accordance with the views herein expressed.

Reversed and remanded.

(204 Ill. 347)

IN re UNION TANK LINE CO. OF NEW JERSEY.

(Supreme Court of Illinois. Oct. 26, 1903.)

TAXATION—CARS OF FOREIGN NONRAILWAY CORPORATION—INTERSTATE COMMERCE—CREDITS PAYABLE AT HOME OFFICE.

1. Cars of a foreign corporation (not a railroad corporation) having its principal office in another state, which are merely in transit in Illinois for the purpose of bringing merchandise from another state into or through this state, are instruments of interstate commerce, and not subject to taxation here.

2. Credits of a foreign corporation, payable at its home office in the state where it has its domicile, are not subject to assessment in this state.

In the matter of the appeal of the Union Tank Line Company of New Jersey from the action of the board of review of Cook county. Action disapproved.

This is an appeal from the action of the board of review of Cook county under the provisions of section 35 of the revenue law of 1898 (Hurd's Rev. St. 1899, c. 120).

From the statement of facts submitted by the board of review it appears that appellant, by its agent, filed with the board of assessors of Cook county a schedule of personal property in Cook county subject to assessment therein, consisting only of office furniture estimated at a value of \$150. Thereafter the board of assessors increased this valuation to \$1,000 and an assessed valuation of \$200, and returned the same to the board of review, who, believing this assessment inadequate, notified appellant to appear before the board and show cause why its assessment should not be increased. Pursuant to the notice, appellant, by its agent and its attorney, appeared, and they were interrogated by the president of the board as to the number of cars appellant owned and as to the moneys and credits appellant had in Cook county on April 1, 1901. Appellant's representatives asserted that they could not give the desired information. Afterward the board of review, upon information obtained from other sources, found that appellant had in Cook county on April 1, 1901, 150 or more cars, of a cash value of \$500 each, and had moneys and credits and office furniture of a cash value of \$125,000, all subject to assessment in Cook county, and accordingly found appellant's personal property to be of the value of \$200,000, and entered an assessed value of \$40,000 upon the assessment books.

On the date of the hearing before the board of review appellant filed with the board a written statement that appellant is

a corporation organized and existing under the laws of the state of New Jersey; that its business is to own, maintain, and operate a line of tank cars for the transfer of merchandise for other parties into and through the state of Illinois and into other states; that it has no place of business nor any property in Cook county except some office furniture in an office in Chicago, which is used by one agent, whose business is to trace or locate cars which are sent into or through the state of Illinois, and prevent such cars being delayed, and such other clerical work as he may be directed to do from appellant's principal office; that its cars had no situs in law in the state of Illinois; that the cars are not allowed to remain within the state of Illinois longer than is necessary for them to be passed through the state, or, if shipped to points within the state, longer than is necessary for them to be unloaded and returned to such other places in other states as they may be needed to be loaded with merchandise; that the cars are used only in transit into and through the state of Illinois, and are instruments of interstate commerce only, and this state has no jurisdiction to impose any tax upon them. Subsequently appellant filed with the board of review a petition to set aside the increased assessment, and also a series of objections to the increase, stating substantially the same reasons as appear in appellant's first written statement. No relief being granted by the board of review, appellant prayed an appeal to the auditor of public accounts for presentment to this court, which appeal is now before us on the statement of facts submitted to the board of review.

Alfred D. Eddy and James A. Fullenwider, for appellant. H. J. Hamlin, Atty. Gen., Edwin W. Sims, Co. Atty., and Frank L. Shepard, Asst. Co. Atty., for Board of Review.

PER CURIAM. We think it sufficiently appears from the statement of facts submitted by the board of review to this court that the assessment of \$40,000 upon the property of appellant was made upon its 150 tank cars, valued at \$500 each, and money and credits of the value of \$125,000, and that it was claimed by the company that such cars were merely in transit temporarily, if at all, in the city of Chicago, on the 1st day of April, 1901, and therefore not subject to taxation in this state, and also that the moneys and credits due the company were payable at its home office in New Jersey, and therefore likewise exempt from taxation in Illinois. On the question of the exemption from taxation by one state of cars owned by a corporation (not a railroad corporation) having its domicile in another state, the Supreme Court of Missouri, in the well-considered case of *State ex rel. v. Stephens*, 148 Mo. 662, 48 S. W. 929, 60 Am. St. Rep. 625, where the authorities are fully cited, held adversely to

the taxing power. The language used is as follows: "The relator is a corporation organized under the laws of the state of New Jersey, and is engaged at Kansas City, Missouri, in the general packing business; that is, in killing and dressing food animals and in selling the meats thereof. It owns a number of refrigerator cars, in which it ships its goods to various counties in this state and to other states in the Union. Its cars are hauled by various railroads. It appears from the petition that the relator's place of business is in Kansas City, in the state of Kansas, and that the cars here taxed are attached to its business as an incident thereto, and are loaded in the state of Kansas and shipped into and through the state of Missouri. These allegations are not denied by the return, and hence they must be taken as true in this case. Under the circumstances, the relator, though a foreign corporation as to the state of Kansas, has acquired a domicile in that state, and the cars can only be taxed in that state. *Comstock v. Grand Rapids (Mich.)* 20 N. W. 624; *City of Dubuque v. Illinois Central Railroad Co.*, 39 Iowa, 83; *British Commercial Life Ins. Co. v. Commissioner of Taxes*, 31 N. Y. 32; *Fargo v. Michigan*, 121 U. S. 230, 7 Sup. Ct. 857, 30 L. Ed. 888; *Pullman Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 11 Sup. Ct. 876, 35 L. Ed. 613; *Railway Co. v. Backus*, 154 U. S. 439, 14 Sup. Ct. 1122, 38 L. Ed. 1041; *Cable Co. v. Adams*, 155 U. S. 638, 15 Sup. Ct. 268, 39 L. Ed. 311; *Adams Express Co. v. Kentucky*, 166 U. S. 171, 17 Sup. Ct. 527, 41 L. Ed. 960; *Hall v. Transit Co. (Colo. Sup.)* 51 Pac. 421, 56 L. R. A. 89, 65 Am. St. Rep. 223. The reason of the rule is, that the cars could not be reached for assessment and taxation anywhere else, and the company owes this just return to the state of Kansas for the protection it receives from it. The cars are in the state of Missouri only in transitu, and have no situs in this state; hence they are not subject to assessment or taxation in this state. *Fargo v. Michigan*, 121 U. S. 230, 7 Sup. Ct. 857, 30 L. Ed. 888; *California v. Northern Railway Co.*, 127 U. S. 1, 8 Sup. Ct. 1073, 32 L. Ed. 150; *Reading Railway Co. v. Pennsylvania*, 15 Wall. 232, 21 L. Ed. 146; *People v. Wemple*, 138 N. Y. 1, 33 N. E. 720, 19 L. R. A. 694; 2 *Dillon on Mun. Corp.* §§ 787, 788. Being in Missouri only in transit for the purpose of bringing merchandise from another state into or through this state, they are instruments of interstate commerce, and this state cannot impose any tax on them. *Telegraph Co. v. Texas*, 105 U. S. 460, 26 L. Ed. 1067; *Leloup v. Port of Mobile*, 127 U. S. 640, 8 Sup. Ct. 1380, 32 L. Ed. 311; *Pickard v. Car Co.*, 117 U. S. 34, 6 Sup. Ct. 635, 29 L. Ed. 785; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 5 Sup. Ct. 826, 29 L. Ed. 158; *Reading Railway Co. v. Pennsylvania*, 15 Wall. 232, 21 L. Ed. 146; *Pullman Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 11

Sup. Ct. 876, 35 L. Ed. 613; *Express Co. v. Seibert*, 142 U. S. 339, 12 Sup. Ct. 250, 35 L. Ed. 1035. Being instruments of interstate commerce, Congress alone has jurisdiction over them under section 8, art. 1, Const. U. S. Except as above indicated, the cars can be taxed as property by the state in which the company has acquired a domicile and the cars have a situs." The facts in the case above quoted from are quite similar to those in the case at bar. Appellant's principal office is in New Jersey. Its cars, when not in use, are returned to that state. All its business affairs are regulated and managed from that office, except the mere matter of tracing the cars and some minor details. Bills due it are payable at that office, and in fact its domicile is in the state of New Jersey. Its personal property has its situs there, and is there subject to taxation by that state in return for the protection afforded by that state to the company. The taxation of appellant's cars in this state would be an unwarranted interference with interstate commerce, over which Congress has exclusive control. In fact it is not contended, but is substantially admitted, that cars of a foreign corporation (not a railroad corporation) in transit through this state are not subject to taxation here. That appellant's credits, which it is not disputed were payable at its home office in New Jersey, are not subject to assessment here, is settled by the case of *Scripps v. Board of Review*, 183 Ill. 278, 55 N. E. 700, and cases cited.

For the reasons indicated, the action of the board of review is disapproved, and appellant's assessment, except as to the \$1,000 assessment made by the board of assessors, is held void.

Action disapproved.

(204 Ill. 208)

BURNETT v. PEOPLE.

(Supreme Court of Illinois. Oct. 26, 1903.)

HOMICIDE—SOLICITING COMMISSION OF SUICIDE—EVIDENCE—SUFFICIENCY—ADMISSIONS—INSTRUCTIONS—CHASTITY OF DECEASED.

1. Accused was charged with murdering deceased by administering poison to her, and in a second count by hiring, persuading, and procuring her to take poison. Accused and deceased procured a room at a hotel, and when discovered next morning deceased was dead, and accused was found in a stupefied condition. Empty bottles of morphine were found on the dresser, and a note from deceased, stating that she did it herself. Accused was a paramour of deceased, and they had been drinking on the evening before going to the hotel. Deceased had talked during the evening of committing suicide, rather than return to her husband, and stated she had morphine sufficient. No witness was produced to prove any substantial fact outside of the corpus delicti. The evidence that accused did or said anything that might induce deceased to kill herself rested wholly on his alleged admissions, which were made when he was in a stupefied condition. Held insufficient to sustain a conviction of murder on the hypothesis that an agreement was made between them to commit suicide, and the agreement was in part the

inducing cause of deceased taking the poison that produced her death.

2. An instruction which is defective may be properly refused.

3. Where, in a prosecution for murder, the evidence to convict is mainly verbal admissions of accused, and no instruction is given with reference to the weight of such evidence, it is error to refuse an instruction that, where a confession of a prisoner is offered in evidence, the whole of it must be taken together, and if the part favorable to accused is not disproved, and is not improbable or untrue, considered with the other evidence, then that part is entitled to as much consideration as parts unfavorable to accused.

4. Where, on a trial under an indictment for murder by hiring, persuading, and procuring deceased to take poison, deceased's chastity has not been attacked except in so far as the nature of it appeared from her relation with accused and the opening remarks of counsel for accused, evidence is not admissible as to her general reputation, in the community in which she lived, for chastity, such question not being in issue.

Error to Criminal Court, Cook County; Frank Baker, Judge.

Orville S. Burnett was convicted of murder, and he brings error. Reversed.

Plaintiff in error sues out this writ of error to the criminal court of Cook county to review a judgment and sentence pronounced against him in that court for the murder of Charlotte S. Nichol.

The indictment contained two counts. The first count charges the plaintiff in error with having produced the death of the deceased by administering poison to her. The second count charges the plaintiff in error with murder, charging, first, an unlawful and felonious assault upon the said Charlotte S. Nichol, and then charging that with malice aforethought, and feloniously and willfully devising and intending the said Charlotte S. Nichol to then and there poison, kill, and murder herself, did then and there counsel, hire, persuade, and procure the said Charlotte S. Nichol to then and there take into her mouth a large quantity of morphine, a deadly poison, with intent that she should take and swallow the same for the purpose of then and there poisoning, killing, and murdering herself, and that in consideration of such counseling, hiring, persuading, and procuring the said Charlotte S. Nichol did take and swallow the said morphine, from which she died. The count concludes that the plaintiff in error "the said Charlotte S. Nichol, in manner and form aforesaid, then and there unlawfully, willfully, feloniously, and of his malice aforethought did kill and murder, contrary to the statute and against the peace and dignity of the said people of the state of Illinois."

The jury returned a verdict of murder, and fixed defendant's punishment at 15 years in the penitentiary, upon which judgment and sentence were had. The defendant has sued out this writ of error, and assigns as error that the evidence did not establish the defendant's guilt; that the court erred in allowing the state to introduce evidence of the deceased's reputation for chastity; and erred

in refusing to give the defendant's third, fourth, and fifth refused instructions, which dealt with the weight to be given to the confessions or admissions testified to as having been made by the defendant.

O'Donnell & Brady and William Dillon, for plaintiff in error. H. J. Hamlin, Atty. Gen., Charles S. Deneen, State's Atty., and J. R. Newcomer and F. L. Barnett, Asst. State's Attys., for the People.

RICKS, J. (after stating the facts). The evidence discloses that the plaintiff in error, Orville S. Burnett, whom we will refer to hereafter as "defendant," a married man, about 28 years of age, living with his wife, was a practicing dentist, with an office in the city of Chicago; that he had resided there some two or three years, and that his family relation was pleasant. The deceased, Charlotte S. Nichol, was a married woman, living with her husband and three children, residing about three blocks distant from defendant's residence and place of business. About the 3d of September, 1901, defendant became acquainted with the deceased, Mrs. Nichol, in a drug store under his office. At that time Mrs. Nichol was with a woman called Kirby Smith, from some place in Tennessee. The defendant and the two women casually met in this store, and, without anybody to introduce them, formed an acquaintance. Between that time and the 20th of October—the date of the death of Mrs. Nichol and of the alleged crime of the defendant—the defendant and Mrs. Nichol were very frequently together, sometimes accompanied by Kirby Smith, on which occasions they went to theaters, saloons, luncheons, and dinners, and at other times visiting the house of Mrs. Nichol, accompanied by a man named Adams, and one time, at least, upon the invitation of the husband of Mrs. Nichol, visited the home of the latter, and took dinner there. The evidence shows that on the night of Wednesday, the 17th of October, the defendant and Mrs. Nichol spent the night together at the Marlborough Hotel. The husband of Mrs. Nichol was holding some official position with a railroad company, and had formerly lived in Tennessee. Shortly prior to Mrs. Nichol's death her husband had been promoted to a higher position with the railroad company, which necessitated his return to Nashville to reside. This change of residence was very distasteful to Mrs. Nichol, as it appeared that her home life in Tennessee, where she had formerly resided with relatives of her husband, had been made unpleasant, and also for the further reason that during her brief acquaintance with defendant she had formed a violent attachment for him, and was very loath to leave him. When Mrs. Nichol was apprised that it was necessary for her to change her residence, it seems that the idea of suicide at once entered her mind, and on the Wednesday evening preceding her death—be-

ing the same day she learned of the proposed change—she sought the defendant, went to saloons with him, drank with him, spent the night at the Marlborough, as above stated, and during that night constantly talked about committing suicide, stating that she had sufficient chloral to accomplish that end. The defendant advised her against pursuing this course, pointing out to her the absurdity of doing so. The following Friday evening—the night of her death—defendant again met her about 6 o'clock, and from that time until 1 or 2 o'clock the following morning, in the company of each other, they were in a number of saloons, each drinking quite heavily, and each taking whisky. During the evening Mrs. Nichol was continually talking about committing suicide, stating that she would not go back to Nashville under any circumstances, and informed the defendant that she had determined to commit suicide, stating she had in her pocketbook two phials of morphine, and solicited the defendant a number of times to commit suicide with her, which he refused to do. About 2 o'clock on Saturday morning they arrived at the Marlborough Hotel, where they secured a room together for the night. When they arrived there, defendant, Burnett, was quite drunk, but Mrs. Nichol did not seem to be drunk, but in the possession of her senses. A short time after entering the room Burnett went across the street to a drug store and purchased a phial of morphine containing 25 quarter-grain tablets, which he brought to the room, opened, and set upon the dresser, and at which time he states there were two similar phials standing upon the same dresser. When he returned the deceased was undressed, being simply in a night robe, and lying on the bed, and seemingly very happy. She requested some paper and an envelope, which defendant rang for, and which were brought. The sheet of paper and envelope were delivered to Mrs. Nichol as she lay in bed, in the presence of the maid who brought them. Mrs. Nichol at once began writing upon the paper handed to her. When defendant opened the phial of morphine purchased by himself, it overturned, and a portion of its contents—about half—spilled on the floor. Defendant then undressed and retired, and went to sleep without taking any of the morphine. Some time the next day, when he awoke, he found that Mrs. Nichol was lying by his side dead, and found a note written by her upon the dresser, and over or against the empty morphine bottles, which was as follows:

"To whom it may concern—I did it because I loved him better than anything on earth, and he loved me, and we could not be separated. Good-by. Charlotte."

Upon discovering the death of Mrs. Nichol, defendant, horror stricken at the situation in which he found himself, and believing that his life was ruined, arose, took the morphine remaining in the bottle purchased by himself,

attempted to cut his throat or puncture his neck with a hat pin, and turned on the gas and lay down. The proprietress of the house, detecting the gas, came to the door, and was admitted by defendant. A doctor and the police were called at once. Restoratives were given to defendant, and about three hours later he was taken to the police station, where a statement was taken from him.

The statements of the defendant, Burnett, are substantially the only evidence in the case in any manner connecting him with the death of Mrs. Nichol. These statements began when the doctor arrived, and were concluded (there being several of them) about 10 o'clock at night, in the police station. The portions of the statements or admissions chiefly relied on for conviction were to the effect that he had agreed with the deceased to commit suicide if she did. No witness heard any of the conversation between the parties. No witness saw anything done by either of them calculated to produce the death of the deceased, and outside of the statements of Dr. Burnett, the defendant, the only evidence was the fact of their being together in the place, the note found, and the three empty morphine phials, and the testimony of the druggist that a man somewhat resembling the defendant purchased a phial of morphine during that night.

The first person to see the defendant, outside of the chambermaid and the landlady, who had no conversation with him, and knew nothing about him outside of the fact that he was drunk when he came in the night before, and that the paper was called for and given to the deceased, was Dr. Carter, a witness for the people, who arrived there at 3:30 p. m., and testifies that when he first saw defendant he was in a sort of dazed or stupefied condition, with the pupil slightly contracted, but that at that time the witness could not tell whether the defendant was suffering from the effect of the excessive use of liquor or the effect of morphine. To the doctor, upon his inquiry, the defendant stated that he and the woman had taken a room together there, and that, sooner than go south with her family, she had taken the suicide route, and called the doctor's attention to the note which one of the maids of the hotel had found. When asked as to the cause of death, the defendant pointed to the dresser, where three empty morphine phials were, and stated that she had taken a quantity of morphine; that the defendant awoke some time during the afternoon, and also attempted to commit suicide, calling attention to the scratch on his neck made by the hat pin, and stated that he had taken morphine and turned on the gas, and requested the witness to give him more morphine that he might finish his undertaking. To the doctor he said nothing about any agreement between him and the deceased to commit suicide. The doctor stated that at the first visit he stayed but a short time, and returned in an hour, and found the pupil contracted, and the patient in a semicomatose

condition. He stated that the effect of morphine was first promotive of mind exhilaration, and secondarily resulting in stupor, and finally in death, unless checked. He stated also that he administered an emetic to the patient, and tortured him to keep him awake, and directed the officer to use his club on the bottom of the defendant's feet, as that was the best treatment to keep one from relapsing into sleep in case of morphine poison; that the primary effect of morphine lasted about four hours, and the after-effect several hours, the exact time not stated; that he saw the defendant at 6 o'clock the last time, and that defendant was then tending towards stupor; that when he first talked to the defendant he was apparently rational, but any stimulant would give that impression at first; that the stimulus to the mind is the first effect, but in an hour, when witness became satisfied that defendant's condition was due to morphine, he regarded him as not responsible for what he was saying.

Officer O'Brien seems to have been the next person in the order of those to see defendant. He stated that he arrived at the Marlborough about 4 o'clock, and that defendant was still lying in bed, opposite the body of Mrs. Nichol, and was not yet dressed; and that he stayed until 6 o'clock, and assisted in taking him to the station; that defendant pointed out to him, while there, the drug store where he got the morphine; and that defendant also said that he and deceased agreed to commit suicide together before they came to the hotel that evening. This witness also testified that the defendant told him he tried to kill himself with his knife. The officer took the knife, and it was introduced in evidence. To this officer nothing was said about the hat pin. Describing the condition of the defendant, and how he talked with him, the officer said that he was directed by the doctor to keep the defendant awake; that he put water on him, rubbed a big piece of ice steadily up and down his back for half an hour, pinched and slapped him, shook him, pulled his ears, and did everything he could to keep him awake, and that the statements made by the defendant were in answer to questions put by him.

Officer White, who assisted O'Brien in taking the defendant to the station, testified that he arrived at the Marlborough about 5 o'clock, and that Officer O'Brien was trying to put the defendant's clothes on him when he arrived; that the defendant could not get up—could not handle himself; that they had to dress him; that the defendant made no statement while he was there; that they all tried to keep him awake, and that it took a full hour to dress him.

When the defendant was taken to the police station, Officer Shaughnessy, connected with that station, was directed to take defendant's statement, which he says he did, in writing. The written statement was not offered in evidence. Sidney M. Weil, a newspaper reporter, was present at the taking of that state-

ment, and both were witnesses at the trial. While assisting with that statement, the defendant said that the deceased stated that she could not live in Nashville, and could not bear to leave the defendant, and that she was going to commit suicide, and asked him to commit suicide with her; that at first he did not like the idea, but finally assented; that she told him that she had enough morphine for herself, but not enough for two, and that he went out and got a bottle of morphine, and came in and set it on the dresser. In this statement the defendant detailed the trip of the deceased and himself the night of and preceding the tragedy, and as much as he knew relative to it. The testimony of the witness Weil in regard to it covers some four or five pages, and the witness states that they were a full hour getting the statement; that the defendant was lying in bed when he and the officer went in to see him, and apparently asleep; that they aroused him, and told him that they desired to take his statement; that it was necessary to shake him, and wake him up or arouse him, and that they did shake him several times during this conversation; that both Shaughnessy and the witness would shake him, and then ask him more questions; and that, after getting the thread of the story, the defendant would doze off, his eyes would close, he would breathe heavily, and the lids of his eyes would flutter; that it would take a second or two to arouse him at each time; that he was under a heavy drug of some kind; that the defendant volunteered nothing himself; that it was all solicited from him by questions, and he only made statements as questions were asked him, except in one or two instances. As to the condition of the defendant at that time both Weil and Shaughnessy agree; Shaughnessy stating that the defendant had to be aroused every 15 or 20 seconds, and seemed to be dazed and stupefied.

The next witness who testified was Charles F. Carpenter, who took a statement from the defendant about 10 o'clock at night, when he was in his cell. This witness testifies that defendant was not asked by him the direct question whether he did agree with deceased to commit suicide, but he (witness) told him that the officers of the station were so reporting, and he asked him what about it, when the defendant said: "I suppose I said it. I was drunk. I suppose I agreed. I suppose it was true." As to the condition of the defendant at that time this witness says: "When I began talking to him he did not talk very freely. He seemed to be in a kind of stupor. He was all humped up in a chair, and did not seem to pay any attention to surroundings. I put the questions to him, and he would answer 'Yes' or 'No.' Did not go ahead and tell the story. He would affirm or deny a story. He never contradicted me in any of them. He seemed to assent to whatever I said. No difference what I said, he seemed to agree with me. I would

make suggestions, and he would assent. That is practically it."

There is no evidence, either by the admissions of the defendant or any witness, that the deceased took any morphine in the presence of the defendant, or that he gave her any, or requested her to take any, or bought any for her. The evidence rather tends to show that while the defendant was gone to the drug store to get the morphine that he purchased the deceased took that which she had. In one of the alleged confessions or admissions the defendant said, "I drank considerable, and she had worked me up to such a state that I agreed to do anything with her." The defendant testified in his own behalf, and denied explicitly that he ever stated to Mrs. Nichol that he would kill himself if she did, but, on the contrary, he urged and counseled her against suicide; that the deceased insisted that she would commit suicide, and had sufficient morphine in her pocketbook to accomplish that end, and further stated that she would never return to Nashville. Defendant denied that he saw her take any morphine, or advised her to take any, and stated that he had no recollection whatever of being at the police station, or making any statements or confessions or admissions that were offered in evidence against him; but did admit that he bought the morphine, but was unable to state why he did it. He swore that he took none of it until after he had discovered that Mrs. Nichol was dead, and then not in pursuance of an agreement, but because of his disgrace and humiliation.

The conviction of the defendant for murder in this case can only be sustained on the hypothesis that there was an agreement between him and Mrs. Nichol to commit suicide together, and that that agreement, in part, at least, was the inducing cause of the deceased taking the poison that produced her death. Upon the question whether, under the circumstances, suicide is a crime, we have a paucity of decisions. The general rule, as stated by Wharton, is: "If two persons encourage each other to commit suicide jointly, and one succeeds and the other fails in the attempt upon himself, he is a principal in the murder of the other." Wharton on Crim. Law, § 448. There are a number of English cases that hold if two persons mutually agree to commit suicide, and the means employed produce death upon one of the persons only, that the one surviving will be guilty of murder; but in all such cases the defendant was actually present, and did some act furthering the commission of the suicide. Thus, in *Regina v. Jessop*, 10 Crim. Law Mag. 862, Jessop handed the bottle of laudanum to the deceased with the intention that the deceased should drink therefrom a sufficient quantity to cause death. In *Regina v. Stormouth*, Q. B. Div. 61 J. P. 729, there was an agreement to commit suicide between a man and a woman because of poverty. The agreement was mutual, and each purchased laudanum

to carry out the agreement. The woman took the laudanum and died. The man took a portion, but did not die, and left a note in the room where they both had been, stating that they had made such an agreement, and that the laudanum taken by the woman had produced death, but his had not proved fatal, so that other means must be resorted to. On the same day of the discovery of the death of the woman the man was arrested. In discussing the case the court said: "If there was an agreement, in consequence of which the woman destroyed herself, the prisoner was guilty, in the law, of murder; and the fact that that might have been only a pretended agreement on his part, or that he might have had some idea of not carrying out his part of the agreement, or have changed his mind, made no difference in law."

In this state we have never had the question before us, and there are few cases decided by other courts of this country. In *Blackburn v. Ohio*, 23 Ohio St. 146, Blackburn and a woman named Lovell mutually agreed to commit suicide. The defendant mixed strychnine with wine, and in pursuance of the agreement the woman drank the mixture. There was some evidence tending to show that the defendant, by threats, forced the woman to take the poison. The defendant was found guilty, and appealed, contending that, as suicide was not punishable, there could be no conviction as an accessory. To this contention the court said: "Purposely and maliciously to kill a human being by administering to him or her poison is declared by the law to be murder, irrespective of the wishes or the condition of the party to whom the poison is administered, or the manner in which or the means by which it is administered. The fact that the guilty party intends also to take his own life, and that the administration of the poison is in pursuance of an agreement that both will commit suicide, does not, in a legal sense, vary the case. If the prisoner furnished the poison to the deceased for the purpose and with the intent that she should with it commit suicide, and she accordingly took and used it for that purpose; or if he did not furnish the poison, but was present at the taking thereof by the deceased, participating, by persuasion, force, threats, or otherwise, in the taking thereof or the introduction of it into her stomach or body, then, in either of the cases supposed, he administered the poison to her, within the meaning of the statute. Her act of taking and swallowing it in his presence and by his direction was his act of administering it. It is said by counsel that suicide is no crime by the laws of Ohio, and that, therefore, there can be no accessories or principals in the second degree in suicide. This is true, but the real criminal act charged here is not suicide, but the administering of poison, and to this criminal act there may be accessories and principals in the second degree. If I

furnish poison to a guilty agent—an accomplice—to be administered by him, and he administers it accordingly, I am accessory before the fact; and if I stand by and counsel or encourage him in the act of administering the poison to another I am a principal in the second degree. But no question of this kind arises in the present case, either upon the indictment or in the evidence. There is no claim or pretense that there was any guilty third person participating in the transaction. The charge is, that the prisoner, as principal in the first degree, is guilty of administering poison, and thereby causing death. We think, therefore, that the court did not err in its instructions as to what amounted to the administering of poison within the meaning of the crimes act."

In *Commonwealth v. Bowen*, 13 Mass. 356, 7 Am. Dec. 154, one Jewett was imprisoned under sentence of death, and the defendant, Bowen, having an opportunity to talk with him, advised him to commit suicide, and procured and brought to him for that purpose a rope, with which Jewett did hang himself. The defendant was indicted for murder, there being two counts. The first count charged that the defendant "did counsel, hire, persuade, and procure said Jewett" to kill himself. The second count charged directly that Bowen murdered Jewett by hanging. This seems to be the first and leading reported case in any of the states upon this question. Upon appeal the court said: "You have heard it said, gentlemen, that, admitting the facts alleged in the indictment, still they do not amount to murder, for Jewett himself was the immediate cause and perpetrator of the act which terminated in his own destruction. That the act of Bowen was innocent no one will pretend; but is his offense embraced by the technical definition of a principal in murder? Self-destruction is doubtless a crime of awful turpitude. It is considered in the eye of the law of equal heinousness with the murder of one by another. In this offense, it is true, the actual murderer escaped punishment, for the very commission of the crime, which the law would otherwise punish with the utmost vigor, puts the offender beyond the reach of its infliction, and in this he is distinguished from other murderers. But his punishment is as severe as the nature of the case will admit. His body is buried in infamy, and in England his property is forfeited to the king. Now, if the murder of one's self is felony, the accessory is equally guilty as if he had aided and abetted in the murder of A. by B., and I apprehend that, if a man murders himself, and one stands by aiding in and abetting the death, he is as guilty as if he had conducted himself in the same manner where A. murders B.: and if one becomes the procuring cause of death, though absent, he is accessory."

The only other reported case that we know of is that of *Commonwealth v. Mink*, 123

Mass. 429, 25 Am. Rep. 109. In that case the defendant was engaged to be married to one Charles Ricker, who expressed his intention of breaking the engagement. This announcement so exasperated the defendant that she determined to take her own life, and, seizing a revolver, made an attempt to shoot herself. Ricker, being present, seized her, and attempted to prevent her carrying out her purpose, and in the struggle the pistol was accidentally discharged, fatally wounding Ricker. The defendant was indicted and convicted of manslaughter. The court held that suicide was a criminal act, and followed the principle that if one attempts to commit a criminal act, and thereby commits homicide, although no homicide was intended, the crime will be manslaughter. It was also held that in that state suicide was not technically a felony, and the conviction was sustained.

We are not disposed to go to the extent of holding, as was done in the *Bowen* Case, *supra*, that suicide or self-destruction is a felony, but take the view that the later pronouncement of the Massachusetts court in the *Mink* Case, *supra*, and of the Ohio court in the *Blackburn* Case, *supra*, more nearly announce the correct rule. By the English common law suicide was a felony, and the punishment for him who committed it was interment in the highway with a stake driven through the body, and the forfeiture of his lands, goods, and chattels to the king. We adopted the English common law, and the acts of the British Parliament in aid thereof, as it existed up to the fourth year of James I, which was the year 1606, as far as the same was applicable to our conditions and institutions and of a general nature; but as we have never had a forfeiture of goods, or seen fit to define what character of burial our citizens shall enjoy, we have never regarded the English law as to suicide as applicable to the spirit of our institutions. In the view we entertain of the case at bar it is not necessary that suicide be held to be a crime. The charge against the plaintiff in error in both counts in the indictment is murder. In the first count he is charged with murdering Charlotte S. Nichol by administering poison to her, and in the second count with murdering her by hiring, persuading, and procuring her to take poison, and we think proof of either one of these charges would warrant the conviction for murder.

The English common law, as applied to accessories before and at the fact, has become more a form than a substance under our law. From an early day we held that under our statute the accessory before and at the fact could be indicted as a principal (*Baxter v. People*, 3 Gilman, 368), and in two cases where the question was directly presented we held that it was improper to indict an accessory simply as such, as was done at common law, but that he must be indicted as principal (*Usselson v. People*, 149 Ill. 612,

36 N. E. 952; *Fixmer v. People*, 153 Ill. 123, 38 N. E. 667). As to the crime of murder, we have applied the rule that he who acts by another acts by himself, and that the acts of the principal are the acts of the accessory, and that the latter may be charged with having done the acts himself, and may be indicted and punished accordingly. *Spies v. People*, 122 Ill. 1, 12 N. E. 835, 17 N. E. 898, 3 Am. St. Rep. 320. If a lunatic or an idiot, at the instigation or direction of another person, should commit a homicide, none would question but that the instigator and director in such case would be guilty of murder, although the principal could not be punished at all; and if A., by virtue of deceit or persuasion, induce B. to kill himself, this is as much the act of A. as though A. had induced C. to kill B. The charge in the second count of the indictment is that plaintiff in error did "hire, persuade, and procure" the deceased to kill herself, and, if he did either of these, and as a result thereof deceased did kill herself, it was the act of plaintiff in error, and we have no hesitancy in pronouncing it murder if the element of malice is found.

Counsel for plaintiff in error have ably and elaborately discussed the proposition that the second count is merely a charge against the plaintiff in error as an accessory, and that, in order that there shall be an accessory there must be a principal, and as, under our law, suicide is not a crime, the act of the deceased in killing herself was not a criminal act, and there was no crime committed. But when we apply the principal above announced, that the act of the principal, when done pursuant to the will and direction of the accessory, is the act of the accessory, then it becomes immaterial what was the character of the crime committed by the principal, or whether there was any crime, and in such case as this, where it is not shown or claimed that the accused directly administered the poison of which the deceased died, but that the taking of it was by his procurement, we should require strict proof of this latter fact. Though the plaintiff in error may have known that the deceased intended to kill herself, and may have assented to it, or may have even wished that she would do so, still, unless the evidence shows beyond a reasonable doubt, that he did or said something which aided, encouraged, or induced deceased to kill herself, he cannot be held guilty of the charge of murder. *White v. People*, 81 Ill. 333; *Jones v. People*, 166 Ill. 264, 46 N. E. 723. The evidence that plaintiff in error did do or say anything that might by any possibility have been an inducement to the deceased to kill herself rested wholly upon his alleged admissions. Those admissions were made under such circumstances, and when the plaintiff in error was in such condition, physically and mentally, as should have required the court to have made proper investigation before they were admitted at

all, and, if admitted, to have fairly instructed the jury as to the character of and weight to be given to admissions and confessions made under the conditions here shown. This was especially so in view of the instructions of the court as to the substance of the crime. By the thirteenth instruction the jury were told that suicide was self-murder, and, while this instruction is not complained of, and probably, as modified by what follows it, would not be reversible error even if objection had been made to it, the effect of it was to declare that felonious which is not a felony under our law. The jury were also told that the plaintiff in error was permitted to testify in his own behalf, and stated the true test as to his credibility, and attached to that instruction the charge that, if the accused had willfully and corruptly testified falsely to any fact material to the issue, the jury could entirely disregard his evidence, except in so far as it was corroborated. There was no possible contradiction of the evidence of the plaintiff in error upon the material things testified to, except that growing out of his alleged admissions. There was not a single witness put upon the stand by the state to prove a substantial fact in the case outside of the corpus delicti, and in fact the whole case for both sides practically rested upon the testimony of the plaintiff in error and on his alleged statements to the police authorities.

Plaintiff in error offered three instructions, which were refused by the court, which related to the alleged admissions. The first told the jury that confessions of a person out of court at best are a doubtful species of evidence, and should be acted upon by the jury with great caution, unless supported by other corroborative evidence. The fourth and fifth instructions were as follows: "(4) The court instructs the jury that, where a confession of the prisoner charged with a crime is offered in evidence, the whole of the confession so offered and testified to must be taken together, as well that part which makes in favor of the accused as that part which makes against him; and if the part of the statement which is in favor of the defendant is not disproved by other testimony in the case, and is not improbable or untrue, considered in connection with all the other testimony of the case, then that part of the statement is entitled to as much consideration from the jury as the parts which make against the defendant. (5) The court instructs the jury that if they believe, from the evidence in this case, that the defendant, at the time he made the confession which has been given in evidence, was in a dazed and stupefied condition from the joint effect of intoxicating drink, morphine and the inhaling of illuminating gas, or from the effects of any one or any two of these agencies, and if the jury further believe, from the evidence, that the confession was elicited from the defendant by questions while he

was in such condition, then such confession is entitled to very little weight, and the jury would not be justified in convicting the defendant upon said confession unless they find it is corroborated by other testimony in the case." No instruction was given with reference to the weight or character of the testimony, such as is referred to in the instructions and was the main reliance for conviction. The fifth instruction is defective, and we could not say that it was reversible error to refuse it for that reason. But no objection can be raised as to the fourth, and as all the alleged admissions of the plaintiff in error that were offered in evidence were mere verbal admissions, none of them rising to the dignity of a confession, between which and admissions there is a well-recognized distinction in the law, and as the admissions were drawn from the plaintiff in error by questions when in a condition that his mental status was doubtful, the jury should have been told by some instruction that they should be received with caution. *Marzen v. People*, 173 Ill. 43, 50 N. E. 249; *Ackerson v. People*, 124 Ill. 563, 16 N. E. 847; *Jones v. State*, 29 Tex. App. 20, 13 S. W. 990, 25 Am. St. Rep. 715; *Conner v. State*, 34 Tex. 659; *Commonwealth v. Howe*, 9 Gray, 110. We think the refusal to give the fourth instruction was manifest error.

Some 15 witnesses were, over the objection of plaintiff in error, allowed to testify as to the general reputation of the deceased, in the community in which she lived, for chastity. That question was not an issue in the case. 5 Am. & Eng. Ency. of Law (2d Ed.) p. 872; *Cannon v. People*, 141 Ill. 270, 30 N. E. 1027; 3 *Greenleaf on Evidence* (15th Ed.) par. 27. Her chastity had not been attacked, except in so far as the nature of it appeared from her relation with plaintiff in error and the opening remarks of counsel for plaintiff in error. This evidence covered the life of the deceased for several years back, both in Illinois and Tennessee. There was nothing in the record justifying any such evidence as this. The witnesses all declared her general reputation for chastity to be good. The plaintiff in error stood charged with her murder as the result of a liaison between them, and none can doubt but that the testimony thus admitted was calculated to and did prejudice the jury against the plaintiff in error. By it the natural inference arising in the minds of the jury was that the deceased was a good and virtuous woman, who had been despoiled by the plaintiff in error, and because of an affection produced by his effort they had mutually agreed to commit suicide sooner than separate. The only evidence as to their relation came from the admissions and testimony of plaintiff in error, and upon these matters it was wholly uncontradicted; and not only that, but every part of it, as made to the various witnesses, was harmonious with every other part, and all tended to show that the deceased sought

plaintiff in error, telephoned him at his office, would go to his office in the guise of a patient, would go to the drug store under his place of business and send for him, and in a general way seek him out that she might be in his company. This was uncontradicted; yet the jury might feel warranted, from the evidence, in finding that the deceased was a woman of good character and chaste life when considering the precautionary instruction as to the weight that was to be given to the testimony of plaintiff in error, and their right to wholly disregard it if they believed he willfully swore falsely upon any material matter, and in concluding that her general reputation should weigh more in their estimation than his testimony as to the circumstances which brought and kept them together, and the probable influence plaintiff in error had in producing her death.

The judgment is reversed, and the cause remanded to the criminal court of Cook county for further proceedings in harmony with this opinion. Reversed and remanded.

(204 Ill. 604)

KELLER v. PEOPLE.

(Supreme Court of Illinois. Oct. 26, 1903.)

RAPE—EVIDENCE—SUFFICIENCY—REVERSAL OF CONVICTION BY SUPREME COURT.

1. The court on appeal will reverse a conviction where the evidence is so unsatisfactory or so preponderates in favor of defendant that, after a patient consideration thereof, there remains such grave doubt of the guilt of the accused as leads to the conclusion that the verdict of the jury is the result of prejudice or passion.

2. On a prosecution for rape, evidence held insufficient to support a verdict of guilty.

Error to Criminal Court, Cook County; Arthur H. Chetlain, Judge.

F. C. Keller was convicted of crime, and brings error. Reversed.

On August 2, 1902, an indictment was returned in the criminal court of Cook county charging plaintiff in error, in three counts, with the crime of rape on July 1, 1902, in and upon a female child named Bessie Lamb, of the age of 13 years. At the September term, 1902, of said criminal court, a plea of not guilty having been entered by defendant below, the cause was brought to trial before a jury. The jury found the defendant guilty of rape, and his punishment was fixed at imprisonment in the penitentiary for the term of four years. Upon the rendition of the verdict a motion for a new trial and a motion in arrest of judgment were overruled, and judgment pronounced upon the verdict. The case is brought to this court for review by writ of error.

The prosecution produced three witnesses who testified on the trial below, namely, Bessie Lamb, the prosecutrix; her mother, Alice Lamb; and a police officer named John Quinn. The statement of what a Dr. McNamara would testify to if present was ad-

mitted in evidence on the part of the people.

Bessie Lamb, on her direct examination, testified that she was 18 years old; that she lived at 643 Sheffield avenue, in the city of Chicago, and had lived there for the past year; that plaintiff in error owned a livery stable on Lincoln avenue; and that she had known him for two years. She fixed the date of the last time she was at his stable in various ways, viz.: That it was two weeks before he sold out. This sale was made on May 12, 1902, but the business continued under the name of plaintiff in error until June 6, 1902. That it was about two months before the trial, which would fix the date of the occurrence about July 11th. That it was about three or four weeks before the public schools closed. The date of the closing of the schools, according to her testimony, was July 25, 1902. She further testified that she went up a ladder to a room where Keller slept, over his office in the livery stable; that he said nothing to her about going up above the office; that he asked her how she felt, and that was all that was said; that he followed her upstairs, and there had sexual intercourse with her on a cot in a room above the office, where plaintiff in error was in the habit of sleeping; that she does not remember anything that was said upstairs; that he went down first, and she followed in about five minutes; that she never told anybody anything about what happened; that the first time she spoke to anybody about what occurred there was "when the policeman came," but does not remember when that was. On her cross-examination she testified that she lived a block from the stable; that she had been around there before this time, and had been ordered away from there by a Mr. Regner a number of times; that on the afternoon of the day in question she was going to the store, past the stable, and Mr. Keller motioned to her to come in, and that she went in; that he had promised her and another girl to take them a ride, and that she thought he would give them a ride before they left the stable; that nobody was with her, but she was going over to get the other girl; that when she went in it was daytime; that there were not very many people around there, but there were other men working around in the stable; that she saw them when she went in, but did not know whether they saw her; that there was nothing to prevent them from seeing her; that Mr. Keller told her to go up on that ladder, and she went; that he did not tell her why she should go, and she did not ask him why; that she did not cry; that nothing hurt her, and there were no stains on her person or drawers, and nothing wet on her; that before she went down he said for her to wait until he went down and saw that it was all right. She testified that she knew a man by the name of Joe Keller, who worked in that livery stable, and was asked the follow-

ing questions, and gave the following answers: "Q. Did you tell the police that it was Uncle Joe that had done something to you? A. I said there was a man that we called Uncle Joe. Q. Didn't you tell the police that it was Uncle Joe Keller that had done something to you? A. I didn't tell him his last name, because I didn't know his last name. Q. Now, then, I am asking you, didn't you tell the police officer that it was a man by the name of Uncle Joe Keller that had done something to you? A. I didn't say which Keller; no, sir. I didn't tell him it was Uncle Joe Keller; no, sir. Q. Did you say it was Uncle Joe? A. Yes, sir."

The only testimony given by Alice Lamb was that Bessie Lamb, her daughter, was 13 years old on June 22, 1902.

John Quinn testified that he was a police officer; that he first saw Bessie Lamb on the 31st of July, 1902, at the station. The following appears from his testimony in chief: "Q. Well, was any complaint made to you at that time by Bessie Lamb? A. Yes, sir. Q. With reference to what, officer? A. She complained that she had intercourse." The latter question was answered over the objection of plaintiff in error, and an exception was duly preserved to the ruling of the court thereon. The witness further stated that nothing definite was said by her as to time or date.

The statement of Dr. McNamara was that he "had examined Bessie Lamb on August 7th, and found her parts large enough to accept of the male organ; that there were no lacerations, or anything of the kind."

The defendant testified that he was 39 years of age; that he had never before been arrested for any offense or charged with crime; that he had conducted this livery stable for nine years, lacking a month; that he sold the stable at auction on May 12, 1902, but continued there, and the stable was conducted under his name, until the 6th of the following June; that he did not take Bessie Lamb, during the months of May, June, or July, up in his office, or any place in the stable, and have intercourse with her; that he never caressed her or had anything to do with her; that he had seen her around there for some time, the same as other children, and had told her many times to go away, the same as other children; that he had never had any intimacy or attempted to have any connection with her; that he never put her on his bed, or anything of that nature; that he had a man working for him, named Joe Keller, who was 34 years old, and that Bessie Lamb would always ask for him when she came to the stable; that she never talked to plaintiff in error much.

Eight witnesses were produced by plaintiff in error, all of whom testified that his general reputation as a peaceable, quiet, and orderly citizen was good. These witnesses were composed of three physicians, a mer-

chant, painter, shoe repairer, insurance and loan agent, and an engraver.

David, Smulski & McGaffey, for plaintiff in error. Charles S. Deneen, State's Atty., and F. L. Barnett and F. L. Fake, Asst. State's Attys., for the People.

SCOTT, J. (after stating the facts). This conviction rests upon the testimony of the prosecutrix alone. She is wholly uncorroborated in regard to any material contested question. The prosecution sought to sustain her testimony by showing that she made complaint. It is impossible to tell, from her testimony, when the alleged offense was committed. She first fixes the time at about two weeks before plaintiff in error sold the livery stable, which, fixing the latest date possible, by calculating from the time when possession changed, would not be later than May 23, 1902. She afterwards fixed it at two months prior to the time of the trial, and again at three or four weeks before the close of the school year. These two latter statements would fix the time some time between June 27th and July 10th. She states that she did not tell anybody until the policeman came. It does not appear what policeman she referred to, when or where he came, nor where she was at the time she told him about the matter; but she says on cross-examination that she told him that it was "Uncle Joe" that had done something to her, thereby referring to an employé in the livery stable by the name of Joe Keller. With the record in this condition, the people called one John Quinn, a police officer. He testified that he saw Bessie Lamb on the 31st day of July, 1902, at the Sheffield Avenue Police Station, and at that time "she complained that she had intercourse," but she did not definitely say anything in regard to the time or the date of the occurrence. It does not appear in the case at bar that the complaint which Quinn testified about was a complaint in reference to the occurrence for which plaintiff in error was then being tried, nor does it, in fact, appear that Quinn is the person to whom the prosecutrix says she related her wrongs. For aught that appears, Quinn may be the policeman to whom she stated that it was "Uncle Joe" that had done something to her, while the jury may have concluded that the complaint which Quinn heard was a complaint of the conduct of the plaintiff in error—a conclusion wholly unwarranted by the evidence.

The prosecutrix further testified, in substance, on cross-examination—using language which it is unnecessary to set out here—that she might be mistaken about penetration having taken place. It appears from her testimony that the offense was committed in the daytime in a livery stable on a public street, that she saw persons in the livery

stable as she went in, and that there was nothing to prevent such persons seeing her. None of these persons were called on the part of the people, nor is their absence in any wise accounted for. Her testimony abounds in uncertainties and contradictions about other material matters, less vital to the determination of this cause, however, than those herein above referred to.

On the part of the accused, it was shown that he had resided in the same vicinity for several years, and it was proved by witnesses of unquestioned respectability and good standing that he had during that time been of good reputation as a law-abiding citizen. He testified in his own behalf, and emphatically denied the charge made by Bessie Lamb, and his testimony was in no manner weakened or impeached. The failure of the prosecutrix to fix the time when the offense was committed put it beyond his power to account for his whereabouts or to show how he was engaged at the time when she claims the wrong was perpetrated. He presented as complete a defense to this charge as any man, however innocent, would ordinarily be able to present to an accusation of this character, surrounded, as this one was, with such uncertainty in regard to time and persons who were in the vicinity at the time of the alleged commission of the crime. The uncertainties of Bessie Lamb's testimony in these particulars, which ordinarily would weaken the cause of the prosecution, in this instance seem to have been a bulwark of strength, by making it impossible for the plaintiff in error to meet her testimony by any evidence save his own denial and proof of his previous good character.

While this court is to the fullest extent committed to the doctrine "that the jury, in their deliberations, are the judges of the facts and the weight of the evidence in all criminal cases," yet this court will not hesitate to reverse a judgment of conviction in a criminal case where the evidence on which it is based is of an unsatisfactory character, and where the evidence in the case so greatly preponderates in favor of the defendant that, after a patient consideration thereof, there remains such grave and serious doubt of the guilt of the accused as leads to the conclusion that the verdict of the jury is the result of prejudice or passion, and not of that calm and deliberate consideration of the evidence which the law requires. *Mooney v. People*, 111 Ill. 388; *Clark v. People*, 111 Ill. 404; *Campbell v. People*, 159 Ill. 9, 42 N. E. 123, 50 Am. St. Rep. 134; *Waters v. People*, 172 Ill. 367, 50 N. E. 148. In our judgment, the evidence contained in this record is not sufficient to support a verdict of guilty, and a new trial should have been granted.

The judgment of the criminal court will be reversed and the cause remanded to that court. Reversed and remanded.

(204 Ill. 588)

GEE v. GEE.

(Supreme Court of Illinois. Oct. 26, 1903.)

ANNUITIES—CHARGE ON LAND—LACHES.

1. A will devised an annuity to testator's daughter to issue and be payable out of certain real estate which was devised in fee to testator's son, and the daughter was empowered to take any proper and necessary steps to enforce the payment of the annuity. *Held*, that the annuity was a charge upon the land, and not merely upon the rents and profits, so that the land might be sold in order to pay arrearages of the annuity.

2. Land was devised to testator's son, subject to an annuity payable to testator's daughter out of the rents and profits of the land. After paying the annuity for several years payments were stopped, and the daughter did not commence suit to recover back payments until three years after the last payment had been made. *Held*, that she was not guilty of laches precluding recovery.

Appeal from Appellate Court, First District.

Suit by Mary Gertrude Gee against Benjamin F. Gee. From a judgment of the Appellate Court (107 Ill. App. 313) affirming a judgment for plaintiff, defendant appeals. *Affirmed*.

Mary Gertrude Gee, appellee, filed her bill of complaint in the superior court of Cook county, on March 21, 1901, against Benjamin F. Gee and others, praying for a receiver and an accounting, and for an order requiring appellant to pay the amount found to be due her upon such accounting, and in case of default in the payment thereof for a sale of certain property devised to appellant by his father, Charles Gee, deceased. Appellant answered the bill, denying that appellee was entitled to the relief prayed for, and averring that he had fully accounted to her. Appellee filed a replication to this answer. The cause was referred to the master in chancery to take the proofs and report his findings and conclusions thereon to the court. The parties stipulated that the following facts were true, and no other evidence was heard by the master.

On October 5, 1891, Charles Gee, the father of the parties, died in the city of Chicago, leaving a will which was duly probated in Cook county. The will, among others, contained the following clauses:

"And I hereby give, devise and bequeath to my said daughter, Mary Gertrude Gee, for and during and until she shall get married however, in case she shall live and remain a single person for and during the term of her natural life, the one annuity or clear yearly rent or sum of \$600, free of all taxes and other deductions, to be issuing and payable out of the real estate devised to my son, Benjamin F. Gee, known as the east half (½) of lots twelve (12), fifteen (15) and sixteen (16), in Johnson, Roberts & Storr's addition to Chicago, in equal monthly payments of \$50 each, on the first day of each and every month in each and every year, as aforesaid; and I do hereby charge and subject the said real estate with and to the payment of the said annuity, yearly rent or sum of \$600 per

annum at the times and in the manner aforesaid, fully empowering and authorizing said Mary Gertrude Gee to take any and all proper and necessary steps to enforce the payment thereof, as aforesaid, if default shall at any time be made in the payment of any of said payments as aforesaid.

"I do hereby give and devise to my son, Benjamin F. Gee, to have and to hold unto himself and his heirs forever, the following described real estate: The east half (½) of lots twelve (12), fifteen (15) and sixteen (16), in block three (3), in Johnson, Roberts & Storr's addition to Chicago, with the frontage on Elm street, subject to said annuity."

Appellant paid to appellee the sum of \$50 per month from the time said will was probated up to and including March 31, 1898, and afterwards paid her \$150, which would make the payments up to June 30, 1898. After that she received nothing from appellant. On March 31, 1901, appellee was married. Upon the death of his father appellant went into possession of the real estate and has had the control of it ever since. He has rented it and has collected all the rents and profits since the death of his father. Appellee has contributed nothing to the running expenses of the real estate, but all of these have been paid by appellant, amounting in the aggregate to the sum of \$3,084.96. The aggregate income from the property up to the time of the marriage of the appellee amounted to \$3,802.50. The total amount paid to appellee by appellant during this period was \$4,050. The filing of this bill is the first step appellee has taken to enforce payment of the annuity.

The report of the master finds that the annuity has accumulated through no fault of the appellee as devisee, but through the failure of appellant to comply with the provisions of the will; that appellee is entitled to recover \$1,650, but that the will does not charge the corpus of the land, and that appellee is not entitled to a sale of the fee. It further finds that appellee is entitled to a receiver to collect the rents and apply them to the satisfaction of such amount.

Objections were filed before the master, by both parties, to the conclusions in his report; appellee objecting on the ground that the master had found that the property could not be sold to pay her claim. It was stipulated in open court that these objections should stand as exceptions. The court overruled all exceptions other than that of appellee above stated, and rendered a decree finding appellee entitled to recover \$1,650 of appellant; also finding that such amount was a lien upon the property, and that it should be paid from the gross rentals due and to become due, free of taxes and other deductions; that it is a continuing and first lien on the gross rentals arising and to arise therefrom, and that the same must be paid from such gross rents and from any sale of the property hereafter made; that the same is a lien upon the corpus; and that the remedy is not confined to the rentals.

Albert E. G. Goodridge is appointed receiver to collect the rents and profits, and it is ordered that, if the amount is not paid within 90 days, the property be sold by the master in chancery, and the proceeds applied to the payment of such amount. Appellant appealed from this decree to the Appellate Court for the First District, where the decree was affirmed, and he now prosecutes this further appeal to this court.

Ward, Currey & Webster, for appellant.
Galt, Birch & Galt and Bangs, Wood & Bangs, for appellee.

SCOTT, J. (after stating the facts). The determination of the principal question in this cause involves a construction of the two clauses of the will of Charles Gee, deceased, which are set out in the foregoing statement of facts.

It is the theory of appellant that the annuity or rent devised to Mary Gertrude Gee is chargeable only upon the rents and profits arising from the real estate from which the annuity or rent was to be paid, while appellee contends that this annuity or rent is a continuing charge and lien upon rents and profits arising from said real estate and also upon the corpus or body of the land itself. Appellant places great reliance upon the case of *Irwin v. Wollpert*, 128 Ill. 527, 21 N. E. 501, where the language creating the annuity is almost identical with that of the will now before us; but in the will in the *Wollpert* Case, after creating the annuity, the testator made the following provision for its collection in case default was made in its payments, to wit: "And I do hereby charge and subject the said real estate with and to the payment of the said annuity or yearly rent or sum of \$300, at the times and in the manner aforesaid, fully empowering and authorizing my said wife and her assigns,—provided said annuity, or any part thereof, shall remain unpaid after the expiration of thirty (30) days from the time the same shall be due and payable, as aforesaid,—to enter into all and singular the premises charged with the annuity, as aforesaid, and the rents, issues and profits thereof, to receive and take until she and they be therewith and thereby, or by the person or persons then entitled to the immediate possession of the premises, paid and satisfied the same, and every part thereof, and all the arrears then due and payable, together with her and their costs, damages and expenses paid out and sustained by reason of the nonpayment thereof." In construing that will effect had to be given to all the language contained therein, and while from the language creating the annuity in that case it might well have been concluded that the annuity was a charge upon the corpus of the estate, still, when that language was taken into consideration, together with the provision for the collection of the annuity, it became apparent that the

testator intended that the annuity should be paid out of the rents and profits only, and in that cause this court regarded the fact that the annuity, if default was made in the payment thereof, could be collected by process of law out of the rents and profits only, as the controlling factor in determining the question then presented.

In the will of Charles Gee the language creating the annuity is coupled with the following provision for its collection: "Fully empowering and authorizing said Mary Gertrude Gee to take any and all proper and necessary steps to enforce the payment thereof, as aforesaid, if default shall at any time be made in the payment of any of said payments as aforesaid." It will be seen that the collection of this annuity or rent was not limited to such sums as could be derived from the rents and profits of the real estate which was burdened therewith. In the case at bar certain realty was charged with and made subject to the payment of the said annuity by the same clause which created the annuity, which annuity was to terminate upon the death or marriage of the annuitant. By the succeeding clause the same real estate was devised to Benjamin F. Gee, the appellant, "subject to said annuity." In the case of *Einbecker v. Einbecker*, 162 Ill. 267, 44 N. E. 426, the following language from page 637 of the second edition of *Theobald on Law of Wills* is quoted with approval: "If the capital is given over 'subject to' or 'after payment' of the annuities, the corpus is liable." We regard the law so stated as decisive of the principal question in this case, and as the will speaks of this charge as an annuity or rent, "to be issuing * * * out of the real estate," we regard it as a continuing charge or lien upon the rents arising from said real estate until all arrearages of the annuity shall be paid, and in this view of the matter it was not error for the court below to appoint a receiver for the purpose of applying rents to the satisfaction of that decree.

In construing this will we do not regard it important that it is possible the entire value of the real estate may, upon the theory we have adopted, be consumed in the satisfaction of this annuity, because, upon appellant's reasoning, if the annual gross income from the land were \$600 per annum, and no more, it should all be applied to the payment of the annuity. Taxes and repairs would have to come from the corpus itself, and it might thereby be completely consumed, and bring about the same disastrous end that appellant inveighs against as the possible result of the course that may be pursued under the construction placed upon this will by the court below.

It is also urged that appellee was guilty of such laches in bringing this suit that her right to the relief given by the decree was thereby barred. Appellant paid her at the rate of \$50 per month up to March 31, 1893,

and thereafter paid her \$150 on account. These payments were made without any reference to whether the rents from the real estate were sufficient for the purpose. Under these circumstances we think appellee was justified in believing that her brother considered her entitled to the \$50 per month without regard to the amount of the rents, and, that being true, such delay as occurred would not constitute a defense to this bill.

Benjamin F. Gee has placed a trust deed upon this real estate to secure a large sum of money, evidenced by promissory notes which were held at the time this suit was begun by the Union Trust Company. Appellant contends that by a certain quitclaim deed executed by Mary Gertrude Gee her right in this real estate is made subject to the payment of this indebtedness now held by the Union Trust Company, and that the decree entered below is in disregard of the rights of that company. As neither that company nor the trustee in the deed made to secure these notes is a party to this suit, we do not consider this question.

The judgment of the Appellate Court will be affirmed. Judgment affirmed.

(204 Ill. 208)

SWISHER v. DEERING et al.

(Supreme Court of Illinois. Oct. 26, 1903.)

GUARANTY—WAIVER OF NOTICE—CONSTRUCTION OF CONTRACT—INTERPRETATION BY PARTIES—DEFAULT OF PRINCIPAL—FAILURE TO NOTIFY GUARANTOR—EFFECT—EVIDENCE—ADMISSION BY PRINCIPAL—HARMLESS ERROR—REVERSAL.

1. A contract of guaranty should be construed as favorably to the creditor as any other contract.

2. Where a contract of guaranty, written underneath the appointment of an agent, read: "We agree to pay said D. or its successors all damages it or they may sustain by reason of any default of said agent, and we hereby waive notice of the acceptance of the above contract. * * * No agent has authority to vary the terms of this contract of guaranty"—the waiver of notice referred to the contract of guaranty, not to that between the company and the agent.

3. The guarantor having been a guarantor on the contracts of the same agent with the same company for three successive years previous to the making of the contract of guaranty sued on, it was a fair presumption that he was familiar with its method of doing business, and with the terms of contracts of guaranty used by it, and reasonably knew he would be accepted.

4. The guarantor wrote the company that he was ready to answer for the agent's shortage when it received a statement, and he was advised of the balance, and at the time of writing, and before suit was brought, expressed his readiness to make good the shortage. Held a fair inference from the letter that his interpretation of the waiver was that it applied to the guaranty.

5. Failure to notify a guarantor of the default of an agent whose contract he guaranteed has no other effect than to afford him a defense to the extent of the loss or damage sustained by him as a result of such failure.

6. A case will not be reversed for error in an instruction where any other verdict would have been unwarranted and the error was harmless.

7. In an action on a guaranty a statement of account, made before the suit, between the principal and the obligee, showing the amount due the latter from the former, and testified to as correctly stating the balance, was admissible in evidence against the guarantor, where the latter failed to deny that such amount was due.

8. The fact that, at the time a statement of account between a defaulting agent and his employer was made, the agent had gone into bankruptcy, does not render the statement inadmissible in an action against the agent's guarantor on his contract of guaranty.

Appeal from Appellate Court, Third District.

Assumpsit by Charles Deering and others against G. M. Swisher. From a judgment of the Appellate Court (104 Ill. App. 572) affirming a judgment of the circuit court, defendant appeals. Affirmed.

Wolfe & Mulliken, for appellant. Ray & Dobbins and W. B. Riley (James C. McMath and William M. Maxwell, of counsel), for appellees.

RICKS, J. This was an action of assumpsit by appellees against appellant in the circuit court of Champaign county, in which court judgment was entered in favor of appellees for \$1,645.38. Upon appeal to the Appellate Court the judgment was affirmed, and appellant prosecutes this appeal.

It appears that one O. P. Kellogg, who resided in the village of St. Joseph, desired to act as agent for the appellees, who are manufacturers of binders, mowers, and other implements at Chicago. Appellees, doubting the financial responsibility of Kellogg, refused to appoint him as their agent unless he gave a guarantor. Thereupon appellant, upon request of Kellogg, consented to sign the contract of guaranty hereinafter set forth. The appointment of Kellogg as agent of appellees was in writing, and on the same page, and directly beneath it, was a contract of guaranty, which is as follows:

"In consideration of the appointment of said O. P. Kellogg as agent of Deering Harvester Company, for the sale of its harvesters, binders, reapers, mowers, trucks, extras, twine and other property in certain territory, the undersigned jointly and severally guarantee the fulfillment by said agent of all his obligations and duties growing out of and relating to such agency or otherwise to Deering Harvester Company that now or hereafter may exist, and we agree to pay said Deering Harvester Company, or its successors, all damage it or they may sustain by reason of any default by said agent; and we hereby waive notice of acceptance of the above contract, notice of default by the above named agent, demand and diligence; that the written acknowledgment of or a judgment of any court against said agent shall in every respect bind and be conclusive against the undersigned, their heirs and representatives, and that the liability hereby created shall not be waived, modified or canceled by any extension of time to pay or

keep any part of said obligations or duties, or otherwise, nor except by surrender to us of this guaranty and agreement, or by endorsement hereon by Deering Harvester Company at its home office in Chicago. No agent has authority to vary the terms of this contract of guaranty.

"Witness our hands and seals, March 26, A. D. 1901. G. M. Swisher. [Seal.]"

On the written contract between appellees and Kellogg, in the blank printed for that purpose, and appearing just left of the signature of the company and Kellogg, was this indorsement: "Accepted and approved, at Chicago, Illinois, this 4th day of April, 1901. Deering Harvester Company, by P. W. Kellogg."

Kellogg thereupon was appointed agent and acted as such thereunder, and on October 22, 1901, went into bankruptcy upon his own petition. At that time he was in default to appellees in the sum of \$1,645.38, and this suit was brought to recover that sum under the above contract of guaranty. On October 25, 1901, Kellogg made an accounting with a Mr. Peebles, who was an agent for the company, and the statement of account was reduced to writing and signed by both Peebles and Kellogg, showing the above sum due appellees.

The errors relied upon for reversal are raised by instructions requested by the appellant and refused by the court, and upon the admission of certain testimony. The questions raised by the instructions are: (1) That appellant was entitled to notice of the acceptance of his guaranty in order to be bound thereby; (2) that in the absence of notice, from time to time, that liability was accruing against him as guarantor, he could not be held to have guaranteed the payment of the amount due appellees from appellant; (3) appellant having filed a plea, verified by affidavit, denying the delivery of the guaranty, it was error to refuse to instruct the jury that the burden of proof to establish that the guaranty was delivered by the appellant to appellees was upon the appellees. It is also contended the court erred in admitting in evidence the statement of account or admission of indebtedness signed by Kellogg.

We think that a fair construction of the contract of guaranty is that appellant waived any notice of the acceptance thereof. The contract of guaranty should be construed as favorably to the creditor as other written contracts. *Taussig v. Reid*, 145 Ill. 488, 32 N. E. 918, 36 Am. St. Rep. 504. The contention of appellant is that the words, "we hereby waive notice of acceptance of the above contract," applies to the contract between Kellogg and the Deering Harvester Company. We think that under the rules of construction applicable hereto these words refer to the contract of guaranty. The latter contract reads: "We agree to pay said Deering Harvester Company, or its successors, all damages it or they may sustain by reason of

any default by said agent, and we hereby waive notice of the acceptance of the above contract." This guaranty is afterwards referred to in the contract of appellant as "contract of guaranty," and we are of opinion the meaning is that appellant waived notice of the acceptance thereof by appellees. It appears that he had been a guarantor on the contracts of this same agent with the same company for three successive years previous to the making of the contract in question, and it is a fair presumption that he was familiar with its method of doing business and with the terms of contract of guaranty used by appellees, and reasonably knew that he would be accepted. On February 26, 1901, appellant sent to appellees a letter, in which he stated he had a conference with Mr. C. E. Peebles in regard to the Kellogg shortage, and concluded his letter as follows: "I am ready to answer for his [Kellogg's] shortage when you get a statement and I know the balance." At the time of writing this letter, and before suit was brought, appellant recognized his liability as guarantor and expressed his readiness to make good the shortage of Kellogg. While his opinion of the law as to his liability might not bind him, we think it a fair inference from this letter that his interpretation of the waiver in the guaranty was that notice of its acceptance was waived, and where the language of contracts is of doubtful construction the interpretation placed upon it by the acts of the parties tends strongly to show what were their real intentions.

We think that the second objection is not well taken. Failure to give notice of default, as is contended, even if necessary and not waived, would have no other effect than to afford appellant a defense to the extent he had sustained loss or damage as a result of such failure to notify him. *Taussig v. Reid*, supra. There was no effort made by appellant to show any such damage. Moreover, appellant further agreed to waive "notice of default by the above-named agent, demand, and diligence."

If there was any error in refusing to instruct the jury that the burden of proof was upon the appellees to show the delivery, we think the error was harmless. The second instruction given told the jury it was necessary to prove the delivery of the instrument, and the proof that delivery was made was so overwhelming that the jury could not have found otherwise than they did. This court will not reverse a case for error in an instruction where any other verdict would have been unwarranted, and the error is harmless. *Town of Wheaton v. Hadley*, 131 Ill. 640, 23 N. E. 422.

The last objection raised, that the statement of account was not admissible in evidence, we think not well taken. Upon the trial appellees' agent, Peebles, was placed upon the stand and identified the paper as the statement of account made, and testi-

fied that the paper represented the true balance due plaintiffs from Kellogg. No denial was made by appellant that this was the amount due appellees from Kellogg. We held in *Swift v. Trustees of Schools*, 189 Ill. 584, 60 N. E. 44, that such an admission by the principal in suit upon such instrument is evidence of the fact that such amount is due and owing, not only as against the principal, but as against his sureties. The mere fact that at the time this statement was made Kellogg had gone into bankruptcy would not change the rule of law applicable thereto. Furthermore, by the express terms of the contract, "the written acknowledgment of or a judgment of any court against said agent shall in every respect bind and be conclusive against the undersigned," the guarantor. If it had been the desire of appellant to not be bound by the written acknowledgment of the agent in case the latter became a bankrupt, he should have had the provision or exception in the contract. There being no exception, we are not authorized to make one. The admission must be given the same force as though the petition in bankruptcy had not been filed.

Finding no reversible error, the judgment will be affirmed. Judgment affirmed.

(204 Ill. 363)

CHICAGO UNION TRACTION CO. v. CITY OF CHICAGO.

(Supreme Court of Illinois. Oct. 26, 1903.)

MUNICIPAL IMPROVEMENTS—SPECIAL ASSESSMENTS—MEASURE OF BENEFITS—APPORTIONMENT—LEASEHOLD ESTATES.

1. In considering special assessments the general rule is that the inquiry as to benefits is to what extent the market value of the premises will be enhanced by the improvement.

2. Where special assessments are made against property for improvements the judgment is against the property as an entirety, and the benefits cannot be apportioned against the estate in fee in remainder and the leasehold estate of a tenant of the property.

3. Where a street railway company occupied certain real estate for railway purposes, and thereafter leased the same to another street railway corporation with a stipulation that the property should be used for street railway purposes only, but the lessee thereafter sublet such property for other purposes, it was liable to a special assessment for improvements to the extent the market value of the lots was increased by reason of the improvement.

Appeal from Cook County Court; Linus C. Ruth, Judge.

Appeal by the Chicago Union Traction Company from a judgment in favor of the city of Chicago confirming an assessment of benefits for local improvements. Affirmed.

Williston Fish and Louis Bolsot (John A. Rose, of counsel), for appellant. Robert Redfield and Charles M. Walker, Corp. Counsel (Edgar Bronson Tolman, of counsel), for appellee.

BOGGS, J. The city council of the city of Chicago, on the recommendation of the

board of local improvements, adopted an ordinance providing that the alley from the north line of West Washington street to the south curb line of West Randolph street, between South Jefferson street and South Desplaines street (except the space occupied by certain iron vault covers), should be graded and paved with granite blocks laid on artificial concrete, and that the cost of the improvement should be defrayed by special assessments on the property benefited. A petition was filed by the city in the county court of Cook county for a judgment confirming the assessment of benefits made by the commissioners. The north 50 feet of lot 7, in block 47, in the original town (now city) of Chicago, was assessed by the commissioners for benefits in the sum of \$216, and the south 25½ feet of the same lot were likewise assessed in the sum of \$110.85, and lot No. 9 of the same block was assessed for like benefits in the sum of \$326.85. The appellant company appeared in the said county court and filed a number of objections to the confirmation of these assessments, all of which were overruled. Objection No. 22 was as follows: "The said assessment upon the property of said objector exceeds the benefits which will accrue to said property from the proposed improvement." This appeal presents but a single question, whether the court erred in overruling said objection No. 22.

On the hearing of this objection a jury was waived, and the issue was submitted to the court for decision. It was stipulated that the lots objected for in the year 1888 became the property in fee of the West Chicago Street Railroad Company; that said company was a corporation incorporated under the laws of the state of Illinois on July 19, 1887, for the term of 99 years, with power to acquire, construct, maintain, and operate one or more street railroads or horse and dummy railroads in the county of Cook; that said West Chicago Street Railroad Company, on the 1st day of June, 1899, leased the said lots to the appellant company, to be used "for street railway purposes only," for the term of 99 years, and thereafter during any renewal or extension of the West Chicago Street Railroad Company's charter; that the appellant company is also a corporation organized under the laws of the state of Illinois on May 24, 1899, with power to own, lease, construct, and operate street railways in the said county of Cook and other specified counties, and to own and enjoy all real property necessary and proper for the prosecution of the business of operating street railways.

A three-story brick building stood on the north 50 feet of lot No. 7. The east 50 feet of this building had been subleased by the appellant company to C. P. Rice for the term of five years. He was engaged in conducting a transfer stable, and used that portion of the building for that purpose. The appellant company had subleased the west 100 feet of the same building to one B. A. Railton for

the term of five years. He was a wholesale grocer, and occupied that portion of the building in his business. The south 25% feet of the same lot is occupied by a brick building. It was formerly used by the appellant company as a power house, but about a year before the trial the engines and boilers had been removed and the building was unused, save that the remainder of the machinery of the power house still remained in place therein. On lot No. 9 there was a building which the company used as a power house.

Two witnesses testified in behalf of the appellant as to the benefit of the improvement to the lots. They confined their estimates of benefits to the use then made of the properties. The testimony of Conroy, a witness in behalf of the city, was to the effect that on that basis of use the benefits to the lots would equal the assessment against the property; but the testimony of the two witnesses for the appellant company was that as to the south 25% feet of lot 7 there would be no benefit, and that the benefits to the remaining part of lot 7 and to lot 9 would be less in amount than the assessment. On cross-examination, in answer to a question whether he meant to say lot No. 9 would be benefited to the extent of \$375 if used only for a power house, Conroy answered that it would, and volunteered also to say that the grading and paving of the alley would add from \$500 to \$1,000 to the salable value of lot No. 9. The court overruled the motion of the appellant company to strike from the record the remark of the witness as to the increase in the salable value of the lot by reason of the improvement.

The court also refused to hold as correct the following propositions of law:

"The court holds, as matter of law, that the true measure of benefits conferred by the proposed improvement upon any lot or parcel of land objected for herein by the Chicago Union Traction Company, which is restricted by law to use for street railway uses and purposes only, cannot exceed the increase in the value of said lot or parcel of land for the special uses to which it is so by law restricted.

"The court holds, as matter of law, that the true measure of benefits flowing from the proposed improvement to each lot of the property objected for herein by the Chicago Union Traction Company, and used as location for said company's power plant, cannot exceed the increase in value of such lot for use as a location for said power plant.

"The court holds, as a proposition of law, that as to any lot or parcel of land objected for herein by the Chicago Union Traction Company which the evidence shows is so owned or held by said company, that it is restricted by law to use for street railway uses and purposes only, and which the evidence shows has been for many years last past used solely and necessarily as a location of a power plant to furnish power for said company's

street railway, is now so used, and, as far as can now be foreseen, will continue to be so used indefinitely in the future, the true measure of benefits from the improvement herein proposed cannot exceed the increase in the value of said lot or parcel of land for such use as the location of such power house."

It is urged by counsel for the appellant company that the true measure of benefits for all of the lots is the benefit which the improvement would confer upon the property for special use for railway purposes, and that it is apparent from the rulings of the court on the motion to strike out a portion of the testimony of the witness Conroy, and in refusing to hold the said propositions of law to be correct, that the court entertained the erroneous view that benefits to the lots might be determined from the consideration of the effect of the improvement to enhance the salable value of the lots or their value for general purposes, and that, under the influence of such view of the law applicable to the case, it erred in weighing and applying the testimony heard in the case and in arriving at the judgment entered herein.

We have frequently declared it to be the general rule, the inquiry as to benefits is to what extent the market value of the premises will be enhanced by the improvement. The right of way of a railroad is a mere easement, not susceptible of being placed upon the market and sold for general business purposes. The properties here involved are ordinary city lots, platted for the express purpose of being used for business purposes. The title in fee to the lots is in one owner and the leasehold estate of 99 years is in another. The leasehold estate is for a restricted use and is enjoyable only for a limited time, and the benefits of the improvement to that estate may not, for that reason, be properly measured by the enhancement in value of the property by reason of the improvement. But the judgment is in rem (*Gibler v. City of Mattoon*, 167 Ill. 18, 47 N. E. 319), that is, against the property itself as an entirety and in a gross sum for all the benefits which will accrue both to the fee in remainder and the leasehold estate. The benefits cannot be apportioned against the estate in fee in remainder and against the leasehold estate. The adjustment of benefits in respect of these different interests in the lots cannot be made in this proceeding and a separate judgment entered against each estate, but the total benefits are to be ascertained and judgment confirmed therefor against the lots, respectively, in the same manner as state and county taxes are levied and assessed against them. It is usual in leases for such long periods as that by which appellant holds possession of these lots to provide, by stipulations incorporated in the lease, as to the liability of the lessor or lessee to make payment of general taxes, special assessments, etc. But with that the courts have no concern in proceedings for the collection of the general taxes or for the confirmation of special assessments against property for bene-

fits conferred thereon by local improvements constructed by public authorities acting in their legislative capacities. The court therefore properly declined to hold that the measure of the benefits conferred upon the lots in question could not exceed the increase in the value of the lots for the special uses to be made thereof by the appellant company under the terms of the lease by which it held the property.

A careful examination of the opinion in *Illinois Central Railroad Co. v. City of Chicago*, 141 Ill. 509, 30 N. E. 1036, will remove the impression of counsel that a different doctrine was there announced. That was a proceeding for the confirmation of a special assessment against a portion of the right of way of the Illinois Central Railroad Company, and we held that though, as a general rule, benefits arising from a local improvement should be determined by the increase in the market value of the property for any use to which it could be properly devoted, under the peculiar circumstances of the case the true measure of benefits was the increased value of the land for its special use as a right of way. The reason for this exception to the general rule as to the measure of benefits is clearly to be gathered in the opinion. It is that the right of way so proposed to be assessed for benefits was comprised in a certain grant of lands to the state of Illinois from the general government by the first section of the act of Congress of September 20, 1850 (9 Stat. 436), which granted lands to the state of Illinois to aid in the construction of the Illinois Central Railroad, and gave to the state the right of way, of the width of 200 feet, through the public lands for the construction of a railroad, and an act of the General Assembly of the state of Illinois incorporating the Illinois Central Railroad, section 15 whereof granted a right of way to the said Illinois Central Railroad Company, over and through the lands so granted to the state, "for the only and sole purpose of surveying, locating, constructing, completing, altering, maintaining and operating said road and branches as in this act provided." And we there said (page 514, 141 Ill. and page 1037, 30 N. E.): "It is thus plain that under the act of Congress donating the lands for the constructing of a railroad, and the charter of the railroad company, the strip of land—the right of way—is devoted to a certain specified purpose, and it cannot be diverted from that purpose. The Illinois Central Railroad Company owes duties and obligations to the state from whom it accepted its charter. It is bound to maintain and operate its road and perform the different obligations for which it was created. This two hundred foot strip of land the railroad holds and enjoys as its right of way and roadbed, donated to it for that purpose. Under its charter it is clothed with power to use this strip for railroad purposes, but for no other purpose. * * * Here is

a particular, specified use fixed by law, which it is beyond the power of the owner to change. * * * In a proceeding by special assessment, in no case can the assessment exceed the benefit which will be conferred on the property by the construction of the improvement. The benefit must be a real, actual benefit, not one resting in conjecture; and while it was proper to consider in this case all benefits conferred upon the defendant's right of way, for all railroad purposes, by the construction of the improvement, it is manifest that it would be unjust to charge upon the land benefits which might, in the opinions of witnesses, be conferred on the land should it be devoted to other purposes, when the railroad company is prohibited by law from using the land for any but railroad purposes."

The land comprised in the portion of the right of way of the Illinois Central Railroad in that case proposed to be assessed for benefits had been set apart, through the operation of the enactments of the general government and the state of Illinois, to the restricted and limited purpose or use of a right of way. It could not be lawfully used for any other purpose, and could not be benefited by any improvement except to the extent its value for that particular purpose should be enhanced by the improvement. The lots here involved have not been withdrawn by law from any of the uses to which such property may be devoted. The owner of the fee in the lots, as lessor, and the appellant company, as lessee, have stipulated in the lease (evidencing a private transaction between them) that the appellant company should have the right of occupancy and restricted and limited use of the property for the period of the lease, but they could not thereby withdraw the lots from the operation of the general statutes of the state, and the ordinances of the city in pursuance thereof, requiring that the property should, with other property, bear its just proportion of the burdens of constructing local improvements. The evidence showed these lots to be benefited by the grading and paving of the alley, and the court correctly confirmed an assessment for such benefits, and was not required to ascertain and determine what proportion of such benefit would be enjoyed by the appellant and what proportion by the owner of the fee.

The holdings in *Chicago, Burlington & Quincy Railroad Co. v. City of Chicago*, 149 Ill. 457, 37 N. E. 78; *Illinois Central Railroad Co. v. Village of Lostant*, 167 Ill. 85, 47 N. E. 62; *Chicago & Northwestern Railway Co. v. Town of Cicero*, 157 Ill. 48, 41 N. E. 640; and *Illinois Central Railroad Co. v. City of Chicago*, 160 Ill. 329, 48 N. E. 492—cited by counsel for the appellant company as supporting the contention that the measure of benefits arising from a local improvement to property held for railroad purposes and uses only is the benefit to the property for such

purposes, announce no such doctrine. Those cases were proceedings to condemn the rights of way of railroad companies for other public uses, and the principle declared was that the measure of damages or just compensation to be awarded a railroad company, when its right of way is to be condemned for other public uses, is not the market value of the right of way taken, but is the decrease in the value of the use of the land for railroad purposes. In condemnation cases the railroad whose right of way is taken is entitled to just compensation. As such companies, in their right of way holdings, have but an easement in the land, just compensation for the condemnation thereof for another public use is properly restricted to the injury to the easement. But the inquiry here is as to the benefit to accrue to ordinary city lots owned in fee and held by the appellant company under a lease—not a mere easement in the nature of a right of way, which may not, under any circumstances, be sold or appropriated to any other use than that of a right of way. The general rule, therefore, became applicable, that the measure of benefits was the enhanced value of the property by reason of the construction of the improvement. It is true the fee is vested in the West Chicago Street Railroad Company, a corporation organized under the laws of the state of Illinois, and not possessed of full and unrestricted power to acquire and hold real estate. It had lawful power to acquire and hold such real estate as may be necessary for the transaction of its business, or it may lawfully acquire the title to real estate by legal proceedings for the collection of debts due to it; but we are unable to see that the fact that it is so restricted in point of power to acquire, hold, and possess real estate can in any way operate to change the rule as to the measure of benefits accruing to these lots by reason of the construction of a local improvement. In the absence of proof on the point, we are to assume it obtained the fee title to the lots lawfully. It owns the fee in remainder, and may lawfully sell and dispose of the remainder to be used for general purposes, and thus receive the benefit of the improvements in the enhanced value of the property. If it is holding the fee title to these lots in violation of the laws and policy of the state, it may nevertheless sell and dispose of the title in fee in remainder. There is no provision of law for the forfeiture of real estate so held without lawful authority. It may lawfully alien its estate or interest in the lots, or the alienation thereof may be enforced on the application of the Attorney General or state's attorney, acting under the authority of the provisions of section 5 of chapter 32, entitled "Corporations" (Hurd's Rev. St. 1899, p. 435), for an order of the court, pursuant to the further provisions of said section 5, directing sale thereof to be made. The proceeds of such enforced sale, less the costs and fees of the

proceeding, shall, so the statute provides, be paid over to the corporation. If a local improvement adds to the salable value of the property so held by a corporation, it would at private sale or at such enforced sale produce a correspondingly better price, and the benefit of such enhancement of the price would accrue to the corporation. Hence, if the paving and grading of the alley will increase the market value of the lots, the estate therein will be benefited correspondingly, and such increase in value is the proper measure of the benefit of the improvement to the property, the judgment being in rem and against every interest and estate in the lots.

The judgment is affirmed. Judgment affirmed.

(204 Ill. 576)

GAYLORD v. SANITARY DIST. OF CHICAGO et al.

(Supreme Court of Illinois. Oct. 26, 1903.)

EMINENT DOMAIN—PUBLIC USE—WHAT CONSTITUTES—PUBLIC AND PRIVATE USE—PUBLIC GRISTMILLS—OTHER PUBLIC MILLS—CONSTITUTIONAL LAW.

1. To constitute a public use, something more than a mere benefit to the public must flow from the contemplated improvement; and the public must be to some extent entitled to use or enjoy the property, not as a mere favor, or by permission of the owner, but by right.

2. Private property cannot be condemned for a public and a private use.

3. Act approved March 2, 1872 (Rev. St. 1874, p. 701, c. 92), entitled "An act in regard to mills and millers," in so far as it attempts to authorize the condemnation of private property for the purpose of public mills or machinery, other than public gristmills, is violative of the constitutional provision that private property shall not be taken or damaged for public use without compensation.

4. The constitutional provision that private property shall not be taken or damaged for public use without just compensation means that private property shall be taken for no other than a public use, and then only upon the payment of just compensation.

Appeal from Circuit Court, Will County; R. W. Hilscher, Judge.

Petition by Robert Gaylord, under the eminent domain law, against the sanitary district of Chicago and others. Petition dismissed, and petitioner appeals. Affirmed.

Charles A. Munroe (Thomas A. Moran, of counsel), for appellant. John P. Wilson and Henry S. Robbins, for appellees.

WILKIN, J. Appellant filed his petition in the circuit court of Will county, in conformity with the eminent domain law of this state, against appellee and others, alleging that "he is the owner of the bed and banks of the Des Plaines river, in sections 20 and 21, township 35 north, range 10 east of the third principal meridian, from the south line of section 16 to the west line of section 20; that he is about to build a public gristmill, and also construct other machinery, as well as also the improvement of the navigation of the Des Plaines river at a point on said land

described as follows [here follows description]; that in order to construct, operate, and equip said public gristmill and other public machinery, and also the improvement of the navigation of the Des Plaines river, it is necessary to take and injure private property without the owner's consent; that the parties with whom petitioner is unable to agree as to their just compensation are the Atchison, Topeka & Santa Fé Railroad Company * * * and the sanitary district of Chicago." Then follows a description of a particular piece of land in which the sanitary district has an interest, with the prayer that a jury be impaneled to assess the damages in pursuance of the provisions of "An act in regard to mills and millers," etc., approved March 2, 1872, and in force July 1, 1872. Rev. St. 1874, p. 701, c. 92.

Petitioner was able to agree with all the defendants as to their just compensation, except the sanitary district of Chicago, which appeared in the circuit court and entered its motion to dismiss the petition: "First, because this statute is unconstitutional, in that it attempts to authorize the taking of private property without the owner's consent for a private, and not a public, use; second, because petitioner seeks by this proceeding to acquire the property for a private use, and his claim that he desires to equip and operate a public gristmill is a mere subterfuge, under which he seeks to acquire the property for the mere private purposes of developing an extensive water power; third, because the property sought to be taken had been acquired and was used by appellee for the purpose of carrying off the sewerage of Chicago, and, being thus already devoted to a public use, could not be taken by appellant under this statute, which contemplates only the taking of private property." Evidence was heard in support of and against the motion, and an order entered sustaining the same, to reverse which appellant prosecutes this appeal.

Section 1 of the statute under which appellant claims the right to condemn the property of appellee provides as follows: "When any person or persons owning land on one or both sides of any stream or water-course, any part of the bed of which belongs to such person or persons, shall desire to build or repair any public grist mill, saw mill or other public mill or machinery, or to erect, repair or increase in height any dam across such stream or water-course, to supply water for any such mill or machinery, or to improve the navigation of any such stream or water-course for the use of such mill or machinery, and it shall be necessary to take or injure private property without the owner's consent, and the compensation therefor cannot be agreed upon by the parties interested, it shall be lawful for the person or persons desiring to build or repair such mill or machinery, or to erect, repair or increase the height of any such dam, to cause the damage or com-

pensation to be paid to the owner or other person interested in the property to be taken or injured, to be ascertained in the manner provided by law for the taking or damaging of private property for public use: provided," etc. Other sections provide that no dam shall be erected to the injury of any mill lawfully existing on the same stream, nor to the injury of the health of the neighborhood, and the right to the judgment of condemnation shall be availed of within a certain time; otherwise to revert, etc. Section 6 prescribes the duty of the owner or occupier of every public gristmill within the state, requires him to grind the grain brought to his mill in due turn, and authorizes him to take certain tolls for different kinds of grain. The next section attaches a penalty for his failure to promptly and punctually attend to the duties imposed. Section 8 makes him accountable for the safe-keeping of grain received in his mill for the purpose of being ground, and section 9 imposes a penalty for taking illegal tolls. Section 11 relates to dams erected across any river or water course in this state under the authority of any law of this state, and has no application to this case.

This class of statutes has been in force in this and many other states of the Union from a very early day—in Illinois and several others while yet under territorial organization—and are generally known as "mill acts." They were manifestly passed at a time when water power was practically the only means of running such mills, and which, in the then existing condition of society, were a public necessity. As was to be expected, in view of the demands for mills to grind grain for food and to saw timber into building material for the erection of houses, as well as of the fact that land had little or no market value, these laws were enforced and acquiesced in for a great many years, until valuable rights had been acquired under them. Those of Illinois, found in Laws 1819, p. 264 (Rev. Code 1827, p. 297; Rev. Laws 1833, p. 449), were each limited to water gristmills and sawmills, except that of 1819, which was confined to gristmills. They were never called in question, so far as we are advised, and certainly not in this court. The later statutes in other states like the act under which this proceeding is brought, have attempted to extend the power to other than public gristmills, authorizing the taking or damaging of private property for the erection and operation of mills generally; our statute, as will appear from the first section quoted above, extending to "other public mill or machinery," and "to improve the navigation of any such stream or water-course for the use of such mill or machinery." When mill acts came to be questioned, many considerations conspired to influence the courts to be inclined to sustain them, and hence decisions are to be found placing their validity upon various grounds. In every instance, so far as we are advised, acts providing for com-

demnation proceedings for the benefit of public gristmills have been upheld upon the ground that taking private property for that purpose is for a public use, and not for a mere individual purpose; and some of the ablest courts of last resort have sustained laws authorizing the taking or damaging of land for water power for running mills, and factories generally, by water power. See cases cited in note to section 180 of Lewis on Eminent Domain, where the author says: "The constitutionality of acts for this purpose has been seriously questioned, but nevertheless upheld either on the ground of authority, or on long and general acquiescence and usage, in Iowa, Kansas, Maine, Minnesota, Nebraska, and Wisconsin. On the other hand, such acts have been held to be unconstitutional, as authorizing the taking of private property for private use, except in the case of public mills, in the states of Alabama, Georgia, Michigan, New York, Vermont, and West Virginia."

The Supreme Court of the state of Massachusetts, and other courts, and the Supreme Court of the United States, have sustained acts which gave the right to have the damages assessed for overflowing the lands of another by the erection of dams for operating mills and other machinery, not upon the right of eminent domain, but on the theory that the statutes do not authorize the taking or damaging of private property at all; that is, that "it is not a right to take and use the land of the proprietor above against his will, but it is an authority to use his own land and water privilege to his own advantage and for the benefit of the community"; that it is "a provision by law for regulating the rights of proprietors on one and the same stream, from its rise to its outlet, in a manner best calculated, on the whole to promote and secure their common rights in it." *Bates v. Weymouth Iron Co.*, 8 Cush. 548, approved and adopted in *Head v. Amoskeag Mfg. Co.*, 113 U. S. 9, 5 Sup. Ct. 441, 28 L. Ed. 889. These and other cases also seem to proceed upon the idea that that which is a public benefit amounts to a public use.

As already said, the validity of our present statute, in so far as it extends the right of condemnation to sawmills or other public mills or machinery, or to improve the navigation of any stream or water course on which the same may be situated, "for the use of such mill or machinery," has never been passed upon by this court; and it seems clear that, in view of the language of the statute, the Constitution of this state, and the holdings of this court as to what is a public use, within the meaning of the Constitution, and what a taking or damaging of private property, there is no escape from the conclusion that it must be held unconstitutional and void. In reaching this conclusion it is not necessary to dissent from the views of the Supreme Court of the United States and other

courts holding a similar doctrine, for the reason that our statute is in no sense confined to the ascertainment of damages or just compensation for overflowing the lands of another, but authorizes the proceeding whenever "it shall be necessary to take or injure private property without the owner's consent, and the compensation therefor cannot be agreed upon by the parties interested." The necessity may or may not arise from the flowage of the lands of another. Moreover, it, by express terms, authorizes the owner, etc., "to take or injure private property," and allows the assessment of damages or compensation to be paid to the owner or other person interested in the property "to be taken or injured to be ascertained," etc. In other words, it is a statute authorizing the taking or injuring of private property under the right of eminent domain. If it were otherwise, there could be no question, under our decisions, and in fact under the decisions of all the courts, including the Supreme Court of the United States, that the right which appellant seeks to enforce by his petition—that is, to overflow appellee's lands—would amount to taking its property. *Nevins v. City of Peoria*, 41 Ill. 502, 89 Am. Dec. 392; *Rigney v. City of Chicago*, 102 Ill. 64. Lewis, in his work on Eminent Domain (2d Ed.) § 183, says: "There can be no question, it seems to us, but that the flooding of land by a milldam is a taking. It interferes with the right to have the water of the stream flow off in its accustomed manner, and excludes the owner from the use and enjoyment of so much of the land as is covered by water, and may greatly deteriorate that which is not flooded. This has been expressly held to be a taking by the Supreme Court of the United States and by almost every court in the Union"—citing *Pumpelly v. Green Bay Co.*, 13 Wall. 166, 20 L. Ed. 557. At section 67 he further says: "Where works are constructed below the land of a proprietor, such as a bridge or dam or alteration of the channel, which causes the water to set back and overflow the land of such proprietor, there is a violation of such right, and if the works are authorized by law there is a taking, for which compensation must be made"—citing cases from almost all the states.

It is also the settled doctrine of this court that, to constitute a public use, something more than a mere benefit to the public must flow from the contemplated improvement. The public must be to some extent entitled to use or enjoy the property, not as a mere favor or by permission of the owner, but by right. *Chicago & Eastern Illinois Railroad Co. v. Wiltse*, 116 Ill. 449, 6 N. E. 49; *Sholl v. German Coal Co.*, 118 Ill. 427, 10 N. E. 199, 59 Am. Rep. 379; *Chicago Dock Co. v. Garrity*, 115 Ill. 155, 3 N. E. 448; *Millett v. People*, 117 Ill. 294, 7 N. E. 631, 57 Am. Rep. 869. It may be doubted whether the Legislature, in fact, intended to extend the right

of eminent domain to other than public gristmills. It carefully defines such mills, and prescribes the duties of the proprietors thereof, and the rights of the public, making no mention whatever as to what is meant by the expression, "other public mill or machinery." What is a public mill? What is a public machinery? We find nothing in the statute or elsewhere answering these inquiries, nor is there anything in petitioner's petition indicating what kind of "other public machinery" he is about to build. It is apparent that he does not seek merely to establish the right to build a public gristmill, but, as shown by his petition, his purpose was and is to take or injure the property of appellee for the purposes of other mills or machinery. The evidence which was heard by the court below fully justifies the conclusion that for all the purposes of a public gristmill his own property affords ample facilities for the production of more power than could be practicably used for a gristmill. Moreover, if the taking of private property for other public mills or machinery is not for a public use, it must be conceded, at most, that he seeks to condemn private property for a public and a private use, which the law will not permit him to do. *Chicago & Northwestern Railway Co. v. Galt*, 133 Ill. 657, 23 N. E. 425, 24 N. E. 674. In 1 *Lewis on Eminent Domain* (2d Ed.) § 206, note 33, it is said: "Thus, under an act for the erection of gristmills, an order of the court condemning land for a gristmill, sawmill, and paper mill is void"—citing authorities. Our statute does not authorize a condemnation proceeding for the improvement of the navigation of a stream generally, as counsel seem to argue, but only "for the use of such mill or machinery." Hence, if the object is to improve the navigation of the Des Plaines river for the use of public mills or machinery other than public gristmills, the improvement of the navigation is no less a taking of private property for private use than the erection of "other public mills or machinery." If the petitioner can maintain this petition, he can undoubtedly establish and operate, by the water power acquired, every species of machinery, and establish any kind of manufactures, or he may transmit and sell the power wherever he can find a market for it. This would certainly be carrying the right of eminent domain to an alarming and dangerous extent.

Passing upon the validity of an act of the state of Michigan, enacted in 1865, not materially different from the Illinois statute of 1872, the Supreme Court of that state, in *Ryerson v. Brown*, 35 Mich. 333, 24 Am. Rep. 564, said (Mr. Chief Justice Cooley rendering the opinion): "Unlike the act of 1824, the act of 1865 [Laws 1865, p. 651, No. 304] clearly appears to contemplate other mills than those for the grinding of grain. The title of the act would indicate a purpose to give every species of manufacture which could prof-

itably be carried on by means of water power the benefits of its provisions. * * * If the act were limited in its scope to manufactures which are of public necessity, as gristmills are in a new country not yet penetrated by railroads, the question would be somewhat different from what it is now. But even in such case it would be essential that the statute should require the use to be public in fact—in other words, that it should contain provisions entitling the public to accommodations. A flouring mill in this state may grind exclusively the wheat of Wisconsin, and sell the product exclusively in Europe; and it is manifest that in such a case the proprietor can have no valid claim to the interposition of the law to compel his neighbor to sell a business site to him, any more than could the manufacturer of shoes or the retailer of groceries. * * * The statute appears to have been drawn with studious care to avoid any requirement that the person availing himself of its provisions shall consult any interest except his own, and it therefore seems perfectly manifest that, when a public use is spoken of in this statute, nothing further is intended than that the use shall be one that, in the opinion of the commission or jury, will in some manner advance the public interest. But incidentally every lawful business does this. Undoubtedly there may arise circumstances under which it would be convenient if a power to condemn lands for mill purposes might be exercised, but they are so rare that a stretch of governmental power in order to provide for them would be more harmful than beneficial." This reasoning is peculiarly applicable to our statute and this case. The Michigan statute was in that decision held unconstitutional, and the proceeding dismissed. To the same effect are *Loughbridge v. Harris*, 42 Ga. 500; *Tyler v. Beecher*, 44 Vt. 648; *Sadler v. Langham*, 34 Ala. 311; and *McCulley v. Cunningham*, 96 Ala. 583, 11 South. 694.

In *Harding v. Goodlett*, 3 Yerg. 41, 24 Am. Dec. 546, the petitioners sought to condemn land for a gristmill, sawmill, and paper mill under a statute of that state giving the right of eminent domain to one desiring to erect a water gristmill. The Supreme Court sustained the statute on the ground that a gristmill is a public mill, and the miller a public servant, under the statutes of Tennessee, but denied the petition, and in its opinion used the following language: "The petitioners say they are desirous to build a gristmill, sawmill, and paper mill. * * * The sawmill and paper mill have no public character. The erection of these mills would be wholly for the private use of these petitioners. To take Harding's land for such use would be unconstitutional. The act of 1777 (chapter 23) contemplates no such violation of the rights of one man for the private benefit of another. Had the application been confined to the sawmill and paper mill, no one could for a

moment hesitate in rejecting it. Does the introduction of the gristmill, thereby asking the land for these complicated purposes, alter the case? In my opinion, the application is entitled to no more favor than if nothing were said about the gristmill. If an application of this sort were granted, a like application for the erection of ironworks, or any other establishment requiring water power, might be made, and would be entitled to equal favor, provided the applicant, as a pretext, were to associate a gristmill with his other works. Thus the gristmill, the only thing mentioned in the act of assembly as having any claim to be of a public character, would be made the subterfuge for vesting in one citizen the land of another, and of giving to the whole establishment, of which it would be but an inconsiderable appendage, the high appellation of a public mill. This would be mocking the citizen, who would thus be despoiled of his land to enrich another. It would be holding out the idea that his land was taken for a public use, and that the public exigencies required it, when in fact this was only used as a pretext for obtaining the land for private emolument."

We are clearly of the opinion that, in so far as the statute of 1872 attempts to authorize the condemnation of private property for the purposes of public mills or machinery other than public gristmills, it is violative of that provision of our Constitution which declares that private property shall not be taken or damaged for public use without just compensation, the meaning of which is that private property shall be taken for no other than a public use, and then only upon the payment of just compensation, and that on that ground alone the circuit court would have been justified in sustaining the motion to dismiss appellant's petition. Without reference, therefore, to other questions raised and discussed in the argument of counsel, the order and judgment of the circuit court of Will county will be affirmed. Judgment affirmed.

(204 Ill. 384)

ENGLAND et al. v. FAWBUSH.

(Supreme Court of Illinois. Oct. 26, 1903.)

WILLS—UNDUE INFLUENCE—EVIDENCE—SUFFICIENCY—INEQUALITY OF DISTRIBUTION—INSTRUCTIONS—PROMINENCE OF SINGLE FACT—HARMLESS ERROR.

1. Where a will is written or procured to be written by a person largely benefited by it, proof must fully satisfy the court that the testator was not imposed on, but knew what he was doing, and what disposition he was making of his property, when he made his will.

2. The active agency of the beneficiary of a will in procuring it to be drawn, in the absence of those who have at least equal claims upon the justice of the testator, where the testator is enfeebled by old age and disease, is a circumstance which indicates the probable exercise of undue influence.

3. Evidence in a proceeding to set aside a will examined, and held that a reversal was not warranted on the ground that there was no evi-

dence before the jury authorizing it to pass on the question of undue influence.

4. While inequality in the distribution of property is not of itself conclusive evidence of undue influence, yet it may be considered as a circumstance tending to establish undue influence, in connection with all the other facts and circumstances in the case.

5. If testator at the time of executing a will was feeble in body and mind, from sickness, old age, or otherwise, and while in this condition his son unduly influenced him to make the will, and at the time testator was not a free agent, but was under the undue influence of the son, the will was invalid.

6. Where one instruction deals with an inequality in the distribution of property by a will sought to be set aside, and another with undue influence, and others refer to other circumstances, no separate instruction is to be deemed erroneous, as singling out and giving undue prominence to one set of facts.

7. When undue influence is alleged, the real inquiry is, did the testator make and execute the alleged will, in all its provisions, of his own free will and volition, so that it now expresses his own wishes and intentions, or was the testator constrained or induced, through the undue influence, restraint, coercion, or improper conduct of others, to act contrary to his own desires and intentions as regards the disposition of his property, or any part of it?

8. An instruction on undue influence in the making of a will was not erroneous for referring to the improper conduct of "others," on the ground that there was no evidence of such conduct by any person other than testator's son, in view of evidence that the scrivener permitted the son to correct testator as to the provisions of the will, and allowed the son to write the will and compare copies, and some evidence that, though the testator referred generally to heirs, the will was drawn to exclude a grandchild.

9. The court instructed that if, at the time of the execution of the purported will, testator was so diseased mentally that he was incapable of acting rationally in the ordinary affairs of life, and of intelligently comprehending the disposition he was making of his property, then they should find that the writing produced is not the will of deceased. *Held*, that any error must be deemed harmless, in view of other instructions laying down the correct rule, that the testator has testamentary capacity if, at the time of making the instrument purporting to be his will, he has such mind and memory as enable him to understand the particular business in which he is then engaged, and in view of the fact that an instruction similar to the one alleged to be erroneous was given by request of the party complaining.

10. It is not error to refuse instructions, the substance of which is embodied in those already given.

Error to Circuit Court, Menard County; Thomas Mehan, Judge.

Bill by Mattie Fawbush against Perry Joseph England and others. From a decree for plaintiff, defendants bring error. Affirmed.

This is a bill filed in the circuit court of Menard county on the 18th day of June, 1902, by the defendant in error, Mattie S. Fawbush, against the plaintiffs in error, Perry Joseph England, Maranda Miller, Mary She-neman, and Perry Joseph England, executor of the last will of Jesse England, deceased, for the purpose of setting aside the last will and testament of said Jesse England. The bill alleged that the testator was of unsound mind and memory when the will was made,

and was under the improper restraint and undue influence of his son Perry Joseph England, one of the plaintiffs in error, and seeks to set aside the probate of the will upon the two grounds thus alleged—of unsoundness of mind and memory, and the exercise of undue influence. The bill further alleges that Jesse England, in his lifetime, and on January 9, 1902, executed a paper purporting to be his will, and on January 12, 1902, died testate, leaving defendant in error Mattie S. Fawbush, his granddaughter, and his daughters, Mary Sheneman, Maranda Miller, and his son Perry Joseph England, plaintiffs in error, and his son Paren England, since deceased, his only heirs at law; that the will was on February 21, 1902, probated by the county court of Menard county, and letters testamentary were granted to Perry Joseph England as executor; that the deceased owned at the time of his death real estate of the value of about \$50,000; that he was at the time of executing his will 87 years old, and suffering from a mortal illness. The bill was answered by Maranda Miller, Mary Sheneman, Perry Joseph England, and Perry Joseph England, executor, admitting all the allegations of the bill, except those to the effect that the testator was not of sound mind and memory, and had been induced to make his will by undue influence, the latter allegations being denied. The case was tried before the court and a jury, and the jury returned a verdict finding that the writing read in evidence, purporting to be the last will and testament of Jesse England, deceased, was not the last will and testament of the said Jesse England. Motions to set aside the verdict and for a new trial were overruled, to which the defendants below took an exception. Thereupon, on November 1, 1902, a decree was entered setting the will aside, to which decree defendants below took exception. Jesse England, the testator, at the time of his death was a farmer, residing on his farm of about 339 acres, valued at \$32,950. His death on January 12, 1902, took place after an illness of only six days, his disease being pneumonia of a threatening character. His wife had died in 1894, and his daughter Mrs. Mott, mother of defendant in error, died in 1896 at his home. His son Paren England died intestate on June 9, 1902, in Kansas City, Mo., leaving his brother, Perry Joseph England, his two sisters, Maranda Miller and Mary Sheneman, and his niece, Mattie S. Fawbush, his only heirs at law. By the terms of his will as probated, the testator gave to his granddaughter, the defendant in error, Mattie S. Fawbush, \$500; to his daughter Maranda Miller, one large flower wreath; to his son Perry Joseph England, \$1,500. The residue of his estate he gave and bequeathed to his daughters, Mary Sheneman, Maranda Miller, and his sons, Paren England and Perry Joseph England, share and share alike. The will provided that, in case his son Paren Eng-

land did not claim his share within five years, his portion of the estate should be divided equally between the two daughters and the son Perry Joseph. Perry Joseph England was made executor, without bond. There were four witnesses to the will, which was dated January 9, 1902, three days before the testator's death, but only three of these witnesses testified before the county court when the will was admitted to probate, and only three of them have testified in this case. Their names were Joseph Myers, Henry Oleson, James S. King, and James L. Rayburn. Oleson is the witness who has not testified.

T. W. McNeely, F. E. Blane, and N. W. Branson, for plaintiffs in error. John M. Smoot and Charles Nusbaum, for defendant in error.

MAGRUDER, J. (after stating the facts). The bill in this case seeks to set aside the will of the testator upon the ground that at the time of its execution he was not of sound mind and memory, and also upon the ground that his son Perry Joseph England exercised an undue influence over him, so that the execution of the will was not his own act.

A large amount of testimony was taken upon the question whether or not the testator was of sound mind and memory when he made his will. Nearly all this testimony has reference to the condition or state of the testator's mind, as shown by his actions and expressions prior to his last illness. The evidence tends to show that, before the beginning of the final sickness which resulted in his death, the testator was a man of sound mind and memory. One of the contentions of the plaintiffs in error is that there was not sufficient evidence sustaining the charge that he was not of sound mind and memory to warrant a submission of the case to the jury upon that question. We do not deem it necessary to pass any opinion upon this question, although there is some evidence tending to show that during his last sickness, when his will was made, his mind and memory were not as sound as they had been theretofore.

The other charge in the bill, upon which it was sought to set aside the will, was the charge of undue influence exercised over the testator by his son the plaintiff in error Perry Joseph England. The charge in the bill is "that said deceased, in executing same [his will], was under improper restraint and undue influence from said arts and fraudulent practices of said Perry Joseph England." There was sufficient evidence upon this branch of the case to submit to the jury the question whether the paper introduced in evidence as the will of the deceased was in fact his will. The verdict of the jury is general in terms, and does not specify whether, in the opinion of the jury, the testator was of unsound mind and memory, or

whether he was the victim of undue influence.

The plaintiff in error Perry Joseph England lived on his own farm, near the home of his father. At the time of his death the testator was a widower, and lived alone on his own place. His daughter Mrs. Mott, the mother of the defendant in error, who had kept house for him, had died in 1896, and after that date he seems to have been surrounded by hired servants, and not by any of his family. On the morning of January 9, 1902, three days before the testator's death, and while he was very sick, his son Perry was with him, and the subject of making his will was talked of between them. A man named Rayburn, who had been justice of the peace for many years in Menard county, lived northeast of the testator, on an adjoining farm. On January 9th Perry England sent his son after Rayburn to come to the testator's house to draw his will. He invited Rayburn into the house, gave him a seat in an adjoining room, and went alone into the sickroom, and talked with the testator for some time. Perry's daughter was there. In a few minutes Perry called Rayburn into the bedroom where his father was lying in bed. While Rayburn was sitting in the sitting room, he could hear Perry's voice talking to his father, but could not hear what he said. When Perry called Rayburn into the sickroom, he informed his father that Rayburn had come to fix his will. The testator then made some remark about his son Paren, saying that he did not know where he was, and had not heard from him for two years, and said that, if Paren should come back within five years, he was to have his share of the estate, and, if not, it was to be divided among the others. The testator then told Rayburn that he wanted his daughter Maranda to have a certain picture; that he wanted to give Perry \$1,500, and to give his granddaughter, Mattie Fawbush, \$5,000, but Perry corrected him so as to make the amount \$500. Upon this subject Rayburn says: "He wanted to give Perry \$1,500, and to give Mattie Fawbush, he said, \$5,000, and Perry said to me or him (I don't know who he meant to say it to), 'He means five hundred;' and the old man laid there a little bit, and then he says, 'Yes, five hundred;' and then he wanted the balance of his property divided equally between the heirs. I think he named them." Rayburn says that they then went out into the other room to draw the will. He there found lying on a stand the blank form of a will. He said to Perry: "What is this doing here?" And Perry said: "I had it here in case of an emergency. I have had it two years." Rayburn states that he had forgotten his glasses, and did not have them with him, and asked Perry if he could not write the will. Perry said: "I will write it if you will tell me what to put in it." Rayburn said: "All right." Perry offered to send his son, Jesse, after the

glasses, but Rayburn said it was a short will, and it could be written before his son would get back with the glasses. Rayburn then states that he dictated the will, and Perry wrote it down. At first he wrote the will with a pencil. Rayburn says that he dictated the will as the testator had directed him to make it, and Perry wrote it down in pencil. At this point Rayburn says: "He wanted to give Perry \$1,500, and he wanted Maranda to have that picture, and Martha Fawbush to have \$500—\$5,000, he said, and Perry kinder corrected him, and he said then \$500—and then the balance of his property he wanted divided equally between his children." Rayburn further states that, after the will had been thus drafted in pencil, they went in, and Perry read it to his father, whereupon Rayburn asked the testator if it was correct, and the testator answered, "Yes." They then went back into the sitting room, and got another sheet of paper, and Perry wrote the will with pen and ink. Perry read over the will to Rayburn, as he had written it in ink, and they then went back into the sickroom, and Perry read the will again to his father. The will was not read to the testator clause by clause, but as a whole, from beginning to end without stopping. It was read to his father by Perry, and the latter was as close as he could get to the testator. The witnesses were in the yard, and at least two of them had been sent for by the plaintiff in error Perry Joseph England. Perry went out and brought the witnesses in. He said nothing to them about signing the will as witnesses, and Joseph Myers said, "Uncle Jesse, that is your last will, is it, and you want us to sign as witnesses?" and he said, "Yes." Then they all signed it. Rayburn says that the testator did not request them to sign the will, but, when Myers asked him if he wanted them to sign it, he said, "Yes." When Rayburn left the room after the testator had talked to Rayburn in Perry's presence about his will, Perry said: "Don't let anybody go in there while we are away." Upon cross-examination, Rayburn says that he did not know whether the testator "was, or not, of sound mind and memory at the time he executed that will. The only thing he said was, 'Yes,' in answer to what Joe Myers said to him. He was very sick. I noticed, when he was talking, he would stop and kinder catch his breath like he was short of breath. He was very hard of hearing." He says also he does not know whether the testator heard what was read or not, but says: "After he read it, I asked him if that was all right, and he said, 'Yes.' That was all the answer he made." Rayburn further says on cross-examination: "Perry was to get \$1,500. Q. Then about Martha Fawbush? A. Well, when he came over that he said five thousand, and Perry said, 'He means five hundred.' The old gentleman laid there a little bit. Then he said, 'Yes, five hundred.'"

Rayburn also says that, when they were preparing the pencil draft, Perry said something about a note that his father held against him for \$1,500. The extra amount given him by the will would appear to have been the exact amount of the note held against him by his father. When Perry called the witnesses into the bedroom, Rayburn told the testator that he (the testator) must request the witnesses to sign, and that it would not do for any one else to do so, and that the testator then said: "What is it their business about my will?" When the will was signed, the testator was propped up in bed; Perry supporting him and sitting behind him while he signed it. One of the witnesses suggested that, in view of the illegible signature of the testator, his hand should be held and the will should be resigned, but Perry refused to comply with this suggestion. When the witnesses came in, there was quite a pause, and they waited for the testator to request them to sign. Perry then said to his father, "Tell these men what you want them to do," but he said nothing until Myers asked him if that was his will and if he wanted them to sign it as witnesses, and he then answered, "Yes." The word "Yes," thus uttered, was the only word spoken by him in the presence of the witnesses. He was at the time suffering pain from pneumonia and pleurisy. The doctors say that he was afflicted with Bright's disease and kidney, lung, and heart trouble.

It thus appears that Perry Joseph England, one of the plaintiffs in error, and one of the chief beneficiaries in the will, made preparations beforehand for the drawing of the will, sent for the scrivener to draw the will, sent for one or more of the witnesses to witness the will, talked with the testator about the will before the scrivener was called into the sickroom, went into the sickroom with the scrivener, wrote the will with his own hand (both the pencil copy and the ink copy), read the will to his father, held his father up in bed while he signed the will, gave instructions that no one be admitted to the sickroom while he was writing the will, and corrected his father, when the latter directed the scrivener to write in the will a legacy of \$5,000 to defendant in error, by telling the scrivener, or by remarking in the presence of the scrivener, that his father had made a mistake, and that the correct amount was \$500, instead of \$5,000. In addition to all this, Rayburn says upon his cross-examination: "When he [Perry] commenced to copy it [the will] in ink, somebody said dinner was ready. He told me to go on to dinner; that he had the form there now; that he could write it as well without me as with me; and I went on to dinner. When I got back he was still writing—nearly done. Then he took it and read it to the old gentleman in about the same tone of voice. The old gentleman was still in bed. I don't know whether he heard it or not. He read right along just as he did at first."

Where a will is written, or procured to be written, by a person largely benefited by it, such circumstance excites stricter scrutiny, and requires stricter proof of volition and capacity. The proof required in such cases must be such as to fully satisfy the court or jury that the testator was not imposed upon, but knew what he was doing, and what disposition he was making of his property, when he made his will. The active agency of the beneficiary of a will in procuring it to be drawn, especially in the absence of those who have at least equal claims upon the justice of the testator, and where the testator is enfeebled by old age and disease, is a circumstance which indicates the probable exercise of undue influence. Where the mind is wearied and debilitated by long-continued and serious and painful sickness, it is susceptible to undue influence, and is liable to be imposed upon by fraud and misrepresentation. "The feebler the mind of the testator, no matter from what cause—whether from sickness or otherwise—the less evidence will be required to invalidate the will of such person." *Purdy v. Hall*, 134 Ill. 298, 25 N. E. 645; *Smith v. Henline*, 174 Ill. 184, 51 N. E. 227; *Keyes v. Kimmel*, 186 Ill. 109, 57 N. E. 851. In view of the testimony, which has been quoted and referred to, it cannot be said that there was no evidence before the jury authorizing them to pass upon the question whether or not the will was the result of an exercise of undue influence over the testator by his son Perry Joseph England.

The court gave to the jury the following instruction: "The court instructs the jury that if you believe from the evidence that Jesse England was, by any fraud, compulsion, or improper conduct on the part of Perry J. England, induced or unduly influenced to make the paper alleged to be his will, then you should find that the paper in question is not his will." The jury having found, under this instruction and others, which were given to them, that the paper in question was not the last will and testament of Jesse England, we are not disposed to disturb the decree of the court below setting aside the will, based upon their verdict, unless it appears that the trial court committed some error of law which requires a reversal. It remains, therefore, to consider the alleged errors complained of by the plaintiffs in error.

The plaintiffs in error contend that the court erred in giving the first instruction which it gave for defendant in error, the contestant. That instruction is as follows: "The court instructs the jury that inequality in the distribution of property among those who would inherit if no will had been made is not of itself evidence of undue influence or unsoundness of mind, yet it may be considered as a circumstance by the jury, together with all the other facts and circumstances shown by the evidence, as tending to establish undue influence or unsoundness of mind." We are unable to see any error in the giving of this

instruction, in view of the decisions heretofore made by this court upon this subject. We have held that, while inequality in the distribution of property is not of itself conclusive evidence of undue influence, yet it may be considered as a circumstance tending to establish undue influence, in connection with all the other facts and circumstances in the case. *Webster v. Yorty*, 194 Ill. 408, 62 N. E. 907; *Pooler v. Cristman*, 145 Ill. 405, 34 N. E. 57; *Kaenders v. Montague*, 180 Ill. 300, 54 N. E. 321; *Taylor v. Pegram*, 151 Ill. 106, 37 N. E. 837; *Hollenbeck v. Cook*, 180 Ill. 65, 54 N. E. 154.

The second instruction given for defendant in error is also complained of. That instruction tells the jury "that if you believe from the evidence the said Jesse England, at the time he executed the will now in question, was feeble in body and mind, from sickness, old age, or otherwise, and that while in this condition his son Perry Joseph England unduly influenced him to make said purported will, and that at said time the said Jesse England was not a free agent, but was under the undue influence of said Perry Joseph England, then you should so find by your verdict." The views expressed in this instruction have been indorsed by this court in a number of cases. We have said that advanced age and loss of memory do not necessarily of themselves indicate a want of capacity to dispose of property, but that a testator is more liable to be unduly influenced when his mind has become impaired by serious sickness, and that undue influence which will justify the setting aside of a will must be such as to deprive a testator of his free agency. *Pooler v. Cristman*, supra; *Taylor v. Pegram*, supra; *Purdy v. Hall*, 134 Ill. 298, 25 N. E. 645; *Francis v. Wilkinson*, 147 Ill. 370, 35 N. E. 150. In *Francis v. Wilkinson*, supra, we said (page 381, 147 Ill., and page 153, 35 N. E.): "Undue influence which will justify the setting aside of an executed deed must have been of such a nature as to deprive the grantor of his free agency, and thus to render his act more the offspring of the will of another than of his own will."

It is said, however, in regard to the first and second instructions given for the defendant in error by the trial court, that these instructions single out certain circumstances, and make them the subjects of instructions, as tending to prove undue influence. In support of this contention the case of *Rutherford v. Morris*, 77 Ill. 397, is referred to. But in *Pooler v. Christman*, supra, the case of *Rutherford v. Morris*, if not actually overruled, was weakened by the remarks made by this court in reference thereto. In *Pooler v. Christman*, supra, it was said: "But what is said in *Rutherford v. Morris* was not concurred in by a majority of the court, and cannot be regarded as authority." In addition to this, the defect charged against the instructions, of singling out particular circumstances as tending to prove undue influence, can have no

force when all the instructions are read together. It has often been said by this court that all the instructions must be regarded as one charge, and where one instruction mentions one circumstance, and another another circumstance, so that all the material circumstances are thus brought before the jury, there is no singling out of any particular circumstance, so as to give it an undue prominence. In the case at bar, while one instruction may refer to inequality in the distribution of property, and another to feebleness in mind and body from old age, and another to some other circumstance, yet all the material facts and circumstances disclosed by the evidence were, by the instructions, viewed as one charge, correctly presented to the minds of the jury.

What has been said in regard to the first and second instructions given for the defendant in error disposes of the criticisms made by counsel for the plaintiffs in error upon the fifth instruction given by the trial court for the defendant in error.

Complaint is made of the tenth instruction, given by the trial court for the defendant in error. That instruction is as follows: "The court instructs the jury that, when undue influence is alleged, the real inquiry is this: Did the testator make and execute the alleged will, in all its provisions, of his own free will and volition, so that it now expresses his own wishes and intentions, or was the testator constrained or induced, through the undue influence, restraint, coercion, or improper conduct of others, to act contrary to his own desires and intentions as regards the disposition of his property, or any part of it?" We think the language of this instruction is substantially indorsed by the following cases: *Francis v. Wilkinson*, supra; *Taylor v. Pegram*, supra; *Yoe v. McCord*, 74 Ill. 33. Counsel for plaintiffs in error seem to object to the words "improper conduct of others," as used in the instruction, upon the ground that the word, "others" would seem to refer to improper conduct not only on the part of the plaintiff in error Perry Joseph England, but of some other person. The objection is hypercritical, but the evidence does show that the scrivener, Rayburn, readily yielded to the suggestion of plaintiff in error Perry Joseph England when the latter corrected the directions of his father by substituting \$500 in the place of \$5,000 in the drawing of the will. Rayburn also permitted Perry England to write the will, when a slight delay would have placed it in his own power to draw the will as he was requested to do by the testator. Although he states that, after the copy in ink was drawn, he and Perry compared together the pencil copy and the copy in ink, yet it is to be remembered that he was still without his glasses, and their absence was the excuse for permitting the main beneficiary in the will to draw the will himself. There is also a portion of the tes-

timony of Rayburn which tends to show that, after making specific bequests to certain of the heirs, the testator intended the residue of his property to be divided between all the "heirs." If the word "heirs" had been used in the will, the defendant in error would have been included within the terms of the will, because, her mother having died, she, by representation, would, as heir, have taken the same interest which would have gone to her mother if her mother had been living. It is not altogether clear, from the testimony of Rayburn, whether the original directions of the testator required the residue to be divided among all his heirs, or among all his children; but the testimony, taken as a whole, is as much in favor of an intention to give the residue to the heirs as to limit it to the children of the testator. Moreover, it does not appear that, in the directions given to the scrivener by the testator, the words "said amount to be her entire share in my estate" were used. Those words, however, appear in connection with the bequest of \$500 to the defendant in error, showing a determination to limit the bequest to the defendant in error to \$500, when the language originally used by the testator would tend to show that it was his intention to give his granddaughter \$5,000 instead of \$500.

Complaint is also made of the eleventh instruction given by the trial court in behalf of the defendant in error. That instruction is as follows: "The court further instructs you that if you believe from a preponderance of the evidence in this case that Jesse England, at the time of the execution of the purported will, was so diseased mentally that he was incapable, by reason of mental weakness caused by disease, old age, or other derangement, of acting rationally in the ordinary affairs of life, and of intelligently comprehending the disposition he was making of his property, and the nature and effect of the provisions of said alleged will, then they should find that the writing produced is not the will of Jesse England, deceased." This court has said: "It cannot be said, as a matter of law, that, because incapable of transacting ordinary business, a person is incapable of making a testamentary disposition of his estate." *Taylor v. Cox*, 153 Ill. 220, 38 N. E. 656; *Craig v. Southard*, 148 Ill. 37, 35 N. E. 361; *Sinnet v. Bowman*, 151 Ill. 146, 37 N. E. 885. The holding of this court in such cases is that the real question to be submitted to the jury is "not whether the party had sufficient mental capacity to comprehend and transact ordinary business, but did he, at the time of making the instrument purporting to be his will, have such mind and memory as enabled him to understand the particular business in which he was then engaged?" *Ring v. Lawless*, 190 Ill. 520, 60 N. E. 881. In *Taylor v. Cox*, supra, we held that an instruction which told the jury that, to establish testamentary capacity, it was neces-

sary to show both sufficient mental capacity to knowingly and understandingly transact the ordinary business of life, and also to comprehend the act of disposing of the testatrix's property, was erroneous. It is not altogether clear that the words used in instruction numbered 11, here under consideration, to wit, "acting rationally in the ordinary affairs of life," have the same meaning as the words "to knowingly and understandingly transact the ordinary business of life." But if the two expressions do have the same meaning, instruction numbered 11 does not say that, in order to establish testamentary capacity, it is necessary to show both sufficient mental capacity to knowingly and understandingly transact the ordinary business of life, and also to comprehend the act of disposing of the testator's property. Instruction numbered 11 merely requires the jury to believe that not only, at the time of the execution of the will of Jesse England, he was incapable, by reason of mental weakness, etc., of acting rationally in the ordinary affairs of life, but, in addition to this, that at that time he was incapable of intelligently comprehending the disposition he was then making of his property, and further that at that time he was incapable of understanding the nature and effect of the provisions of said alleged will. If the testator was incapable of intelligently comprehending the disposition he was then making of his property, he was certainly incapable of transacting the ordinary business of life; and in this respect the instruction was not erroneous, because, in order to give the testator credit for testamentary capacity, it was only necessary for the jury to find that he was capable of intelligently comprehending the disposition he was then making of his property, whether he was capable of transacting the ordinary business of life or not. The doctrine of this court is that the testator has testamentary capacity, if, at the time of making the instrument purporting to be his will, he has such mind and memory as enable him to understand the particular business in which he is then engaged. This instruction, though awkwardly drawn, does not lay down the contrary of this proposition. But if it should be regarded as erroneous in this respect, other instructions were given which laid down the correct rule as to testamentary capacity. Some of the instructions so given were asked by and given for the plaintiffs in error themselves. For instance, in instruction 5 given for the plaintiffs in error, the jury were told "that to be of sound mind and memory, so as to be capable of making a valid will, it is sufficient if the testator has an understanding of the nature of the business in which he is then engaged. * * * If his mind and memory are sufficiently sound to enable him to know and understand the extent and amount of his property, and his just relations to the natural objects of his bounty, and the business in which he is engaged at the time of executing his

will, then he is of sound mind and memory, within the meaning of the law." But it is well settled that a party cannot complain of an instruction asked by and given for his adversary, if he has asked for and obtained an instruction of the same character. The third instruction given for plaintiffs in error at their request began as follows: "The court instructs the jury that, in order to make a valid will, it is only necessary that a man shall have mental capacity sufficient for the transaction of the ordinary affairs of life, and, possessing this, even though he may be feeble in mind and body from sickness or old age, he has the legal right to dispose of his property just as he pleases," etc. In view of what is said, we are unable to say that injury was done the plaintiffs in error by the giving of instruction numbered 11, complained of by them.

It is further charged that the trial court erred in refusing to give the fourteenth and fifteenth instructions asked by the plaintiffs in error. The fourteenth instruction so refused is as follows: "The court instructs the jury that if they find from the evidence that the deceased, in making the will in question, was influenced by affection or attachment, or a disposition to gratify the wishes of defendant Perry Joseph England, or by his advice and entreaty, that would not be sufficient ground for setting aside the will." The fifteenth instruction so refused is as follows: "The court instructs the jury that advanced age and impairment of memory do not necessarily and of themselves show a want of capacity to make a valid will and dispose of property." There was no error in refusing the fourteenth and fifteenth instructions, for the reason that their substance is embodied in instructions 10 and 11 and 3 and 6 given for the plaintiffs in error. The four latter instructions embodied fully all the ideas expressed in the fourteenth and fifteenth refused instructions.

It is said that the trial court erred in admitting improper evidence. The court permitted some evidence to be introduced showing the relations which existed between the testator and his deceased daughter, Mrs. Mott, to the effect that she had kept house for him, and that his feelings towards her were kindly and affectionate. Some evidence was also admitted, tending to show attempts on the part of Perry Joseph England to influence his father to refuse pecuniary aid to one of his sisters when such aid was asked for. We recognize fully the doctrine, frequently announced by this court and insisted upon by counsel for plaintiffs in error, that statements made by the testator, either before or after the execution of a contested will, which are in conflict with the provisions thereof, do not invalidate or modify such will in any manner, and that parties making wills cannot invalidate them by their own parol declarations made previously or subsequently. *Dickie v. Carter*, 42 Ill.

376; *Taylor v. Pegram*, supra; *Kaenders v. Montague*, supra; *Harp v. Parr*, 168 Ill. 459, 48 N. E. 113. We do not regard the testimony complained of as in any way contravening this rule. It was not testimony of the character condemned by the rule. In *Wilbur v. Wilbur*, 138 Ill. 446, 27 N. E. 701, we said (page 450, 138 Ill., and page 701, 27 N. E.): "While it is true that the undue influence which will invalidate a will must be present and exercised over the mind of the testator at the time the will is made, yet it is competent to prove previous conduct of the one charged with procuring it to be made, as tending to show his influence over the testator at such time." It is also a well-settled rule that, while the declarations of the testator are not admissible to show an express revocation of his will, or the fact that it was executed under duress or undue influence, they may nevertheless be proved and used to show his mental condition at the time of the execution of the will, or so near the time that the same state of affairs must have existed. *Reynolds v. Adams*, 90 Ill. 134, 32 Am. Rep. 15.

We are of the opinion that there was sufficient evidence introduced before the jury to justify them in finding that this will was produced by improper conduct and undue influence on the part of the plaintiff in error Perry Joseph England. We are also of the opinion that plaintiffs in error have not pointed out any errors committed by the trial court of sufficient importance to justify us in reversing the decree of the circuit court, based upon the verdict so rendered by the jury. Accordingly the decree of the circuit court is affirmed. Decree affirmed.

(204 Ill. 430)

YOUNG et al. v. YOUNG et al.

(Supreme Court of Illinois. Oct. 26, 1903.)

ADVANCEMENTS—EXPRESSION IN WRITING—SUFFICIENCY.

1. Under *Hurd's Rev. St. 1899*, c. 39, § 7, providing that no gift or grant shall be deemed an advancement unless so expressed or charged in writing by the intestate, or acknowledged in writing by the child or other descendant, an account book in which a decedent had merely charged to his children certain sums which had been given to them, and to one of them the expressed consideration for a deed of land to him, such deed being in ordinary warranty form, did not show the sums given or the land conveyed to have been advancements.

Appeal from Circuit Court, Schuyler County; Thomas M. Mehan, Judge.

Action by Elizabeth D. Young and others against Carl C. Young and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

Glass & Bottenberg and D. L. Mourning, for appellants. B. O. Willard (L. A. Jarman, of counsel), for appellees.

WILKIN, J. This is an appeal from the circuit court of Schuyler county by Elizabeth

D. Young and others to reverse a decree there rendered in a proceeding for partition.

John A. Young, a resident of Schuyler county, died in June, 1902, owning about 400 acres of land, leaving a widow, Elizabeth D. Young, and nine children. During his lifetime he from time to time paid money to several of the children, keeping an account of such payments in an account book. Some time before his death he made a conveyance of land to one of his sons, Carl C. Young, and at the same time entered in the account book an item for a sum equaling the consideration expressed in the deed, namely, \$8,100. Soon after his death his widow and J. Henry Young, a son, were appointed administrators of his estate. A controversy arose as to the shares of the several children in the estate, it being claimed by some that the items set forth in the book of accounts were advancements, intended by the father to be deducted from the shares of the children named in each account, while others claimed that the items were gifts by the father, not to be taken into account in the settlement of the estate, and others that the items were charges against the children as mere debts due to the father. Carl C. Young filed a bill for partition of the lands, claiming that each of the heirs, who were made defendants, was entitled to a one-ninth share thereof (without mentioning the supposed advancements), and praying also for the assignment of homestead and dower to the widow. One of the daughters and the widow filed an answer, alleging that the conveyance to Carl C. was an advancement to him, and that the latter's interest in the estate does not amount to that much. Three of the boys who were minors answered by guardian ad litem, denying that the bill correctly set forth the shares of the heirs, and alleging that the charges in the account book were so made as advancements, not only to Carl C., but also as to three of the other children who had received money from the father. The widow and the five children against whom no items appear in the account book then filed a cross-bill, which was afterwards amended, alleging that the items set forth in the account book were advancements, and praying that the same be so considered in determining the respective interests of the heirs in the lands. A demurrer was sustained to the cross-bill first filed, and by an amendment it was alleged that the items were charged, in writing, as advancements to the four defendants. Answer was filed by the defendants, denying the allegations of the cross-bill, and this formed the principal issue in the court below. Upon the hearing the chancellor dismissed the cross-bill, and ordered partition and the assignment of dower according to the prayer of the amended original bill, holding that the several items in the account book were not advancements.

Upon this appeal the sole question is whether the items in the account book, un-

der a proper interpretation of section 7, c. 39, Hurd's Rev. St. 1899, can be treated as competent evidence of advancements made by the deceased to his several children. That section provides: "No gift or grant shall be deemed to have been made in advancement unless so expressed in writing or charged in writing by the intestate, as an advancement, or acknowledged in writing by the child or other descendant."

Four pages of an account book of the deceased were offered in evidence, upon the hearing, by counsel for the cross-complainants, as follows:

(Page 158.)

1899.	Apc. James H. Young.	
Ap. 20.	Cash	\$ 100 00
Jul. 15.	Cash	500 00
Sept. 4.	Charged cash	1,000 00
1901.		
Dec. 1.	Bank stock	1,500 00

(Page 159.)

1897.	Apc. Sadie Young.	
July 7.	Cash	\$ 50 00
Feb. 6.	Cash	500 00
Apr. 6.	Cash	100 00
Dec. 1898.	Cash	500 00
		\$1,150 00
Sept. 1898.	In store	3,416 67
		<u>\$4,566 67</u>

(Page 160.)

Sept. 15, 1889.	In Apc. with Florence Young.	
1889.	Three hundred dollars	\$ 300 00
1890.	Three hundred dollars	300 00
1892.	Three hundred dollars	300 00
1893-4.		\$325 00
		100 00
		125 00
		<u>\$550 00</u>
Sept. 4.	Cash	550 00
	Cr. Cash	50 00
Oct. 16.	Cr. Cash	\$ 5 00
Feb. 3.	Cr. by cash	5 00
		<u>\$15 00</u>
Sept. 24, 1901.	Crg. by cash	500 00

(Page 161.)

	In Apc. with Carl C. Young.	
1900.	Jan. 1. Deeded to C. C. Young 178 acres land, valued at \$8,100 dollars..	\$8,100 00

Cross-complainants also offered in evidence a warranty deed signed by the deceased, John A. Young, and his wife, conveying to Carl C. Young, for the consideration of \$8,100, 178 acres of land. The testimony of the widow was then offered by the cross-complainants to show that the deceased, as he made the entries in the books, had stated to her and to others that his purpose in keeping this account was to make a record of his advancements to his children, expecting it to come out of their share in the farm, but this evidence was rejected by the court. Evidence of Mary E. Young, one of the daughters, and John Robinson, a young man who had worked for the deceased, to the same effect, was also objected to, but the court received it, overruling the objection. The defendants to the cross-bill introduced the testimony of W. H. Dooley, who had been a partner in business with the deceased, and who stated, in substance, that the deceased had told the witness, in explanation of his deed to Carl C. Young, that he "felt like he

would like to favor him and put him in shape to help himself." In the same examination he states: "I do not know as he said he gave him the farm at all. He says, 'I want to fix him.'" The witness further states that, as to the daughter Sadie, he heard deceased say on one occasion that her house "wasn't finished, and the accommodations wasn't very good to entertain any one outside of the family, and he said he wanted a place to stay when he came to town, and when he came to town he liked to stay at his daughter's, and said he just gave her \$500 to finish the house with."

Upon this evidence, which was all that was introduced, it is clear the circuit court properly dismissed the cross-bill, and held that the items in the account book did not comply with the requirements of the statute as to the making of an advancement. The language of the statute is not of doubtful meaning, but is plain, clear, and easily understood. No gift or grant shall be deemed to have been an advancement unless so expressed in writing or charged in writing by the intestate as an advancement, or acknowledged in writing by the one receiving the gift or grant. Inasmuch as advancements, under this statute, cannot be evidenced by parol declarations or statements (*Wilkinson v. Thomas*, 128 Ill. 363, 21 N. E. 596), no material or essential part of the proof necessary to establish an advancement can be supplied by parol testimony. The deed to Carl C. contains nothing which distinguishes it from an ordinary warranty deed. The book account, at most, evidences the charging of money paid to the children from time to time, but discloses nothing from which the inference can be drawn that the payments were made by way of advancements, as contemplated by the statute. It is not enough that the deceased intended the several accounts to be advancements. The items will not have such a legal effect, however clear the intention may be, if that intention be not evidenced in the manner required by the statute. *Long v. Long*, 118 Ill. 638, 9 N. E. 247; *Bartmess v. Fuller*, 170 Ill. 193, 48 N. E. 452; *Marshall v. Coleman*, 187 Ill. 556, 58 N. E. 628.

The decree of the circuit court will be affirmed. Decree affirmed.

(204 Ill. 145)

DANZIGER v. PITTSFIELD SHOE CO.

(Supreme Court of Illinois. Oct. 26, 1903.)

ATTORNEYS—COMPROMISING CLAIM—AUTHORITY—BURDEN OF PROOF—SALE—TIME OF DELIVERY—CONSTRUCTION OF CONTRACT—ADMISSIONS.

1. An attorney to collect a claim cannot, without special authority, compromise it, and, he having done so, it is for the other party to show he had authority, or that his client ratified it, to do which he must have had knowledge of the facts.

2. Where defendants, in ordering goods of plaintiff, requested that shipments be made at

a certain time, and plaintiff in reply said that it had lots of orders, and did not know as it could ship all of theirs, but it would do the best it could, there is no agreement to deliver at a particular time.

3. Where a contract is in writing, its meaning is for the court, though there is parol evidence that it was superseded by another contract, and a question therefore for the jury.

4. Admission in an action for the price of shoes that a certain amount was due, except as it might be reduced by proof of offsets or settlement, makes proof of delivery of the shoes unnecessary.

Appeal from Appellate Court, First District.

Action by the Pittsfield Shoe Company against Abe Lincoln Danziger. From a judgment of the Appellate Court (107 Ill. App. 47) affirming a judgment for plaintiff, defendant appeals. Affirmed.

This is an action of assumpsit begun on September 4, 1900, in the superior court of Cook county by the appellee against the appellant to recover an amount claimed to be due on account of certain merchandise consisting of shoes, alleged to have been delivered to the appellant by the appellee. The declaration consisted of the common counts and two special counts. In the special counts it was charged that the appellee consigned certain goods to appellant, to be disposed of by him for commission and reward; that appellant promised to account for the same, and pay over to appellee the proceeds of the sale of said goods; that, although appellant received and sold said goods, he had made default in rendering an account of sales and in not paying over the proceeds. The plea of general issue was filed. The trial resulted in a verdict by the jury in favor of appellee for \$3,817.83. Motions for a new trial and in arrest of judgment were overruled, to which action of the court exception was taken, and judgment was entered in favor of appellee and against appellant for \$3,817.83 and costs. An appeal was prayed to the Appellate Court, where the judgment of the superior court has been affirmed. The present appeal is prosecuted from such judgment of affirmance.

Israel Shrimski, for appellant. Bangs, Wood & Bangs, for appellee.

MAGRUDER, J. (after stating the facts). Appellee is a corporation engaged in the business of manufacturing shoes at Pittsfield, in the state of New Hampshire. Appellant is engaged in the wholesale shoe business in Chicago. It appears from the evidence that appellee and appellant commenced their business relations in November, 1897. In that month appellant placed an order with appellee for shoes, such order being given by letter written from Chicago. A letter written by appellant on December 28, 1897, was answered by appellee on December 31, 1897, and from that time down to at least No-

¶ 3. See *Contracts*, vol. 11, Cent. Dig. §§ 767, 770.

vember, 1890, appellee continued to ship goods on consignment to appellant, and appellant remitted for all goods sold at the invoice prices of the same, less 7 per cent. discount. The controversy here involved arises out of transactions had between the parties from November or December, 1899, until they ceased business relations in July, 1900. It is claimed by the appellant that all former transactions and methods of purchase and payment for merchandise were entirely superseded by new contracts entered into subsequently to November, 1899. The questions arising upon this record are much simplified by the following admission and agreement, made by appellant at the close of appellee's testimony upon the trial below, to wit: "It is admitted and agreed that the defendant owes the plaintiff for goods the sum of \$3,817.83, unless the defendant is able to reduce said amount by showing offsets or settlement." It is claimed by appellant that a full settlement and accounting were had between the parties. It was also relied upon as a defense by the appellant that the appellee had failed to deliver goods to appellant according to the contract between him and appellee, and that by reason of such default the appellant, who had sold such goods, was unable to fill contracts made with his own customers, and, in consequence, suffered financial loss. The amount of \$3,817.83 being admitted by the appellant to be due for goods sold and delivered unless the proof shows that such amount ought to be reduced by damages suffered by appellant, or unless there was a settlement of appellee's claim against appellant, there are only two questions here to be considered: First. Was there a settlement? Second. Were damages incurred by the appellant, which should be applied in reduction of the amount admitted to be due?

1. It is assigned as error that the trial court excluded evidence offered by the appellant for the purpose of showing a settlement. The contention of appellant upon this subject is that on August 7, 1900, he gave to a person named Bicknell, claiming to represent the attorneys of appellee, a check for \$1,169.13 upon the Continental National Bank of Chicago, to the order of appellee's attorneys, signed by "Abe Lincoln Danziger & Co.," and having upon the face of it, just before the name of the maker, these words: "Account Pittsfield Shoe Co." Appellant also says that after this check was given he returned certain goods. It is said by counsel for appellant that the claim was settled by the acceptance of the check for \$1,169.13 and of the goods returned. The position taken by appellant's counsel is that, if the trial court had admitted the offered testimony in regard to the settlement, this case would have been brought within the rule announced in *Lapp v. Smith*, 183 Ill. 179, 55 N. E. 717, and *Ostrander v. Scott*, 161 Ill. 339, 42 N. E. 1089. In *Ostrander v.*

Scott, supra, it appeared that the debtor enclosed a check in a letter to his creditor, stating that it was in full of the amount claimed by the creditor, and should be returned if the creditor did not desire to accept it in full settlement of the account; and that the creditor refused to accept the check in full payment of the account, but applied it as a part payment thereof; and it was held that, inasmuch as the amount of the claim was in dispute and unliquidated, the creditor could not receive the check in part payment only, but that his receipt thereof and use of the check would constitute a full satisfaction of the claim. It was also there held that an account cannot be considered as liquidated, so as to prevent the receipt of a less amount as payment from operating as a satisfaction, where there is a controversy over a set-off and the amount of the balance. In *Lapp v. Smith*, supra, where, although the items of appellee's claim were not disputed, yet a set-off was asked, and it was denied that the demand had become and was a matured liability, it was held that the amount of the appellee's claim being in dispute, and that it was due being denied, it was an unliquidated demand; and it was further therein held that a tender of a check for a certain sum and notes for the balance claimed by the debtor to be due, as an offer to adjust an unliquidated disputed account, must be accepted or rejected by the creditor in toto, and that the creditor could not keep the check and return the notes, and sue for the balance claimed by him to be due after crediting the proceeds of the check.

Under the doctrine announced in the two cases referred to, it is here contended by appellant, as we understand the argument of his counsel, that, although the check for \$1,169.13 and the amount of the goods returned were less than the amount claimed by appellee, yet that the demand was unliquidated, and that, therefore, the check and the goods, having been tendered in full settlement of the account, could not be applied in part payment of the same. In other words, the claim of appellant is that he tendered the check and the goods in settlement of the account, and that they were accepted by appellee, and that, therefore, appellee is estopped from suing for the full amount of the account. The trouble with the position taken by counsel for appellant upon this branch of the case is that the attorneys, or person claimed to represent the attorneys, of appellee, who accepted the check, were not shown to have had authority to compromise the claim in behalf of appellee. The authority of an attorney to prosecute a suit does not involve authority to compromise it. Before an attorney can compromise a suit he must have a special authority for that purpose. *Wetherbee v. Fitch*, 117 Ill. 67, 7 N. E. 513. Where an attorney employed to prosecute or defend a suit makes an agreement for the settlement

of the same out of court, and without making the agreement a part of the decree or judgment in the suit, the client will not be bound by such agreement or settlement without proof of authority in the attorney to bind the client, or acquiescence on the part of the client after knowledge of the facts; and in such case there is no presumption of authority, but the burden of proof rests on the party alleging authority to show that fact. *Brooks v. Kearns*, 86 Ill. 547. "Even where attorneys are employed to sue for and collect debts of their clients, the attorneys, without special authority, can lawfully do no more than obtain judgment, have execution issued, receive and receipt for the proceeds. They cannot compromise the debt, give day of judgment, receive a less amount in satisfaction, or receive in payment anything but money." *Nolan v. Jackson*, 16 Ill. 272; *Lochenmeyer v. Fogarty*, 112 Ill. 572. Nor can it be said that there is any ratification of such contract of settlement by the client, unless it is shown that the client has full knowledge of the facts. In the case at bar, the check for \$1,169.13 was handed to Mr. Bicknell, but appellant made no offer to prove that Bicknell had any authority from appellee, or from appellee's attorneys in Chicago, to adjust and settle the account for the amount of the check, or for a less amount than the full amount claimed. No offer was made to show that appellee's attorneys had such authority from the appellee. No offer was made to show that the information that the check was accepted or received by Bicknell in alleged full settlement was communicated to the appellee's attorneys, or to the appellee, or that either appellee or its attorneys had any knowledge of the alleged circumstances surrounding the giving of the check, or that there was any ratification by the appellee. There were no circumstances proposed to be proven from which such ratification could be inferred. An offer was made to show that Bicknell was told that the check and goods were tendered in full settlement of the account, but no offer was made to show that such information, if given to Bicknell, was communicated to appellee's attorneys or to appellee. The fact that appellee accepted the check and credited it upon appellant's account was no evidence of any ratification of a settlement. The correspondence between the parties, together with their evidence, shows clearly that appellant was in the habit of remitting checks to the appellee and receiving credit for the same. There was no offer to show that appellee received this particular check, and gave appellant credit for it, with knowledge that it had been tendered as a settlement of the account. For the reasons above stated, the trial court committed no error in excluding the offered evidence in regard to a settlement.

2. It is claimed by appellant that he had contracts with appellee to deliver goods to

him at certain times, but that appellee failed to make such deliveries at the times agreed upon, and that in consequence of such failure appellant was unable to fill contracts which he had made with his customers, to whom he had resold the goods, and thereby was subjected to financial loss. In other words, appellant claims, as a set-off to appellee's claim, damages incurred for failure to deliver goods at the time or times agreed upon. The damages alleged to have been thus incurred are claimed to have arisen under and by virtue of two alleged orders for goods. One of these orders was given by letter dated December 16, 1899, and the other is claimed by appellant to have been given orally in a conversation had with appellee at its factory in Pittsfield on January 23, 1900. In the first place, in regard to the order of December 16, 1899, it is a disputed question whether the goods were to be delivered at any particular time or not; in the second place, it is a disputed question whether appellant had any right to sell the goods embraced in the order of December 16, 1899, at advanced prices, or only at the prices at which the goods were billed to him. In his letter to appellee dated December 16, 1899, appellant says: "Since we find that you object to making such a large order at old prices, we enclose a new order, which only covers the goods which we have actually sold and must deliver at old prices; consequently, the orders of November 10 and 25 are herewith canceled." The order of December 16, 1899, sent with the foregoing letter, was for 54 different lines of goods, the aggregate value being a little over \$8,000, of which, according to the testimony of the appellee, goods to the amount of \$7,417.80 were actually delivered, and of which, according to the testimony of appellant, goods to the amount of \$6,884.42 are admitted to have been delivered. It is true that at the bottom of the order of December 16, 1899, appellant had written a request that shipments be made one-half January 15, 1900, and one-half February 15, 1900; but in its reply, written on December 21, 1899, to the letter of December 16, 1899, appellee said: "In answer to letter 12/16 will say that we will accept this last order of December 16 at old prices, but on all future orders we must get an advance of five cents per pair. We have lots of orders, and do not know as we can ship all of yours or not, but will do the best we can." If there was no contract on the part of appellee to deliver goods at any particular time under the order of December 16, 1899, then no damages could accrue to the appellant on account of failure to deliver at any particular time. Certainly the letter of December 21, 1899, does not agree to deliver goods at any particular time, but simply states that appellee "will do the best we can."

As to the claim by appellant that there was a verbal order for goods made on January 23, 1900, it is denied by appellee that there was any such order which was accepted by it. Appellant drew up such an order, and left it

in appellee's factory with the bookkeeper, but the testimony of appellee goes to show that such order, which was not seen by the managing men of the company until afterwards, was not accepted. It is admitted by appellant that no goods were delivered under the alleged order of January 23, 1900. If there was no contract to deliver goods in pursuance of an order given and accepted on January 23, 1900, then appellant is not entitled to any damages against appellee for failure to deliver goods within any particular time, so far as the alleged order of January 23, 1900, is concerned. In his letter dated December 16, 1899, to appellee, appellant states that the order of that date "only covers the goods which we have actually sold and must deliver at old prices." "Old prices," as here used, means, as we understand it, "billed prices"; that is, the prices at which the goods had been billed to appellant. If appellant sold such goods at advanced prices, he certainly violated his agreement with appellee, inasmuch as he states that he had sold the goods, and was to deliver them to his customers at the old prices. These questions as to whether appellee was to deliver the goods at any particular time or not, and as to whether appellant had any right to sell the goods at advanced prices instead of selling them at the billed prices, were submitted to the jury under the instructions. So far as the contracts were in writing as embodied in the correspondence, they were interpreted and construed by the court.

Appellant complains that the third instruction given by the trial court for the appellee was erroneous. This instruction tells the jury that the expression used by the appellee in its letter of December 21, 1899, that "it would do the best it could," did not mean an agreement on appellee's part to do it in a certain time, and that in determining whether appellee failed to do the best it could its ability and prior orders and pressure of business might be taken into account. Appellant also complains of instruction numbered 7, given by the trial judge of his own motion, upon the ground that therein the court decided that no contract to deliver goods at certain times was embodied in the written evidence which was introduced. The trial court did not err in placing a construction upon the written contract as embodied in the letters. It is well settled that the meaning of a written contract is a question of law, and that the court must determine the construction of such a contract. The court gives to the jury, as matter of law, what the legal construction of a written contract is, and this the jury are bound absolutely to take. 2 Parsons on Contracts (6th Ed.) marg. p. 492; *Graham v. Sadlier*, 165 Ill. 95, 46 N. E. 221; *Keeler v. Clifford*, 165 Ill. 544, 46 N. E. 248; *Streeter v. Streeter*, 43 Ill. 155; *Nash v. Classen*, 163 Ill. 409, 45 N. E. 276; *Fleet v. Hertz*, 201 Ill. 594, 66 N. E. 858. Further objection is made to the third instruction upon the alleged ground

that there was no evidence in regard to appellee's ability, prior orders, and pressure of business. There was evidence in regard to these matters. In one of its letters to the appellant appellee alludes to the fact that some of its customers buy large quantities of goods, and pay for them in 10 days, and that it was its duty to take care of these customers before shipping to appellant. The orders of these customers were prior in date to those of the appellant. In one of its letters appellee also stated that it was a small concern, and could not make more than 15 or 18 cases of goods per day, so that it was unable to ship as much as appellant desired it to do. In the very letter of December 21, 1899, written in reply to appellant's letter of December 16, 1899, appellee states that it has "lots of orders, and do not know as we can ship all of yours or not." These letters, and others that might be referred to, show that there was testimony in regard to the matters referred to in the third instruction. There was evidence tending to show that the appellee delivered goods as soon as it could, and we do not think that the instruction singles out or gives undue prominence to any single fact or to several facts.

Appellant criticises instruction numbered 5, given for the appellee by the trial court. By that instruction the jury were told that "in arriving at their verdict they will take as a basis the figures \$3,817.83 as the amount due the plaintiff, less such sum, if any, as you shall find from the evidence the defendant, Danziger, may be entitled to deduct therefrom." It is said that this instruction disregards all mention of appellant's defense. This criticism of the instruction is not just, because it expressly tells the jury to deduct such sums as they may find from the evidence appellant is entitled to have deducted therefrom. Moreover, instruction numbered 6, given for the appellee, told the jury to find the issues for the appellee, and assess its damages at \$3,817.83, "unless they find from the evidence that the defendant, by a preponderance of the evidence, has established a counterclaim or set-off due from the plaintiff to the defendant." Here was an express reference to the fact that appellant made a counterclaim and claimed a set-off.

Instruction numbered 7, given by the court of its own motion, is further criticised by appellant upon the ground that in this case the written contract embodied in the letters was not exclusively for the consideration of the court, but that evidence in regard to the alleged contracts between appellant and appellee was embraced both in the letters and in the oral testimony, and that, therefore, it should have been referred to the jury to consider both the letters and the oral testimony in determining what the contract was. The instruction expressly said to the jury: "Whether such contracts are proved by the testimony of the witnesses is for the jury to decide. If they are proved, and the

plaintiff did not deliver the goods, then upon the invoice prices of such as the defendant sold, but could not deliver because they were not delivered by the plaintiff, the defendant is entitled to deduct from the claim of the plaintiff five per cent. of those invoice prices. * * * If such contracts and nondelivery are proved, and if the defendant did not induce the plaintiff to believe that he was selling the goods at the invoice prices, then he would be entitled to have a deduction for the profits above the invoice prices on the goods which he did sell, but could not deliver, because of such nondelivery by the plaintiff." Instruction numbered 7 thus left it to the jury to say whether the contracts were proved by the testimony of the witnesses or not, and it further left it to the jury to decide whether appellant was entitled to the deduction claimed by him.

The question in regard to the alleged order of January 23, 1900, was whether any such order was given or not, and, as that question depended upon the oral testimony, it was referred by the instructions to the jury to decide. So far as the order of December 16, 1899, and the contract embodied in the letter of that date, are concerned, they were wholly and altogether in writing. Their construction and meaning were, therefore, to be determined by the court. The contract of December 16, 1899, was not embraced in the letters and the oral testimony together, but was embraced in the letters alone. This is not a case, therefore, like the cases referred to by counsel, where the contract is partly in writing and partly oral. That this is so is admitted by counsel in his brief, where he states appellant's contention to be "that a new contract was made, and that the 'do the best we can' proposition was in that conversation between Mr. Green, Mr. Rand, and the appellant entirely abrogated." It is one thing to say that a written contract is abrogated by a subsequent oral contract, and another thing to say that a contract is embodied both in writing and in conversation.

The question whether or not the order of January 23, 1900, was accepted by the appellee was fairly submitted to the jury by the second and fourth instructions given for the appellee, and upon such question of fact the jury found against the appellant. The objections made to the seventh instruction are not well taken, and it is incorrect to say that that was an omnibus instruction, in which the court attempted to embody all the law applicable to the case. This is not a case where, as in *North Chicago Street Railway Co. v. Louis*, 138 Ill. 9, 27 N. E. 451, the trial court refused all instructions, and gave an instruction of its own motion; but here the court, although giving an instruction of its own motion, gave other instructions both for the appellant and the appellee, in accordance with requests made by both. Taking the instructions all together, and regarding

them as one charge, we think they correctly submit the questions involved to the jury.

Complaint is made that the court refused to give the fourteenth instruction asked by the appellant upon the trial below. There was no error in refusing this instruction, inasmuch as all that was material in it in favor of appellant was embodied in the closing paragraph of the seventh instruction given by the court of its own motion. Moreover, the instruction ignores the question whether or not appellant was at liberty to sell the goods ordered at an advance over the billed prices of appellee. For the same reason there was no error in refusing the fifteenth instruction asked by the appellant upon the trial below.

Some objection is made to the admission of certain portions of the testimony of the president of the appellee company and of the bookkeeper of such company in regard to the amount of goods which were delivered to appellant under the order of December 16, 1899. The objection made to this testimony is that the knowledge of the witnesses was based upon the showing of the ledger account of appellee. The bookkeeper, who testified, kept the ledger, and made the entries therein, and the president of the company testified that he managed the entire business, and did the shipping with the assistance of the bookkeeper. We think it is clear from the evidence that the witnesses obtained their knowledge not merely from the ledger account, but from their connection with the business, and the management thereof, and the shipping of goods therein. Moreover, the admission of appellant that \$3,817.83 was due, except so far as such amount might be reduced by proof of offsets or of settlement, makes such testimony as to delivery immaterial.

We find no error in the record which would justify us in reversing this judgment. Accordingly the judgment of the Appellate Court is affirmed. Judgment affirmed.

(204 Ill. 373)

CITY OF CHICAGO v. COOK.

(Supreme Court of Illinois. Oct. 26, 1903.)

PLEADING—AMENDMENT DURING THE TRIAL—ASSIGNMENTS OF ERROR—WAIVER.

1. Where a cause had been pending for over four years at the time of trial, and had been at issue for over three years, refusal to allow the filing of a plea of limitations instantan during the trial was not an abuse of discretion.

2. Alleged errors, not insisted upon in appellant's brief in the Appellate Court, will be considered waived on further appeal to the Supreme Court.

3. Appellant's contention that certain assignments of error were urged in its reply brief in the Appellate Court, and hence not waived by failure to discuss in that court, cannot be considered, when not supported by a certified copy of the brief.

¶ 1. See Pleading, vol. 39, Cent. Dig. §§ 766, 772.

Appeal from Appellate Court, First District.

Action by Charles E. Cook against the city of Chicago. From a judgment of the Appellate Court (105 Ill. App. 353) affirming a judgment for plaintiff, defendant appeals. Affirmed.

Charles M. Walker, Corp. Counsel, William H. Sexton, Asst. Corp. Counsel, and William H. Fitzgerald (Fitzgerald & Orr, of counsel), for appellant. Clarence S. Darrow and Irving W. Baker, for appellee.

BOGGS, J. Judgment in the sum of \$5,000 awarded the appellee against the appellant city in the circuit court of Cook County was, on appeal, affirmed by the Appellate Court for the First District. The city has prosecuted this its further appeal to this court.

The action was in assumpsit. The declaration was filed June 24, 1897, and contained the common counts only, and was not accompanied by an itemized bill of particulars. The only plea presented was that of the general issue, which was filed on the 9th day of August, 1897. On the 28th day of May, 1898, the appellant city entered its motion asking that the appellee be required to file a bill of particulars. The motion was granted, and a bill of particulars filed on June 2, 1898. By leave of the court an amended bill of particulars was filed October 12, 1898, and by further like leave the bill of particulars was again amended on December 8, 1898. The trial of the cause before a jury was commenced on the 30th day of December, 1901. The morning session of the court on that day was devoted to the examination and cross-examination of a witness introduced in behalf of the appellee. At the convening of the court for the afternoon session, counsel for the city asked leave to file instant a plea of the statute of limitations. The court refused to grant such leave, and this action of the court is assigned as for error.

The application for leave to file the additional plea was addressed to the discretion of the court. *Fisher v. Greene*, 95 Ill. 94; *Dow v. Blake*, 148 Ill. 76, 35 N. E. 761, 39 Am. St. Rep. 156; *Phenix Ins. Co. v. Stocks*, 149 Ill. 319, 36 N. E. 408; *Davis v. Lang*, 153 Ill. 175, 38 N. E. 635. A defendant who presents such an application after the cause has gone to trial, in order to entitle the application to the favorable consideration of the court, should support the motion by showing some reasonable excuse for not having presented the defense before the calling of the cause for trial. *Phenix Ins. Co. v. Stocks*, supra; 21 Ency. of Pl. & Pr. 686, 695. In *Fisher v. Greene*, supra, the motion to file additional pleas was made after the cause had been reached for trial and after the issues had been made up for about 19 months. The motion was not supported by affidavit showing any excuse for not filing the pleas at an earlier day, and was denied by the court. We there said: "Under such circumstances we cannot hold

that the court erred in denying leave to file additional pleas. Had the defendant shown a reasonable excuse for the delay, doubtless it would have been the duty of the court to have permitted the pleas to have been filed, but for aught that appears the defendant knew as well when he filed his first pleas the necessity of filing the additional pleas as he did when the motion was made. If he did, he had no right to remain silent until plaintiff had prepared for trial on the issues presented, and then, on the eve of a trial, present a new and unexpected issue which might compel a continuance of the cause. The correct rule of practice in a case of this character was indicated in *Millikin v. Jones*, 77 Ill. 372, in which it was held, where a defendant, after filing the general issue, and the continuance of the cause, discovers that he has a substantial defense not admissible under the general issue, he should at the earliest convenient day ask for special leave of the court to file an additional plea, so as not to take the plaintiff by surprise or delay the business of the court. In this case the defendant had ample time and opportunity to present an additional plea, if he desired, long before the cause was called for trial. The court was held every month, and surely a year and six months afforded sufficient time in which leave might have been obtained long before the cause was called for trial. We do not, therefore, regard the decision of the court as erroneous." In *Dow v. Blake*, supra, application for leave to file additional pleas, made more than seventeen months after the issues had been made up and only three days before the cause stood for trial, was denied, and it was held this court could not say that under the circumstances the trial court abused the discretion with which it was vested. In the case at bar the motion was presented during the trial of the cause before the jury. The case had been at issue on a plea of the general issue for more than four years. Itemized bills of particulars had been on file for more than three years. No reason was advanced, by way of affidavit or otherwise, explaining or excusing the delay in presenting the additional defense. There was no abuse of discretion in refusing to allow the plea to be interposed.

The appellant city did not, at the close of testimony in the cause, move the court to instruct the jury that, as a matter of law, the plaintiff could not recover. Therefore no question of law is raised in this court whether or not there was evidence fairly tending to support the plaintiff's cause of action. Whether such cause of action was supported by the weight of the testimony is a question of fact, which has been conclusively determined adversely to the appellant by the judgment of the circuit court and the affirmance thereof in the Appellate Court. It appeared from the bills of particulars and from the evidence that the claim of the appellee was for services rendered to the city. Whether the services rendered by the appellee to the city were such

as could only be recovered for out of a special fund created, as appellant contends, for the payment of such services and expenses, is not, as we have seen, in any way presented as a question of law for the determination of this court.

Appellant complains that the circuit court refused certain instructions which it asked to be given to the jury. The appellee insists that the refusal to give these instructions was not urged in the brief filed by the appellant in the Appellate Court, and in support of this insistence has, by leave of this court first had and obtained, filed a certified copy of the brief filed by the appellant city in the Appellate Court. This brief supports the insistence of the appellee. The omission to urge in the Appellate Court as error the refusal of the trial court to grant the instructions must be considered as a waiver or abandonment by the appellant city of the assignment of such refusal as error, and such alleged errors cannot to be revived and raised for the first time in this court. *Abend v. Endowment Fund*, 174 Ill. 96, 50 N. E. 1052; *Chicago & Alton Railroad Co. v. Strawboard Co.*, 190 Ill. 268, 60 N. E. 518.

Appellant, in its reply brief in this court, insists that in the reply brief filed in its behalf in the Appellate Court the refusal of the court to grant these instructions was called to the attention of the Appellate Court. Apart from the question whether an assignment as for error may be presented for the first time in a reply brief, to which the adversary can have no opportunity to respond or be heard, the insistence of the appellant is not supported by a certified copy of the brief filed by it in reply in the Appellate Court, and for that reason cannot be considered in this court.

The judgment of the Appellate Court must be and is affirmed. Judgment affirmed.

(204 Ill. 479)

DAVID v. PEOPLE.

(Supreme Court of Illinois. Oct. 26, 1903.)

INCEST—CONSENT OF FEMALE—EVIDENCE—SEVERAL OCCURRENCES—ELECTION.

1. In a prosecution for incest, evidence reviewed and held sufficient to sustain a conviction.

2. The statute defining incest provides that persons within the degrees of consanguinity within which marriages are declared by law to be incestuous and void, who shall commit adultery or fornication with each other, shall be imprisoned, etc. *Hurd's Rev. St. 1901, c. 131, § 1*, declares that words importing the plural number in such statutes may include the singular. Held, that the consent of the female to unlawful sexual intercourse was not necessary, within such statute, to constitute the crime of incest by the male.

3. Where several instances on which defendant was charged to have committed incest were proved, if the defendant desired the state to be required to elect on which it would rely for a conviction, the proper practice was to move the court to require an election, and not by requesting an instruction that the prosecution could rely on only a particular occurrence specified.

Error to Circuit Court, Iroquois County; Geo. W. Brown, Judge.

William David was convicted of incest, and he brings error. Affirmed.

This is an indictment returned on November 15, 1902, in the circuit court of Iroquois county, charging plaintiff in error, in three counts, with the crime of incest on October 18, 1902, with his niece, Belle L. Price. Two trials have been had, and in each the jury have found plaintiff in error guilty. A new trial was granted by the court in the first instance, and was denied in the second. Plaintiff in error was sentenced to the penitentiary, and brings his cause to this court.

Belle L. Price, the niece with whom he is charged to have committed this crime, is a girl fourteen years of age on July 9, 1902. She and plaintiff in error had lived with the mother of plaintiff in error, who was also the grandmother of the girl, for about a year prior to the time when the crime is alleged to have been committed. The girl did chores and went to school, while plaintiff in error worked in the fields and performed other necessary work upon the farm. The testimony of the niece tends to show that plaintiff in error had sexual intercourse with her on three distinct occasions, each on Saturday, the first time in the barn, the second time in the house, and the third time, on October 18, 1902, in Hizer's woods near the house. Her testimony concerning the first two acts of intercourse is not corroborated by any other witness. She testified that the occurrence in the barn took place about two or three weeks before October 18th; that she had gone up in the haymow of the barn to throw down hay to the horses, and that while she was there the plaintiff in error came up, took hold of her, threw her down, and committed fornication with her; that this was the first time she had ever had sexual intercourse; that she does not remember that he hurt her or that she made any outcry; that there were no blood stains on her clothing or person when she left the barn; that she said nothing to any one about this, and continued in school the same as usual; that she does not remember of offering any resistance or of trying to prevent him from accomplishing his purpose. The occurrence in the house, according to her testimony, took place one week later than that in the barn. She testified that she went upstairs to her room, and that soon afterwards the plaintiff in error came up, took hold of her and carried her to his room, where he again had sexual intercourse with her; that at this time her grandmother was away from home; that she did not try to push him away, because he held her; that she told no one about this, and does not remember that he hurt her. Plaintiff in error denied both of these occurrences, and introduced several witnesses to prove that on Saturday, October 11th, during the entire afternoon, he was not on or near the premises on which they lived.

¶ 2. See *Incest*, vol. 27, Cent. Dig. § 6.

The testimony of the niece as to the occurrence on October 18th tends to show that she was sent by her grandmother to Hizer's woods, about 40 rods from the house, immediately after dinner, to drive some cows and colts into a pasture from which they had escaped; that she left plaintiff in error at the house; that after she had driven the cows out she returned for the colts, and that plaintiff in error followed her into the woods, overtook her, threw her down, unbuttoned her clothes, and again had sexual intercourse with her; that while they were in the act four men approached, and that plaintiff in error jumped up and walked off fast through the woods, while she got up, went behind a tree or stump, and fastened her clothes; that she then started for the house, but the men called to her, stopped her, asked her name and that of the man who was with her, and that she told them it was her uncle, William David. She further testified that she did not remember that he hurt her, nor that she resisted him, or tried to prevent him from performing the act; that she told no one of this occurrence until the following Monday, when her father and mother called at school, asked her about it, and took her home. Two of the four men referred to by the witness in her testimony, namely, Webster and Malone, testified that they were in Hizer's woods hunting, and saw a man lying on the ground about 200 feet away; that he got up and appeared to be buttoning his pants, and walked away; that they then saw the girl get up from the same place and go behind a tree or stump. Webster testified that the man's pants were open and his privates out; that he had been acquainted with the man for several years, and that it was William David. Malone testified that they called to the girl, stopped her, asked the name of the man and her name; that she said her name was Belle Price, and that the man was her uncle, William David. Both testified that she then went to the house, and that soon afterwards they saw and talked with plaintiff in error. Plaintiff in error denied this whole occurrence, and testified that he did not see his niece after she left the house to drive the cows out of the woods; that he stayed at the house until he hitched up his horses and drove down in the field, where he met the four men. In this he is corroborated by his mother, from whose testimony it appears that she was with him during the entire time from dinner until he left with his horses for the field, and that Belle Price had returned to the house before plaintiff in error left it; that the four men came to her house for a drink, and that plaintiff in error had then only been gone long enough to reach the woods; that the cattle had been brought back into the pasture before he started, and that she saw the girl back around the house before he went back to the field.

Testimony of Belle Price given on the former trial of the case was read in evidence on

the part of the accused, in which she stated that she tried to prevent this occurrence in the woods, as well as the two earlier occurrences; that she never consented, and that she tried on each occasion to put him away and prevent the act with all her might and strength. Witnesses were introduced who testified that Webster had made statements to them out of court that he did not see plaintiff in error with his niece in the woods on that occasion. A physician testified that he had examined Belle Price some time in December, just before the first trial, with the view of ascertaining whether or not she had had sexual intercourse, and that he found conditions from which he formed the opinion that she had. A large number of witnesses were introduced on behalf of the state, who testified that the general reputation of the plaintiff in error for truth and veracity was bad. Other testimony was offered which tended to show that the testimony of the mother tending to establish an alibi for William David as to the transaction in Hizer's woods was untrue.

Donovan & Shields and Payson & Kessler, for plaintiff in error. H. J. Hamlin, Atty. Gen., and J. W. Kern, State's Atty., for the People.

SCOTT, J. (after stating the facts). Plaintiff in error complains that the verdict is not sustained by the evidence. With this contention we cannot agree. The case has been twice tried. The prosecutrix testified on both trials. A transcript of her testimony given on the first trial was offered and read in evidence on the second trial. Her testimony on each trial contains many contradictions and inconsistencies in reference to immaterial matters, but upon the material contested questions, namely, did some man have sexual intercourse with her in Hizer's woods, and was that man William David, her testimony is unequivocal, and consistent with her statements made upon being detected in the criminal act, and with other facts and circumstances proven on the trial in reference to what took place in these woods, and she is amply corroborated by Webster, and to some extent by Malone. Opposed to this testimony was that of the defendant, corroborated, so far as the alibi set up by him is concerned, by the testimony of his mother. Evidence was offered tending to impeach the truth and veracity of the accused, his mother, and Webster. It was peculiarly the province of the jury to determine whether or not the testimony was sufficient to establish the guilt of the defendant beyond a reasonable doubt. With their conclusion, under the evidence in this case, we will not interfere.

It is also argued that the testimony in the cause tends to show that rape was committed, and the court below was asked by the accused to instruct the jury that in order to constitute the crime of incest it is essential

the proof should show that the "sexual intercourse is accomplished without force by the defendant and with the consent of the prosecuting witness." This instruction was refused.

Our statute provides that "persons within the degrees of consanguinity within which marriages are declared by law to be incestuous and void, who shall intermarry with each other, or who shall commit adultery or fornication with each other, or who shall lewdly and lasciviously cohabit with each other, shall be imprisoned in the penitentiary not exceeding ten years," and the instruction offered is based on the theory that the crime of incest, under the statute, is a joint one, requiring the consent of both parties to the fornication, and that where the act is accomplished by force, and without the consent of the female, the male is guilty of rape and not of incest, and stress is put upon the fact that the statute is in the plural, and against persons who commit fornication "with each other." Incest, as it is made punishable in the various states of the Union, is defined by statutes. Some apparent conflict in the authorities grows out of the fact that there is a variance in the several statutes on this subject; but there is a hopeless conflict in adjudicated cases which have been determined by the courts of last resort in states having statutes defining incest in substantially the same words as are used in our statute. In *De Groat v. People*, 39 Mich. 124, *State v. Jarvis*, 20 Or. 437, 26 Pac. 302, 23 Am. St. Rep. 141, and *Yeoman v. State*, 21 Neb. 171, 31 N. W. 669, under statutes almost identical in words and identical in meaning with our own, it was held that the crime of rape by forcible ravishment and incest cannot be committed by the same act, but that of incest requires the concurring assent of both parties. To the same effect are other cases decided by the courts of other states under statutes differing somewhat from our own. On the other hand, under statutes in substance precisely as that of Illinois, it has been held in *Smith v. State*, 108 Ala. 1, 19 South. 306, 54 Am. St. Rep. 140, *People v. Kaiser*, 119 Cal. 456, 51 Pac. 702, and *State v. Nugent*, 20 Wash. 522, 56 Pac. 25, 72 Am. St. Rep. 133, that where the parties to sexual intercourse are within the prohibited degrees the male may be convicted of incest even though he accomplish the act by force and without the consent of the female. In Iowa the language in the statute is as follows: "Or if any person being within the degrees of consanguinity or affinity in which marriages are prohibited by this section, carnally know each other they shall be deemed guilty of incest." In *State v. Hurd*, 101 Iowa, 391, 70 N. W. 613, this question arose under the Iowa statute above quoted, and, although the language of the statute requires carnal knowledge by each of the other, the court in that case determined that the consent of the female is not necessary to

constitute the crime of incest in the male, and held that in the earlier Iowa case of *State v. Thomas*, 53 Iowa, 214, 4 N. W. 908, which is relied upon by the Oregon court in the case of *State v. Jarvis*, supra, the question here presented did not properly arise.

In our judgment the better reasoning supports the conclusion that the consent of the female is not necessary to constitute the crime of incest by the male. It is true that our statute is written in the plural, but the third paragraph of section 1 of chapter 131 (Hurd's Rev. St. 1901) provides that "words importing the singular number may extend and be applied to several persons or things, and words importing the plural number may include the singular," so that no violence is done to the language of the section denouncing incest by holding that it applies to any person who shall have sexual intercourse with another who is within the prohibited degrees. The things which the law is intended to punish are the purpose and desire to have, and the act of having, sexual intercourse with another who is related to the first as specified in the statute. The mind of the male is equally criminal, and his act equally deplorable, unnatural, and detestable, whether the female consents or not. The fact that she consents adds nothing to his moral and legal turpitude. It is his intent and his act that the law punishes him for. It was not intended to punish him because she consented to the fornication, but because he desired and participated therein. Nor is the persuasion or enticement of the female by the male an element of the crime, because she is equally guilty with him if she consents, however reluctantly and no matter under what persuasion or inducement, to the fornication, and his legal guilt would not be the less if she should entice and persuade him to join her in the commission of this crime.

The accused asked and the court refused the following instruction: "You are instructed by the court that the prosecution can rely upon but one act of intercourse in this case for the purpose of asking a conviction, and that is the one that is alleged to have occurred in the Hizer woods on the 18th day of October, A. D. 1902." This action of the court is said to have been prejudicial to the defendant below, for the reason that the prosecutrix testified that William David had had sexual intercourse with her on two earlier occasions, and it is suggested that the refusal of the court to give this instruction left the jury free to convict the defendant on account of the girl's testimony in reference to the earlier occurrences, and amounts to putting him on trial for two or more felonies at the same time. We have carefully examined this record, including the instructions given, and are satisfied from this examination that the jury understood that the charge upon which the prosecution sought a conviction and upon which they were trying

the defendant was that of having committed incest in the Hizer woods on the later occasion. If, however, the accused desired to have the court require the prosecution to elect of record which of the occurrences testified to by the prosecuting witness the people would rely upon in seeking a conviction, the proper practice was to move that the court require an election, and, if this motion was overruled, the propriety of requiring an election could then be presented to this court in the event of a conviction below. The court could not, by an instruction, make an election for the prosecuting officer. In the refusal of this instruction there was, therefore, no error.

The judgment of the circuit court will be affirmed. Judgment affirmed.

(304 Ill. 163)

CHICAGO, I. & L. RY. CO. v. BARR.

(Supreme Court of Illinois. Oct. 26, 1903.)

MASTER AND SERVANT—RAILROADS—SWITCHMAN—DEATH—ASSUMPTION OF RISK.

1. A switch engine, with which deceased was employed as a switchman, stopped to take him aboard while backing through the railroad yard, and he stepped on the hind footboard. There was no ladder leading from the board to the top of the tank, and, without any necessity for doing so, after he had signaled the engineer to start, he attempted to climb to the top of the tank by placing his foot on the drawbar and springing to the top, in order to deposit certain flags in the box on top of the tank, in doing which he lost his hold and fell to the track and was run over. *Held*, that deceased assumed the risk incident to his attempt to climb on the tank in such manner.

Error to Appellate Court, First District.

Action by Herbert S. Barr, as administrator of the estate of Charles M. Campbell, deceased, against the Chicago, Indianapolis & Louisville Railway Company. From a judgment in favor of plaintiff, affirmed by the Appellate Court (107 Ill. App. 111), defendant brings error. Reversed.

G. W. Kretzinger, for plaintiff in error.
James C. McShane, for defendant in error.

CARTWRIGHT, J. Charles M. Campbell was run over and killed by a switch engine of plaintiff in error in its railroad yard at Hammond, Ind., on July 13, 1897, while in its employ as a switchman. Defendant in error was appointed administrator of his estate, and brought suit in the superior court of Cook county to recover damages for his death under a statute of Indiana giving a right of action to the personal representatives of one whose death is caused by the wrongful act or omission of another. Upon a trial there was a verdict and judgment for \$5,000, and the Appellate Court for the First District affirmed the judgment. The writ of error in this case was sued out to review the judgment of the Appellate Court.

The defendant offered no evidence at the trial, but at the conclusion of the evidence

introduced by the plaintiff moved the court to direct a verdict of not guilty. The court denied the motion, and refused to give the instruction tendered with it, and the ruling is assigned as error. The declaration contained three counts. The first alleged that the deceased was employed by defendant as a switchman; that defendant had a switch engine, upon the rear end of which it provided and maintained a footboard for switchmen to stand upon; that switchmen were frequently required, in the discharge of their duties, to reach or climb from the footboard to the top of the tender while the engine was in motion; that defendant failed to furnish a sufficient hand railing upon the rear of the engine by which they could hold while attempting to climb to the top of the tender; and that deceased, while attempting to climb to the top of the tender, and exercising ordinary care, while the engine was in motion, by reason of the failure to provide a sufficient handrailing, fell off and was run over. The second and third counts contained substantially the same averments, charging as negligence the failure of defendant to equip the rear end of the tender with a ladder for switchmen to climb to the top while the engine was in motion. The plea was the general issue.

There was but one witness who knew anything about the accident, and there was no conflict whatever in the evidence, which was all offered by the plaintiff. The facts which the evidence tended to prove are as follows: The deceased was 38 years old, and had worked as a switchman for 15 years. He had been accustomed to working in switch yards and in various places, switching cars, and had been employed by defendant as a switchman for more than a year. At 6 o'clock on the morning of July 13, 1897, he went to work at Hammond, Ind., with a fellow switchman, Frank Stowman. The switch engine which they worked with had been a small road engine, which had been converted into a switch engine about a year before, by removing the pilot and putting a footboard at each end. The footboard at the rear was about 12 inches wide, extending across the tender, and from 12 to 18 inches above the rail. The distance from the footboard to the top of the tank was about 6 feet. Upon the rear of the tender, about 8 feet above the footboard, there were two iron handrails or grab-irons, about 18 inches long, running crosswise and extending within 2 inches of the sides, for switchmen to hold by while riding on the footboard. There was a drawbar in the center of the tender, of what is called the "nigger-head" style. The drawbar was fastened to the tank by four bolts. The tank was of sheet iron, with a leaf or flange 9 or 10 inches wide at the top, making a flaring top. There was no ladder on the rear of the tender, and nothing above the handrails to hold on to in attempting to climb the smooth sheet-iron tank. It was impos-

sible to reach the top of the tank and keep one foot on the footboard. A switchman could not hold the grab-iron and at the same time reach the top of the tender. If he put his foot on the drawbar he would have to let go of the grab-iron and make a spring, and if he got hold of the top he would then have to spring up, and, striking his body on the edge of the tender, get over on top. Campbell had no considerable work on the engine during the day, but worked in the field as end man, while Stowman followed the engine. The accident occurred in broad daylight, about 4:30 in the afternoon, and Campbell had been working with the engine, in switching, for nine or ten hours. Stowman was the only one who saw the accident. He was standing on the left-hand side of the footboard, and the engine was backing north on track No. 2. The place where it was going was about 30 car lengths distant. The engine came to almost a stop to take Campbell up, and he stepped on the footboard on the right-hand side. He had a green flag in his hand, which was used on the main line of the road to denote the rear of a train, but which there was no use for in the yards. After Campbell got on the footboard, he gave a signal to the engineer to back up, and the engineer backed on north. Campbell then asked Stowman where he put the flag. Stowman testified: "I told him, 'Why, I put the damned thing up there—any old place.' I told him I always put it in that box." There was a box on the tank behind the manhole, about three feet from the rear of the tank, in which the switchmen kept their belongings, such as flags and lanterns. They would get the lanterns in the evening, and trim and fill them for use at night, and flags were put there when not in use. Campbell turned around and faced the tank and said he would put the flag where it belonged. He took hold of the grab-iron and put his foot on the drawbar, apparently to climb up on the tank. Stowman supposed that he tried to get up, but did not look at him, and did not know what then happened. The next thing he saw of him he was on the track in front of the tender and was run over. Stowman testified that if he got up that way he always stepped on one of the bolts of the nigger-head, and then had to take a little spring to reach the top of the tank. Stowman was five and a half feet in height, and Campbell was about the same height. Another switchman testified that when he went to get from the footboard to the top of the tender he was careful, and used to get a hand from the fellow above, and that, if he put his foot on the drawbar, he could not reach the top of the tender with his other hand, but would have to make a jump. The absence of a ladder was open and visible, and there was no latent or concealed defect or imperfection about the tender.

There can be no dispute about the law. It was necessary for the plaintiff to prove that

at the time of the accident Campbell was in the discharge of his duty to the defendant as a switchman, and that he was in the exercise of ordinary care for his own safety. If there was no evidence tending to prove the exercise of such care on his part, and if the undisputed facts proved that he was not performing any duty required of him under the circumstances and when the engine was in motion, and that he knowingly and voluntarily undertook to climb to the top of the tender in a manner likely to result in injury or death, the court erred in denying the motion. Although the trial court refused to give the instruction directing a verdict, an instruction was given on the submission of the case to the jury, advising them as to the law, that, although there was no ladder on the rear of the tender, if the absence of the ladder was open and known to the deceased, and yet, having knowledge thereof, he attempted to climb to the top of the tank, and by reason thereof fell, the verdict should be for the defendant. There was no controversy about the facts, and no possible doubt that Campbell knew there was no ladder on the rear of the tender, or other means of climbing up the back end. It would be impossible for the jury to draw any inference from the evidence that he supposed there was a ladder there, or that its absence was not open or apparent or known to him. He was not attempting to climb some imaginary ladder, which he supposed was there, but he attempted to climb up by putting his foot on the drawbar, and with his other hand on the grab-iron probably attempted to make a jump or spring to the top of the tank. Counsel for defendant in error concedes that he undoubtedly saw that there was no ladder or handhold on the back end of the tender, and saw the kind of grab-irons that were upon the tender. There was no command or requirement of defendant that he should encounter such a danger. Even his associate merely told him that he put the thing up there—any old place; that he always put it in the box. Lanterns were put in the box, but the only occasion to get them would be at night to get them ready for use, when they were used during the night, and put in the box during the day. There was safe access to the box on the tender from the front, and there was no evidence tending to show that switchmen were required to climb over the rear of the tender in the morning to put lanterns in the box, or at night to take them out. Flags were put in the box, but they were not used in switching in the yards. The flags were used on the road to denote the rear of a train, and when the switch engine came into the yards there was no further use for them. If it was necessary to put a flag in the box when not in use, the commonest prudence would require it to be done when the engine was standing still, or else in some other way than the one adopted in this case. The engine had practically stopped when Campbell

stepped on the footboard, and he signaled the engineer to start, and afterward attempted to climb the smooth sheet-iron surface at the back of the tender while the engine was in motion, and when there was no necessity or emergency requiring such an act. He had as absolute and perfect knowledge of the absence of the ladder and of the danger as he could have had with any explanation or warning by the defendant. He was an experienced switchman, but no person could fail to know and understand the danger involved in the attempt which he made. It would be a mere contradiction to say that he knew he was liable to fall and be run over, but did not understand or appreciate the risk or danger. The sole occasion of the accident was the unnecessary attempt to reach the top of the tender, when the engine was in motion, in the hazardous manner proved by plaintiff's witnesses, where failure would undoubtedly result in injury or death. There was no evidence tending in the slightest degree to prove that defendant required switchmen to deposit flags in the box while the switch engine was in motion, by climbing up the back end of the tender; or that there was any occasion at any time for a switchman to make such an attempt. There was evidence tending to show that on the main line, when hauling a train of cars, a switchman would sometimes have to come forward over the cars upon the tender to communicate with the engineer, but in such a case he did not climb up the rear of the tender, and there was nothing showing the slightest necessity or any requirement of the defendant that a switchman should ever get on the tank in that way. The evidence did not tend to prove a cause of action, and the court erred in denying the motion and refusing to give the instruction.

The judgments of the Appellate Court and the superior court are reversed. Judgment reversed.

(204 Ill. 130)

CLINE v. CLINE.

(Supreme Court of Illinois. Oct. 26, 1903.)

HUSBAND AND WIFE—PURCHASE OF LAND—TITLE TAKEN IN NAME OF WIFE—CONSTRUCTIVE AND RESULTING TRUSTS—EVIDENCE.

1. Where, after the overruling of a demurrer to the complaint, defendant permitted her general answer to the bill to stand, she thereby waived the right to assign error to the overruling of the demurrer, unless on the whole case complainant is not entitled to the relief sought.

2. Where a husband claimed to have furnished the money with which property was purchased in his wife's name, as he alleged, by reason of his undue subjection to her demands, but there was no evidence to justify a conclusion that the money paid, or any aliquot part thereof, for the property, was derived from sources belonging exclusively to plaintiff, it was insufficient to establish a resulting trust of the property in plaintiff's favor.

3. Where a husband and wife purchased certain property, the title to which was taken in the wife's name, without any fraud or mistake, but with the husband's knowledge and acquies-

cence, and he made no objection thereto for several years thereafter, the fact that such title was taken by reason of the wife's alleged imperious temper, and that the husband had been unduly subjected to her demands, was insufficient to establish a constructive trust of the land in the husband's favor.

Appeal from Circuit Court, De Witt County; W. G. Cochrane, Judge.

Action by Mathias Cline against Amanda Cline. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Appellee, at the March term, 1901, of the De Witt circuit court, filed his bill against appellant, his wife, for the purpose of enforcing an alleged trust to certain real estate in the city of Clinton, and for the transfer of title from her to himself. Appellee and appellant were married in 1868. At the time of their marriage appellant owned, near Clinton, in De Witt county, 120 acres of land, while the appellee had about \$1,400 or \$1,500 in notes and money. Immediately after their marriage they built a small house upon the farm, and made it their home until 1870, when the farm was exchanged for property in Clinton, which the parties occupied as a home for about 30 years, and until they moved into the property now in controversy. At the time of the removal to the city the parties had practically nothing, except the property for which the farm was exchanged; the farming operations having proved unsuccessful, and appellee's money having been consumed in living expenses. After moving to the city appellee conducted a dray line for some two or three years, then became a section boss for a short time, and then became employed as stationary engineer for the Illinois Central Railroad Company, which position he held until 1892, at an average salary of about \$45 per month. Since 1892 he has had no regular business, but has looked after the property which he and his wife had acquired. The appellant, Mrs. Cline, on moving to Clinton took in roomers and boarders, did public washing and sewing, and in 1882 opened a public dressmaking establishment. Her earnings, according to the evidence, were probably about equal to her husband's. The business operations of appellant and appellee were almost entirely conducted in appellant's name. Properties were purchased from time to time, and mortgages taken and loans made, all in the name of appellant. Appellee now claims that appellant was given such control of their property and business operations in order that he might have peace with her. On the other hand, appellant claims that early in their married life, when the first property was purchased, the title was put in her name to save the payment of an unjust debt, and that always after that the same thing was done without question. In 1884 the property in controversy, designated the "hotel property," was purchased, consisting of about a quarter of a block of ground, with a large

brick residence upon it, and located near the center of the business portion of the city. The purchase price was \$2,300, one-third cash, the balance on time. The original building has been added to, and now constitutes the home of both parties, in which is conducted a boarding hotel; the balance of the lot being occupied by small buildings used for various purposes, and the whole property being worth about \$20,000. At the time this purchase was made, title was taken in appellant's name. The cash payment was made from money derived from certain securities, which were also in her name. Until long after the purchase of the property in question the money of these parties was kept in common; appellee usually paying his wages to his wife, who loaned all their money out or invested it in property or improvements. Appellee claims that his wife had a high temper, and was hard to get along with, and he was compelled to yield to her dictation in order to secure peace. On the other hand, appellant charges appellee with many cruelties and infidelity, and because of these their relations were made unpleasant and her dictation in property matters made essential. The bank account was mostly in the name of appellant, and appellee would sign her name to checks for expenditures that met with her approbation. Appellee at last tired of this supervision, and instituted this suit for the purpose of having the title to this property transferred from appellant to himself, and asked for a receiver pending the litigation; and on final hearing, after demurrer to the bill had been overruled and appellant had answered over, the prayer of the bill was granted, and appellee was given the property and rents.

The material allegations of the bill, upon which the right to relief is claimed, are: "That at the time your orator purchased the premises last above described [being the premises in controversy], the defendant, Amanda Cline, demanded and insisted that the conveyance thereof be made to her, and the title to said premises be placed in her name; and to avoid a quarrel, and to please her, and for no other reason, your orator permitted the title to said premises to be placed in her name. * * * That it was the money he earned and saved that paid the purchase price of \$2,300, * * * and also paid for all the improvements afterwards made and placed thereon, costing more than \$4,000." He further represents that his said wife "is a woman of violent temper, ungovernable disposition, and that during the whole of their married life your orator has been compelled to defer to her wishes in most matters and upon most subjects, for the sake of securing peace in their household and avoiding unpleasant and disgusting family quarrels." The cause was referred to the master in chancery, before whom the evidence was heard. The master having made his report, favorable to complainant, defend-

ant excepted thereto, and exceptions were overruled.

The Cline family consisted of Mr. and Mrs. Cline and two daughters; the children being born while the Clines lived on the farm, and before the removal to Clinton.

Wm. Monson and Mills Bros., for appellant. George K. Ingham, for appellee.

RICKS, J. (after stating the facts). The appellant assigns various errors in this court, the first of which is the overruling of the demurrer to the bill of complaint. After the demurrer was overruled appellant permitted her general answer to the bill to stand, and by so doing must be held to have waived the right to assign error to the overruling of the demurrer, unless upon the whole case, pleadings and proof considered, complainant is not entitled to the relief sought. *Gordon v. Reynolds*, 114 Ill. 118, 28 N. E. 455; *Bauerle v. Long*, 165 Ill. 340, 46 N. E. 227.

The other errors assigned all involve the determination of the question of whether the property in controversy was purchased under such circumstances as to create a trust in favor of appellee, complainant below. The rulings of the court below were to the effect that this question should be answered in the affirmative. This conclusion, appellant insists, is wrong. Appellant insists that there was neither a resulting nor constructive trust created in her, at the time she became vested with the legal title to the premises in controversy, for the benefit of appellee. The former contention appellee admits, but insists that a constructive trust was created, and he seeks to sustain the decree upon that ground.

While the authorities make a clear distinction between a resulting and a constructive trust, yet each is a species of implied trust, and as such they are closely allied and frequently discussed by the authorities in the same connection. We are of the opinion that the case at bar does not properly fall within either of such divisions. There is no claim in the bill, or evidence submitted, of any fraud, accident, or mistake connected with the transaction, except the contention of counsel for appellee that the alleged imperious temper of appellant brought appellee in undue subjection to her demands, and operated as a constructive fraud on the rights of appellee. This contention we do not endorse. There is no claim of diverted funds, or that appellee (plaintiff below) was not fully aware of all that was done. Nor is it claimed that a trust was intended at the time the deed was executed. All that is charged is that the funds of appellee paid for the property, and that appellant exercised an undue influence over him in securing the title to be placed in her name. The principal charges are that she "demanded and insisted" that the conveyance be made to her, and that, "to avoid a quarrel and to please her, and for no other reason," the appellee directed the deed to be made to her.

The property was purchased of eastern parties through the agency of Messrs. Lewis & Burr, both of whom are now dead; and, while the evidence is quite voluminous, most of that which is really material comes from appellant and appellee. Concerning the details of this purchase appellant and appellee told different stories, each claiming to have furnished the purchase price; but it seems to be quite clearly established—in fact, admitted—that the legal title to the securities by means of which the first cash payment was made was in appellant, and the further payments were made from rents accruing from property the legal title to which was also in her, and from the earnings of both appellant and appellee. Practically during all the married life of the parties hereto the earnings of each were placed in a common fund and invested from time to time in the name of appellant, who seems to have had the principal management of their property, was possessed of good business judgment, was economical and industrious, and, from the evidence, we would conclude, had as much or more property, at the time the parties were married, than appellee, and during their coverture earned quite as much money. Appellee, in stating the reason for putting the property in question in the name of his wife, testified as follows: "The deed of the eastern people was sent to Mr. Burr to handle, and I went up there to arrange about the payments, and took my wife along with me. She said she wanted to go. She wanted to know what was going on. And I says: 'All right, my dear. I will take you right along.' She said on the way up there on the train that she was the head of the family, and wanted it in her name like the other, and if I ever made a mistake or a bad trade they could not break us up. I said: 'That ought to go in my name. The other is in yours, and I have all my money in that.' We chewed the rag, and the judge said: 'I want this settled.' That is pretty near all that was said. We didn't have any fight. We quarreled. It was finally settled in Judge Burr's office. The judge says: 'How do you want it written?' I said: 'My wife wants it in her name, and just give it to her.' * * * He [Judge Burr] asked me how it should go—in my name, or in her name. That was talked over right there, and decided it should go in her name. * * * She said she wanted it in her name, and I said I wanted it in mine. I said to give it to her, then, if that would settle it; if nothing else would settle it, it would have to go in her name, like everything else I had. As far as I know that was the last talk we had with reference to putting the property in her name. It was settled right there with me."

Appellant testified that when they moved to Clinton appellee had no property. Her farm was traded for property in town, the title to which was taken in her name without any objection on the part of appellee,

and subsequent conveyances were made to her, and, as she claims, without any objection on his part or any demand on hers. As to the purchase of the property in question in this suit, appellant testified that nothing was said between her and appellee as to how the title should be taken. She had been active in the preliminary negotiations for the purchase, and had made a tender to the agent who had the property for sale. There was some slight controversy as to whether the parties to this suit should have the property, or other parties who were also negotiating for it at the same time. According to appellant, the decision was left to a Mr. Kent, who said: "You make the deed to Mrs. Cline. She was the first one." Mrs. Cline testified that nothing was said, prior to this time, between herself and husband as to whom the deed should be made.

To sustain the decree of the lower court on the theory of a resulting trust in Mrs. Cline for the benefit of appellee, it would have to appear from evidence clear, strong, unequivocal, and unmistakable, that the purchase price for this property was paid by appellee and the deed taken to appellant, from which the law raises an implied intention that the legal title should be taken in appellant for the benefit of appellee. This rule is so well established that it is hardly necessary to cite authorities upon the subject, and, in fact, it is conceded by appellee to be the law. In the case of *Goelz v. Goelz*, 157 Ill. 33, 41 N. E. 756, it was declared (page 47, 157 Ill., and page 760, 41 N. E.): "The rule is well settled that where the evidence is doubtful, and not entirely clear and satisfactory, or is capable of reasonable explanation upon theories other than that of the existence of an implied or a resulting trust, such trust will not be held to be sufficiently established to entitle the beneficiary to a decree declaring and enforcing the trust. *McGinnis v. Jacobs*, 147 Ill. 24 [35 N. E. 214]; *Strong v. Messinger*, 148 Ill. 431 [36 N. E. 617]. The evidence in this record falls far short of establishing such a case as is demanded by this rule"—and the case was reversed and remanded. And in the case of *Wormley v. Wormley*, 98 Ill. 544, we said (page 550): "The complainant swears to one state of facts, and the defendant to another and a different state of facts. If the title to land could be taken from one and transferred to another on such conflicting evidence, all security in titles to real estate would be at an end."

In order to establish a resulting trust in this case, it was incumbent on appellee to prove, by clear, strong, unequivocal, and unmistakable evidence, the payment by appellee of the purchase price, or an aliquot part thereof. From appellee's own statements no such conclusion can be logically drawn from the circumstances shown, and, to say the least, the testimony appears to be as strong in favor of appellant as appellee that the

money first paid on the property was derived from sources belonging exclusively to appellant.

Appellee contends, however, that this is a constructive trust; that, because appellant "demanded and insisted" that the title be placed in her name, appellee, in order "to avoid a quarrel and to please her, and for no other reason," was compelled to accede to her wishes. The bill further sets out the orator's subservient condition as follows: "He further represents that his said wife is a woman of violent temper, ungovernable disposition, and that during the whole of their married life your orator has been compelled to defer to her wishes in most matters and upon most subjects, for the sake of securing peace in their household and avoiding unpleasant and disagreeable family quarrels." And counsel for appellee contends that there is here alleged a species of fraud on the part of appellant, which, if true, raises a constructive trust. Even if the evidence was sufficiently clear and strong—which we do not think it is—to substantiate the averments of appellee's bill, we would not be warranted in assenting to appellee's conclusions as to the nature of a constructive trust and the character of the relief proper to be granted in the present case. While a resulting trust was being discussed in the case of *Devine v. Devine*, 180 Ill. 447, 54 N. E. 336, we think the following remarks there made are pertinent to the case at bar (page 448, 180 Ill., and page 336, 54 N. E.): "The cross-bill sets out * * * that the title to all said real estate was taken in the name of Elizabeth Devine, the defendant in the cross-bill, at her request and persistent persuasions. * * * The money used in the purchase of the property was derived from the earnings of both of them, but what portion was furnished by the plaintiff in error the record does not show. When the property was bought, plaintiff in error had full knowledge of the transaction, and the title was taken in his wife's name, not through fraud, accident, or mistake, but with the tacit or reluctant consent of the plaintiff in error." And in that case the relief sought by the alleged cestui que trust was denied, as we think it should be in the case at bar.

We think, in the case at bar, from the version given by appellee, the most that can be said is, as in the case just quoted, appellee "had full knowledge of the transaction, and the title was taken in his wife's name, not through fraud, accident, or mistake, but with the tacit or reluctant consent of the" appellee. We certainly cannot say that none of the wife's money went into the purchase of this property, and we think the evidence strongly tends to show that all of the first payment did come from property originally conceded to be the wife's, and admittedly, at the time of this transaction, the legal title to it was in her. From such circumstances the presumption would be quite natural that

it was the intention that the beneficial, as well as legal, interest should be in her. In this state a married woman has the right to acquire real estate, either by gift or purchase. That a wife and mother should demand and insist that the title to real estate about to be purchased should be taken in her name is neither uncommon, surprising, nor illegal, and in many instances it may be the proper and most discreet thing to do. The law of this state recognizes the right of a married woman to hold property, and the title of a wife to such property is as inviolate as that of her husband acquired in like manner. The law allows the husband and wife perfect freedom in the management of their property, and leaves them free to determine whether the title to such property shall be placed in one, or the other, or both. They are permitted to counsel together, to advise and persuade each other, so long as no fraud or deceit is used. We can conceive of no fraud or deceit on the part of appellant, even if her actions were the same as alleged in the bill and as testified to by appellee. Her alleged conduct was certainly sufficiently open, free, and above board for any one to understand. She claims her money was being invested. No one but appellee denies it, and his denial does not seem to be entirely harmonious, or consistent with the facts admitted to be true. If her money was being invested, she had a right to insist on whatever terms she saw fit to impose, and appellee admits that he assented to her terms, and under no coercion, except the fear of arousing her temper. "It is not sufficient to avoid a will or deed that its execution was procured by honest argument or persuasion. * * * The proper and legitimate exercise of an influence fairly and honestly acquired is not the exercise of an undue influence, and a deed which, but for such influence, would never have been made, will still be sustained, if it be made freely, and as a result of the maker's honest conviction, and in the exercise of his own deliberate judgment." *Sturtevant v. Sturtevant*, 116 Ill. 340, 6 N. E. 428; *Wilcoxon v. Wilcoxon*, 165 Ill. 454, 46 N. E. 369; *Dickie v. Carter*, 42 Ill. 376.

That fraud is the gist of a constructive trust is a proposition so well established that a citation of authorities is scarcely required, and we content ourselves with a reference to the conclusion reached by Mr. Pomeroy in his admirable work on Equity Jurisprudence (section 1044): "An exhaustive analysis would show that all instances of constructive trusts, properly so called, may be referred to what equity denominates 'fraud,' either actual or constructive, as essential elements and as their final source." However censurable may have been the conduct of appellant, conceding the truthfulness of the allegations of the bill, from a moral standpoint, the acts alleged and the testimony given do not warrant the deduction that they amounted to a fraud in law. This property

was purchased in 1884, and the bill in this case was filed in 1901. Thus it is seen that for a period of 17 years the legal title to this property stood in appellant, with the knowledge and consent of appellee. He consented to such arrangement at the time of the execution of the deed, and during all this time he has acquiesced in what was then done, and not until the estrangement between his wife and himself has become acute does he seek to deny his wife's title. If a fraud was committed upon him, he knew it at the time, and his long acquiescence raises the further presumption that he was not misled, but that the present effort is an endeavor to evade an arrangement deliberately made by him, but which subsequent events cause him to desire to retract. *Goelz v. Goelz*, supra; *Sanford v. Finkle*, 112 Ill. 148.

The evidence in this case discloses that appellant has in her possession several thousand dollars' worth of property other than the property in controversy, which is the proceeds of the joint earnings and savings of the appellant and appellee and the increase from judicious investments, the value of which property would, in all probability, amount to as much or more than the earnings of appellee, as far as shown by the evidence. The evidence fails to show that the earnings of the appellee went into the particular property in controversy, rather than in the other property not brought in controversy by this suit. As was said in *Devine v. Devine*, supra (page 450, 180 Ill., and page 337, 54 N. E.): "Were this a bill for an accounting, it would be a difficult matter, viewing the testimony in any light, to say what the financial portions of the earnings or savings of the parties to the suit were. No books of account were kept between them, or by either of them, except during the first two years, when it seems Mr. and Mrs. Devine did keep books for the boarding house; the books being kept by Devine, as his wife could neither read nor write. These books are not, however, in evidence. What part of the joint or several earnings went for clothing, interest, or living expenses is not shown. The parties quarreled about money matters, and plaintiff in error states that he could not get any satisfaction about the money he had been paying in; that he left the house, and was gone three weeks; that he then came back, and it was agreed he should pay board. While it might be conceded that the plaintiff in error did pay to the defendant in error a large portion of his earnings, yet the testimony fails to trace any particular sum or sums paid into any particular lot or lots." So, in the case at bar, the evidence shows that there are several pieces of real estate owned by appellant that have been bought by her and the title taken in her name since the parties moved to Clinton, and it likewise fails to show whether the earnings of appellee went into these properties, or the property in question, or what portion of his earn-

ings was used in the purchase of any or either of such properties.

The decree of the circuit court will be reversed, and the cause remanded to that court, with directions to dismiss appellee's bill of complaint.

Reversed and remanded, with directions.

(204 Ill. 488)

ROCK ISLAND & P. RY. CO. v. JOHNSON.

(Supreme Court of Illinois, Oct. 26, 1903.)

EMINENT DOMAIN—RAILROADS—STREETS—ADDITIONAL TRACKS—INJUNCTION—LACHES—DEDICATION—FLATS.

1. Where county commissioners, in laying out a town, failed to comply with statute providing for the recording of town plats, no statutory dedication of the fee of the streets designated on the plat was made, but only a common-law dedication thereof.

2. The laying of a second track in the street by a steam railroad company under authority of a municipal ordinance is an additional servitude, for which an abutting owner, who owns the fee in the street, is entitled to compensation, though the owner's predecessor in title granted to the company's predecessor the right to construct and operate a track in the street pursuant to permission given to the company's predecessor by the municipality.

3. Where a steam railroad company lays a second track in a street, without making or providing for compensation to an abutting owner who owns the fee in the street, the remedy of such owner is by injunction to restrain the company from using the second track until it has acquired the right to do so by grant from the owner or by condemnation proceedings.

4. A steam railway company constructed a track in a street. No work was done on it till 1898, and it was not until June, 1899, that it was used as a main track. The owner of the land abutting on the street applied for an injunction in April, 1899, as soon as he ascertained that the company intended to make and use the track as a permanent second track, and which he supposed was a temporary track only. *Held*, that the abutting owner was not guilty of laches defeating his right to enjoin the company from using the second track.

Appeal from Circuit Court, Rock Island County; W. H. Gest, Judge.

Suit by Walter Johnson against the Rock Island & Peoria Railway Company. From a decree for complainant, defendant appeals. Affirmed.

Appellee filed his bill in the circuit court of Rock Island county on April 26, 1899, against the appellant, for an injunction to restrain it from using for railroad tracks, switches, yards, etc., the south half of Mississippi street (now called First avenue), in the city of Rock Island. The bill alleges that the complainant is the owner of lot 1, and the east 50 feet of lot 2, in block 6, in said city, which front north on said avenue; also that he owns the fee of the west half of Twelfth street, in so far as the same abuts upon his lot on the east; that he owns the fee to said south half of the avenue and half of Twelfth street, subject to an easement in said city over the same for a street; that said railroad company was in the act of lay-

¶ 1. See Dedication, vol. 15, Cent. Dig. §§ 59, 61.

ing down and constructing an additional or new main railroad track on said south half of said avenue, claiming the right to do so under and by authority of an ordinance of the city of Rock Island adopted July 6, 1898, without first obtaining the permission of complainant, or in any way compensating him therefor. An answer was filed by the defendant, denying all the material allegations of the bill, and upon replication thereto the cause was referred to the master to report his conclusions as to the law and the facts; but afterwards, by stipulation of the parties, he reported the testimony, without conclusions, and the cause was heard before the chancellor, and a decree rendered in favor of the complainant.

The bill is very voluminous, and seeks relief against various other acts alleged to have been done and committed by the railroad company; but the decree from which this appeal is prosecuted is based upon the last named allegation—that the complainant is the owner of the fee of the soil to the center of the street—and enjoins the defendant company from in any manner using or operating the new or main track so far as the same abuts and is north of the complainant's lots and the west 40 feet of Twelfth street, and from in any manner operating or using any train or trains of cars or locomotive over or upon said new track, or any portion thereof, in front of complainant's said lots on said avenue, or from permitting other persons or corporations to use the same, "until such time as defendant shall have obtained the right so to do by grant from complainant, or by the exercise of the right of eminent domain." To reverse that decree, this appeal is prosecuted by the railroad company.

The issues in the court below were substantially the same as in *Davenport & Rock Island Bridge Railway & Terminal Co. v. Johnson*, 188 Ill. 472, 59 N. E. 407, and the facts are substantially the same. Most of the questions argued in that case have been reargued in this.

Robert Mather and Jackson & Hurst, for appellant. J. T. Kenworthy, for appellee.

PER CURIAM. Counsel for appellant have presented an elaborate and able argument to convince this court that it ought to reconsider its decision in the other case that the county commissioners of Rock Island county, when they laid out the town of Stephenson (now part of the city of Rock Island), failed to make a sufficient plat to vest the fee of the streets in the municipality. We there held that they had failed to comply with the statute of 1833 providing for the recording of town plats, and therefore had not made a statutory dedication of the fee of the streets. Counsel claim that the county commissioners had no power to make any other kind of a plat, except a statutory plat; that they were commanded so to do by

the Legislature, and could not make a common-law dedication. The Legislature has provided the requisites of a statutory dedication, and we have repeatedly held that these requirements must be complied with by every authority or person but the state itself. The county commissioners of Rock Island county not having complied with these requirements, no statutory dedication was in fact made, and the result is that there was a common-law dedication only.

It was also settled by this court in the other case that the center of the Mississippi river was the north line of the street now called First avenue, lying north of appellee's premises, and that he had title in fee to the center of such street, burdened by the public easement of a street. The appellant's predecessor, in pursuance of permission granted by an ordinance of the city of Rock Island, laid down a railroad track in the street now called First avenue in 1856, which track, known as the "old main track," has been maintained thereon continuously ever since in front of appellee's lots, and about which no complaint is made in the case at bar. There was also a switch or lead track connected with this main track, on the north side of it, at a point about 50 feet west of the east line of appellee's lot; said switch track running thence east. There were some switch tracks south of the old main track, but their location is not pertinent to this inquiry. On July 6, 1898, the city council of Rock Island passed an ordinance granting appellant the right to construct and maintain an additional main track north of the old main track on First avenue, with necessary connections and switches, which track would run the whole length of the frontage of appellee's lots. Appellant extended its embankment further into the river, and laid an additional track north of the old main, coming from the west and running east in front of appellee's lot, but did not connect this new track with the tracks extending east. This new track was used as a track for hauling dirt by the contractors to make the fill, but afterwards the north switch track mentioned above was disconnected from the old main track, and moved and connected with the new track, to be used as a new main track. To prevent this use of the track as a permanent main track, appellee's injunction was granted, enjoining such use until compensation should be made to appellee.

Appellee derives title from Napoleon B. Buford, who was the owner of the lots in question and a director and officer of appellant's predecessor at the time the original main track was laid, in 1856. Appellant insists that the action of Buford in permitting such track to be laid upon the streets fronting his lots amounts to an executed license or implied grant of an easement for such width as was reasonably necessary for the transaction of the company's business, and

that even a wrongful entry in 1856, and uninterrupted possession ever since, would give appellant an easement in the premises; that all rights of action accrued to Buford as the abutting owner, including the right to compensation for the putting down and use of the second main track; and that no right of action for compensation passed to appellee. As no complaint is made in regard to the original main track laid in 1856, the main question presented is, did the laying of such track, and the acquiescence of Buford therein, give the appellant's predecessor any other and further easement in the lots in question than that required for such track?

This was a steam railroad track laid on a public street of the city of Rock Island, the fee of which was in the abutter, and under these circumstances the rights acquired against the owner of the fee could be no greater than such as were granted by the ordinances of the city, and actually availed of by the railroad company. It could have no claim to a right of way of the extreme statutory width, for this railroad track was not laid across a farm or a portion of a city lot of which the owner had absolute control, but across land of which the control and easement were in the city for street purposes, and the company's rights were limited to the part of the street actually occupied, in pursuance of permission granted by the city to occupy such street. *Pittsburg, Ft. Wayne & Chicago Railroad Co. v. Reich*, 101 Ill. 157; *Wray v. Chicago, Burlington & Quincy Railroad Co.*, 86 Ill. 424; *Illinois Central Railroad Co. v. Indiana & Illinois Central Railway Co.*, 85 Ill. 211. A great number of ordinances of the city of Rock Island were introduced in evidence, from which it appears that the appellant was repeatedly authorized by such ordinances to lay down additional tracks in other parts of First avenue and in other streets, but the original ordinance in 1856 merely granted the right to lay down one main railroad track in that street. Nor was there any other main track laid there until after the passage of the ordinance of 1898, which granted the privilege of laying down another main track north of, and 13 feet distant from, the former main track. The acceptance of the last ordinance clearly shows that appellant was aware that it had exhausted its rights acquired from the city under the first ordinance. But at all events, it could have no greater rights against the owner of the fee, without express agreement, than it acquired against the city under the ordinances of the city. That the laying of additional tracks in a street, the fee of which is in the abutter, is an additional servitude, for which such owner is entitled to compensation, is well settled. *Bond v. Pennsylvania Co.*, 171 Ill. 508, 49 N. E. 545; *Davenport Bridge Railway Co. v. Johnson*, supra.

It is further urged on the part of appellant that appellee has lost his right to an injunction by laches, in permitting such addi-

tional track to be laid without objection. There is some conflict in the testimony as to just when the new main track was laid and completed, but we do not think that the appellee was guilty of any laches in the premises. No work was done on it till 1898, and it was not until June, 1899, that it was used as a main track. Appellee applied for an injunction in April, 1899, as soon as he ascertained that appellant intended to make and use the track, which he supposed was a temporary track laid for the purpose of filling in the embankment, as a permanent second main track. Injunction was the proper remedy. *Bond v. Pennsylvania Co.*, supra; *Davenport Bridge Railway Co. v. Johnson*, supra.

Some other points are discussed, but we regard them as unimportant or without application to the facts in the case.

The decree will be affirmed. Decree affirmed.

(204 Ill. 334)

NORWAYSZ v. THURINGIA INS. CO.

(Supreme Court of Illinois. Oct. 26, 1908.)

INSURANCE — POLICY — CONSTRUCTION—GASOLINE CLAUSE — USE BY TENANT — CONDITIONS—MATERIALITY—CAUSE OF LOSS.

1. Where the Appellate Court reversed a judgment of the circuit court, but did not remand the cause for trial, and the judgment of reversal did not recite a finding of fact, it will be presumed, on appeal to the Supreme Court, that the Appellate Court found the facts the same as the trial court, and that the evidence in the record did not establish a cause of action.

2. A policy provided that it should be void if the hazard be increased by any means within the control or knowledge of the insured, or if there was kept or used on the premises any gasoline. *Held*, that the provisions against the increase of hazard and the use of gasoline were separate and distinct, and could not be construed together as one clause, so as to render the policy void, only in case the keeping of gasoline increased the risk.

3. Where a policy provided that it should be void if gasoline was kept on the premises, except that permission was given to use gasoline stoves provided the assured warranted that no gasoline would be kept within the building except that contained in the reservoir of the stove, evidence of a witness that when she moved into the building she kept a one-gallon gasoline can, which was nearly full at the time of the fire, in the pantry, which was a part of the kitchen, established a breach of the condition.

4. Where a policy on a tenement house provided against the keeping of gasoline on the premises, the fact that gasoline was so kept by a tenant without the knowledge of the landlord did not relieve the latter from the breach of the condition.

5. Where a policy provided that it should be void if gasoline was kept on the premises, and such condition was broken, the insurer was not bound, in order to relieve itself of liability, to show that the loss resulted from such breach.

Appeal from Appellate Court, First District.

Action by Leopold Norwaysz against the Thuringia Insurance Company. From a judgment of the Appellate Court (104 Ill. App.

390) reversing a judgment in favor of plaintiff, he appeals. Affirmed.

William A. Doyle, for appellant. Lackner, Butz & Miller, for appellee.

RICKS, J. This was an action of assumpsit upon a policy of insurance for \$1,900, issued by the Thuringia Fire Insurance Company, appellee, on December 21, 1899, insuring the frame buildings of Leopold Norwaysz, appellant, against a loss by fire for the period of three years from the date of the policy. The premises insured were located at 4346 Honore street, in the city of Chicago, and were destroyed by fire June 21, 1900. There was a verdict and judgment in favor of appellant in the circuit court of Cook county for \$1,768.64. This judgment was reversed by the Appellate Court on the ground that the trial court erred in refusing to direct a verdict for the defendant at the close of all the evidence.

The errors relied upon by appellant for a reversal of the judgment of the Appellate Court are the following: (1) The Appellate Court erred in not affirming the judgment of the circuit court, having found the facts in issue the same as the trial court; (2) the Appellate Court erred in finding that the circuit court erred in the application of law to the undisputed facts in the case; (3) the Appellate Court erred in its construction of the policy of insurance; (6) the Appellate Court erred in not remanding this case to the circuit court, having reversed the judgment of the said circuit court.

The sixth assignment presents the question whether the record shows a case for review in this court. The error assigned is that the Appellate Court erred in not remanding the case to the circuit court, having reversed the judgment of the said circuit court. The judgment of the Appellate Court does not recite a finding of fact. Although reversing the court below, it does not remand the cause for another trial. In such a case it will be inferred that the Appellate Court found the facts the same as the trial court. It will also be presumed from the fact that the case was not remanded that the error committed was not one arising during the progress of the trial, such as error in admitting or excluding evidence or giving or refusing general instructions. Therefore, having found the facts the same and not having reversed the judgment for error arising during the progress of the trial, the Appellate Court must be presumed to have held that the evidence in the record did not prove or tend to prove a cause of action. *Brant v. Lill*, 96 Ill. 608; *Post v. Union Nat. Bank*, 159 Ill. 421, 42 N. E. 976; *Busenbark v. Saul*, 184 Ill. 343, 56 N. E. 417; *Supple v. Agnew*, 191 Ill. 439, 61 N. E. 392. This court has therefore jurisdiction in this case for the purpose of ascertaining whether there was evidence tending to show a right of action in the plaintiff.

The policy in question contained the following clause: "This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void if * * * or if the hazard be increased by any means within the control or knowledge of the insured; * * * or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used or allowed on the above premises, benzine, benzole, dynamite, ether, fireworks, gasoline, greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitroglycerine or other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard." Attached to the policy was a "rider" which contained a "vapor stove and gasoline permit," in the following words: "Permission is hereby given for the use of gasoline stoves, the reservoir to be filled by daylight only and when the stove is not in use. Warranted by the assured that no artificial light be permitted in the room when the reservoir is being filled, and no gasoline, except that contained in said reservoir, shall be kept within the building, and not more than five gallons, to be in a tight and entirely closed metallic can, free from leak, on the premises adjacent thereto." Beneath this the word "Caution," printed in bold-faced type, drew the attention to the following: "The danger from gasoline stoves is not so much in themselves as in having the material about. At ordinary temperature gasoline continually gives off inflammable vapor, and a light some distance from the material will ignite it through the medium of this vapor. It is said that one pint of gasoline will impregnate two hundred cubic feet of air and make it explosive, and it depends upon the proportion of air and vapor whether it becomes a burning gas or destructive explosive. Beware of any leaks in cans, and never forget how dangerous a material you are handling." It is because of the violation of the prohibitive clause in this "rider" that the defendant below moved the court, at the close of the evidence, to direct a verdict for the defendant.

The evidence of this violation is contained in the testimony of Mrs. Anna Glatky, who was introduced by the appellant to give evidence in rebuttal. Her material testimony was as follows, on direct examination: "Q. Where did you live about June 21, 1900? A. On Honore street, in that house that burned down. Q. Who did you rent the place from? A. Leopold Norwaysz. Q. Were you living there at the time of the fire? A. We rented; we moved there the tenth and the fire was on the twenty-first." Redirect examination: "Q. When you moved into this place, on or about the tenth, what did you use for lighting purposes in this house—coal oil or gas? A. We used kerosene. We had two stoves in there; one we used coal in and the other we used oil. Q. Did you buy, or your husband any kerosene at the time, or shortly after you moved in there, for household use? A.

I had a gallon of kerosene and also a gallon of gasoline." Re-cross-examination: "Q. When did you get the gallon of kerosene and when did you get the gallon of gasoline? A. I don't remember what date; I know I had it. Q. How long after you moved in there? A. About the second or third day; but in the summer time we used very little. Q. What did you use the gasoline for? A. Stove cooking during summer. Q. You had a gasoline stove? A. Yes, sir; we did. Q. Where did you keep that gallon of gasoline? A. Why, I had the stove filled and the balance in the pantry. Q. How much was in the can in the pantry? A. Almost full—not very much taken out. Q. Where was the pantry? A. In the kitchen. Q. How many rooms did you occupy? A. We had a front room, kitchen, and two bed rooms. Q. Those rooms you speak of were in the front, downstairs, of the house 4346 Honore street. Is that right? A. Yes, sir. Q. Did that gallon of gasoline remain in that pantry or that kitchen up to the time of the fire? A. Yes, sir; it was there. Q. Almost full was it—the can? A. Yes, sir. Q. At the time of the fire this gallon can was almost full, was it? A. Yes, sir; a lamp filled with oil. Q. The lamps were filled? I say the gasoline can; that was almost full at the time of the fire? A. Pretty nearly full; yes, sir. We used some for the stoves."

There was no other evidence introduced to contradict the testimony of this witness, and it must be taken as entirely undisputed. The only question, therefore, necessary to be considered by this court is whether, as a matter of law, the testimony of Mrs. Glatky shows facts sufficient to constitute such violation of the terms of the policy as will relieve the insurer from liability thereon.

Counsel for appellant cites numerous cases to the point that where there is a question whether or not the hazard was increased it is a fact to be determined by the jury. The cases undoubtedly support the doctrine, but neither the cases nor the doctrine have any application to the case under consideration. To be sure, there was a clause in the policy which provided, "or if the hazard be increased by any means within control or knowledge of the insured," but it is entirely separate from the clause which prohibits the keeping or use of gasoline. The paragraph begins, "This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void if," and then follows a series of co-ordinate clauses, each punctuated by a semicolon. Among these clauses are the two in question—the one prohibiting an increase of risk by any means within the knowledge or control of the insured; the other prohibiting the keeping or using of gasoline on the premises. They are entirely disassociated in fact, and there is no rule of construction that would require or suggest their connection.

It is suggested that a rule of construction

applicable to this case is that all parts of the contract are to be considered together. That is unquestionably a valuable rule, but it must not be applied to the extent of reading two separate clauses as one just because one can be attached to the other without destroying the meaning of either. The position of counsel for appellant is this: One clause prohibits the use of gasoline; another clause prevents the increase of hazard by any means; therefore the prohibition of the use of gasoline means only such use as a jury would decide to be an increase in the hazard. Such a construction is so extravagant that it would be useless to cite authorities for rejecting it, were it not that the appellant has based the greater part of his argument upon the assumption that the two clauses must be read together.

In *Newport Imp. Co. v. Home Ins. Co.*, 163 N. Y. 237, 57 N. E. 475, the policy, very similar to the one under consideration, read: "This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void, * * * or if the hazard be increased by any means within the knowledge or control of the insured, or if mechanics be employed in building, altering or repairing the within described premises for more than fifteen days at any one time." The court, in construing this clause, said: "This clause in the policy contains a large number of provisions, separated by semicolons, each of which renders it void as therein provided. * * * It is clear that the acts to which reference is about to be made [certain alterations] fall within the second provision quoted above, to the effect, 'or if mechanics be employed in building, altering or repairing the within described premises for more than fifteen days at any one time.' The question of increase of hazard is not necessarily involved. If mechanics are employed in building, altering or repairing the premises for more than fifteen days at any one time, and an agreement or consent is not endorsed on the policy permitting such work, the contract of insurance is void." The court affirmed the judgment of the court below holding that it was proper to have dismissed the suit on its merits.

The Supreme Court of the United States construed this clause in *Imperial Fire Ins. Co. v. County of Coos*, 151 U. S. 452, 14 Sup. Ct. 379, 38 L. Ed. 231. The clause in this case was substantially the same as in the case just cited. The court said in construing: "If the last stipulation had been so plain as to require the element of an increased risk to be incorporated into the condition that 'if mechanics are employed in building, altering or repairing the premises named herein,' etc., then there would have been presented a question of fact for the jury whether such alterations and repairs constituted an increase of risk. But this condition being wholly independent of any increase of risk, its violation without the consent of the in-

suror or waiver of the breach annulled the policy." Again: "The condition which was violated did not in any way depend upon the fact that it increased the risk, but by the express terms of the contract was made to avoid the policy if the condition was not observed. The instruction of the court gave no validity or effect to the condition and its breach, but made it depend upon the question whether the acts done in violation of it in fact increased the risk and whether such increased risk was operative at the date of the fire."

These long quotations have been given because they are directly in point on the question of construction, and because, taken together with the reason therefor, they effectually dispose of the appellant's earnest contention that the provision regulating the use of gasoline must be taken to be modified by the clause prohibiting an increase of hazard. It is contended that "surely that this part of the policy [prohibiting the increase of hazard] must have some meaning." It undoubtedly does, and the meaning does not seem to be concealed. If, for instance, the insured should do some act not specifically prohibited by the terms of the policy, but which was of such a nature as to increase the hazard and multiply the possibilities of fire, then the clause in question would apply, and the jury would properly be looked to in a determination of the question whether such act was an increase of the hazard.

The permission given to the insured to use gasoline does not relieve him from the effect of the violation of the one important restriction on such use. The insurance company was not compelled to give its permission to the appellant to use gasoline. It was a voluntary act for the benefit of the insured, and there was no advantage to the insurance company gained thereby. Contracts of insurance are to be construed like other contracts. If ambiguous terms are used, the meaning more favorable to the insured will be adopted, not because he is the sufferer in a recent loss or because of a disparity in the financial condition of the two parties, but because the words are those of the insurer, and the ambiguity is chargeable to it. Where, however, there is no ambiguity in the terms, neither party is to be favored. If the stipulation is one that the parties could lawfully make, and, having been made, is not actually or inferentially waived, it is the function of the court to enforce its observance as the parties made it, and not to make a new agreement for the purpose of mollifying the hardship that the rigorous and inflexible terms occasion. In the case at bar there was permission given to use a gasoline stove, and on the permit were the words, "Warranted by the assured that no artificial lights be permitted in the room when the reservoir is being filled, and no gasoline except that contained in said reservoir shall be kept within the building." The undisputed evi-

dence is that gasoline was kept by the tenant of the insured in the building.

Counsel for appellant contends that there could have been only a small quantity of gasoline, because the witness swore that she had the stove filled and had the balance in the pantry. There is no possible way for this court to determine how large the reservoir attached to the stove was, except from the testimony of this witness. She swears, further along in her testimony, that the can in the pantry was "almost full," and again "pretty full; we used some for the stove." From this it must be concluded that the reservoir was quite small; at any rate, this witness manifested a clear desire to impress the fact that there was a considerable quantity of oil kept in the pantry. She moved into the house on the 10th of June. When asked when it was that she purchased the gasoline, she answered, "About the second or third day after we moved in there, but we used very little in the summer." This explanation was evidently for the purpose of rebutting the natural presumption that if purchased on the 12th or 13th of June there would be very little gasoline remaining at the date of the fire, eight or nine days later. There can be no doubt that the undisputed testimony of this witness shows that there was, in fact, a considerable quantity of gasoline kept in the pantry.

Counsel for appellant desires that this court should take notice of the common knowledge that a reservoir upon a gasoline stove contains one gallon, and that if witness had filled the stove there would be practically none left in the can. If a gasoline can were kept in the pantry with no oil in it, or such an inconsiderable quantity as might adhere to the inside of the can, there would, of course, be no violation of the clause. But this witness has sworn, and reiterated, that the can was nearly full. If this court were allowed to draw presumptions from common knowledge, we might presume that if the can were kept in the pantry (as the witness testified) it is probable that at some time it was kept there with the entire gallon of oil in it. Of course, such presumption is not proper nor is it necessary under the testimony given, but it is fully as proper as the presumption urged by the appellant that the reservoir on the gasoline stove contained a gallon, and therefore there was little, if any, gasoline kept in the pantry.

Being fully convinced that there was a material breach of the warranty by the insured, the policy of insurance must be held to have been avoided unless some other rule prevents such avoidance.

It is contended that the breach of the warranty was the act of the tenant, for which the insured was not responsible. It has been shown that this clause has no possible connection with the provision elsewhere in the policy that the hazard shall not be increased

by any means within the knowledge or control of the insured. Therefore, if the insured can rely upon his ignorance of the breach by the tenant as an absolution from the result of it, it must be because of a rule of law applicable, and not because the policy provides any such thing. Upon this question the following cases are decisive: *Diehl v. Adams County Mutual Ins. Co.*, 58 Pa. 443, 98 Am. Dec. 302; *Wetherell v. City Fire Ins. Co.*, 18 Gray, 276; *German Fire Ins. Co. v. Shawnee County*, 54 Kan. 732, 39 Pac. 697, 45 Am. St. Rep. 307; *Insurance Co. v. Gunther*, 116 U. S. 113, 6 Sup. Ct. 306, 29 L. Ed. 575, and 134 U. S. 110, 10 Sup. Ct. 448, 33 L. Ed. 857; *Kelly v. Worcester Co.*, 97 Mass. 284; *Hall v. People's Ins. Co.*, 6 Gray, 185; *Concordia Ins. Co. v. Johnson*, 4 Kan. App. 7, 45 Pac. 722; *Long v. Beeber*, 106 Pa. 466, 51 Am. Rep. 532; *Badger v. Platts*, 68 N. H. 222, 44 Atl. 296, 73 Am. St. Rep. 572. Each one of these cases holds pointedly that an insured party cannot be relieved from the effect of the violation of prohibitive clauses by showing that the violation was by his tenant, without his knowledge or control. A violation of the provisions by any one who is permitted by the insured to occupy the premises is a violation by the insured himself. In *Insurance Co. v. Christensen*, 29 Neb. 572, 45 N. W. 924, 26 Am. St. Rep. 407, a contrary doctrine is announced, but it is clearly without the support of authority.

On the trial below it was not proved that the fire was in any way due to the presence of the gasoline in the building, nor can the origin of the fire be determined from the evidence. The point is urged that, since the violation of the prohibitive clause was in no way shown to have occasioned the fire, it was a question for the jury to determine whether, as a matter of fact, the hazard was thereby increased. This contention is not supported by reason or authority. The assured warranted that no gasoline, except that contained in the reservoir upon the stove, should be kept in the building. If he had refused to warrant this, the insurance company would doubtless have withheld the permission to use gasoline at all. To hold now that unless the insurance company can show that the breach of the warranty contributed to the fire it must be held to a strict liability would be to confound all distinctions of contractual liability. The insurer unquestionably considered the presence of gasoline in the building as an increase of risk. In one sentence permission is given to use gasoline in the stove, but in the next sentence it is provided that no gasoline except that in the reservoir shall be kept in the building. Then, beneath this, the word "Caution," in bold-faced type, draws the attention to the dangerous character of gasoline. This cau-

tion begins with the sentence, "The danger from gasoline stoves is not so much in themselves as in having the material about." That is the very thing it is wished to provide against. If we were to consider this "rider" as a contract, there is on one side a permission to use a gasoline stove; on the other side, standing as a consideration for the permission, a warranty that in using the stove no gasoline other than that in the reservoir shall be kept in the building. The warranty was inserted for the benefit of the insurer. It was the material and essential restriction on the use of gasoline. A substantial violation has been proved, and it is absolutely beside the point to inquire whether or not the breach actually contributed to the loss. The following cases support these views: *Hill v. Middlesex Ins. Co.*, 174 Mass. 542, 55 N. E. 319; *Newport Imp. Co. v. Home Ins. Co.*, supra; *Diehl v. Adams County Mutual Ins. Co.*, supra; *Turnbull v. Home Fire Ins. Co.*, 83 Md. 312, 34 Atl. 875; *Kyte v. Assurance Co.*, 149 Mass. 116, 21 N. E. 361, 3 L. R. A. 508; *Pennsylvania Ins. Co. v. Faires*, 13 Tex. Civ. App. 111, 35 S. W. 55; *Thomas v. Fame Ins. Co.*, 108 Ill. 91; *Imperial Fire Ins. Co. v. County of Coos*, supra.

There are two general classes of cases in which it has been held with considerable uniformity that a breach of a prohibitive clause in a policy such as this will not operate to relieve the insurer from liability thereon—one, where the policy of insurance, being on a stock of goods used in business, contains clauses forbidding the keeping of certain materials which are customarily a part of such a stock of goods (*Reaper City Ins. Co. v. Jones*, 62 Ill. 458); the other, where the breach consists in keeping small quantities of the forbidden article for cleaning clothes or machinery or like purposes. The reason for the holding is that in the first class, by insuring the stock of goods in which the forbidden articles were a usual part, the insurer impliedly waives the restrictive clause referring to it. See note to *Lancaster Fire Ins. Co. v. Lenheim*, 89 Pa. 497, in 33 Am. Rep. 781. In the second class the bringing of the small quantities on the premises is held to be such a trifling departure as will not amount to a breach. Of course, the case in question falls in neither of these classes. Having gasoline in the building for cooking purposes, when keeping it there, other than in the reservoir, was forbidden, was a substantial and serious breach.

We fail to find in the cases cited, or elsewhere, any authority to warrant us in depriving the appellee of the right to a strict observance of the restrictive clause in the policy, and we think that the peremptory instruction should have been given.

The judgment of the Appellate Court is accordingly affirmed. Judgment affirmed.

(204 Ill. 35)

STRONG v. LEWIS et al.

(Supreme Court of Illinois. Oct. 26, 1903.)

LIMITATION OF ACTIONS—ACCRUAL OF ACTION—NONRESIDENCE OF PARTIES—SUBSEQUENT ACTION IN STATE—STATUTES—CONSTRUCTION.

1. Hurd's Rev. St. 1899, p. 1119, § 20, enacts that when a cause of action has arisen "in another state and by the laws thereof limitations have run against an action," an action cannot be maintained in the state. *Held*, that where a cause of action arose in Virginia and subsequently the debtor moved to New York, and an action thereon became barred under the laws of New York, and subsequently the debtor moved to Illinois, no action could be maintained in the latter state, the phrase "when a cause of action has arisen" meaning when jurisdiction exists in the courts of a state to adjudicate between the parties upon the particular cause of action.

Appeal from Appellate Court, First District.

Action by Joseph H. Strong, as administrator of the estate of Henry Body, deceased, against J. F. Lewis. Judgment for defendant. On the death of defendant, F. K. Lewis and R. R. Bradley, executors, were substituted. From a judgment of the Appellate Court affirming a judgment for defendant, plaintiff appeals. Affirmed.

Thomas A. Moran and Chilton P. Wilson, for appellant. Goodrich, Vincent & Bradley, for appellees.

RICKS, J. This is an action of assumpsit commenced by appellant against J. F. Lewis in the superior court of Cook county. The declaration consisted of the common counts, and the action was for recovery on two promissory notes, due, respectively, September 10, 1881, and October 29, 1881. The declaration was filed May, 1899. To the declaration appellee filed 11 special pleas. Appellant filed a general demurrer to the tenth and eleventh special pleas. The demurrer to these pleas being overruled, appellant stood by his demurrer. To appellee's eighth special plea a replication was filed, and, a rejoinder having been filed to this replication, plaintiff demurred thereto, which demurrer was overruled and plaintiff stood by his demurrer. Upon appeal to the Appellate Court the judgment of the superior court was affirmed. Subsequent to the commencement of the suit J. F. Lewis died, and his executors were substituted as appellees.

From the declaration it appears that the notes in question were executed in West Virginia and made payable at Staunton, Va. The eighth plea alleges that the cause of action did not accrue within 10 years next before the commencement of the suit. Appellees replied that at the time of the accrual of the action the defendant was not a resident of Illinois, that defendant first became a resident of Illinois after the accrual of the action, in 1890, and that plaintiff commenced the action hereon within 10 years next after defendant first became an inhabit-

ant of Illinois. The rejoinder to this replication was that at the time of the accrual of the action herein neither the defendant nor the party in whose favor the action accrued was a resident of Illinois.

Appellees' tenth and eleventh pleas are practically alike, and allege substantially as follows: First, that the cause of action accrued in the state of Virginia in 1881; second, that neither the defendant nor the person in whose favor the action accrued was then a resident of Illinois; third, that subsequent to the accrual of said action the defendant became a resident of the state of New York; fourth, that, by the laws of New York then and ever since in force, all such actions are barred, and were barred, in six years, and that no action was ever brought in New York; and, fifth, that defendant resided in New York for six years after the said action accrued.

The only questions presented in this record are those raised by the demurrers. The question raised by the tenth and eleventh pleas is the effect section 20 of the limitation act has upon causes of action arising outside of this state where both parties are non-residents. Section 20 (Hurd's Rev. St. 1899, p. 1119), provides as follows: "When a cause of action has arisen in a state or territory outside of this state, or in a foreign country, and, by the laws thereof, an action thereon cannot be maintained by reason of the lapse of time, an action thereon shall not be maintained in this state."

It is contended by appellant that this cause of action arose in the state of Virginia, and not in the state of New York, and therefore that the tenth and eleventh pleas, which set up the limitation laws of New York, are insufficient. We are of the opinion, however, that when appellant permitted appellees' testator to go into the state of New York and permitted the bar of the statutes of that state to become complete, he lost all right, under the laws of Illinois, thereafter to maintain suit against him, and that when he came into the state of Illinois he came clothed with all the privileges that the law of the state of New York conferred upon him. This question we have decided in the case of *Hyman v. McVeigh*, 87 Ill. 708, note, but not reported, where we said: "The words, 'when a cause of action has arisen,' as they occur in the statute pleaded, should be construed as meaning when jurisdiction exists in the courts of a state to adjudicate between the parties upon the particular cause of action, if properly invoked, or, in other words, when the plaintiff has the right to sue the defendant in the courts of the state upon the particular cause of action, without regard to the place where the cause of action had its origin." This case has also been followed in *Wooley v. Yarnell*, 142 Ill. 442, 32 N. E. 891.

We are of the opinion that the tenth and eleventh pleas were sufficient, and the demurrer was properly overruled. From what

we have said regarding these two pleas it is unnecessary to consider the demurrer to the rejoinder to the eighth plea.

The judgment will be affirmed. Judgment affirmed.

(205 Ill. 84)

JACOBY v. STARK.

(Supreme Court of Illinois. Oct. 26, 1903.)

BREACH OF MARRIAGE PROMISE—DAMAGES—EXEMPLARY DAMAGES—INSTRUCTIONS—LOSS OF WORLDLY ADVANTAGE—EVIDENCE.

1. In an action for breach of marriage promise, exemplary damages may be awarded if defendant has been guilty of any fraud, deceit, or evil motives in the making of the contract or in the breach thereof.

2. In an action for breach of marriage promise, it is not essential that exemplary damages arising out of improper motives in entering into the contract should be specifically declared for in the declaration.

3. In an action for breach of marriage promise, the court instructed that the jury might punish defendant by awarding exemplary damages if they believed they should be awarded, and at the request of defendant an instruction was given that if the jury believed that the conduct of defendant was free from malice plaintiff would be confined in her recovery to the actual loss arising from the breach. *Held*, that there was no prejudicial error in the giving of the first instruction, notwithstanding that it did not refer to the circumstances of aggravation which must be present to authorize punitive damages.

4. In an action for breach of marriage promise, it was not improper to instruct that the jury might consider the money value or worldly advantage of the marriage, there being evidence that plaintiff had told defendant that he would build a house for a home, and that they had planned a house.

Error to Appellate Court, Third District.

Action by Lena Stark against Frank J. Jacoby. From a judgment of the appellate court, affirming a judgment in favor of plaintiff, defendant brings error. Affirmed.

Livingston & Bach and Welty & Sterling, for plaintiff in error. Kerrick & Bracken, for defendant in error.

BOGGS, J. This was an action in assumption by the defendant in error against the plaintiff in error to recover damages for the breach of a contract of marriage. The cause was tried before a jury, who returned a verdict in favor of the defendant in error in the sum of \$2,100. Judgment was entered on the verdict, and the Appellate Court for the Third District affirmed the judgment. This writ of error challenges the judgment of affirmance.

The only errors urged relate to the action of the court in instructing the jury. But two instructions were given for the defendant in error. Both were intended to advise the jury as to the elements of damage proper for their consideration. Instruction No. 1, so far as it relates to vindictive damages, was as follows: "And you are further instructed by the court that in this case, if you should find for the plaintiff, you have the right to punish the defendant for violating the promise to marry

the plaintiff by awarding exemplary or punitive damages, in addition to actual damages, against the defendant, if the jury believe from the evidence that exemplary and punitive damages should be awarded." Instruction No. 2, upon the same element of damages, read as follows: "You are further instructed by the court that in this case you have the right, should you find for the plaintiff, to award her exemplary and punitive damages in addition to actual damages, if you believe from the evidence that exemplary and punitive damages should be awarded."

The general rule that exemplary or vindictive damages cannot be recovered in actions *ex contractu* does not apply to an action to recover damages for the breach of a contract to marry. In such actions exemplary damages may be awarded if the defendant was guilty of fraud, deceit, or was moved by evil motives in making the contract or in the breach thereof. 5 Cyc. 1021; 4 Am. & Eng. Ency. of Law, 899; 3 Sutherland on Damages (2d Ed.) § 986; Fidler v. McKinley, 21 Ill. 308. It is not essential that exemplary damages, arising out of improper motives in entering into the contract of making or in refusing to comply therewith, should be specifically declared for in the declaration. Such damages may be recovered as part of the general damages if the evidence discloses a proper case for the infliction thereof. 5 Ency. of Pl. & Pr. 745. Whether seduction is admissible as a basis for the assessment of vindictive damages without being specially pleaded need not be determined, as nothing of that nature is involved in this record.

It is pointed out, however, that in both of the instructions given at the request of the defendant in error, hereinbefore set out, all reference is omitted to the peculiar circumstances of aggravation which must be present to authorize the infliction of punitive damages, and it is urged the instructions must be condemned as erroneous for that reason. There would be much force in this insistence if these instructions stood alone as the charge of the court to the jury. Another instruction given by the court to the jury fully supplied the omissions in those under consideration and cured the defects therein.

At the request of the plaintiff in error the court further instructed the jury as follows: "You are instructed that if you believe from the evidence that the conduct of the defendant in relation to his failure to perform a marriage contract in question with the plaintiff has been free from malice, and there was no circumstance attendant therewith that showed any willful or malicious disregard for plaintiff's rights, then the plaintiff will be confined in her recovery to the actual loss, if any, sustained by her for reason of the defendant's failure to perform the marriage contract in question, as shown by the evidence."

The two instructions which are the subject of criticism were not erroneous, in that they declared to the jury that exemplary damages might be awarded in the action upon proper evidence, but in the fact that they did not go further, and advise the jury that such damages were permissible only when there had been some element of deceit, malice, or oppression connected with either the formation of the contract or the breach thereof. The instruction given at the request of the plaintiff in error supplemented those given at the request of the defendant in error, and supplied what was omitted in them. The instructions, taken as a whole, are entirely harmonious, and as a series presented the law correctly, and the error of granting those given for the defendant in error was cured. *Town of Vinegar Hill v. Busson*, 42 Ill. 45; *Hoge v. People*, 117 Ill. 35, 6 N. E. 796; *Durham v. Goodwin*, 54 Ill. 469; *Stowell v. Beagle*, 79 Ill. 525; *Toledo, St. Louis & Kansas City Railroad Co. v. Bailey*, 145 Ill. 159, 33 N. E. 1089.

That the plaintiff in error sought the hand of the defendant in error in marriage was not denied, and that there was a contract was not denied. He sustained the relation of an engaged lover to her for a period of two years. No justification for the refusal to comply with the contract of marriage was attempted to be shown, and we are inclined to accept the view of counsel for defendant in error that the evidence so far tended to establish that the plaintiff in error insincerely and deceitfully advanced untruthful, unsubstantial, and frivolous reasons for casting the defendant in error aside as to fairly justify the imputation that he was trifling with her affections, and was moved by evil or improper motives in seeking to avoid the fulfillment of his contract with her, and that his actions were such as to indicate that he was indifferent to the humiliation that would befall her, and that the breach of the contract on his part was ruthless and unjustifiable. The tendencies of the evidence were therefore sufficient to authorize instructions with reference to the allowance of punitive damages. 3 *Sutherland on Damages*, 2190.

It was not improper to advise the jury that, if they found for the plaintiff, in estimating the damages they might consider "the money value or worldly advantage of a marriage which would have given plaintiff a permanent home, if you believe, from the evidence, the defendant would have been able to give the plaintiff such a home." The complaint is there was no proof to warrant the giving of this instruction. We find in the record proof that the plaintiff in error told the defendant in error he would build a house on lots which he owned, for a home for them, and that they planned the house that he said he intended to build.

What has been said as to the action of the court in granting instructions, heretofore considered, disposes of the contention the court

should have given instructions Nos. 1, 2, and 4, which were tendered by the plaintiff in error, but refused.

The judgment must be and is affirmed. Judgment affirmed.

(204 Ill. 510)

GILCHRIST TRANSP. CO. v. NORTHERN GRAIN CO.

(Supreme Court of Illinois. Oct. 28, 1903.)

DEFAULT JUDGMENT—VACATING—MERITORIOUS DEFENSE—COUNTER AFFIDAVITS—ADMISSIBILITY—TRIAL OF MERITS OF CASE ON AFFIDAVITS—SERVICE OF PROCESS ON AGENT—EVIDENCE.

1. Where defendant corporation moved to vacate a default judgment and for leave to plead, on the grounds that the summons was served on one not an agent of defendant, upon whom service of process against it could be made, and that it had a meritorious defense to the action, it was error to consider plaintiff's counter affidavits so far as they related to the merits of the controversy, but its counter affidavits on the question of the agency and defendant's diligence were admissible.

2. The court will not open a default judgment if there is no defense to the action, even where the default and judgment did not result from the fault or negligence of the defendant.

3. An agent acting for defendant corporation, a transportation company, for procuring cargoes for its vessels, signed the bill of lading for plaintiff's corn, plaintiff being referred to him by defendant's president and general manager, with whom to confer upon any matter relating to the cargoes. After a loss of part of the corn, he acted as defendant's representative in examining into the matter, which was afterwards left in his hands, defendant recognizing his agency. *Held*, that he was a regular agent of defendant, and service of the summons on him was service on defendant.

Appeal from Appellate Court, First District.

Assumpsit by the Gilchrist Transportation Company against the Northern Grain Company. From a judgment of the Appellate Court for the First District (107 Ill. App. 531), affirming the judgment of the circuit court denying defendant's motion to vacate a default judgment, defendant appeals. Affirmed.

C. E. Kremer, for appellant. Church, McMurdy & Sherman, for appellee.

CARTWRIGHT, J. The Appellate Court for the First District affirmed the judgment of the circuit court of Cook county denying the motion of appellant to vacate a judgment entered by default against it in said court in favor of appellee, and to set aside the default, and for leave to plead and interpose a defense to the action. From the judgment of the Appellate Court appellant prosecuted this appeal.

The suit was in assumpsit, and the record is as follows: On September 11, 1901, summons was issued, returnable to the October term of that year. On September 20, 1901, the summons was returned, with an indorsement of service thereon, as follows: "Served

this writ on the within named Gilchrist Transportation Company, a corporation, by delivering a copy thereof to Dennis Sullivan, agent of said corporation, this 17th day of September, 1901. President of said corporation not found in my county." On the same day the declaration was filed, containing four counts, charging the defendant with negligence in the care of corn of plaintiff loaded on a vessel of defendant at Manitowoc, Wis., to be transported by defendant to Buffalo, N. Y., by reason of which negligence the corn was greatly injured, damaged, and lessened in value. On October 23, 1901, the defendant was defaulted. On November 7, 1901, the court assessed the plaintiff's damages against the defendant at \$7,791.86, and judgment was entered for said amount and costs. During the same term the defendant, on November 16, 1901, entered its motion to vacate the judgment, and to set aside the default and for leave to plead, on the grounds that Dennis Sullivan was not an agent of defendant upon whom service of process against it could be made, and that it had a meritorious defense to the action. It appears from the bill of exceptions that the court heard and decided the motion upon affidavits presented and read by the defendant in support of the motion, and also upon counter affidavits presented and read by the plaintiff, both upon the question of the agency of Sullivan and also upon the merits involved in the action. Upon a consideration of such affidavits the court entered an order that if the plaintiff should remit \$1,841.39 from the judgment the motion should be denied, but otherwise it should be granted. Plaintiff elected to remit such sum, and the remittitur was entered nunc pro tunc as of the date of the judgment, leaving the judgment to stand for \$5,950.47 and costs. The court then denied defendant's motion.

One of the assignments of error is that the court erred in permitting the plaintiff to file, and read on the hearing of the motion, the counter affidavits presented in its behalf. So far as these counter affidavits related to the merits of the controversy, the court erred in hearing and considering them. The appearance entered by the defendant when the motion was made was general, and the motion was not for the purpose of having the judgment set aside as void for want of jurisdiction of the defendant, but its object was to enable the defendant to present its defense to the action. In the form in which the motion was made, it was necessary for the defendant to show that Sullivan was not its agent, that it was not guilty of negligence, and that it had a meritorious defense. It is conceded that, if Sullivan was an agent of the defendant of such a character that delivering a copy of the summons to him would constitute service upon the defendant, the judgment could not be set aside, as in such case there would be no legal excuse for not appearing in an-

swer to the summons and making the defense. The question of the agency of Sullivan and diligence of the defendant was to be tried by the court on the motion, and to be finally and conclusively settled. It could not be tried again, and if the judgment should be opened to let in the defense it would not be an issue in the case, and consequently should not be heard and finally determined *ex parte*. If the court should conclude to vacate the judgment and set aside the default, the order would be final, and both parties should have an opportunity to present the facts. On such a question the court should hear both sides, so as to finally determine the facts, and we have always held counter affidavits to be admissible. *Boyle v. Levi*, 73 Ill. 175; *Palmer v. Harris*, 98 Ill. 507; *Hefling v. Van Zandt*, 162 Ill. 162, 44 N. E. 424; *Hartford Life Ins. Co. v. Rossiter*, 196 Ill. 277, 63 N. E. 680. Even if it should appear that the default and judgment did not result from the fault or negligence of the defendant, the court will not open the judgment if there is no defense to the action. It is therefore necessary for the defendant to show a defense *prima facie* on the merits, but if the affidavits on the part of the defendant show a meritorious defense the court is not authorized to try the merits of the case on affidavits. Under our system such action would be an encroachment upon right to trial by jury. In *Mendell v. Kimball*, 85 Ill. 582, it was said that such a practice was a vicious one, and that courts could not do justice to parties in thus trying the merits upon affidavits where the affiants are not subject to cross-examination. If there should be cause for opening a judgment and setting aside a default, and the affidavits for the defendant show a meritorious defense, the courts should not try the issue which the defendant proposes to raise by interposing its defense. The right of defendant is to have the issue passed upon by a jury. In this case the hearing on the merits was favorable to the defendant to the extent of the remittitur, and in any event, if the affidavits did not show good grounds for vacating the judgment and setting aside the default, the action of the court in denying the motion must be affirmed.

The facts relating to the agency of Sullivan, appearing from the affidavits and counter affidavits, are as follows: Sullivan carried on the business, in Chicago, of furnishing cargoes for vessels, and in doing so represented the owner of the vessel and signed the bill of lading. The steamers of the defendant were not operated upon any regular line or route, but took cargoes from any port on the lake, and in the prosecution of his business Sullivan acted as defendant's agent for procuring cargoes at Chicago. The general manager of the plaintiff negotiated with the president and general manager of the defendant concerning the shipment of the corn, and was referred by such president and

general manager to Sullivan, at Chicago, as the agent of the defendant, with whom to confer upon any matters relating to the cargoes. Sullivan signed the bill of lading of the cargo of corn in this case, and, after the loss was reported to the defendant, Sullivan proposed to the manager of the plaintiff that they go to Manitowoc to examine into the matter. Sullivan went and acted as the representative of the defendant, and they found a large quantity of corn in the vessel damaged by water. Defendant afterward recognized the agency of Sullivan, and left the matter in his hands.

Service may be had by leaving a copy of the process with the president of a corporation, or, if he cannot be found in the county, by leaving it with certain officers specified in the statute, or a general agent, station agent, or any agent of the corporation found in the county. While Sullivan was not a general agent, it was well established that he was a regular agent of the defendant, acting for it in the city of Chicago. Service upon him was service upon the defendant, and no excuse is shown for its failure to appear and defend the action.

The judgment of the Appellate Court is affirmed. Judgment affirmed.

(204 Ill. 281)

BALDWIN v. HANEY.

(Supreme Court of Illinois. Oct. 26, 1903.)

RES JUDICATA—PARTIES—SUBJECT-MATTER.

1. A receiver appointed on the filing of a creditors' bill filed a bill against the debtor's attorney and the widow and children of the debtor, alleging that the debtor had conveyed certain properties to the attorney in fraud of creditors, and praying that such property be subjected to payment of the creditors' judgment. The attorney's answer alleged a lien for services, and stated that the wife and children had certain beneficial interests in the balance, if any. On the issues so formed, the court entered a decree disposing of the property, and adjudging that nothing remained to be paid over to the wife. The wife also filed an answer. *Held*, that this decree was a bar to a suit by the wife against the attorney, setting up the same claim as to her interest in the property.

2. The fact that plaintiff and defendant were joint defendants in a former suit adjudicating their rights in certain property makes no difference in the application of the doctrine of res judicata, if the decree in that case settled the adverse interests of the parties.

Error to Appellate Court, First District.

Bill by Martha E. Baldwin against Elbridge Hanecy. From a decree of the Appellate Court (104 Ill. App. 84) affirming a decree for defendant, plaintiff appeals. Affirmed.

Plaintiff in error filed her bill in the superior court of Cook county on March 29, 1901, against the defendant in error, for an accounting, to which he pleaded in bar a decree of the circuit court of Cook county entered January 20, 1881. The cause being

heard on the issue thus joined, the bill was dismissed for want of equity. The Appellate Court for the First District affirmed that decree, and hence this writ of error.

The bill alleges that in 1876 one James Cash, husband of the complainant, and Michael Worthy, had certain transactions, out of which grew claims by the latter, and upon which he afterwards obtained a judgment for \$2,000 against said Cash, the defendant, Hanecy, acting as the attorney of Cash, and upon whose counsel and advice he transferred to him (the defendant) certain promissory notes, and conveyed or caused to be conveyed to him certain city lots in Chicago, all of which was done for the purpose of hindering and delaying the said Worthy and other creditors of said Cash in the collection of their just claims against him; that property of the value of \$4,000 was so conveyed, which the defendant claimed was on account of certain claims then due him for attorney's fees rendered to James Cash, amounting to the sum of \$500; that another part of said real estate was transferred to him by Madeline Cash, a daughter of James Cash, on account of a claim due him for attorney's fees, amounting to \$75; that the total claim then made by the defendant against James Cash for attorney's fees did not exceed \$575, for which he obtained possession of real estate formerly owned by Cash amounting in value to \$4,000; that on February 25, 1878, Michael Worthy filed a creditors' bill in the circuit court of Cook county against the defendant, James Cash, the complainant herein, and others, for the purpose of reaching the said property so transferred and conveyed to the defendant, in the course of which litigation Adolph Helle was appointed receiver, and ordered to obtain possession of all the properties, assets, etc., belonging to James Cash; that said receiver during the year 1879 filed his bill against the defendant, Hanecy, and others, praying that all of said property be subjected to the payment of said Worthy judgment; that on November 29, 1879, Hanecy filed his separate answer to the receiver's bill, a copy of which is attached to and made a part of the complainant's bill, it being alleged that he therein "admitted that valuable real estate had been conveyed to him by Cash in a deed stating a consideration of \$2,000, actual consideration \$500, and a conveyance by Madeline Cash, daughter of James Cash, stating a consideration of \$1,000, but the actual consideration was \$75"; also admitting he was at "that time in possession of two notes made by a certain firm, named Boyer & Corneau, for \$2,000 each, and one note by Atkinson & Walker for \$5,000, all of which notes were payable to Cash"; that he at that time claimed in his answer a lien upon said notes for fees to be earned by him, and on account of services to be rendered James Cash, Martha E. Cash (complainant), and Eugene Cash, according to certain express agreement made by James

Cash with him and the makers of said notes, which agreement provided also for the payment of the balance of said money to Martha E. Cash in lieu of her dower right in the real estate of James Cash, transferred as aforesaid, in which she joined. It is then alleged that, by virtue of the terms and conditions of the agreement so made, complainant became entitled to the balance that would remain on hand after the payment of a reasonable fee to the defendant, to be figured during the course of the faithful and conscientious discharge of his duties towards James Cash and Eugenie Cash; that complainant did not know of said agreement or its terms until recently, and that no part of the \$9,000 (being the amount of said notes) was ever paid to her by the defendant; that the defendant acted as counsel and solicitor for James Cash during all of said procedure and suits, and that the original claim of Michael Worthy against her husband was just, and he liable for the same, and that it was the duty of the defendant, as the confidential adviser and attorney of Cash, to so advise him, which he failed to do, but unnecessarily prolonged the litigation for the sole purpose of enabling himself to earn a large amount of money for his fees, to be paid out of the proceeds of said notes; that the defendant collected almost the entire sum of money due upon said notes, and appropriated the proceeds to himself on account of alleged fees, the total amount of money and property secured by him amounting to \$12,000; that no money whatsoever was paid over to the complainant, as provided by said express agreement; that, at the final termination of the suit commenced by Worthy, the defendant, Haney, retained for himself \$6,000; that whatever services were rendered by him had been sufficiently compensated by the transfer of said real estate; and that he was not justly entitled to any portion of the moneys as represented by the said notes, amounting to \$9,000. The prayer is that the defendant be required to fully set forth a true and just account of all moneys by him received on account of the proceeds of said notes, and required to render an account of all expenses claimed by him on account of alleged services, and to render a full account, showing whatever balance remained due to the complainant by reason of said agreement, and how the same was used, and that he be decreed to pay over whatever money he may have in his possession belonging to the complainant, and transfer whatever property now held and owned by him which was acquired by means of any moneys which were due and owing to complainant by reason of said agreement.

In the answer of the defendant, Haney, to the bill of Helle, a copy of which is made a part of the bill, he alleges that the conveyance of the lots to him was made in payment of attorney's fees; that he acted as attorney of Eugenie Cash in the sale of certain

quarry property, the agreed price for which was \$6,000, \$2,000 being paid in cash, and Boyer & Corneau, the purchasers, giving their two notes, for \$2,000 each; that said notes were delivered to the defendant to pay all attorney's fees, costs, or charges due to himself, Robert Hervey, and other attorneys, from Eugenie Cash or her father, James Cash, and the balance was to be paid over to Eugenie Cash; that the note of Atkinson & Walker was placed in his (defendant's) hands to be held under an agreement between James Cash and said Atkinson & Walker; that said note was to be held by him under said stipulation, and also to pay himself anything that might be due from James Cash or Martha E. Cash (this complainant), and the balance, if any, was to be paid over to Martha E. Cash in payment of her dower interest in certain real property held by said James Cash, she having joined him in conveying her dower in said property. By that answer he denies that said conveyances were made to hinder, delay, or defraud creditors, and alleges that he holds the said Atkinson & Walker note, under an agreement entered into between said Cash and Atkinson & Walker, as security for moneys due to himself, Robert Hervey, and other attorneys therein named, and the balance, if any, he will be liable to account for to Martha E. Cash; that he took the Atkinson & Walker note and the Boyer & Corneau notes as collateral security for the amount due and to become due, as stated, without any notice of fraud.

To the present bill defendant, by his plea of former adjudication, sets up that, prior to the commencement of this suit, Adolph Helle, receiver of the estate of James Cash, filed a bill in chancery against defendant and the complainant and others, charging, among other things, that the defendant held certain properties in trust in which James Cash had a beneficiary interest, alleging such rights and interests as the complainant claims by her present bill, and praying relief against the defendant in the same manner and for the same matters, and to the same effect as the plaintiff now prays, to which the defendant and the complainant filed answers, upon which evidence was taken, and a final decree entered on January 20, 1881, in effect as follows: He sets out a decree rendered on the bill, entitled "Adolph Helle, as receiver of the estate of James Cash, vs. Eugenie Staudt [formerly Eugenie Cash], Martha E. Cash [this complainant], James Cash, Elbridge Haney, and others," and on a cross-bill therein filed by William D. Cox against the same parties, which decree finds the recovery of the above-mentioned judgment of Michael Worthy, the transfer of said property to the defendant by James Cash and Eugenie Cash; that said Worthy acquired a lien for the satisfaction of his judgment on the promissory notes so transferred, upon which Helle, the receiver,

had already collected \$2,106.82, that sum being ordered to be applied in part satisfaction of said judgment; that Atkinson & Walker had executed their note on November 25, 1876, payable to the order of James Cash, for \$6,500, which became security for the payment of said judgment, and upon which William D. Cox is entitled to a lien as security for his liability incurred as surety for the payment of said judgment; also that James Cash agreed that certain attorneys therein named, including the defendant, Hanecy, should have a lien upon said notes, or the proceeds thereof, for their legal services rendered and to be rendered to said Cash, and that Hanecy should have a lien upon said note for his services rendered to Eugenie Cash; that one Stephen Keough is entitled to a lien upon said note for \$485, subject to a lien in favor of Boyer & Corneau for \$318.32. It is then ordered that the balance due upon the Worthy judgment, \$1,481.60, be paid out of the proceeds of the Atkinson & Walker note to said receiver, Helle, in full satisfaction of that judgment. The decree further finds that the defendant, Hanecy, has collected on said Atkinson & Walker note \$7,728 above the amount expended by him in collecting the same; that James Cash is indebted to the several attorneys entitled to liens as above stated, other than the defendant, \$1,244.50, and to the defendant, Elbridge Hanecy, \$4,120, and that Eugenie Staudt (formerly Eugenie Cash) is indebted to the said Hanecy in the sum of \$565, all of which amounts are entitled to be paid out of said Atkinson & Walker note. The defendant, who appears to have been appointed special receiver in that proceeding, was ordered to pay out of the moneys in his hands as such receiver the balance of \$1,481.68 in satisfaction of the Worthy judgment, and out of the balance of the money collected by him upon said Atkinson & Walker note, \$6,078, he was directed to pay the several amounts found due said parties for attorney's fees, "and that he apply the balance of said money in satisfaction of his own bill against James Cash and Eugenie Staudt [formerly Eugenie Cash], and that upon the payment of the sums aforesaid he shall stand discharged as receiver, and his bond become discharged and satisfied"; also, said Hanecy is adjudged to be the absolute owner of lots 21 and 22 and lot 11, being the same lots mentioned in the present bill. The court further finds that, all costs in the cause having been paid, no judgment for the same should be entered against any party. It concludes with the recital, "and this decree is satisfied in open court by the payment of the moneys therein specified." The plea then avers that said final decree remains in full force, and the same is pleaded to the whole of the complainant's bill.

Daniel M. Mickey, for plaintiff in error.
George P. Merrick, for defendant in error.

WILKIN, J. (after stating the facts). While there are indirect charges in complainant's bill of misconduct on the part of the defendant in his professional relations with James and Eugenie Cash, she does not attempt to impeach the decree set up in the plea for fraud. It seems to be conceded by her counsel that that decree remains in full force and effect, the sole contention being that the record in that case shows a different cause of action from that involved in this suit, and that the matter in controversy in the present action was not in issue or determined in that.

It is undoubtedly true that a different rule applies in cases where the action pleaded in bar to a second suit is upon the same claim or cause of action, and where, though between the same parties, it is upon a different claim or cause of action. A judgment upon the merits in the first case is an absolute bar to a subsequent action, "concluding parties not only as to every matter which was offered and received to sustain or defeat the action or demand, but as to any other admissible matter which might have been offered for that purpose. * * * But where the second action between the same parties is upon a different claim or demand, the judgment in a prior action operates as an estoppel only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered." *Cromwell v. County of Sac*, 94 U. S. 351, 24 L. Ed. 195; *Riverside Co. v. Townshend*, 120 Ill. 9, 9 N. E. 65. It is conceded that both parties to this bill were parties defendant to the former action. That they were made joint defendants in that action makes no difference in the application of the doctrine of *res judicata*, if the decree in that case settled the adverse interests of the parties here in controversy. *Harmon v. Auditor of Public Accounts*, 123 Ill. 122, 13 N. E. 161, 5 Am. St. Rep. 502.

In our view of this case, it is of little importance whether this action should be considered as being for the same claim or demand as that litigated in the case of Helle, receiver, against the defendant and others, or not. It is perfectly clear that the matters there in issue and finally adjudicated involved the entire subject-matter of the present action. Where one action is pleaded in bar of another, as *res judicata*, there must generally be "identity of parties, of subject-matter, and of cause of action, to constitute the first a bar to the second. Where, however, some controlling fact or question material to the determination of both of the causes has been adjudicated in the former suit by a court of competent jurisdiction, and the same fact or question is again at issue between the same parties, its adjudication in the first will, if properly presented, be conclusive of the same question in the later suit, irrespective of whether the cause of action is the same in both suits or not. The latter is in some of the cases designated as estoppel by verdict." *Wright v. Grifey*, 147 Ill. 496, 35 N. E. 732, 37 Am. St. Rep.

228, and cases cited. Certainly the subject-matter—that is, the property conveyed and transferred to defendant by James Cash and his daughter—was in controversy in the former action. The receiver there claimed that property for the satisfaction of the Worthy judgment. The defendant, Hanecy, by his answer, denied that claim, setting up his right thereto for the payment of an indebtedness due the parties therein mentioned, as well as himself, and attempted to protect the same claim now set up by the complainant under his agreement with her husband; i. e., his liability to pay over to her the balance, if any, remaining in his hands after the satisfaction of the liabilities alleged to be due himself and the other attorneys mentioned. The plea shows that she also answered that bill, though it does not appear what she then claimed. Upon the issues formed in that case by the Helle bill and the defendant's (Hanecy's) answer, the controlling fact or question to be determined by the court was who should have the property, and it did, as shown by the decree set up in the plea, fully and completely dispose of that question. The solemn adjudication and decree of the court in that case was that, of the property conveyed and transferred to the defendant, nothing whatever remained in his hands to be turned over or paid to this complainant. She being a party to that proceeding, must be held concluded and bound thereby. What she seeks to do by the present bill is to compel the defendant to account for the proceeds of certain notes alleged to be held by him in trust for her. The plea shows that he does not hold those notes, but that by the adjudication in the former suit they were taken from his control and applied to the payment of the indebtedness of James Cash and Eugenie Staudt (formerly Eugenie Cash), found by the court to be due and owing by them. We are at a loss to perceive upon what principle it can be said that adjudication is not final and conclusive between the parties.

The judgment of the Appellate Court will be affirmed. Judgment affirmed.

MAGRUDER, J., took no part in the decision of this case.

(204 Ill. 233)

WATTS v. PEOPLE.

(Supreme Court of Illinois. Oct. 26, 1903.)

LARCENY — EVIDENCE — SUFFICIENCY — RECEIVING STOLEN GOODS—INSTRUCTIONS—POSSESSION OF STOLEN PROPERTY.

1. In a prosecution for larceny, evidence considered, and *held* insufficient to support a verdict of guilty.

2. Under Cr. Code, § 167 (1 Starr & C. Ann. St. 1896, c. 38, par. 305), defining larceny as the felonious stealing, taking, and carrying away the personal goods of another, and section 239 (paragraph 388), providing that every person who shall receive or aid in concealing stolen goods shall be fined, etc., a conviction

for receiving stolen goods cannot be had under an indictment charging larceny.

3. Evidence of the receiving of stolen goods will not support a conviction for larceny.

4. In a prosecution for the larceny of several hogs, it appeared that they were driven from their owner's inclosure by two parties other than defendant, and placed in defendant's yard without his knowledge. *Held*, that the hogs were not in defendant's possession in such a sense as to render applicable an instruction that the possession of stolen property soon after the theft is *prima facie* evidence that the possessor is guilty of the wrongful taking.

Error to Circuit Court, Sangamon County; J. A. Creighton, Judge.

Thomas Watts was convicted of larceny, and brings error. Reversed.

This is a joint indictment, found by the grand jury at the January term, 1903, of the circuit court of Sangamon county against the plaintiff in error, Thomas Watts, and one Thomas Watts, Jr., and one Oliver Tomlin, for the larceny of eight hogs, of the value of \$100, being the property of Samuel H. Jones. Thomas Watts, Jr., pleaded guilty to the indictment, and testified upon the trial of the cause for the prosecution. The plaintiff in error, Thomas Watts, or Thomas Watts, Sr., was tried jointly with Oliver Tomlin for the larceny of said hogs, and convicted, and was sentenced to imprisonment in the penitentiary at Chester. By the same verdict Oliver Tomlin was found guilty, and judgment of conviction was entered upon the verdict as rendered against plaintiff in error and Tomlin. Before the judgment was rendered motions for new trial and in arrest of judgment were made and overruled, to which action of the court exception was duly taken. The present writ of error is sued out by Thomas Watts, or Thomas Watts, Sr., the plaintiff in error, for the purpose of reviewing said judgment.

The indictment contains only one count, and that is a count for larceny, the words of the indictment being as follows: "That on the 27th day of January, A. D. 1903, at the county of Sangamon, in the aforesaid state of Illinois, Oliver Tomlin, Thomas Watts, and Thomas Watts, Jr., eight hogs, the personal goods, chattels, and property of Samuel H. Jones, of the value of \$100.00, did then and there unlawfully and feloniously steal, take, and carry away, contrary to the form of the statute in such case made and provided," etc.

The material facts of the case are substantially as follows: Thomas Watts, Jr., was the son of the plaintiff in error, and was married and lived with his family until about two weeks before the offense was committed, during which time he lived at the house of his father, the plaintiff in error. On the night of January 20, 1903, Thomas Watts, Jr., and Oliver Tomlin, who was about 19 years old, and was a coal miner, met at a saloon in Springfield, and went from there to the farm of Samuel H. Jones, about four and a half miles southwest of Springfield, and drove

¶ 2. See Indictment and Information, vol. 27, Cent. Dig. § 612.

away eight hogs, valued at \$100. They arrived in the city with said hogs about 5 o'clock, or between 4 and 5 o'clock, the next morning. When they arrived at the home of the plaintiff in error, where Thomas Watts, Jr., was then staying, they drove the hogs through the barn into a chicken lot on the premises, and left them there until noon of that day. Thomas Watts, Jr., and Oliver Tomlin went down town, leaving the hogs there on the premises of plaintiff in error, in order to secure a wagon to haul the hogs to a slaughterhouse and dispose of them. Thomas Watts, Jr., secured a wagon during the morning of January 21st, and about noon the hogs were taken away from the premises of plaintiff in error, and sold to one Charles Metzger, a butcher in Springfield, for the sum of \$100.50. The sale was made by Thomas Watts, Jr., and he received a check from Metzger in payment, payable to the order of his father, Thomas Watts, Sr. The evidence tends to show that Metzger inquired of Thomas Watts, Jr., whether the hogs belonged to him or his father, and, upon receiving a reply that it did not make any difference whether they belonged to the one or the other, Metzger concluded to make the check payable to the order of Thomas Watts, Sr.

Plaintiff in error was employed as a janitor and attended to making fires and looking after furnaces in a number of private dwellings and business houses in Springfield. The testimony shows that he was in the habit of getting up in the morning between 4 and 5 o'clock, and going to his barn to hitch his horse to his buggy or surrey, and driving down town to attend to his work. The plaintiff in error testified in his own behalf upon the trial of the case, and swore that he had a barn upon his premises, and therein had two stalls, in one of which he kept a cow and in the other his horse; that in the barn was hay hanging from the cracks in the roof of the barn, and scattered about on the floor; that on the morning of January 21st he went down to the barn, and went in, and lighted the lantern, which hung near the back door of the barn, looking out upon the alley, where his surrey stood; that he harnessed his horse and hitched him to the surrey, and drove down town. Plaintiff in error swears that when he went to the barn he saw no hogs, and did not know that any hogs were there, and that he did not see either Thomas Watts, Jr., or Tomlin. He says that he came back from his work about 9:30, and found the hogs in the barn, and inquired of some members of his family whose hogs they were, but they were unable to tell him; that about noon his son came back, and he asked him to whom the hogs belonged, and his son told him that they belonged to Tomlin; that about noon a wagon which his son had gone down town and hired was driven up to the stable for the purpose of carrying the hogs down town. Plaintiff in error admits that his son

and the man who drove the wagon did not seem to understand how to get the hogs into the wagon, and he borrowed some boards of a neighbor to help them load the hogs into the wagon, and they were driven off. One of the daughters of plaintiff in error testifies that after Thomas Watts, Jr., her brother, had driven off with the hogs, Tomlin came up with a wagon, and asked where Thomas Watts, Jr., was, and she told him that he had gone to town with the hogs.

In the afternoon of that day, about 3:30, plaintiff in error was down town on the east side of the square in Springfield opposite the courthouse. He says that he went down to see the sheriff about making a loan of money from him, but was unable to find the sheriff, who was out of town. While he was talking with a Mr. Wright on the east side of the square opposite the courthouse, Thomas Watts, Jr., came along, and asked him to go to the bank with him. He says he went with his son to the bank. At the bank his son indorsed the check in the name of Thomas Watts, and the cashier or teller paid the amount of the check, \$100.50, to Thomas Watts, Jr. The plaintiff in error told the cashier that Thomas Watts was his son, and the cashier or teller, who knew Thomas Watts, Sr., paid the money. In other words, the plaintiff in error seems to have identified his son. Plaintiff in error says that he did not see the check, nor know to whose order it was payable, and did not know the amount of it, and that he never received any of the proceeds of it. In the evening of that day, about 6 o'clock, Thomas Watts, Jr., and Tomlin, and another young man, and two or three of the daughters of plaintiff in error, and plaintiff in error himself, were in the house of plaintiff in error, and there on that evening, in the presence of plaintiff in error, Thomas Watts, Jr., paid about \$30 or \$32 of the money to Tomlin. Tomlin and Thomas Watts, Jr., then left. Thomas Watts, Jr., was not at the house of his father on the night of January 20th nor on the night of January 21st. As we understand the evidence, the three men, Thomas Watts, Sr., Thomas Watts, Jr., and Tomlin, were arrested on January 22d. Mr. Jones testified that he identified the hogs as his hogs by a brand or mark which he had placed upon them.

John G. Friedmeyer and G. A. Sanders, for plaintiff in error. H. J. Hamlin, Atty. Gen., and W. E. Shutt, Jr., State Atty., for the People.

MAGRUDER, J. (after stating the facts). There can be no doubt from the evidence in this case that Thomas Watts, Jr., and Oliver Tomlin were guilty of stealing the hogs in question. The former pleaded guilty, and was sentenced to the penitentiary; and the latter, upon the trial, was found guilty, and was also sentenced, and did not join in the

present writ of error. So far, however, as the plaintiff in error is concerned, we are unable to find any evidence in the record which tends to show that he was guilty of the larceny of the hogs.

Section 167 of division 1 of the Criminal Code of Illinois defines "larceny" as follows: "Larceny is the felonious stealing, taking and carrying, leading, riding or driving away the personal goods of another. Larceny shall embrace every theft, which deprives another of his money or other personal property, or those means or muniments by which the right and title to property, real or personal, may be ascertained," etc. 1 Starr & C. Ann. St. 1896 (2d Ed.) p. 1316, c. 38, par. 305. Section 2 of division 2 of the Criminal Code defines an "accessory" as follows: "An accessory is he who stands by, and aids, abets or assists, or who, not being present, aiding, abetting or assisting, hath advised, encouraged, aided or abetted the perpetration of the crime. He who thus aids, abets, assists, advises or encourages, shall be considered as principal, and punished accordingly." 1 Starr & C. Ann. St. (2d Ed.) pp. 1354, 1355, c. 38, par. 453. There is no evidence in the record which tends to show that plaintiff in error knew anything about the scheme or plan to steal the hogs before the theft was committed. There is no evidence to show that he aided, abetted, or assisted Thomas Watts, Jr., and Oliver Tomlin in going after the hogs, or driving them away from the Jones farm, or putting them in the barn, or the lot adjoining the barn. It is an essential element of the crime of larceny that the property of the owner has been wrongfully taken and carried away, or that the person accused of the larceny has knowingly abetted, aided, encouraged, and advised such wrongful taking before the actual theft of the property, or at the time thereof. 1 Bishop on Crim. Law (5th Ed.) §§ 666, 668; Wharton on Crim. Law (10th Ed.) §§ 237, 238. A person charged with being an accessory before the fact cannot be constituted a principal in the commission of the crime unless there is something in his conduct showing a design to encourage, incite, or in some manner aid, abet, or assist the perpetration of the crime. *White v. People*, 139 Ill. 143, 28 N. E. 1083, 32 Am. St. Rep. 196; *Lamb v. People*, 96 Ill. 73.

Where the evidence fails to sustain a conviction in a criminal case, the judgment will be reversed. *Miller v. People*, 90 Ill. 409; *Randall v. People*, 63 Ill. 202; *Gutchins v. People*, 21 Ill. 641; *McMahon v. People*, 120 Ill. 581, 11 N. E. 883; *Clark v. People*, 111 Ill. 404.

Section 239 of division 1 of the Criminal Code provides as follows: "Every person who, for his own gain, or to prevent the owner from again possessing his property, shall buy, receive or aid in concealing stolen goods, or anything the stealing of which is declared to be larceny, or property obtained by rob-

bery or burglary, knowing the same to have been so obtained, shall be imprisoned in the penitentiary not less than one nor more than ten years, or if such goods or other property or other thing does not exceed the value of \$15.00, he shall be fined not less than \$1,000.00, and confined in the county jail not exceeding one year." 1 Starr & C. Ann. St. 1896 (2d Ed.) p. 1340, c. 38, par. 388. If the evidence in this case tends to establish any offense committed by the plaintiff in error, it is not larceny, but the offense specified in said section 239. Larceny is one offense, and receiving or aiding in concealing stolen property is another and entirely different offense. All the acts and circumstances developed by the evidence which connect the plaintiff in error in any way with the transaction here involved were subsequent to the theft of the hogs. If the plaintiff in error was an accessory, he was an accessory after the fact. But evidence that a person, for his own gain or to prevent the owner from again possessing his property, has received or aided in concealing stolen goods, knowing the same to have been stolen, does not establish or prove the crime of larceny.

The indictment in this case contains only one count, and that is a count for larceny. There is no count in the indictment charging plaintiff in error with receiving or concealing stolen property knowing that it was stolen. If the proof shows that plaintiff in error was guilty of aiding Thomas Watts, Jr., and Oliver Tomlin in concealing the property or in disposing of it, knowing that it was stolen property, the offense proved is different and distinct from the offense charged. The offense charged is larceny, and not the concealment of stolen goods knowing them to be stolen. The proof of an offense under section 239 of the Criminal Code cannot support a conviction under section 167, above referred to. *Gutchins v. People*, supra. A receiver of stolen property has been defined to be "one who receives into his possession or under his control with felonious intent any stolen goods or chattels with knowledge that they have been stolen." "Under statute in most jurisdictions in the United States, the offense is a distinct and substantive crime in itself, and is not merely accessory to the principal offense of larceny." 24 Am. & Eng. Ency. of Law (2d Ed.) p. 44. It is true that when a defendant is put upon his trial for a crime which includes an offense of an inferior degree he may be acquitted of the higher offense and convicted of the lesser, although there may be no count in the indictment specifically charging the particular offense. For instance, where the crime charged is murder, the accused may be convicted of manslaughter. In such cases the graver offense necessarily includes the lesser. But if the lesser offense is not a constituent element in the higher crime charged, no conviction can be had. But "the offense of which an accessory after the fact may be guilty is not included

in, nor has it any connection with, the principal crime. The one cannot be committed until the principal offense is an accomplished fact. Therefore one indicted for larceny cannot be convicted of being an accessory after the fact." *Reynolds v. People*, 83 Ill. 479, 25 Am. Rep. 410.

In *Huggins v. People*, 135 Ill. 243, 25 N. E. 1002, 25 Am. St. Rep. 357, we said (page 245, 135 Ill., and page 1002, 25 N. E.): "By the statute (Cr. Code, §§ 239, 241), the offense of receiving or buying stolen property, or aiding in concealing the same, for gain, or to prevent the owner from repossessing himself thereof, with knowledge that it has been stolen, is made a substantive crime, subject to punishment, without reference to the trial or conviction of the person committing the larceny." See, also, *Aldrich v. People*, 101 Ill. 16; *Friedberg v. People*, 102 Ill. 160; *Guntner v. People*, 139 Ill. 526, 28 N. E. 1101.

In the case at bar the court instructed the jury in behalf of the prosecution that, "if you believe from the evidence beyond a reasonable doubt that the defendants, acting together, each performing a part with knowledge of what was being done by the others, did feloniously steal, take, and carry away the hogs in question, then you will find both the defendants guilty." By another instruction for the prosecution the court told the jury that "if you believe from the evidence beyond a reasonable doubt that the defendants, acting together, each performing a separate part by common understanding, did feloniously steal, take, and carry away the hogs described in the indictment as therein charged, then all are equally guilty, and in such case you will find them guilty." These instructions were not based upon any evidence, for the reason that the plaintiff in error did not perform a separate part by common understanding with Tomlin or with Thomas Watts, Jr., in stealing, taking, and carrying away the hogs, nor is there any evidence that the plaintiff in error acted with Thomas Watts, Jr., and Oliver Tomlin in what they did in the matter of stealing and carrying away the hogs. If he did anything that was criminal in its nature, it was in aiding them to conceal or dispose of the hogs after they were stolen. Inasmuch, however, as he was not indicted for the latter offense, but was only indicted for the larceny of the hogs, the present conviction cannot stand.

Even though it were proper under the present indictment for larceny to prove or attempt to prove that plaintiff in error was guilty of the offense of aiding Thomas Watts, Jr., and Tomlin in concealing the stolen goods, knowing the same to have been stolen, yet the evidence upon this subject is not sufficient to leave the mind free of a reasonable doubt as to the guilt of the plaintiff in error. Thomas Watts, Jr., was put upon the stand as a witness for the prosecution. He sustains the testimony of the plaintiff in error that the latter had nothing to do

with the theft of the hogs. Thomas Watts, Jr., says: "We got them late at night, and got to town early in the morning. We drove them through the barn into the chicken yard at father's. * * * I got the hogs in a pen at home about five a. m. * * * Father did not know where I got the hogs. * * * There was no one up at home when we got there with the hogs. I walked towards the house, and saw father come towards the barn; saw him put the harness on the horse, and hitch up and go to town. That was the last I saw of him. I did not go into the house then. Tomlin was with me, and we went from there up town. Nothing was said to father about hogs that morning. He did not know there were any hogs on the place. * * * I said nothing to father about having any hogs on the place, and never spoke to him that morning we brought the hogs. We put the hogs in the barn after father left the place. He did not see the hogs that morning. Just before dinner, when I came home, father asked me who those hogs belonged to. I just studied a little, and told him they belonged to Mr. Tomlin. He asked me how they got there, and I told him we had driven them; that they got tired, and we could not make it to the slaughterhouse, and we had to let them stay there until we could get them away. I never told him they were my hogs, or that I had any interest in them. Father did not assist me in any way in selling the hogs, or collecting the money for them. He had nothing to do with it at all. He went to the bank with me, at my request, where I cashed the check. When I asked him to go with me he did not know I had a check for any amount, and he was not near enough to me in the bank when I indorsed the check to tell what it was for or to whom it was to be paid. My father did not counsel, aid, advise, or encourage me to take or dispose of the hogs in any way." This testimony came from a witness for the state, and confirms in every respect the testimony of plaintiff in error himself.

It is true that the witness Tomlin contradicts in some particulars the testimony of plaintiff in error and Thomas Watts, Jr. Tomlin says that after they had put the hogs in the barn on the morning of January 21st plaintiff in error came to the stable, and saw the hogs, and told him and Thomas Watts, Jr., to go to the house, and that they did go to the house before Thomas Watts, Sr., went to the city. But he is contradicted in this statement not only by plaintiff in error and Thomas Watts, Jr., but by three or four other witnesses. Tomlin also says that when they went into the barn they found some paper in a barrel, and took the paper out and made a fire on the floor of the stable, and lay down by it to keep warm. The evidence shows that this was improbable, inasmuch as there was hay on the floor and hay hanging from the cracks in the loft, and the barn would inevitably have

been set on fire if such a fire had been started as he speaks of. In many respects the testimony of Tomlin seems to be improbable.

In addition to this, 10 reputable citizens in Springfield, some of whom had known the plaintiff in error as much as 30 years, and others, all the way from 10 to 20 years, testified that his general reputation for truth and honesty was good in the community where he lived. Some of these persons were his near neighbors, and for others he had done work for many years. One witness testifies that he had worked for him for 12 years, and he never heard his general reputation for truth and honesty questioned until the trial of the present case.

By the second instruction given for the prosecution the court told the jury "that the possession of stolen property soon after the commission of the theft is prima facie evidence that the person in whose possession it is found is guilty of the wrongful taking, and unless the other evidence in the case or the surrounding circumstances are such as to raise a reasonable doubt of his guilt such possession is sufficient evidence to warrant a conviction." Looked at abstractly and by itself, this instruction is not an erroneous statement of the law.

In *Comfort v. People*, 54 Ill. 404, we said that the possession of property soon after it is stolen, while such possession "is prima facie evidence of guilt, when it is explained by other evidence or the surrounding circumstances should not control. If the possession is recent after the theft, and there are no attendant circumstances, or other evidence, to rebut the presumption, or to create a reasonable doubt of guilt, the mere fact of such possession would warrant a conviction. * * * All the books agree that a recent possession, after the theft, is sufficient to warrant a conviction, unless the attending circumstances or other evidence so far overcomes the presumption thus raised as to create a reasonable doubt of the prisoner's guilt, when an acquittal should follow." See, also, *McMahon v. People*, 120 Ill. 581, 11 N. E. 883; *Langford v. People*, 134 Ill. 444, 25 N. E. 1009; *Magee v. People*, 139 Ill. 138, 28 N. E. 1077; *Gutchins v. People*, supra; *Sahlinger v. People*, 102 Ill. 241. But we think that this instruction, under the peculiar circumstances of this case, was calculated to mislead the jury to the prejudice of the plaintiff in error. It substantially assumes that the stolen property was found in the possession of the plaintiff in error. In *Smith v. People*, 103 Ill. 82, a similar instruction was held to be good, and it was there intimated that it assumed that the accused was in possession of the stolen property recently after the theft; but there it was proved and admitted by the accused that the stolen property came to his possession within four days after it was proven to have been stolen. In the case at bar, however, it was not admitted, nor is it altogether clear that the proof

showed, that the stolen property was in the possession of the plaintiff in error at all at any time. It is true that the hogs after being stolen were driven through the barn of plaintiff in error and into a yard adjoining the barn, called the "chicken yard," and that both the chicken yard and the barn were a part of the premises of plaintiff in error. But the rule that where stolen property is found in the possession of a person immediately after the commission of a theft it is prima facie evidence of guilt refers to a possession which is exclusive. "In order that the recent possession shall be evidence of guilt, it must be exclusive in the defendant; that is, it must be such as to indicate that the defendant and not some one else took the property. If the place where the property is found is such that others have access thereto as well as the defendant, the property cannot be said to be in the exclusive possession of the defendant, and the circumstance would not be evidence of his guilt." 1 McClain on Crim. Law, § 620. The evidence shows that Thomas Watts, Jr., the son of plaintiff in error, was staying at his father's house, and had been staying there for two weeks. He had access to the premises in question as well as plaintiff in error. The hogs, even after they were taken to the premises of plaintiff in error, were, as a matter of fact, in the possession of Thomas Watts, Jr., and Oliver Tomlin. Some cases hold that, although it appears that the goods are found in a place not exclusively occupied or controlled by the defendant, the fact that other persons had access to the place merely weakens, but does not destroy, the effect of the evidence. 1 McClain on Crim. Law, § 620; *Padfield v. People*, 146 Ill. 660, 35 N. E. 469. But, even under this view of the doctrine of possession of stolen property as evidence of guilt, the instruction in question was too strong in assuming that the possession of the property was solely the possession of the plaintiff in error, and excluded from the consideration of the jury the fact that Thomas Watts, Jr., had access to the place where the hogs were taken as well as plaintiff in error.

In *Conkwright v. People*, 35 Ill. 204, it was said (page 206): "The possession of the stolen property, as has already been seen, is in itself a strong presumption of guilt, though it applies only when the possession is of that kind which manifests that the stolen goods have come to the possession by his own act, or, at all events, with his undoubted concurrence. * * * Cases frequently arise of the discovery of property, recently after its being stolen, in the house of a particular person, but the weight of this evidence depends upon the accompanying circumstances of the case. It is carefully to be observed, says Mr. Starkie, that the mere finding of stolen goods in the house of the prisoner, when there are other inmates capable of stealing the property, is insufficient evidence to prove a possession by the prisoner. 2 Starkie on

Evidence, 450. This seems to be the recognized rule of the courts in reference to this character of testimony. And it is based upon reasons obvious to every one. Possession of stolen property by a person soon after the theft may be the strongest character of evidence of his guilt, when considered in the light of surrounding circumstances, whilst under different circumstances it might be slight, if even any, evidence of guilt. The previous character of the accused may, in such a case, if shown to be good, repel all presumption of guilt. In such a case everything connected with the possession must be considered, such as its proximity to the larceny, whether it was concealed, whether the party admitted or denied the possession, whether other persons had access to the place where it was found, and the demeanor of the accused and his good character. These circumstances, when in evidence before the jury, are proper to be considered by them."

In 18 American & English Encyclopedia of Law (2d Ed.) p. 489, it is said: "In order that an inference of guilt may be drawn from the unexplained possession of goods recently stolen, it must be an exclusive personal possession on the part of the accused. * * * If, however, the place where the goods were found was accessible to others capable of stealing, the inference cannot be drawn, though the fact is entitled to consideration in connection with the other facts of the case. * * * The presumption arising from the possession of recently stolen goods may be overcome by the proof of any facts inconsistent with the theory of guilt, such as the good character of the accused, or his conduct at the time he was found in possession, or the fact that he made no attempt to conceal his possession. * * * The presumption of guilt, which arises from the possession of goods recently stolen, may be rebutted by an explanation or account given by the accused as to how he acquired the possession. * * * The explanation given must be both reasonable and credible."

In the case at bar plaintiff in error was told by his son that the hogs belonged to Tomlin, and that they put them in the barn, because they had driven them so far that they were tired, and he wanted to rest until they could get a wagon to carry the hogs into town. Plaintiff in error states that until he returned home from town between 9 and 10 o'clock he did not know that the hogs were in his barn, or who had put them there, or to whom they belonged, and did not ascertain the facts in regard to their being there until he learned them from his son when he came home at noon. It seems to us from the evidence that he gives a natural and reasonable explanation of the presence of the hogs upon his premises, and of his possession of them, so far as their being upon his premises under the circumstances stated constituted possession. The jury had a right to consider the fact that other per-

sons had access to the premises besides the plaintiff in error, and that, therefore, his possession was not exclusive. The jury had also a right to take into consideration the testimony as to the good character for honesty and uprightness of the plaintiff in error. By saying that evidence of possession of goods immediately after the theft is presumptive or prima facie proof of guilt, the courts usually mean that such evidence will support a conviction in the absence of anything explaining or contradicting it. 1 McClain on Crim. Law, § 618; *Comfort v. People*, 54 Ill. 404. "It is recent possession unexplained—that is, without circumstances appearing which indicate that such possession is consistent with defendant's innocence—which constitutes evidence against him." 1 McClain on Crim. Law, § 618. The evidence in this case explains the presence of the stolen hogs upon the premises of plaintiff in error in such a manner as is entirely consistent with his innocence.

For the reasons above stated, we are of the opinion that the judgment of the trial court is wrong. Accordingly the judgment is reversed, and the cause is remanded to the circuit court of Sangamon county for further proceedings in accordance with the views herein expressed. Reversed and remanded.

(204 Ill. 422)

JAMES WHITE MEMORIAL HOME et al. v.
HAEG et al.

(Supreme Court of Illinois. Oct. 26, 1903.)

WILLS—TESTAMENTARY CAPACITY—INSANE PERSONS—LUCID INTERVALS—EVIDENCE—BURDEN OF PROOF—INSTRUCTIONS—REQUESTS—WITNESSES—COMPETENCY—HARMLESS ERROR.

1. Where it was shown that testatrix at the time of executing her will was afflicted with insanity which was not merely of temporary duration, the burden of showing that the will was executed during a lucid interval was upon the proponents.

2. Where the subscribing witnesses to a will of an insane person testified that at the time she signed the will she was of unsound mind, and the only evidence to the contrary was that of the draftsman, who was not present when it was signed, to the effect that several hours before such signature was made, when testatrix dictated to him the contents of the will, she was lucid and rational, a verdict finding that the testatrix was of unsound mind when she signed the will was not contrary to the evidence.

3. If testatrix was insane at the time she signed the will it was void, though she was rational at the time the will was drawn.

4. Where there was no evidence that testatrix understood the business she was engaged in when she signed the will, an instruction that a person may not have mental capacity to transact ordinary business, and yet have capacity to make a valid will, and that though testatrix might not have had capacity to transact business, yet, if she understood the business she was engaged in at the time she made the will, the jury should find it to be her will, was properly refused.

5. The instruction requested was covered by another charge that, if testatrix was not capable to transact ordinary business, yet if she had

a lucid interval when she executed the will, and at that time knew the nature of the business she was doing and to whom she meant to give her property, she had sufficient capacity to make a will.

6. Where, in a contest of a will claimed to have been executed by an insane person during a lucid interval, a witness who had been appointed testatrix's conservator and temporary administrator, and was a legatee under the will, did not testify to testatrix's mental condition during the days on which the will was executed, when she was alleged to have had such lucid interval, and his testimony merely related to her general mental incapacity, which was corroborated by some 10 or 15 other witnesses, any error in permitting him to testify was harmless.

Appeal from Circuit Court, Jo Daviess County; R. S. Farrand, Judge.

Will contest by Susannah Haeg and others against the James White Memorial Home and others. From a judgment setting aside the will and probate thereof, deponents appeal. Affirmed.

Jesse Arthur and F. J. Campbell, for appellants. Thos. H. Hodson and Sheean & Sheean, for appellees.

RICKS, J. This suit was brought in the circuit court of Jo Daviess county by David Price, Susannah Haeg, and Hannah Barnes to set aside an instrument purporting to be the last will and testament of their sister, Lucy Price, on the ground of testamentary incapacity. The will disposed of all her real and personal property, and was offered for probate on June 25, 1900, and on July 26, 1900, probate thereof was refused by the county court. On August 15, 1900, an appeal was taken from the order of said county court to the circuit court. On a hearing in the circuit court the will was admitted to probate, and on February 4, 1901, the will and order of probate were certified back to the county court. On April 26, 1901, the complainants herein filed a bill for partition in the said circuit court, praying that the court set aside the order allowing the will to be probated. A demurrer to the bill was overruled by the circuit court, and the defendants, standing on their demurrer, appealed to this court (195 Ill. 279, 62 N. E. 872), wherein the decree of the circuit court was reversed and the cause remanded. This suit was then brought to set aside the will, and this appeal is taken by the proponents from the decree of the circuit court setting aside the will and probate thereof.

The record discloses the following facts concerning Lucy Price: She was a maiden lady about 60 years old at the time she died. She lived on her farm, generally alone, but at times employing servants to assist in the work. Although she was possessed of peculiar and eccentric notions with reference to her attire, she was nevertheless unquestionably a woman of business judgment up to July, 1899. Several witnesses who saw her last in July swear that they noticed no change in her condition prior to that time.

The first evidence of a breaking down of her mental powers was in May, 1899, when she wanted witness Carson to plant two or three bushels of corn on each eight acres of land, although one bushel was the usual amount. This was followed by various acts which were clearly the outgrowth of a diseased mental state. In the fall of 1899 her malady began to be serious, and the evidence shows conclusively that her vagaries from this time were not attributable to a mere eccentric disposition. It is unnecessary to rehearse the various distressing manifestations of her mental disorder. It is sufficient to say that she was insane before January 25th, which was the date of the will. Less than two weeks after signing the will she was adjudged insane and committed to the insane asylum, where she died June 7, 1900. The proponents contend that the will was executed during a lucid interval.

The errors insisted upon are as follows: That the circuit court erred in not sustaining all the exceptions to the bill; that the court erred in giving contestants' eighth instruction; that the court erred in refusing proponents' first refused instruction; that the court erred in permitting Sam Carson to testify, or refusing to permit proponents to determine his interest before admitting his testimony; and that the verdict is contrary to the law and evidence.

Attention will first be given to the assignment that the verdict is contrary to the law and evidence. The proponents contend that the evidence shows conclusively that the will was drawn and executed while the testatrix had a lucid interval. The burden of showing that the will in this case was executed at a lucid interval was upon the proponents, and not the contestants. It is true that there is generally a presumption of sanity, but in this case such a presumption has been rebutted by evidence that the testatrix was afflicted with insanity of a permanent nature before the execution of the will. The presumption is that insanity continues, unless the disorder is of such a character as to indicate that it is probably of a temporary duration. *Emery v. Hoyt*, 46 Ill. 258; *Langdon v. People*, 133 Ill. 382, 24 N. E. 874. There was no probability here of a discontinuance of the malady, and the burden was clearly upon the proponents to show that the will was executed at a lucid interval. They did not, in the judgment of the jury, do so. When the testatrix signed the will the two subscribing witnesses, S. B. Winters and George Laughlin, and no other, were present. They swear that she was of unsound mind at the time she signed the will. Isaac Gillespie, who drafted the will several hours before it was signed, swears she was lucid and rational at that time; but he was not present when she signed. We see no reason for holding that the verdict was against the evidence. It is true that the testimony of the subscribing witnesses against the san-

ity of the testatrix should be viewed with caution, but there is no reason to believe that the jury did not view it in that manner. It is possible that they thought the testimony of Gillespie should be viewed with caution. At any rate, this court cannot reverse their finding on a presumption that they did not use caution in weighing the testimony of the subscribing witnesses. The burden was upon the proponents to show a lucid interval, and the verdict, which we have no disposition to disturb, shows that there was a failure to do this.

The first assignment is that the court erred in not sustaining the proponents' exceptions to the bill. Portions of the bill which are objected to are allegations that subsequent to the making of the will a conservator was appointed for the testatrix; also allegations that the father and other ancestors and relatives of the testatrix were insane. These were perhaps unnecessary allegations, but it was not error, and certainly not reversible error, to overrule exceptions thereto.

It is further urged that the court erred in giving the following instruction for the contestants:

"You are instructed by the court that the material question for you to decide in this case is the mental condition of Lucy Price at the time she signed the will in controversy, and if you believe, from the evidence, that she was of unsound mind and memory and not of disposing mind when she signed said will, then you should find that the writing produced in evidence is not the will of Lucy Price, notwithstanding you might further believe, from the evidence, that on the night before she signed said will she was able to give the names of the legatees and what property she desired to bestow upon them." It is urged that the vice of this instruction consists in singling out a portion of the evidence and telling the jury that they need not consider it. An analysis of this instruction in the light of the evidence will show that it was not error to have given it. The proponents introduced evidence showing that Isaac Gillespie, who drafted the will and was named therein as executor, went to the home of Lucy Price in the evening of January 25th with a blank form for the will. He swears that about 2 or 3 o'clock in the morning the will was drawn up, he writing at her dictation. George Laughrin, who was also there, swears that the will was drawn up before midnight. After it was drawn Laughrin took possession of it, and early the next morning went over to get S. B. Winters to come and sign the will as a witness. He returned, bringing Winters with him. Gillespie had in the meantime left. The testatrix, as they swear, came out of a stupor and signed the will, and then they signed as witnesses. The conflict in the testimony is due to the contradictory evidence as to her condition during this night. Gillespie, the draftsman, swears that when the will was drawn

she dictated it and was perfectly rational; that she knew the extent of her property and the objects of her bounty. The two subscribing witnesses swear that they believed that her mind was unsound when she signed the will, and that she inquired five or six times, directly after affixing her signature, whether the will was made. Now, with the evidence in this condition, it was not error to instruct the jury that if she were insane at the time she signed the instrument it would not be her will, even though she were rational and performed rational acts at a previous time when the will was drawn. This instruction does merely that. It emphasizes the fact that, however rational she may have been at the time the will was drawn, the will depends for its validity upon her sanity at the time of the signing. Jurymen are apt to be confused by such expressions as "execution of the will." This instruction presents the case clearly to them, and is not objectionable.

Proponents offered the following instruction, which was refused by the court: "The court instructs the jury that although a person who has mental capacity to transact ordinary business has mental capacity to make a valid will, yet a person may not have a sufficient mental capacity to transact ordinary business and yet have mental capacity to make a valid will; and although Lucy Price, by reason of sickness, disease, or other cause, may not have had mental capacity to transact ordinary business, yet if she had the mental capacity to understand the business she was engaged in at the time she made the will in dispute, the jury should find that the said will was the will of Lucy Price." This instruction, on its face, appears to be wholly unobjectionable, but in the light of the evidence it was not error to refuse it. In the first place, there was no testimony to the effect that when she signed the will she understood the business she was engaged in; and, even if there were such evidence, this instruction might have been refused for the reason that it says, "If she had the mental capacity to understand the business she was engaged in at the time she 'made' the will in dispute, the jury should find that the said will was the will of Lucy Price." Under the state of the evidence there was perhaps some reason for the jury to believe that when the will was drawn she was rational; but there is no evidence that she was rational when she signed. This instruction points to the time that the will was "made" as the time at which a sound mind is essential. More accuracy of statement is required under such condition of the evidence. Jurors might easily have taken the word "made" to mean "drawn," and have been seriously misled thereby.

Furthermore, even if it had been error to refuse this instruction, the error would have been corrected by giving the twelfth instruction, which was as follows: "If the jury

believe, from the evidence, that Lucy Price was afflicted by a diseased condition of the head, and by reason of such condition, or from other causes, was subject at times to mental weakness, paroxysms of delirium, incoherent mutterings and insane ravings, and that at such times she was not capable of transacting ordinary business, yet if you further believe, from the evidence, that she had a lucid interval when she executed the will in question in this case, and at the time knew the nature of the business she was doing and to whom she meant to give her property, then she had mental capacity sufficient to make said will."

Other instructions of like import and equally strong were given at request of appellants, and we are satisfied that, so far as the appellants' case was shown by the evidence, the jury were fully and fairly instructed on every part of it.

Counsel for proponents urge that the court erred in the admission of the testimony of Sam Carson, a witness offered by appellees. The record discloses that he was the conservator of the testatrix after she was declared insane and up to the time of her death, and then, under the statute, was permitted to continue the administration of her estate pending the litigation touching her will. He was a legatee under the will, and was made a party defendant. The contestants of the will, the appellees here, comprised all the legal heirs of the testatrix and all the devisees except the witness George Laughrin, as to whom the provision is that he shall be rewarded for his services, without stating any sum; Adem Walter, Jr., who was given "a fiddle," and appellants. The witness, as has been stated, was called by appellees, and so far as his name appeared in the title of the case and the allegations of the bill and as a devisee under the will, he was an adverse party, both in fact and in interest, to the parties calling him. When called, he was objected to by appellants as incompetent. When the court inquired if he was a party, he was advised that he was. The court thereupon stated: "This man isn't testifying for himself; I think he is a competent witness." The reason or ground of the objection was not at that time stated, further than that he was the conservator and was testifying on his own motion. After his testimony had been given, he was inquired of by appellants as to the value of the horse (the property willed to him), and stated that it was \$85. He was then inquired of as to the value of the estate, for the purpose, as stated by counsel, of showing that as administrator he would receive certain commissions, and that the commissions would amount to more than the value of the horse. This evidence the court excluded. Motion was then made to exclude all the testimony of the witness, and this motion was denied by the court.

The rule is as contended by appellants, that when objection is made to a witness

on the ground of his incompetency, it is the duty of the court, before his evidence is taken, to determine the question of his competency, and he may do so by inquiring of the witness under his *voir dire*. He may also hear additional evidence to properly determine the question, and in that respect the court in this case erred. *Campbell v. Campbell*, 130 Ill. 466, 22 N. E. 620, 6 L. R. A. 167. It may be, too (though we do not so determine), that said witness was not a competent witness, and that the refusal to strike his testimony was error. But it is not every error committed by a court that justifies the reversal of the case. Where, as in the case at bar, the evidence given by the witness is merely cumulative, and where, taking the whole evidence, the same result must have followed without the evidence objected to, we will not feel warranted in reversing the case that has been submitted to the jury merely for such error. In this case there were not two witnesses who had any knowledge of the mental condition of the testatrix from early in December to the time of her death who did not testify that she was of unsound mind. Eleven days after the time she executed the will in question she was declared insane on an inquest and was sent to an asylum, where she died the following June. The main contention of the proponents, and the only contention they could make under the evidence given, was that the will was executed at a lucid interval. This witness did not testify anything about her condition on the two days, parts of which were consumed in the preparation and execution of the will. His testimony was general as to her mental condition before and after that time; and the same facts, substantially, and certainly sufficiently, were testified to by some 10 or 15 other witnesses. Under such a condition of the evidence we are not disposed to reverse this case for the error complained of.

The decree of the circuit court is affirmed. Decree affirmed.

(69 Ohio St. 45)

ERIE R. CO. et al. v. McCORMICK.

(Supreme Court of Ohio. Oct. 13, 1903.)

RAILROADS—CONSTRUCTION OF BRIDGE—INJURY TO EMPLOYE—NEGLIGENCE—KNOWLEDGE OF DANGER.

1. The omission of a duty is not the foundation of an action unless it results in injury to one for whose protection the duty is imposed.

2. In the absence of a statute requiring it, and of evidence showing that it is usual, a railroad company is not required to construct its bridges so as to permit one to stand upon them in safety while a train is passing; and, if such duty were imposed, its omission would not be the foundation of an action by an employé who, with full knowledge thereof, acquiesces in the omission.

3. In an action against a railroad company by one who, by his own fault, is upon its track

¶ 2. See *Railroads*, vol. 41, Cent. Dig. § 1261.

and in a place of danger, to recover for a personal injury caused by the failure of its employees operating one of its trains to exercise due care after knowledge of his peril, it is necessary to show actual knowledge imputable to the company. *Railroad Co. v. Kassan*, 81 N. E. 282, 49 Ohio St. 230, distinguished.

(Syllabus by the Court.)

Error to Circuit Court, Summit County.

Action by one McCormick, administratrix, against the Erie Railroad Company and others. Judgment for plaintiff was affirmed by the circuit court, and defendants bring error. Reversed.

Plaintiffs in error are lessee and lessor of a railway running through Akron. The defendant is administratrix of James Thomas McCormick, who, on the 25th of December, 1897, while acting as track walker for the lessee company, was struck by one of its trains while upon a bridge in the city of Akron, but near its eastern limit, receiving injuries from which he died in a few days. McCormick had for more than 10 years been a track walker on the portion of the road which included the bridge, and he crossed it at least twice daily during that service. On this occasion, while on the bridge, which, with its approaches, is 165 feet in length, 95 feet between abutments, he discovered a train approaching from the east, and attempted to escape by the west end of the bridge, had passed the bridge, and had nearly succeeded in escaping from the approach, when he was struck by the train. The track and ties were snowy and slippery. The speed of the train was about 45 miles per hour. About two years later the administratrix began her action to recover for the next of kin of McCormick under the statute which authorizes such recovery in cases where the deceased might have recovered for the injury had it not proved fatal. In her petition she charged the company with negligence in the following respects: (1) In so constructing the bridge that one could not stand upon it while the train passed, and in not having planks between the ties. (2) That the speed of the train exceeded that limited by the ordinance of the city of Akron. (3) That no signal was given by the engineer for a public road crossing in the vicinity. (4) That the engineer, after discovering McCormick and the peril of his position, might have averted the injury by giving signals and checking the speed of the train, but willfully and wantonly failed to take any precaution to that end. These averments were all denied by the answer, and the company alleged acquiescence by McCormick with full knowledge of all the conditions complained of, and alleged that the decedent failed to exercise due care for his own safety. Upon the trial the construction of the bridge was shown to be substantially as alleged in the petition: an ordinance of the city of Akron, limiting the speed of trains to six miles an hour, was introduced; and some witnesses

who were interested in other matters testified that they heard no signals given for the road crossing or the bridge. No evidence was produced by the plaintiff upon the original trial to show when the engineer first discovered McCormick's peril, or that he discovered it at all. At the conclusion of the plaintiff's evidence the companies moved the court to direct a verdict in their favor, which motion the court overruled, and they excepted. Defendants introduced testimony to show that track walkers were required to look out for trains at all times, and that McCormick was at the time alone governing his own movements without any direction or control whatever from any superior of the company, but exercising his own discretion as to the performance of his duties under the general rules of the company. This evidence also tended to show that McCormick, on discovering the approach of the train, might have avoided injury by stepping upon an abutment, or have escaped with but slight injury by jumping from the approach which he had reached before he was struck. The companies also put the engineer and fireman upon the stand, and by the testimony of the former it was shown that he first discovered McCormick when he was too near him to stop the train; that, owing to the condition of the windows from snow upon the window of his cab, resulting from snow upon the ground moved by the passing of the train and snow which had but recently fallen, and the smoke of the engine, he could see him but indistinctly, but supposed that he was on the track beyond the bridge; that he nevertheless immediately sounded the stock alarm, applied the brakes, and, discovering that from the condition of the tracks the brakes were not working well, he applied sand, but, to use his own comprehensive phrase, he exhausted all his resources to stop the train; that it was impossible to stop the train before reaching McCormick's position; that immediately after giving the signal and applying the brakes the boiler and forward portion of the engine interposed between him and McCormick, but that he believed, owing to the slacking of the speed of the train, and McCormick's nearness to a place of safety, he had escaped, and had no knowledge to the contrary until, as they were approaching the station in Akron, the fireman came around to his side of the engine and informed him that they had hit the man at the bridge. In its instructions to the jury the court called the attention of the jury to all of the charges of negligence alleged in the petition, directed them to inquire concerning them, and to return a verdict for the plaintiff if any of the charges of negligence were sustained by the evidence, unless they should find the right of action defeated by McCormick's contributory negligence. Upon the subject of the failure to exercise care after the discovery of McCormick's peril the court charged the jury as follows: "If the

decedent in this case was negligent in going upon the track—and I will say 'bridge'—here in the manner and at the time he did, yet if the engineer in charge of the train ought, by the exercise of ordinary care, to have seen the deceased in his perilous position, and could, by the exercise of ordinary care, have stopped or checked the speed of the train so as to avoid the collision, and failed to do so, it was negligence for which the company is liable, notwithstanding the negligence of the deceased in going upon the track and bridge." The jury returned a verdict for the plaintiff. A motion for a new trial was overruled, and a judgment following the verdict was affirmed by the circuit court.

Tibbals & Frank, for plaintiffs in error.
E. F. Voris and A. J. Wilhelm, for defendant in error.

SHAUCK, J. (after stating the facts). Counsel for the administratrix now insist that the judgment may rest upon the allegation of the petition that the engineer did not use due care to avoid the injury to McCormick after discovering his peril, and the evidence adduced upon that point. By clear implication at least, it is now admitted that the judgment can stand upon no other ground. If that view had been taken by counsel in the preparation of the petition or by the court upon the trial, questions now before us would have been excluded from the record. But allegations of negligence as to the construction of the bridge, the omission of signals at a neighboring road crossing, and of violation of the ordinance as to the speed of trains, were made in the petition, evidence was introduced to sustain them, and the court directed the jury to consider them as the foundation of their verdict. They appear, therefore, as grounds upon which the verdict and judgment were recovered; and, if any one of them was improperly applied in the case, the error cannot now be cured by admissions in the argument. It seems entirely clear that, but for the allegations of the petition relating to a want of care by the engineer after the discovery of McCormick's peril, the petition itself would have been bad upon general demurrer; and all of the other allegations of the petition should have been omitted.

There is no statute requiring the construction of a railroad bridge in any other manner than that in which this bridge was constructed. Certainly there is no common knowledge that different methods of construction prevail, nor was there any evidence to that effect. There was, therefore, shown no duty whatever resting upon the company to construct its bridge otherwise; and, if there had been such duty, it is entirely clear from the plaintiff's own case that, with full knowledge of the condition, acquired through 10 years of service, he had acquiesced in that condi-

tion, and had thereby waived a right of action in consequence of it. *Krause v. Morgan*, 53 Ohio St. 26, 40 N. E. 886; *Coal Co. v. Estievenard*, 53 Ohio St. 44, 44 N. E. 725. The petition and all the evidence having shown that McCormick was an employé of the company, engaged as a track walker, there should have been no allegation in the petition as to the omission of signals for the neighboring road crossing, or of the violation of the ordinance regulating the speed of trains, because by the fact of his relation to the company it was made to appear that he was not within the classes of persons for whom such signals are required to be given, or for whose protection the speed of trains is regulated. The omission of a duty does not constitute the foundation of an action unless it results in injury to one for whose protection the duty is imposed. This would seem to be elementary, and it is sustained by the decided cases. *Railroad Co. v. Depew*, 40 Ohio St. 121; *Railway Co. v. Workman*, 66 Ohio St. 509, 64 N. E. 582, 90 Am. St. Rep. 602. In view of the admissions of counsel upon the argument, it does not seem necessary to pursue these points at length.

Passing to a consideration of the ground upon which counsel for the administratrix now insist that the recovery might have been sustained, the general inquiry is whether it is in accordance with the law which defines liability for the wanton and willful infliction of injury. The concrete rule upon the subject is that if one is upon the track of a railway company by his own fault, and in peril, of which he is unconscious, or from which he cannot escape, and these facts and conditions are actually known by the engineer, it is his duty to exercise all reasonable care to avoid the infliction of injury. It does not impose the duty to exercise care to discover that one so upon the track is in a place of danger, but it does impose a duty to be exercised upon actual discovery. No matter if the rule did originate in considerations of humanity, it is an established rule of the law, which does not unreasonably interfere with the rapid movements of trains, nor is it ordinarily difficult of application if earnest and impartial efforts are made to apply it according to its terms and obvious import. With respect to the ground of liability now considered, the court instructed the jury that the company would be liable if the engineer ought, by the exercise of ordinary care, to have seen the deceased in his perilous position, and could, by the exercise of ordinary care, have stopped or checked the speed of the train so as to avoid the collision. Notwithstanding the manifest conflict between the instruction given and the rule, it is said that the instruction is authorized by *Railroad Co. v. Kassen*, 49 Ohio St. 230, 31 N. E. 282. Attention to that case will show that it was decided in accordance with the generally recognized rule, and that its doctrines are not applicable to the present case. In the discharge of its duty to

administer justice according to law the court was there called upon to determine the liability of the defendant in view of the very peculiar state of facts which the case presented. This it did by the application of the reason for adjudging that a liability arises in such cases. For the purpose of declaring the law it assumed the existence of all the facts which the evidence tended to establish. The material facts were: The company was running two trains in the same direction about two hours apart. Kassen fell from the rear platform of the forward train to the track, sustaining injuries which disabled him from leaving his position of danger on the track, and while in that position and condition he was run upon and killed by the following train. That he had fallen from the train and was in a place of danger were facts actually known by the employés of the company operating the forward train. There was ample opportunity to rescue him either by stopping the train from which he had fallen or by using the telegraph to communicate information of his situation to those in charge of the following train. The actual knowledge of the employés of the company in charge of the forward train was its actual knowledge, charging it with the duty of using the opportunities at hand to rescue him from his perilous position. The phrase "ought to have been aware" manifestly applies to those in charge of the following train, and implies the duty of the company to communicate to them its actual knowledge of Kassen's danger. This is entirely clear, not only from the peculiar facts of the case, but from the language of the opinion; for it is said: "The court properly instructed the jury that the employés operating the train which ran over Kassen were without fault. They had no notice that he was on the track, and were not required to anticipate his presence there. Until they discovered him, they were justified in running the train as if the track was clear; and it is not claimed that after his discovery they omitted any precaution for his safety. If those employés had received notice of Kassen's situation in time to have avoided the injury, it is clear that it would have been their duty to exercise due care in the management of the train to do so, notwithstanding he was there through his own fault, which was known to them; and for their omission to use such care the defendant would be liable. While they were ignorant of the situation, the defendant was not." It is entirely clear, therefore, that the liability of the company was placed upon the sole ground that, after receiving actual notice that Kassen was upon the track, and in a position of peril, it failed to use the means at hand to avoid injury to him. The doctrine of the case can have no application when neither the company nor its employés operating the train by which the injury is inflicted may be charged with actual knowledge. The rule of liability applies only when there is actual

knowledge of those operating the train inflicting the injury, which knowledge is imputed to the company, or the actual knowledge of the company derived through other means, with opportunity to communicate it to those operating the train. By introducing into the instruction given the phrase, "if the engineer in charge of the train ought, by the exercise of ordinary care, to have seen the deceased in his perilous position," and by other expressions in the charge involving the same conception, the court gave to the jury an erroneous view of the law.

The motion of the companies to direct a verdict at the conclusion of the testimony offered by the plaintiff should have been sustained, for it is quite clear from the foregoing considerations that the evidence offered in support of the immaterial averments of the petition did not entitle the plaintiff to a verdict, and upon the only ground alleged in her petition upon which she might recover there is an entire absence of evidence, to wit, the actual knowledge of the engineer of McCormick's peril. The companies did not stand upon that motion, but introduced the evidence of the engineer which, for the first time, showed that he had discovered McCormick before the collision; and from his evidence it also appears that he did all that was in his power to avoid the infliction of injury.

With respect to the conduct of the trial, it seems sufficient to say that court and counsel appear to have been alike unmindful of the doctrine of *Hayes v. Smith*, 62 Ohio St. 161, 56 N. E. 879. Counsel have at some length discussed the constitutional validity of section 3365-22 of the statutes of this state (*Bates' Ann. St.*); but in the view of the case which we have taken we do not consider that question material, and we do not determine it.

Judgments of the circuit court and the court of common pleas reversed.

BURKET, C. J., and SPEAR, DAVIS, PRICE, and CREW, JJ., concur.

(68 Ohio St. 1)

STATE ex rel. SHEETS, Atty. Gen., v. LAYLIN, Secretary of State.

(Supreme Court of Ohio. Oct. 6, 1903.)

CONSTITUTIONAL AMENDMENTS—SUBMISSION
—LONGWORTH BALLOT ACT—CONSTITUTIONAL LAW.

1. The act of the General Assembly entitled "An act to provide for the manner of submission of constitutional amendments and other questions to a vote of the people," passed May 2, 1902 (95 Ohio Laws, p. 352), is a valid act. (Syllabus by the Court.)

Application by the state, on the relation of Sheets, attorney general, for writ of quo warranto to Laylin, secretary of state. Demurrer to petition sustained, and petition dismissed.

The relator sets forth in his petition that by certain joint resolutions passed by the General Assembly of the state of Ohio it was agreed to submit to the electors of the state of Ohio, on the first Tuesday after the first Monday of November, 1903, certain propositions to amend the Constitution of the state of Ohio, which propositions are described in the petition. It is also alleged that under the act of the General Assembly passed May 2, 1902, entitled "An act to provide for the manner of submission of constitutional amendments and other questions to a vote of the people" (95 Ohio Laws, p. 352), the Republican and Democratic parties of the state of Ohio, in convention assembled, took action in favor of the adoption of certain of such constitutional amendments, and also against the adoption of certain other constitutional amendments, and certified their action to the Secretary of State in the manner provided for certifying nominations for state offices; and that the defendant, as Secretary of State, pursuant to said act, is preparing, and is about to print, such action of said parties, so certified to him, upon the official ballot for use at the election to be held on the first Tuesday after the first Monday of November, A. D. 1903, as a part of the party ticket of each of said parties, and in all other respects in the preparation of such ballot and the placing of such constitutional amendments thereon is complying with the requirements of the said act of May 2, 1902; and the relator alleges that the exercise by the defendant of any of the franchises, privileges, rights, or powers sought to be conferred by said act is in contravention of the Constitution of the state of Ohio, and prays that he be compelled to answer by what warrant or rights he claims to act in the preparation or arrangement of such ballot in the form aforesaid, and by what warrant or right he is about to have printed upon such ballot the action in favor of or against the adoption of such constitutional amendments by the parties aforesaid, and that upon the hearing hereof he be ousted from the rights, franchises, and privileges so claimed. The defendant demurred to the petition on the ground that it did not state facts sufficient to constitute a cause of action.

John M. Sheets, Atty. Gen., George B. Okey, R. M. Ditty, and W. A. Taylor, for relator. Charles Kinney and Wade H. Ellis, for respondent.

DAVIS, J. In the Constitution of this state there is no limitation upon the legislative power to provide by general laws the manner of submitting to a vote of the people a proposed amendment to the Constitution, except that, when there is more than one amendment to be submitted, they shall be so submitted that the elector shall be enabled to vote separately on each. This does not mean that each amendment must be upon a

separate ballot, or be deposited in a separate ballot box, nor that each or all of the proposed amendments may not be voted for on ballots on which are the names of candidates for office who are voted for by the elector. It merely requires that the elector shall be "enabled" to record his vote upon each amendment separately, if he so desires; that is, that he may vote for one or more and against one or more at the same time if he chooses so to do. If, being so enabled, he chooses not to vote at all upon any or all of the amendments, such failure to vote necessarily operates as a negative vote, because amendments to the Constitution must be adopted by a majority of all the votes cast at the election. It was not the design or intention of the Constitution to put a premium on ignorance or indifference at the same time that it is the duty of every citizen to inform himself and to vote upon every matter submitted to a vote of the people. Out of the proposition that a Constitution adopted by the people can be amended only by a majority of the people, it naturally follows that of all the people voting at an election when an amendment to the Constitution is submitted only those should be counted for the amendment who expressly so vote, and this is the whole scope of article 16, § 1, of the Constitution of Ohio. The act of the General Assembly entitled "An act to provide for the manner of submission of constitutional amendments and other questions to a vote of the people," passed May 2, 1902 (95 Ohio Laws, p. 352), enables the elector to vote with or against his party on each or all of the amendments, or to vote separately upon each and every proposed amendment, or to not vote at all if he so desires. So far as we have been able to discover, the act is not in any respect in conflict with the Constitution, and not irreconcilably in conflict with the joint resolutions adopted by the General Assembly submitting propositions to amend the Constitution.

Demurrer to petition sustained, and petition dismissed.

BURKET, C. J., and SPEAR, DAVIS, PRICE, and CREW, JJ., concur.

BARKER v. STATE

(Supreme Court of Ohio. Oct. 13, 1903.)

BRIBE—ACCEPTANCE—CITY EMPLOYE.

1. An accountant employed by a board of revision of a city constituted of the mayor, president of council, and city solicitor, is an employee of an officer within the meaning of section 6900, Rev. St. 1892, and may be punished, by virtue of said section, for accepting a bribe given for the purpose of influencing him with respect to his duty as such accountant.

(Syllabus by the Court.)

Error to Circuit Court, Erie County.

One Barker was convicted of accepting a bribe, and brings error. Affirmed.

(89 Ohio St. 68)

Grayson Mills and W. B. Starbird, for plaintiff in error. J. M. Sheets, Atty. Gen., and Roy H. Williams, Pros. Atty., for the State.

SPEAR, J. The plaintiff in error, Barker, was indicted by the grand jury of Erie county, under section 6900, Rev. St. 1892, for soliciting and receiving a bribe. On trial he was convicted of accepting a bribe, and sentenced to two years' imprisonment in the penitentiary and to pay costs, which judgment was affirmed by the circuit court.

The above-named section, among other things, provides that "whoever, being * * * a state or other officer, or public trustee, or agent or employé * * * of such officer or trustee, either before or after his election, qualification, appointment, or employment, solicits or accepts any such valuable or beneficial thing to influence him with respect to his official duty, or to influence his action, vote, opinion, or judgment, in any matter pending, or that might legally come before him, shall be imprisoned in the penitentiary," etc. The indictment charged the defendant with "being then and there the agent and employé of certain officers of the city of Sandusky, to wit, the mayor, president of the board of councilmen, and solicitor of the said city of Sandusky, the said officers then and there being and constituting the duly organized and acting board of revision of the said city of Sandusky," and in his said capacity accepting a bribe from one Miller, theretofore the clerk of the city, for the purpose and with the intent of influencing him in favor of Miller with respect to his (Barker's) action and judgment in a matter then legally pending before him as said agent and employé concerning Miller's accounts with the city, etc.

It is insisted by counsel for plaintiff in error that the conviction is wrong, because the action of Barker in receiving a bribe to influence his conduct, however immoral and blameworthy, is not, after all, one of the offenses embraced in the terms of the statute, because Barker was not an employé of an officer, the board of revision not being officers. If this contention is correct, it is fatal to the judgment. The real question is, therefore, were the members of the board of revision officers within the meaning of section 6900, Rev. St. 1892? We are not embarrassed by the fact that the indictment describes this board as "officers" while the statute uses the term "officer," because section 6794, Rev. St. 1892, permits the use of the plural for the singular and vice versa in the Criminal Code. The situation is the same, therefore, as though the statute had used the word "officers."

The board of revision is constituted and its duties defined by sections 1720, 1720a, 1720b, Rev. St. 1892, which provide, in substance, that the mayor, president of the board of councilmen, and the solicitor of the

corporation shall constitute a board of revision, which shall meet as often as once in every month to review and investigate proceedings of the council and of all other departments of the corporation government, with the duty to report to the council any and all irregularities which may be discovered in any of the departments, or in the acts of any of the officers or employés of any of the departments, and with the power to send for persons and papers, issue subpoenas, and enforce the attendance of witnesses and examine them under oath; and it is made the duty of all constables, police officers, and other persons deputized by the chairman to serve subpoenas and other process of the board. The board is also authorized to employ competent accountants to examine books, papers, contracts, or other writings connected with any investigation; also to prescribe forms of books, accounts, reports, and other methods of accountability for the different departments, and formulate and enforce such a general and manifest system of accounting as will secure the most rigid accountability for the funds and property of the corporation, etc. Beyond this, when the board has provided a system of accounting for any officer or department as herein provided, such system shall take the place of and be substituted for any manner of accounting for such department or officer now provided by law, and any officer of the corporation who refuses to accept and adopt the system of accounting prescribed by the board in accordance with the provisions of the sections cited shall be subject to removal upon complaint filed with the probate judge.

It must be apparent to the careful reader that this board is not a mere committee akin to the committees appointed by the probate judge to examine the county treasury, or by the common pleas to examine the accounts of the county commissioners, or the citizens appointed by the same court to act with county officers in the construction of a courthouse, as is contended by counsel for the accused, but that the men constitute a board having duration of service, clothed with authority during that service to exercise public functions in the interest of the people of the municipality, with power to employ assistants and provide for expending the public money in compensating them, and with power to enforce against others their will with respect to the proper discharge of those functions, and to enforce, also, their orders regarding the conduct of others in the employ of the municipality in respecting and obeying orders of the board. It is true that the board does not appear to be made a quasi corporation, as some boards are; nor is there attached to the duty any emolument. But neither of these characteristics is an essential element in the constitution of an office. *State v. Brennan*, 49 Ohio St. 33, 29 N. E. 593. The most essential characteristic is present, viz., "that the incumbent, in his in-

dependent capacity, is clothed with some part of the sovereignty of the state, to be exercised in the interest of the public, and required by law," and that the duties are of a continuous character, as opposed to a mere temporary employment. *State ex rel. v. Halliday*, 61 Ohio St. 171, 55 N. E. 175. On the face of things, it would appear that it is not an unreasonable contention to insist that this board had authority as such to employ the accused, and that such employment would be an employment by a board of officers, and that the person thus employed would come within the purview of the section of the statute heretofore quoted.

But it is insisted that there is evidence in the criminal statutes to show that where the Legislature has intended to include boards of officers within the sections of any statute that body has plainly said so, and sections 6842, 6846, 6969, 6970, 6975, and 6975a are cited. An examination of these sections shows that, except the last named, they relate to the punishment of offenses other than that of bribery, and section 6975a is confined to the offering or receiving of a bribe for recommending text-books, and to the employment by a school director or member, of a board of education of a father or brother as teacher, and to the accepting by such director or member of any reward for any official act. These provisions, we think, are properly to be treated as covering only the specific subjects enumerated, and not as expressing the entire legislative purpose on kindred subjects.

It seems unnecessary to pursue this inquiry farther, because there is another view, which, to our minds, appears to effectually dispose of the objection. Where two or more persons are organized and act together by virtue of law in the performance of public duties, they are said to constitute a board, and they may or may not become officers thereby, depending upon their powers and the character of the duties enjoined upon them; and where persons who are already officers are clothed with joint duties of a public character they are properly classed as a board of officers, and their joint action will ordinarily be treated as the action of a board; yet in the latter case, where the powers given and the duties imposed do not constitute the members officers, they do not thereby lose their official character because of such joint association and action. They remain officers notwithstanding. The mayor in the present instance continued to be mayor, the president of the council remained such president, and the solicitor was still the law officer of the municipality; and whether we conclude that the members of the board, while acting as such, were, by virtue of such relation, officers within the meaning of the statute or not, nevertheless they were officers having attached to their several offices the further duties prescribed by the sections of the statute heretofore cited; and it would

follow, as we think, clearly, that an employé appointed by them jointly by virtue of the power given by the statute would be an employé of such officers.

We are quite aware that the rule of law and of this court is that a statute defining an offense is not to be extended by construction to persons not within its descriptive terms, yet it is just as well settled that penal provisions are to be fairly construed according to the expressed legislative intent, and mere verbal nicety, or forced construction, is not to be resorted to in order to exonerate persons plainly within the terms of the statute. Applying these tests, we are of opinion that whether the three members are to be regarded as officers, constituted such by reason of their organization as a board, or whether the authority is to be held to rest in the mayor, president of council, and solicitor as such, and the board's duties to be regarded simply as additional duties attached by statute to their other duties and powers, Barker was, within the terms of the statute, in the employ of the officers named when he accepted the bribe as charged in the indictment, and that the judgment below should be affirmed.

BURKET, C. J., and DAVIS, SHAUCK, PRICE, and CREW, JJ., concur.

(69 Ohio St. 15)

BAKER et al. v. CARPENTER.

(Supreme Court of Ohio. Oct. 13, 1903.)

DEVISEE OF WILL—DEATH DURING LIFETIME OF TESTATOR—RIGHTS OF ISSUE.

1. Under the provisions of section 5971, Rev. St. 1892, where a devisee named in a will dies during the lifetime of the testator, leaving issue, such issue takes the estate so devised "in the same manner the devisee would have done if he had survived the testator"; and if such primary devisee is indebted to the estate of the testator his issue is entitled under said statute to have and take only so much of the amount bequeathed to the parent (the primary legatee) as is left after the payment of his debt.

(Syllabus by the Court.)

Error to Circuit Court, Greene County.

Action by A. G. Carpenter against G. O. Baker and others. From the judgment, affirmed by the circuit court, defendants bring error. Affirmed.

On April 25, 1900, A. G. Carpenter, as executor of the will of Jacob W. Baker, deceased, under favor of section 6202, Rev. St. 1892, commenced an action in the court of common pleas of Greene county, Ohio, for the purpose of obtaining the judgment and direction of said court as to the proper distribution to be made by him as executor of the property and estate to be by him administered under the provisions of the will of said Jacob W. Baker. Plaintiff attached to his petition, and made part of it, a copy of the will of said Jacob W. Baker, which will is in the words and figures following, to wit:

"I, Jacob W. Baker, of Greene county,

Ohio, do make and publish this my last will and testament:

"Item 1. After the payment of all the just debts, I will and bequeath to my son, John Q. A. Baker, as compensation and in lieu of all claims he might have against my estate on account of care, nursing and attention given and to be given me, the sum of three dollars per week from January 1, 1891, to January 1, 1893, and the sum of six dollars per week from January 1, 1893, till my death, if I shall so long remain with him, but if I shall not remain with him and receive his care, nursing and attention so long, then till I shall go elsewhere.

"Item 2. After payments aforesaid, I bequeath the residue of my estate equally between my three children, share and share alike; that is to say, one-third to Justice L. H. Baker, one-third to John Q. A. Baker, and one-third to Mary P. Taylor.

"Item 3. I will and direct that my executor cause my farm to be appraised by three disinterested appraisers to be appointed by the probate court of said county in parcels; that is to say, so much thereof as lies on the north side of the Xenia and South Plymouth road in one parcel, and so much as lies on the south side of said road in other parcel. It is my will that my son John Q. A. Baker be allowed to take such north portion at the appraisement, and my son Justice L. H. Baker be allowed to take the south portion at the appraisement—each on the terms of one-third cash, one-third in one year, and one-third in two years—deferred payments to be secured by mortgage on premises and to bear six per cent. interest. But the probate court may modify these terms, if it deems the same proper to do in respect to times of payment. Should either or both my sons decline to take said respective portions at the appraisement, then the same shall be sold under order of said courts—that is, the untaken portion or portions.

"Item 4. I nominate and appoint A. G. Carpenter the executor of my will.

"In testimony whereof witness my hand this April 17, 1894.

"Jacob W. Baker.

"Signed by us as witnesses in the presence of all at the request of said Jacob W. Baker at the date aforesaid, he acknowledged the same as his last will.

"Thomas L. Morris.

"F. W. Ogan."

In his petition the plaintiff alleged that at the time of the execution of said will, to wit, April 17, 1894, J. Q. A. Baker, Mary P. Taylor, and Justice L. H. Baker, the legatees therein named, were all in full life; that thereafter, and during the lifetime of the testator, Justice L. H. Baker died, leaving surviving him as his children and only heirs at law G. O. Baker, Elma R. Bush, Anna R. Baker, John L. Baker, Emma J. Baker, Frank Baker, Justus W. Baker, Wilbur C. Baker, and Zola Baker. It further

appears from the averments of said petition that Justice L. H. Baker, a legatee under said will, and the father of the plaintiffs in error, was at the time of his death indebted to the testator, Jacob W. Baker, upon two promissory notes in the sum of about \$1,400, and the prayer of the petition was that plaintiff might have "the direction and judgment of the court in the matter of his duties respecting said notes, whether the amount due thereon is to be taken as a part of the assets of the estate of his testator, Jacob W. Baker, and whether such amount is to be deducted from the distributive share that would be coming to the children and heirs of said Justice L. H. Baker, deceased." The answer, so called, which was filed by the children of Justice L. H. Baker, who are plaintiffs in error herein, does not controvert or deny the allegations of the petition, but asserts the claim only "that one-third of the entire estate of said Jacob Baker, after the payment of certain debts and charges, was by his said will devised to said L. H. Baker without being subject to any other or further charges, debts, or deductions; and that these defendants, by reason of the death of said J. L. H. Baker after the execution of said will and prior to the death of said testator, take the estate devised to said J. L. H. Baker (their father) without any charges, debts, or deductions by reason of or on account of said promissory notes mentioned in said petition." Upon the hearing of this cause in the court of common pleas that court found and adjudged that said notes were due the estate of said Jacob Baker, deceased, that they were assets in the hands of plaintiff as his executor, and directed plaintiff to deduct and retain the amount due thereon from the distributive share belonging to the children and heirs at law of said Justice L. H. Baker, deceased, under the provisions of said will. The case was appealed by defendants below (plaintiffs in error here) to the circuit court, and a like order and judgment was made and entered by that court. To reverse this finding and judgment of the circuit court this proceeding in error is prosecuted.

W. A. Paxson and T. L. Magruder, for plaintiffs in error. Chas. L. Spencer, Snodgrass & Schnebly, and H. L. Smith, for defendant in error.

CREW, J. (after stating the facts). The question presented for decision in this case involves the construction of section 5971 of the Revised Statutes of Ohio of 1892. That section provides as follows: "When a devise of real or personal estate is made to any child or other relative of the testator, if such child or other relative shall have been dead at the time of making of the will, or shall die thereafter, leaving issue surviving the testator, in either case such issue shall take the estate devised in the same manner as the devisee would have done, if he had survived the tes-

tator; or if such devisee shall leave no such issue, and the devise be of a residuary estate to him or her, and other child or relative of the testator, the estate devised shall pass to, and vest in such residuary devisee surviving the testator, unless a different disposition shall be made or required by the will." It is the claim of counsel for plaintiffs in error in this case that by force of the provisions of this section on the death of Justice L. H. Baker, their father, the interest and estate bequeathed to him by the will of Jacob W. Baker vested in them, as the children of said Justice L. H. Baker, directly and immediately under the will of their grandfather, as a devised estate, and that they take the same unincumbered by and discharged of any debt due the testator from their father. The sole question we are called upon to consider and determine in this case is whether these plaintiffs in error, who are not named in the will of Jacob W. Baker as devisees or legatees, but are such only by way of substitution and by force of the provisions of above section 5971, take the property or estate bequeathed to their father subject to the equities which would have existed against it in his hands had he survived the testator, or whether they take it in their own absolute right, and discharged of all such equities. There can be no doubt, and counsel for plaintiffs in error concede, that if Justice L. H. Baker, the primary legatee named in this will, were here in person asking to recover his legacy, or his distributive share of his father's estate under said will, the court would say to him, "If you would have your legacy, you must pay your debt; if you will not pay, you must suffer your legacy to be applied in discharge of it;" and such decree would not only be in accord with justice and sound reason, but would be in keeping and harmony with the principle of equality which pervades our laws of descent and distribution. Such, then, being the standard by which the rights of a primary legatee thus situated must be measured and determined, are these plaintiffs in error, who are devisees or legatees only by substitution, entitled to have or to hold a better or more advantageous position in the distribution of this estate than could their immediate ancestor, the primary legatee? The answer is to be found in the construction and interpretation proper to be given to above section 5971, Rev. St. 1892. What, then, is the true interpretation, meaning, and effect of this statute? In the construction and interpretation of statutes of this character—remedial statutes—and as an aid both in determining the legislative intent and the meaning and effect proper to be given to the statute itself, it is helpful and important to inquire what was the old law, what the mischief which existed under it, and what the remedy intended to be applied by the Legislature by the enactment of the particular statute, the interpretation of which is being considered. Before the enactment of section

5971, under the rule of the common law, if a legatee should die before his testator, his legacy would lapse, and such lapsed legacy would fall into the residuary fund, if any, of testator's estate, and thus might pass to those who had no natural or rightful claim whatever upon the testator's bounty. Prior to the time of the enactment of this section, such was the law of this state that, if a father made a will distributing his estate as he thought proper among his children, and one of them should die in the father's lifetime, leaving children, unless the testator was wise enough and thoughtful enough to anticipate and provide in his will for such contingency, the children of his deceased child would take nothing, but the children of the testator who survived him would take the whole estate. To remedy this imperfection, and to relieve against this harshness and injustice of the common law, our statute was passed. The statute, as its title shows, was designed and intended to relieve against a hardship by preventing the lapsing of devises and legacies, and its sole purpose and effect, as we think, was and is upon the happening of the contingency therein mentioned, to place the grandchildren of a testator in their parent's stead, and to give to them the right to take what such parent would have taken if he had survived the testator. But certainly we think it was not the purpose, and could never have been the intention, of the Legislature, by the enactment of this statute to secure to the grandchildren of the testator greater rights and privileges than their parent—the primary legatee—could have had; nor may we reasonably assume that it was the intention of the Legislature to give to such grandchildren rights against other beneficiaries under the will which the person in whose place they stand, and for whom they are substituted, never would himself have been permitted to assert. Yet such result must inevitably follow if the statute under consideration is to have the construction and interpretation contended for by the plaintiffs in error. The rule of construction is elementary that statutes must always be construed so as to give effect to the intent and object of the Legislature. The statute now under review, as we have seen, was designed to relieve from a hardship, and should, therefore, be so read and interpreted as to cure the mischief it was intended to remedy; but its meaning and effect must not be enlarged or extended by construction beyond the purpose of its enactment. The plaintiffs in error in this case are not named in the will of Jacob W. Baker as legatees, nor anywhere designated in said will as beneficiaries, of the testator. They are mere "statute made" legatees, who, by force of the provisions of section 5971, take the place of their father, and are given what, but for his death, would have gone to him as primary legatee under said will; and as such substituted legatees they must bear the burdens and be subject to the

same equities that would have existed against him if he had survived the testator. In other words, in the language of the statute itself, they "must take in the same manner as he would have done had he survived the testator." The circuit court in this case having so found and adjudged, its judgment is affirmed.

BURKET, O. J., and SPEAR, SHAUCK, and PRICE, JJ., concur.

(69 Ohio St. 56)

STATE ex rel. GREAT CAMP, KNIGHTS OF MODERN MACCABEES, v. VORYS.

(Supreme Court of Ohio. Oct. 13, 1903.)

FOREIGN MUTUAL BENEFIT ASSOCIATION—RIGHT TO DO BUSINESS—ISSUE OF CERTIFICATE.

1. Where an association is organized or incorporated in another state, province, or territory, under laws which provide for such an association operating within the description, in substance, as set forth in section 3631-11, Rev. St., and is shown by certificate to be authorized to do business in that state, and is not now doing business within this state, such association has the right to be admitted to do business within this state when it shall have filed with the superintendent of insurance of this state a duly certified copy of its charter and articles of association, a copy of its constitution or laws certified by its secretary or corresponding officer, and an appointment of the superintendent of insurance of this state as the person upon whom process may be served, as provided in section 3631-13, Id., and under such circumstances section 3631-16, Id., is mandatory upon the superintendent of insurance to issue to such association a certificate authorizing it to do business within the state of Ohio.

Shauck, J., dissenting.

(Syllabus by the Court.)

Action by the state, on the relation of the Great Camp, Knights of Modern Maccabees, for writ of mandamus to one Vorys, superintendent of insurance of the state of Ohio. Writ granted.

The relator asks this court to issue a writ of mandamus commanding the defendant to issue to the relator a permit in writing to do business in the state of Ohio as a fraternal beneficiary association, under the provisions of the statute in such case made and provided. The relator alleges that it is a fraternal beneficiary association originally incorporated in 1881 under the laws of the state of Michigan, and reincorporated in 1893 under Act No. 119, p. 186, of the Public Acts of 1893 of the laws of the state of Michigan. It also avers that it is such a fraternal beneficiary association as is declared and defined and authorized to be organized and to be permitted to do business in this state under section 3631-11 of the Revised Statutes of the state upon the relator's compliance with the conditions prescribed by the fraternal beneficiary laws of this state. It is averred that on September 16, 1902, the relator filed with the defendant, as superintendent of insurance, an application for a permit in writing to do

business in this state, and that the relator filed with the defendant, accompanying said application, a duly certified copy of the relator's charter and articles of association, a copy of the relator's constitution and laws duly certified to by its record keeper and secretary, an appointment of the superintendent of insurance of this state as the person upon whom process may be served, a certificate from the commissioner of insurance of the state of Michigan that the relator is authorized to do business in the state of Michigan, in which it is incorporated, and a financial statement of the business of relator for the year ending December 31, 1901; and that the defendant, on the presentation of said documents and application, refused, and still refuses, to issue to the relator such permit in writing.

The defendant, by his answer, in his first defense, admits that the relator was reincorporated under Act No. 119, p. 186, of the Public Acts of 1893 of the laws of the state of Michigan; that he is, and was at the time mentioned in the petition, the duly appointed, qualified, and acting superintendent of insurance of the state of Ohio; and that on September 16, 1902, the relator filed with him an application for a permit in writing to do business in this state as a fraternal beneficiary association, a duly certified copy of relator's charter and articles of association, a copy of its constitution and laws certified to by its record keeper and secretary, an appointment of the superintendent of insurance of this state as the person upon whom process may be served, a certificate of the commissioner of insurance of the state of Michigan reciting that relator is authorized to do business in the state of Michigan, a financial statement of its business for the year ending December 31, 1901, a copy of its application for membership, and copy of benefit certificate, and that the relator tendered the defendant the statutory fee of \$25 for such permit; and also admits that defendant at the time of said application refused, and still refuses, to issue such permit to the relator, and he denies all the allegations of the petition not herein expressly admitted. For a second defense the defendant, in substance, sets out that it appears in the copy of the articles of association so filed with him on September 16, 1902, that the name of this corporation shall be the Great Camp of the Knights of the Modern Maccabees, etc., setting out in detail the laws and rules and regulations of the Great Camp of the Modern Maccabees, and averring that the provisions in the copy of the articles of incorporation and constitution and laws of the relator so filed with the defendant disclose that the relator is not a fraternal beneficiary association as defined in section 3631-11, Rev. St., in this: That it is not a corporation, society, or association formed, or organized, or carried on for the sole benefit of its members and their beneficiaries, and that, while the subordinate tents have a

lodge system with ritualistic form of work, the relator does not have a lodge system with ritualistic form of work, and that the relator does not have a representative form of government, and that the members of camps in Ohio will not have representation equal to that accorded tents in Michigan, etc. In his third defense the defendant avers that at the time of the passage of the act of April 27, 1896 (92 Ohio Laws, p. 360), known as the "Fraternal Beneficiary Act," being sections 3631-11 to 3631-23, Rev. St., there existed a fraternal beneficiary association with ritualistic form of work known as the "Supreme Tent of the Knights of the Maccabees of the World"; that said association for 11 years prior to the passage of said act had been doing business in the state of Ohio, and has duly filed its annual reports, designated the superintendent of insurance as the person upon whom process may be served; and has therefore been at all times, and is now, duly authorized by the superintendent of insurance of this state to continue its business in this state in accordance with the provisions of section 3631-11; that by the constitution and laws of the Supreme Tent of the Knights of the Maccabees of the World great camps are organized in various states and territories of the United States and provinces of Canada; and there is, and has been for 18 years, under the jurisdiction of said supreme tent, a Great Camp of the Knights of the Maccabees for Ohio, and under this there have been subordinate tents or lodges established in the state of Ohio. The defendant sets out in detail the similarity in names, laws, rules, and regulations between the said Supreme Tent of the Knights of the Maccabees of the World and the relator, and further says that, if the relator is permitted to transact business in the state of Ohio, in case an action is brought against it, and process served on the defendant by virtue of relator's appointment of him as its attorney for that purpose, it will have the same legal force and vitality as if served on the relator, and under the provisions of section 3631-15, Rev. St., the defendant, when served with any process, is required to notify the association sued of such suit and forward copies to it, careful action being imposed by statute on defendant in order to guard the rights of the association similar to the relator, now doing business in Ohio, and also of the relator, if it be permitted to do business in this state; and that to permit the relator to do business in this state under a name and title similar to that of another beneficiary organization will lead to confusion in the defendant's department and in the public mind as to the identity of the person sued, and for whom the defendant is acting and receiving service, and that for the protection of the defendant against liability to error in the transaction of his business the relator ought not to be permitted to transact business under a name and title which would produce confusion and uncertainty. Where-

fore he prays that the petition and supplemental petition be dismissed at costs of relator, the Great Camp of the Knights of the Modern Maccabees, and that he may go hence without day and costs.

The relator demurred to the third defense of the answer for the reason that the same does not contain allegations sufficient to constitute a defense to the petition, and for reply to the second defense of the answer makes certain specific denials. Upon motion, the Honorable E. B. Dillon was appointed master commissioner to take evidence and report his findings of fact and conclusions of law in the case; and on the 27th of April, 1903, the said master filed the evidence taken by him and submitted by the parties in this court, together with his report. The conclusions of law in said report are as follows: "First. That the relator is a fraternal beneficiary association, as the same is described and defined in section 1 of the fraternal beneficiary act (92 Ohio Laws, p. 360, section 3631-11). Second. That the relator has fully and completely complied with the provisions of said act (92 Ohio Laws, p. 360, §§ 3631-11 to 3631-23). Third. That the demurrer of plaintiff to the third defense of the defendant be sustained. Fourth. That the superintendent of insurance of the state of Ohio is not vested with an absolute discretion in the exercise of the functions of his office with reference to the admission or rejection of foreign insurance companies desiring to do business in this state; but, on the other hand, that where he is in manifest error in regard to the facts or his construction of the law, he may be compelled by mandamus to act. Fifth. That a peremptory writ of mandamus issue against the defendant and in favor of the relator, as prayed for in the petition." The relator filed a motion to confirm the report of the master and enter judgment as prayed for in the petition. The defendant filed exceptions to the findings of fact and conclusions of law of the master, and moved to vacate and set aside the judgment, and for judgment in his behalf.

J. B. McIlwain and Fred C. Rector, for relator. John M. Sheets, Atty. Gen., and J. E. Sater, for defendant.

DAVIS, J. (after stating the facts). Section 6 of the "Act regulating fraternal beneficiary societies, orders, and associations," passed April 27, 1896 (92 Ohio Laws, p. 364; section 3631-16, Rev. St.), is mandatory upon the superintendent of insurance to issue to any association having the right to do business within this state, as provided by said act, a permit and certificate authorizing such association to do business within this state. Section 3 of the said act (section 3631-13, Rev. St.) requires that any association operating within the description as set forth in section 1 of the act, organized under the laws

of any other state, and not doing business within the state, shall be admitted to do business within this state when it shall have filed with the superintendent of insurance a duly certified copy of its charter and articles of association, a copy of its constitution or laws certified by its secretary or corresponding officer, and an appointment of the superintendent of insurance of this state as the person upon whom process may be served as provided. In case the laws of the state, etc., in which such association is organized shall provide for such organization, it is also required that such association shall be shown by certificate to be authorized to do business in the state, etc., in which it is incorporated or organized. When all of these requirements are met, the association has "a right to do business within this state, as provided" by said act, and the superintendent of insurance has no option to refuse to issue the permit and certificate. He is not authorized under this act to enter into any inquiry in regard to a foreign fraternal beneficiary association applying to be admitted to do business within this state, except "in case the laws of such state, province, or territory do not provide for any formal authorization to do business on the part of any association." It appears in the record of this case that the relator is incorporated under the laws of Michigan, and is authorized to do business in that state, and is so doing business. It also appears that the statutes of Michigan define and describe a fraternal beneficiary association substantially as it is defined and described in section 1 of the act of the General Assembly of Ohio now under consideration (section 3631-11, Rev. St.), and in almost the same words. It further appears that along with the application of the relator for admission to do business within the state of Ohio as a fraternal beneficiary association it filed with the defendant, as superintendent of insurance, a duly certified copy of the relator's charter and articles of association, a copy of the relator's constitution and laws duly certified by its record keeper and secretary, an appointment of the superintendent of insurance of this state as the person upon whom process may be served, a certificate by the commissioner of insurance of the state of Michigan that the relator is authorized to do business in the state of Michigan, and a financial statement of the business of the relator for the year ending December 31, 1901, being the year preceding the making of this application. We regard this as a compliance, in letter and in spirit, with the statute, and therefore hold that the relator has the right to do business within this state as provided in said act, and is entitled to have the permit in writing therefor according to the provisions of section 3631-16, Rev. St.

A number of points have been submitted and argued which would be appropriate in an action in equity between rival corpora-

tions having similar names, and some which would probably be better addressed to the Legislature; but we do not find the decision of any of these essential here.

We have not overlooked the citation of decisions of this court as to the discretionary power of the superintendent of insurance in certain cases. We do not think that these apply to the case in hand for the reasons already stated, and for a further reason. In section 1 of the act now under consideration (section 3631-11, Rev. St.) it is enacted that "such associations shall be governed by this act, and shall be exempt from the provisions of the insurance laws of this state, and no law hereafter passed shall apply to them unless they be expressly designated therein." So that fraternal beneficiary associations have a law unto themselves, and neither the insurance laws nor the construction thereof are applicable to them unless expressly made so.

Exceptions to the report of the master overruled, report confirmed, and peremptory writ of mandamus awarded.

BURKET, C. J., and SPEAR and PRICE, JJ., concur. SHAUCK, J., dissents.

(69 Ohio St. 24)

STATE NAT. BANK v. ESTERLY.

(Supreme Court of Ohio. Oct. 13, 1903.)

INSOLVENT DEBTOR—PROPERTY IN HANDS OF RECEIVER—SECURED CREDITOR—DIVIDENDS.

1. Where the property of an insolvent debtor, by order of court, is placed in the hands of a receiver to be administered upon for the payment of the insolvent's debts, a creditor who holds collaterals taken to secure his claim, and upon which he has realized before a dividend is declared, is entitled to a dividend on only so much of his debt as remains after deducting the proceeds of the collaterals; and this sum may be ascertained at the time the dividend is declared, although the claim had formerly been proven and allowed for the full amount.

Shauck, J., dissenting.

(Syllabus by the Court.)

Error to Circuit Court, Columbiana County.

Action by the State National Bank against Anron Esterly, receiver of J. Esterly & Co. From the judgment and from an order denying a new trial, plaintiff brings error. Affirmed.

The plaintiff in error commenced an action in the court of common pleas of Columbiana county against the defendant in error, who was and is receiver of the insolvent firm of J. Esterly & Co., to compel the allowance of dividends on certain notes owned by plaintiff in error upon which said insolvent firm were liable as indorsers. One of said notes is dated August 1, 1896, and calls for the payment of \$5,500 four months after date, with 8 per cent. interest per annum after

¶ 1. See Receivers, vol. 42, Cent. Dig. § 260.

maturity, and signed by "Columbiana Pump & M'ch Co." The other note is dated October 24, 1896, and calls for \$3,132.70, payable four months after date, with 8 per cent. interest after due until paid. This note is signed by "The Ohio Lumber & Mining Co." It was stipulated in each note that, if the interest was not paid when due, the same should be added to the principal, and the aggregate should draw interest at same rate until paid. When J. Esterly & Co. indorsed and transferred said notes to the bank, it also transferred collaterals to secure their indorsements, from which collaterals the bank realized such amounts that, if applied, materially reduce the claims against indorsers. Inasmuch as the answer of the receiver admits all the facts alleged in the petition except their legal effect, the petition is here copied, omitting the caption:

"The plaintiff says it is a national bank organized and doing business under the laws of the United States. That the defendant Aaron Esterly is receiver of J. Esterly & Co., having the powers of such receivers in the state of Ohio.

"For its first cause of action against the defendant plaintiff says that on May 11, 1898, being the owner of claim against J. Esterly & Co., based on a promissory note, of which a copy, with all indorsements thereon, is hereto attached, marked 'Exhibit A,' and made a part hereof, it presented the claim on said day, May 11, 1898, to said Aaron Esterly, as such receiver, for allowance against the said estate of which he was receiver, and thereupon on said date the claim was allowed by indorsement thereon as follows: 'May 11, 1898. Allowed subject to distribution. Aaron Esterly, as Surviving Receiver of J. Esterly & Co., Bankers.' That said J. Esterly & Co. were and still are liable on said notes as indorsers thereon. Said note bears date August 1, 1896, is due in four months from date, and draws interest after maturity at eight per cent. That at the time of the presentation of said claim for allowance there was due thereon to the plaintiff from J. Esterly & Co. and said receiver the sum of \$1,187.48. That afterwards, as appears by indorsement on said note, and on April 22, 1901, there was paid thereon the sum of \$834.73, being realized from makers of note and assignee of makers of same. After deducting such payment and computing interest according to law, there was due on said note June 1, 1901, the sum of ten hundred eighty-nine dollars and thirty cents (\$1,089.30), which amount still remains due from the estate of J. Esterly to the plaintiff, and remains wholly unpaid. That afterwards, and on or about May 30, 1901, the said Aaron Esterly, receiver, informed the plaintiff that a dividend of about thirty (30) per cent. was to be made by him as receiver to the various creditors; that he proposed to compute such dividend upon the balance at present owing, exclusive

of interest, instead of computing upon the amount allowed as aforesaid. To this method of computation plaintiff objected, and thereupon said Aaron Esterly, through his attorney, W. G. Wells, notified the plaintiff that the claim was wholly disallowed and rejected, and that the plaintiff would be obliged to bring suit and have the question settled in court. The plaintiff says that no amount has been paid on said claim by the receiver, but all amounts paid thereon have been realized from the collaterals held by the plaintiff for the payment of said note. The plaintiff further says that the dividend should be computed on the amount owing at the time of the insolvency of said bank and the appointment of the receiver therein, viz., December 8, 1896, and that at that time the entire principal was due on said note. If interest is added to other claims in the computation, then interest should be added to the claim of the plaintiff before computing the dividend. The plaintiff further says that the said receiver had no right to disallow the plaintiff's claim because of the dispute in the mode of computing the dividend, and his action therein was and is illegal and void.

"Second cause of action: Making the allegations herein preceding the first cause of action a part of the second cause of action the same as if herein repeated, the plaintiff says, for its second cause of action against the defendant: That on February 24, 1897, being the owner of a promissory note, of which a copy, with all indorsements thereon, is hereto attached, marked 'Exhibit B,' and made a part hereof, the plaintiff duly presented the same for allowance to the defendant, and his then co-receiver, Josiah Rohrbach, and the same was thereupon duly allowed, in writing, as a valid claim against said estate, for the full amount of said note, to wit, three thousand one hundred thirty-two dollars and seventy cents (\$3,132.70). Said note bears date October 24, 1896, is due four months after date, and draws interest after maturity at the rate of eight per cent. per annum. That said J. Esterly & Co. are liable on said note as indorsers. That said note had been properly presented and protested for nonpayment when the same became due. That on said claim, after such allowance, the plaintiff realized from collaterals held for the payment thereof payments as follows: July 16, 1897, \$1,579.22; May 25, 1898, \$363.08; July 10, 1899, \$60.60; April 29, 1901, \$84.01; leaving a balance now due, with interest computed to June 1, 1901, of \$1,676.58. The plaintiff says that after the said allowance of said claim, and on or about May 30, 1901, the defendant, desiring to pay a dividend on claims against the estate of J. Esterly & Co., notified the plaintiff that such dividend would be computed on the balance now owing, exclusive of interest, instead of on the amount owing at the time said claim was allowed; and the plaintiff,

having refused to agree to accept the dividend on that basis, the defendant then, through his attorney, wholly disallowed the claim, and notified the plaintiff that it would have to bring a suit to have the question determined in court. The plaintiff says that no amount has been paid on said claim by the receiver, but all amounts paid thereon have been realized from the collaterals held by the plaintiff for the payment of said note. The plaintiff further says that the dividend should be computed on the amount owing at the time said claim was allowed, and, if interest is added to other claims in the computation, then interest should be added to the claim of the plaintiff before computing the dividend. The plaintiff further says that the said receiver had no right to disallow the plaintiff's claim because of the dispute in the mode of computing the dividend, and his action therein was and is illegal and void. Wherefore plaintiff prays that the defendant be ordered to treat its claims as valid and subsisting claims under the former allowance thereof; that he be ordered to compute the dividends on the amount owing at the time of the declaration of insolvency of said bank and the appointment of the receiver therein, to wit, December 8, 1896; and, if interest is added to other claims before the computation of dividends, then to add interest to plaintiff's claim; and the plaintiff prays for such further order in the premises as may fully protect its rights in law and equity against the defendant.

"J. A. Martin and

"Brewer, Cook & McGowan,

"Attorneys for Plaintiff."

The following is the answer of the receiver:

"Now comes Aaron Esterly, as receiver of the estate of J. Esterly & Co., and the defendant herein, and for answer admits all the allegations of fact in the plaintiff's petition, but denies that said claims should be allowed by the said receiver for a greater amount than which amount now remains unpaid on said notes.

"W. G. Wells,

"Attorney for Defendant."

The pleadings presenting purely questions of law, the court of common pleas found against the plaintiff bank as to the basis upon which dividends should be computed. It appealed from the judgment and order of that court to the circuit court, where the cause was heard and submitted on the pleadings. The circuit court made the following findings and order: "This cause coming on for hearing on this day was submitted to the court on the pleadings, and the court, being fully advised of the issue raised by said pleadings and the questions of law involved, do, upon the allegations made in the answer, find that all the payments made upon the two notes described in the petition subsequent to the presentation and allowance of said claims by the receiver, and subsequent

to the date of the insolvency of said J. Esterly & Co. and the appointment of the receiver therein, to wit, December 8, 1896, should be credited upon said notes, and that the balance due after crediting said payments is the basis upon which the plaintiff should receive dividends pro rata with the other general creditors of said insolvent bank; that the balance due upon said notes should be allowed as a valid claim against the estate of J. Esterly & Co., and that said balance is the sum of \$1,596.09, and should be allowed as of the date of May 11, 1898. Wherefore the court finds that the balance due on said notes on May 11, 1898, to be the sum of \$1,596.09; that the same is a valid claim against Aaron Esterly, receiver of J. Esterly & Co.; and it is hereby ordered, adjudged, and decreed that said claim be and is hereby allowed, that the defendant be ordered to allow said claim, and that said sum of \$1,596.09 be the basis upon which dividends shall be paid plaintiff in common with other general creditors, and that said allowance be made as of the date of May 11, 1898."

The court ordered the costs paid out of the funds in his hands as receiver. The plaintiff in error filed a motion for new trial, which was overruled, and error is prosecuted here to reverse the findings and order as to the basis for computing the dividends.

J. A. Martin and Brewer, Cook & McGowan, for plaintiff in error. W. G. Wells, for defendant in error.

PRICE, J. (after stating the facts). We learn from the averments of the petition filed in the lower court by plaintiff in error that at some date prior to the appointment of a receiver for the firm of J. Esterly & Co. it had become liable to the plaintiff bank as indorsers upon two promissory notes mentioned in the foregoing statement of this case, and that the liability of the firm had become fixed when the notes were properly presented to the makers thereof and protested for non-payment. It also appears that, to secure the bank in accepting the notes bearing such indorsements, J. Esterly & Co., at the time of their transfer, delivered to it certain valuable collaterals as security for their contracts of indorsement, and from which collaterals, after the receiver was appointed, the bank realized from time to time in substantial sums, which, if applied as credits on the obligations of indorsement when collected, would materially reduce the obligations before the receiver was ready to pay a dividend. The receiver was appointed on the 8th day of December, 1896, about the time the larger of the two notes became due. On or about the 11th day of May, 1898, the bank presented its claims to receiver for allowance, and they were allowed "subject to distribution." The amounts which the bank realized on the collaterals were collected at different times after the appointment of the receiver. On or about

the 30th of May, 1901, the receiver notified the bank that he was ready to make a dividend to the various creditors, and that he would compute such dividend upon the balance then owing, exclusive of interest, and not upon the full amount of the indorsements of the insolvent firm. On refusal to accept a dividend on the proposed basis, the bank brought its action in the court below to have its rights determined. It failed in its contention in the lower courts, and its counsel thus formulates the inquiry in this court: "Shall dividends be computed (1) upon the amount due at the date of the appointment of receiver, or (2) upon the amount due at the time the claim is presented and allowed, or (3) upon the balance unpaid at the time of settlement?"

This case has been considered with two others involving similar questions, which cases will be stated at the close of this opinion. Learned counsel representing the parties in each case have been heard orally, and they have submitted briefs containing careful discussions of the points involved, wherein are cited a long array of cases adjudicated in the English and American courts, the latter embracing both state and federal. Numerous text-writers have been drawn upon by each side of the controversy, until we are constrained to agree with counsel that the authorities are about equally divided, both as to numbers and their apparent weight. Their reconciliation is impossible, and a careful review of them here would be fruitless labor. Counsel for plaintiff in error in this case, and to some extent counsel in the other cases herewith decided (*Buckingham v. Loan Ass'n*, 68 N. E. 1126), argue their causes as if the dispute arose in the settlement of an estate under a deed of assignment for the benefit of creditors, and lay down the proposition to govern this case that: "By the deed of assignment the equitable ownership of all the assigned property passed to the creditors. They became joint proprietors, and each creditor owned such a proportion or part of the whole as the debt due him was of the aggregate of the debts. The extent of this interest was fixed by the deed of trust. * * *" This proposition is found in many of the authorities cited in behalf of the bank, and, indeed, it seems to be the favorite reason for the holdings made. Notably this is true in *Miller's Appeal*, 35 Pa. 481, *Merrill v. Bank*, 173 U. S. 131, 19 Sup. Ct. 360, 43 L. Ed. 640, and *Bank v. Armstrong*, 59 Fed. 372, 8 C. C. A. 155, 28 L. R. A. 231, cited for plaintiff in error. If, for any reason, we are required to consider this and its kindred cases under the law governing the mode of administering estates under our assignment laws—which we do not concede—we are of opinion the proposition is entirely too broad, and is subject to important limitations. In cases of assignment under our insolvent laws the legal title of the property of the assignor passes to the assignee, in trust for the benefit of not some,

but all, creditors of the assignor. The unsecured creditor is as fully represented by that title as is he who holds collateral security for his claims, and, if he becomes the equitable owner of such "a proportional part of the whole as the debt due him is of the aggregate of the debts," his equitable title is not weakened nor his equitable joint share decreased by the fact that another creditor has security for all or part of his claim. But to allow a dividend to the secured creditor on the basis of his entire claim unreduced by collected collaterals would diminish the share of the general or unsecured creditor in the estate of the insolvent debtor. In other words, to pay a dividend on more than is actually due on a secured claim will unjustly reduce the general fund in which the unsecured creditor is entitled to share.

But we do not think the interest or title of creditors in the assigned property is the determining factor, if even they have an equitable ownership. The deed of assignment, under our statute, must be general, and inure to the benefit of all creditors, and their rights are to be worked out through the assignee as they appear from time to time during the administration of the trust. In such case the creditors are not purchasers of the estate in proportion to their claims, for investigation and proper defense against the claims of one or more may modify or extinguish their interest in the estate, so that whatever title, equitable or otherwise, a creditor may have in the assigned property, it is at best but contingent, and subject to adjudication with other demands held against the debtor. As said by Owen, C. J., in *Mannix, Assignee, v. Purcell et al.*, 46 Ohio St. 135, 19 N. E. 584, 2 L. R. A. 753, 15 Am. St. Rep. 562: "No higher or better right or title to any of this property passed to the assignee than the assignor held. His creditors acquired no new rights or remedies in or against it by force of the assignment. The assignee simply represents them and their rights, which he has undertaken to enforce by the plain processes appointed by statute. They do not, in any sense, stand to the assigned property in the relation of purchasers. The beneficiaries of the property which the assignee is now seeking to subject to the payment of the assignor's debts are free to assert against the latter every right and claim which, before the assignment, they could have asserted against the assignor." The equitable ownership of a creditor in the assigned property, if any there be, is contingent merely, because its force and validity depend upon the subsequent events. Such creditor must present his claim to the assignee for allowance within a certain time. If rejected, he must sue within a specified time. Default in either loses his right to share in the estate, unless saved by other provisions of our law. If he presents his claim before it is allowed, or any payments made thereon, "he must make and file an affidavit setting forth that the said

claim is just and lawful, and the consideration thereof, and what, if any, set-offs or counterclaims exist thereto; what collateral or personal security, if any, the claimant holds for the same, or that he has no security whatever; and the assignee or trustee or any creditor shall have the right to examine the claimant under oath touching any such collateral or other security, or any other matter relating to said claim, within such time and under such regulations as shall be prescribed by the probate judge." See section 6354, Rev. St. 1892. The making and filing of this affidavit is not optional with the creditor, but it is essential to the proper allowance of his claim, and it proceeds upon the evident policy of the law that the affidavit will truthfully disclose both the nature of the claim and its condition with reference not only to payments made, but as to what admitted set-offs or counterclaims exist whereby the creditor's demand may be in part or wholly satisfied. This procedure is against the theory that by assignment a creditor acquires a definite equitable ownership in the assigned property that shall measure his rights to dividends in the further administration of the estate. It further argues that its purpose is to give the assignee, and the probate court on the report of the assignee, full knowledge of the condition of each claim, in order that rights of the general as well as the secured creditors may be determined. If valid offsets then exist, if good collaterals are held from which collections are being made, they are to be so applied that the general creditors may receive their equitable portion of the estate. And we think that this information as to the condition of the claims is to be furnished so that a dividend may be made on equitable principles, because whatever amount a secured creditor receives beyond what is actually due him after application of money realized from collaterals, or after allowance of admitted offsets, must be taken from the general fund, and therefore from the general creditor. Therefore it seems to us that we should hold and answer the third inquiry of counsel by saying that the dividend should be computed "upon the balance unpaid at the time of the settlement." The result to be thus reached is the result that would be reached in an action at law between the creditor and the debtor, because the latter could have the court or jury fix the true amount he owes the creditor after deducting valid set-offs and counterclaims, and the balance would be the real debt. We do not now see why the standing in the probate court in an assignment case should be better than in the action at law, because the rights of the creditors in reference to such claims as are here involved can be fully worked out in administration of the assigned estate. When the estate is ready to warrant a dividend, and it is known from the proof of claim that set-offs or collaterals existed when the claim was allowed, the amount of

the admitted set-off, or what has been paid from the collaterals, should be deducted, and the balance due is the true basis for a dividend.

We have devoted time to this extent in discussing the rule in assignment cases because its discussion pervades so largely the briefs of counsel, wherein they liken the cases at bar to assignment cases. But the analogy is not complete. In the cases under review receivers were appointed, and it is not open to debate that title to the debtor's property does not vest in the receiver, but remains in the debtor, subject to the possession and control of such receiver, until he sells the same under the direction of the court, when the title passes to the purchaser. Creditors who had no lien or title prior to the appointment of the receiver gained neither in any sense nor degree through the receivership. Hence it is that property in the hands of a receiver is considered as in the court, and under its control, to be administered so as best to subserve the ends of equity; and when the debtor's estate becomes assets in his hands the general creditors acquire rights which the court will protect by placing all the creditors on an equality as far as possible. This is the rule stated in *Bank v. Bank*, 3 N. J. Eq. 268, and many other cases. Therefore the argument of an equitable ownership by the creditor in assigned property can have no application whatever here. But, if we are right in our views as to the rights of creditors in assigned property, it seems quite clear that the same rule should be enforced in settlements of estates placed in the hands of a receiver. All sums realized on the collaterals in this case were collected after the appointment of the receiver. Part was collected by the bank before, and the remainder after, the proving and allowance of its claims; but whether before or after allowance we think is immaterial. When the debtor's property has been reduced to money, and under the direction of the court the receiver is ready to make a dividend, there is nothing inequitable in crediting these amounts as payments pro tanto. The law would compel such an application if it was resisted, because the amount due the creditor is his claim less what has been paid for its liquidation, either directly or indirectly. When this is done, and not until then, do the secured and unsecured creditors stand on an equal footing. When that is done the secured creditor has received the benefit of his security, and is ready to claim a share in the general estate with the general creditors; otherwise, as before stated, the secured creditor would hold the avails of his securities actually reducing his demand, and would also take from the general estate a portion which belongs to the unsecured creditors. This latter would be inequitable, while the former rule would do even and exact justice between all parties. To elaborate this doctrine, or quote from cases in which it is

found, is not necessary. We think the principle is right, and approve it as has been done in a long line of cases, and by the best of modern text-writers. We therefore hold the circuit court did not err in its judgment, and the same is affirmed.

Judgment affirmed.

BURKET, C. J., and SPEAR and DAVIS, JJ., concur. SHAUCK, J., dissents.

(176 N. Y. 308)

CITY OF BUFFALO v. DELAWARE, L. & W. R. CO.

(Court of Appeals of New York. Oct. 30, 1903.)

APPEAL—AFFIRMANCE IN PART.

1. Under Code Civ. Proc. § 1317, giving the Supreme Court power to reverse or affirm wholly or partly where a judgment consists of distinct parts so separate and independent in form and nature as to be easily severed, and each is in fact a distinct adjudication, the Supreme Court may on appeal affirm the adjudication not affected by an error, and reverse the adjudication affected by error, and grant a new trial as to that portion of the issues only.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by the city of Buffalo against the Delaware, Lackawanna & Western Railroad Company. From an order of the Appellate Division (81 N. Y. Supp. 1120) denying a motion to amend a judgment of that court on appeal, plaintiff appeals by permission. Affirmed.

Charles L. Feldman, Corp. Counsel (Edward L. Jung, of counsel), for appellant. John G. Milburn, for respondent.

VANN, J. This action was brought to procure a decree that a strip of land fronting on Buffalo river in the city of Buffalo, situated partly on the east and partly on the west side of Main street, is a public street, and to require the defendant to remove certain obstructions therefrom. The action was in equity, and, while but one decree was entered, it consisted of two adjudications resting on separate findings settling different issues, each relating to a distinct piece of real estate, and supported by evidence peculiar thereto. The first adjudication was that the parcel of land on the east side of Main street is a public street of the city of Buffalo, and the defendant was required to remove all obstructions that it had placed thereon. The second adjudication was that the parcel of land on the west side of Main street is not a public street of said city, but is the property of the defendant, and the complaint was dismissed as to that parcel. The defendant appealed from the first and the plaintiff from the second adjudication to the Appellate Division, which affirmed as to

the latter but reversed as to the former, and ordered a new trial both on the law and the facts as to that branch of the controversy only. An application was thereupon made by the plaintiff requesting the Appellate Division to so modify its order as to grant "a new trial of the whole action," and from the order denying said motion this appeal was taken, the following question having been certified to us for decision: "Considering that the river frontage west of Main street involved different issues from the river frontage east of Main street, and that there was a separate adjudication in one and the same judgment by the trial court as to each locality, from each of which a separate appeal was taken, and the Appellate Division having, on the appeal of the plaintiff from the adjudication as to the river front west of Main street, affirmed the judgment of the lower court, and having, on the appeal of the defendant from the adjudication as to the river front east of Main street, reversed the judgment of the lower court upon the law and the facts and granted a new trial, had the court power to make the order or judgment it did make in conformity with its actual determination of the separate appeals?"

The plaintiff claims that the Appellate Division had no power to grant a new trial as to part of the issues only, and that it was its duty to so modify its order as to grant a new trial as to all the issues. The defendant claims that in an action in equity affecting separate parcels of land, where by distinct adjudications in the same decree the plaintiff succeeds as to one parcel and the defendant as to the other, and cross-appeals are taken, the Appellate Division has power to affirm as to the one and reverse as to the other, and to grant a new trial as to such issues only as are affected by the reversal. When a judgment consists of a single adjudication, such as the recovery of a gross sum of money, even if it is founded upon several causes of action, the rule has long prevailed that the appellate branch of the Supreme Court cannot affirm as to a part and reverse with a new trial as to the remainder only, but the reversal must include the entire judgment, and the new trial extend to all the issues. *Altman v. Hofeller*, 152 N. Y. 498, 46 N. E. 961, and cases therein cited; *Van Bokkell v. Ingersoll*, 5 Wend. 315, 340. As judgments in actions at law are usually for a gross sum of money, or for the possession of a single piece of property, the rule has frequently been stated as if it applied only to actions on the law side of the court, with entire accuracy as to the cases to which the rule was applied, but without strict accuracy as to the small number of actions at law in which distinct and separate adjudications are made. In other words, the exception to the general rule has not usually been mentioned in the decision of those cases to which it did not apply. Where a judgment consists of distinct parts,

¶ 1. See Appeal and Error, vol. 3, Cent. Dig. §§ 4555, 4556, 4561.

so separate and independent in form and nature as to be easily severed, and each is in fact a distinct adjudication, the Supreme Court may upon appeal affirm the adjudication not affected by error, and reverse the adjudication which is affected by error, and grant a new trial as to that portion of the issues only. This rule has frequently been stated as if it were confined to actions in equity, to which, indeed, it mainly applies, because there are but few judgments except those rendered by courts of equity which consist of distinct and independent adjudications. We think the rule to be applied depends upon the form and nature of the judgment rendered, rather than upon the forum of the action, and the statute regulating appeals, which simply codifies the practice as it had long prevailed, as well as promptness in the administration of justice, invite this construction. Code Civ. Proc. § 1317. Power to "reverse or affirm, wholly or partly," implies that part may be affirmed and part reversed, because the part not reversed must be affirmed. Thus, if in an action of ejectment for separate parcels of land, each depending upon an independent chain of title, there is a verdict for the plaintiff as to one and for the defendant as to the other, and each party appeals from the separate adjudication against himself, we see no reason why it is not within the power of the court to affirm as to one and reverse as to the other. So, when a special verdict by a jury, or separate findings by the court or referee settle the facts as to independent causes of action and distinct adjudications follow in the same judgment, a retrial of all the issues is not required on account of an error affecting one adjudication only. A claim in the complaint properly sustained, and a counterclaim in the answer improperly defeated, may also be an illustration of the right to sever in judgment on appeal. Why should a cause of action, determined without error, be tried over again because another cause of action, joined with it in the complaint, but severed from it in the judgment, requires a retrial? Why should time and money be expended upon a trial which is unnecessary? If the judgment is entire, even if it might have been otherwise, it cannot be so severed on the decision of an appeal as to grant a new trial of part of the issues only without confusion and danger. If, on the other hand, it is comprised of distinct and independent adjudications, we think the Appellate Division has the power to sustain the adjudication which correctly disposes of the issues to which it is confined, and allow it to stand, while as to the issues which relate wholly to a separate adjudication, infected with error, a new trial is granted. Inconsistent judgments cannot arise from such a course, because the determination of the one controversy does not involve the other. We also think that, while the Appellate Division has this power, it is not obliged to

exercise it, but the subject rests in its sound discretion to sever the issues or not, and to award a new trial as to all or a part only, accordingly. *Van Bokkelen v. Ingersoll*, 5 Wend. 316, 340; *Smith v. Jansen*, 8 Johns. 111, 116; *Bradshaw v. Callaghan*, Id. 558, 566; *Altman v. Hofeller*, supra; *Wilson v. Mechanical OrguINETTE Co.*, 170 N. Y. 542, 552, 63 N. E. 550; *Gray v. Manhattan Railway Co.*, 128 N. Y. 499, 509, 28 N. E. 498; *Story v. N. Y. & H. R. R. Co.*, 6 N. Y. 85, 89, 91; *Frederick v. Lookup*, 4 Burr. 2118, 2022. The subject was so thoroughly considered in the recent case of *Altman v. Hofeller* that further discussion is unnecessary.

The application of the rule to the case in hand requires us to affirm the order appealed from, with costs, and to answer the question certified in the affirmative.

O'BRIEN, BARTLETT, MARTIN, CULLEN, and WERNER, JJ., concur. PARKER, C. J., absent.

Order affirmed.

(176 N. Y. 297)

O'KEEFFE v. CITY OF NEW YORK.

(Court of Appeals of New York. Oct. 30, 1903.)

MUNICIPAL CORPORATIONS—INTEREST ON CLAIMS.

1. Where plaintiff recovered judgment against a city for various sums due for paving certain streets, interest can be awarded only from the time payment was demanded on the separate claims, and not from the maturity thereof.

Appeal from Supreme Court, Appellate Division, First Department.

Action by John G. O'Keeffe, as receiver of the Matt Taylor Paving Company, against the city of New York. From a judgment of the Appellate Division (83 N. Y. Supp. 1112) affirming a judgment for plaintiff and an order reducing the verdict, plaintiff appeals. Affirmed.

William A. Barber and Henry D. Hotchkiss, for appellant. George L. Rives, Corp. Counsel (Theodore Connolly and Chase Melten, of counsel), for respondent.

PER CURIAM. The only question brought up for review is as to the time that interest should be allowed upon the plaintiff's claim. It would be exceedingly difficult for the comptroller of a large city to look up claimants or their heirs or assigns and tender payment as their claims matured and became due. If interest at 6 per cent. is chargeable from the date of the maturity of claims, many persons might refrain from presenting them during the period permitted by the statute of limitations. The allowing of interest from such maturity would afford a safe and profitable investment, which might become

¶ 1. See *Municipal Corporations*, vol. 36, Cent. Dig. §§ 909, 2174.

very attractive to many, and induce them to buy up claims for the purpose of holding them for the interest. This would impose a burden upon the city that it ought not to bear. The better and more just way is to follow the rule laid down in *Taylor v. Mayor*, etc., of N. Y., 67 N. Y. 87, 94, and *Sweeny v. City of New York*, 173 N. Y. 414, 66 N. E. 101, and award interest on claims only after the demand of payment has been made.

The judgment appealed from should be affirmed, with costs.

PARKER, C. J., and GRAY, HAIGHT, MARTIN, VANN, CULLEN, and WERNER, JJ., concur.

Judgment affirmed.

(161 Ind. 358)

BALTIMORE & O. S. W. R. CO. v. HARMON.

(Supreme Court of Indiana. Oct. 29, 1903.)

MASTER AND SERVANT—FAILURE TO PAY—ACTION—PENALTY—ATTORNEY'S FEES—APPEAL.

1. Burns' Rev. St. 1901, § 7056 (Horner's Rev. St. 1897, § 5206a), provides that every corporation shall, in the absence of a written contract, be required to make full settlement with its employes engaged in manual or mechanical labor once in every calendar month. Section 7057 (section 5206b) declares that, if any company shall neglect to make such payment for 30 days after demand, it shall be liable to a payment of \$1 for each succeeding day, together with reasonable attorney's fees. *Held* that, to entitle the employe to recover the penalty and attorney's fees, his complaint must aver the absence of the contract mentioned in section 7056 (section 5206a).

2. Where the judgment included said penalty and fees, and defendant appealed under Acts 1901, p. 566, §§ 6, 8 (Burns' Rev. St. 1901, §§ 1337i, 1337h), under which the constitutionality of a statute can be raised on appeal, but the complaint contained no allegations of the absence of the contract, and no finding of such fact was made, no question of the constitutionality of the statute was raised by the appeal.

Appeal from Circuit Court, Jennings County: Willard New, Judge.

Action by William Harmon against the Baltimore & Ohio Southwestern Railroad Company. Judgment for plaintiff, and defendant appeals. Appeal dismissed.

O. H. Montgomery and McMullen & McMullens, for appellant. Overmeyer & Williams, for appellee.

MONKS, C. J. Appellee sued appellant before a justice of the peace to recover for work and labor performed by him for appellant, and also demanded judgment for penalty and attorney's fees. A trial of the cause resulted in a judgment in favor of appellee for the amount demanded. The cause was appealed by appellant to the court below, and the court, at the request of appellant, made a special finding of the facts, stated conclusions of law thereon, and rendered judgment

in favor of appellee, which included said penalty and attorney's fees.

It is claimed that the penalty and attorney's fees were recovered under sections 7056, 7057, Burns' Rev. St. 1901 (sections 5206a, 5206b, Horner's Rev. St. 1897; Acts 1885, p. 36), and that said judgment was erroneous, because said sections, so far as they provide for the recovery of a penalty and attorney's fees, are in violation of the state and federal Constitutions. The transcript in this cause was filed in this court December 29, 1902, and is therefore governed by sections 6 and 8 of the act of 1901 (Acts 1901, p. 566, being sections 1337i, 1337h, Burns' Rev. St. 1901). This cause was within the jurisdiction of a justice of the peace, and under said sections the only questions that can be presented are those enumerated in section 8 of said act of 1901 (being section 1337h, supra), one of which is the constitutionality of a statute. It has been held by this court that before an employe can recover the penalty and attorney's fees under said sections, if the same are constitutional, he must allege in his complaint and prove facts showing the absence of the contract mentioned in said section 7056 (5206a) supra. *Chicago, etc., R. Co. v. Glover*, 159 Ind. 168, 170, 62 N. E. 11; *Toledo, etc., R. Co. v. Long*, 67 N. E. 259. The complaint in the case contains no such allegations, nor are such facts found in the special finding of the court. It is evident, therefore, that the complaint and special finding do not bring the case within said sections 7056, 7057 (5206a, 5206b), supra, and therefore no question of their constitutionality is presented by this appeal.

As no question mentioned in section 1337h (being section 8 of the act of 1901) is presented by this appeal, the same is dismissed.

(161 Ind. 323)

STEMBEL et al. v. BELL et al.

(Supreme Court of Indiana. Oct. 27, 1903.)

TOWNS—INCORPORATION—IRREGULAR PROCEEDINGS—NOTICE—CURATIVE ACTS—CENSUS—OMISSION OF NAMES—QUESTION OF FACT.

1. In a proceeding for the incorporation of a town the court's determination as to the legal residence of persons from affidavits in support of the census and other evidence, being on a question of fact, will not be reviewed.

2. Under Burns' Rev. St. 1901, § 4315, requiring a census in a proceeding for the incorporation of a town exhibiting the name of every head of a family residing within the territory, and the number of persons belonging to the family, an omission in a census of a family of 3 in an enumeration of a population of 1,131 persons will be disregarded.

3. The use of initials for Christian names in the enumerating list will not vitiate a census taken in proceedings for the incorporation of a town.

4. Under Burns' Rev. St. 1901, § 4317, requiring application for the incorporation of a town to be presented to the board of county commissioners at the time indicated in the notice of the application, citizens remonstrating against the incorporation are not entitled to no-

tice of the time of the presentation of the application.

5. Acts 1903, p. 333, c. 189, legalizing the incorporation of the town of Oxford, ratified all acts done in the incorporation which were matters of detail, and not jurisdictional.

Appeal from Superior Court, Tippecanoe County; H. H. Vinton, Judge.

Proceedings for the incorporation of the town of Oxford, in which Theophilus Stembel and others appeared before the commissioners, and moved to dismiss for want of notice of the time for presentation of the petition, and filed remonstrances against the sufficiency of the census. From an order overruling the motion and an adverse finding on the remonstrance, they appeal. Affirmed.

Lee Dinwiddie and Stuart, Hammond & Simms, for appellants. James McCabe and E. F. McCabe, for appellees.

HADLEY, J. Acting under the statute for the incorporation of towns, beginning with section 4314, Burns' Rev. St. 1901, persons intending to make application for the incorporation of certain territory into the town of Oxford caused to be made and verified by a practical surveyor an accurate survey and map of such territory, in conformity with said section 4314. A verified census of the population resident within the territory was taken under the provisions of section 4315 not more than 30 days before the application for incorporation was made to the board of commissioners, and said survey, map, and census, after completion and verification, were left at a convenient public place within the territory for examination by those interested in the application for a period of not less than 20 days, as provided in section 4316, notice of which fact and the place where the same might be found having been, on December 12, 1900, given by posting printed notices thereof in 10 public places within the territory proposed to be incorporated, under section 4316. On January 5, 1901, in conformity to section 4317, a petition for such incorporation, signed by more than one-third, to wit, 164, of the qualified voters residing within said territory, was presented to the board of commissioners. No notice of the time of presenting said petition was given. Such further proceedings were had that at an election held 251 of the voting inhabitants voted for incorporation and 27 against it, and upon the proper showing the commissioners entered an order declaring said territory incorporated as the town of Oxford. Appellants at the proper time appeared before the commissioners, and moved to dismiss the proceeding for want of notice of the time for presentation of the petition, and also filed remonstrance against the sufficiency of the census. The overruling of the motion to dismiss, and an adverse finding on the remonstrance by the circuit court on appeal, form the basis of the questions before us for

decision. These questions are two, stated by appellants as follows: "The points that we make against the legality of the proceedings are that no notice was given of the application before the county board, as required by section 4317, and that no census was ever taken as required by section 4315, exhibiting the name of every head of a family residing within the territory, and the number of persons belonging to such family." It is admitted that the order for an election and all subsequent proceedings were regular.

1. With respect to the second ground of complaint the record discloses that out of a total population of 1,131 and of a voting population of 323 the name of Charles Wheeler as a head of a family is wholly omitted. Wheeler, at the time of the census, had a wife and child, and resided within the territory. It is further shown that the wife and daughter of Hiram Stephenson were living within the territory, but Stephenson at the time was employed at Indianapolis, where he subsequently moved his family. Also the wife of Henry B. Kiger was living in the territory, but Kiger himself was working in Warren county, and at the time of trial was living in Fountain county; his wife, though undivorced, in the meantime having continued to live in Oxford. The residence of the wife was with the husband, and, whether the legal residence of Stephenson was in Indianapolis and that of Kiger in Warren county at the time the census was taken were questions of fact, determined by the court against appellants, upon the weight of the affidavits in support of the census and other evidence, and we cannot review the conclusion. *Indiana Co. v. Wagner*, 138 Ind. 658, 38 N. E. 49; *Cabinet Makers' Union v. Indianapolis, etc.*, 145 Ind. 671, 44 N. E. 757; *Mead v. Burk*, 156 Ind. 577, 60 N. E. 338. It is not important that we decide, and we do not decide, that the provisions relating to a census are mandatory or directory only; for, whether one or the other, this appeal cannot be sustained for an insufficient census. That Charles Wheeler was a resident head of a family, and was omitted from the enumeration of that class, is not denied. But failing to list the head of one family of 3—husband, wife, and child—in enumerating a population of 1,131 persons is such a trifling omission that the law will not regard it. A census so nearly perfect is in substantial compliance with the statute, even if mandatory. The use of initials for Christian names in the enumerating list did not vitiate the census. *State ex rel. Collings v. Beck*, 81 Ind. 500; *Collins v. Marvill*, 145 Ind. 531, 44 N. E. 487; *Goodrich v. Stangland*, 155 Ind. 279, 58 N. E. 143.

2. Appellants were not entitled to notice of the time of presenting the application to the commissioners, as provided in section 4317, unless they show us a statute conferring such a right. This they have not done, and we are unable to find one. A clause in the

latter part of section 4317 seems to imply the giving of notice of some sort, without suggesting the character, service, or duration, and without enjoining the giving of any. The fact is that such notice is not now required and has never been required by any statutory scheme for the incorporation of towns since the organization of the state. Rev. St. 1831, p. 522, c. 105; Rev. St. 1838, p. 588, c. 108; Rev. St. 1843, p. 388, c. 25; Rev. St. 1876, p. 874; 1 Gav. & H. St. p. 619, c. 184, § 4. There appears no good reason for such a notice. When a petition, signed by more than one-third of the resident voting population of the district, accompanied by the required survey, map, and census, is presented to the board of commissioners, they have no discretion when once they have satisfied themselves that the survey, map, and census have been exposed to examination in the manner and for the period required by the statute; but it becomes an imposed duty to submit the question of incorporation to the voters of the district. The preliminary steps in the proceeding to secure the election imperils no right of the citizen. It is the election that counts. The ballot box is the forum that adjudicates his rights, and of the time and place of election he is entitled to notice, and had it in this case, strictly in accordance with the statute. The question we have here is like the question before the court in *Board of Com'rs, etc., v. Reeves*, 148 Ind. 467, 476, 46 N. E. 995, where it was held that dissenting citizens were not entitled to notice of the time of presentation of a petition for an election to determine whether a free gravel road should be constructed under the act of 1895. Acts 1895, p. 143, c. 63.

3. This appeal must fail for another reason. At the legislative session of 1903 a curative act was passed in these words:

"An act to legalize the incorporation, laws and official acts of its officers, ordinances, resolutions, minutes and proceedings of the several town boards of the town of Oxford, Benton county, Indiana, and declaring an emergency.

"Section 1. Be it enacted by the General Assembly of the state of Indiana, that all steps taken and all acts done in and about the incorporation of the town of Oxford, in Benton county, Indiana, be and the same are hereby legalized and declared to be legal and valid, and all elections of officers of said town and all official acts, ordinances, resolutions, minutes, and proceedings of the several Boards of Trustees of said town are hereby declared to be legal and valid."

"Sec. 2. Whereas an emergency exists for the immediate taking effect of this act, therefore the same shall be in full force and effect from and after its passage." Acts 1903, p. 333, c. 189.

The steps taken and acts done in and about the incorporation of the town of Oxford were not jurisdictional infirmities, but were matters of detail, that might have been

dispensed with by the Legislature by a former statute, and are within the ratification and curative powers of the lawmaking body. *Strosser v. Ft. Wayne, etc.*, 100 Ind. 443, 454; *Johnson v. Board Com'rs, etc.*, 107 Ind. 15, 8 N. E. 1; *Schneck v. Jeffersonville, etc.*, 152 Ind. 204, 52 N. E. 212.

Judgment affirmed.

(161 Ind. 348)

HOOVER v. STATE.

(Supreme Court of Indiana. Oct. 29, 1903.)

HOMICIDE—EVIDENCE—ADMISSIBILITY—SUFFICIENCY—INSANITY—INTOXICATION—TRIAL—CROSS-EXAMINATION—INSTRUCTIONS—ASSUMPTION OF FACTS.

1. Alleged error in refusing to give instructions requested is waived by the failure of counsel for appellant to discuss it.

2. Admission of testimony that witness had seen defendant drink, introduced to rebut specific evidence that defendant's appearance and manner at sundry times was caused by mental derangement, and that he did not drink, was not error.

3. On prosecution for homicide, a question asked on cross-examination of the wife of the accused, who was a witness for the state, as to whether at a certain time, while she and accused were living in a house with a certain man, they had not had some trouble, was properly excluded, as indefinite, and not showing relevancy to the issues.

4. A question to witness whether accused became angry on a certain occasion while he and witness were visiting her folks, and left the house before she did, was likewise objectionable.

5. It was not error to refuse to permit cross-examination of witness where she had been fully questioned on the subject on a previous cross-examination.

6. An instruction that, though there may be some mental derangement, still if accused at such time had mental capacity sufficient to adequately comprehend the nature and consequences of his acts, and a mind sufficient to deliberate and premeditate and to form an intent on and purpose to kill—an unimpaired will power sufficient to control an impulse to commit crime—he is not entitled to an acquittal upon the ground of mental incapacity, was not objectionable, as reflecting on the defense, or suggesting justification for a verdict of guilty.

7. The instruction was not bad as assuming that accused had sufficient mental capacity to commit the crime.

8. Where the killing by defendant was not controverted, and the only defense alleged was insanity, it was not error for instructions to assume the fact of killing.

9. In a prosecution for murder in the first degree, evidence of insanity of accused examined, and held inconclusive, and a verdict of guilty justified.

Appeal from Criminal Court, Marion County; Fremont Alford, Judge.

Edward Hoover was convicted of murder in the first degree, and appeals. Affirmed.

Frank Hendricks, for appellant. C. W. Miller, Atty. Gen., L. G. Rothschild, C. C. Hadley, and W. C. Geake, for the State.

DOWLING, J. Indictment for murder in the first degree. Plea of not guilty, and special answer that the appellant was of un-

sound mind when the offense was committed. Trial by jury, and verdict of guilty, with the death penalty. Motion for a new trial overruled, and judgment on verdict.

It is not denied that the verdict was right upon the evidence. The supposed errors for which a reversal of the judgment is demanded arise upon an adverse ruling upon an objection by appellant's counsel to a single question asked by the prosecuting attorney, the exclusion of the answers of a witness for the state to three questions on cross-examination by appellant, and misdirection of the jury by instructions numbered 13, 18, and 22. The alleged error of the court in refusing to give certain instructions requested by appellant is waived by the failure of counsel for appellant to discuss it.

1. A witness for the state (Asa Hutchins) in the course of his examination was asked the following questions, among others: "I will ask you if you ever drank with him (appellant)? Ans. I have drank with him." "What did you see him drink?" Counsel for appellant objected to the latter question. The objection was overruled, an exception noted, and the witness answered: "Ans. I have seen him drink beer and whisky." It is contended on behalf of appellant that proof of particular acts of this kind was not competent for the purpose of rebutting the evidence of appellant's general reputation for sobriety, or to show that he was under the influence of liquor, and not insane, when the offense was committed. Even if these propositions contain a correct statement of the law, it does not follow that the trial court erred in admitting the testimony objected to. It was not introduced to contradict the proof of the general reputation of the appellant for sobriety, nor to rebut the evidence which tended to show that the appellant was insane, and not under the influence of liquor, when the offense was committed. On the contrary, it was admitted to meet and rebut specific evidence introduced on behalf of the appellant to prove that his flushed face, inflamed eyes, and unnatural manner at sundry times were the result of mental derangement, and that he never drank intoxicating liquors. A brother-in-law of the appellant (William Raines), called for the defense, testified that about four years before the homicide the appellant came to his store armed with a large club, and accused him (Raines) of telling lies about him. The witness ordered him to go away, and behave himself, and added that when appellant cooled down he (Raines) would talk with him. The witness further stated that the appellant returned the next morning in a good humor, and friendly, and that he seemed to be all right. Raines also swore that he never saw the appellant under the influence of liquor, and in response to the question by counsel for appellant whether the appellant was a man that used liquor he answered that he never knew him to drink. Another witness for appellant (G.

B. Lanham) testified that a day or two before the homicide the appellant came to his livery stable, leaned against the wall, looked flushed and unnatural, and appeared to be drunk. George Rader, also a witness for appellant, said he saw him a day or two before Sutton was shot; that his face was flushed, and his manner peculiar. Winnie Raines, a sister of the appellant, testified for him that he was not in the habit of getting drunk, and that she never saw him drink. The wife of the appellant was asked by appellant's counsel on cross-examination if at times the appellant did not refuse to eat his meals, and when the witness answered that he did she was asked if he was under the influence of liquor. She said that he was at one time. Counsel for appellant then inquired of the witness if appellant was drunk at other times, and the witness answered that she did not know that he was. As counsel for appellant went into the subject of the habits of the appellant in respect to the use of liquor, and attempted to prove by several witnesses that the appellant never drank liquor at all, it was competent and proper for the state to show by way of rebuttal that the appellant did use liquor, and that other witnesses had seen him drink it. If it was shown by the proof that the appellant at times was quarrelsome and abusive, that his face was flushed, and his manner peculiar or unnatural, and that he looked and acted like a man who had been drinking, yet that he never drank intoxicating liquor, such evidence might tend to prove that he was of unsound mind. But if it was shown, upon the other hand, that the appellant did drink beer and whisky occasionally, the peculiarities of appearance and conduct described by appellant's witnesses might be accounted for as the results of intoxication. The evidence of Hutchins that he had seen the appellant drink beer and whisky was properly admitted. It was strictly rebutting, and was entirely relevant to the issue tendered by the appellant. A party who introduces evidence of a particular kind cannot complain if his adversary introduces evidence of the same kind to explain or contradict it. And this is true even where the rebutting evidence would otherwise be incompetent. *Perkins v. Hayward*, 124 Ind. 445, 449, 24 N. E. 1033; *Pence v. Waugh*, 135 Ind. 143, 150, 34 N. E. 860; *Ewing v. Bass*, 149 Ind. 1, 10, 48 N. E. 241; *Campbell v. Conner*, 15 Ind. App. 23, 42 N. E. 688, 48 N. E. 453.

2. Upon the cross-examination of the wife of the appellant, a witness for the state, she testified that at one time she and her husband lived in a house at Noblesville, with a man named Stanbrough. Counsel for appellant thereupon asked the following question: "Ques. You had some trouble while you lived there?" An objection to this question by the prosecuting attorney was sustained by the court. One of the grounds upon which the evidence was excluded was that the in-

quiry did not relate to anything said by the witness on her examination in chief. The question was probably objectionable for this reason. *Louisville, etc., R. Co. v. Terrell*, 12 Ind. App. 328, 39 N. E. 295. It was also too indefinite. If the appellant was the person with whom it was supposed she had trouble, he should have been designated. In form, at least, the question had no relevancy to the issues which were being tried.

3. On the further cross-examination of the witness Gertrude Hoover the following questions were asked by counsel for appellant: "Ques. While you lived in the city, I will ask you whether you and he (appellant) visited at your folks? Ans. Yes, sir. Ques. During that time you may state whether or not he did not get mad at something at the house, and left before you did?" The state's objection to the latter question was sustained, and the appellant excepted. The question was not a proper cross-examination of the witness. Its relevancy to any matter testified to by her was not apparent, and no offer to show its connection with the facts stated on the direct examination of the witness was made. Neither was any further question asked by counsel for appellant which would indicate such relevancy. The court did not err in sustaining the objection to it. The same witness was also asked upon cross-examination the following question: "Ques. I will ask you whether you noticed your husband's condition on Saturday, when he was at the Shover farm, when Mr. Shover brought him in the buggy." The objection of the prosecuting attorney to this question was sustained on the ground that the witness had already been examined on the matter referred to. The record discloses that when this witness was upon the stand the first time, as a witness for the state, she was fully cross-examined by counsel for appellant in regard to the condition of her husband when he was at the Shover farm on the day mentioned in the above question. She was minutely interrogated concerning everything he said and did, and the character of the examination fully justified the court in sustaining the objection to the question.

4. The latter part of instruction numbered 13 given by the court is complained of on the ground that it reflected on the defense set up by the appellant; that it assumed that the appellant had sufficient mental capacity to commit the crime with which he was charged; and that it suggested to the jury grounds of justification for a verdict of guilty. That part of the instruction referred to is in these words: "But, although there may be some mental derangement, still if the jury trying said person should find that such person at such time had mental capacity sufficient to adequately comprehend the nature and consequences of his acts, and a mind sufficient to deliberate and premeditate and to form an intent on and purpose to kill—

an unimpaired will power sufficient to control an impulse to commit crime—he is not entitled to an acquittal upon the ground of mental incapacity." There is here no reflection upon the defense of insanity interposed by appellant; no assumption that the appellant had mental capacity to commit the crime for which he was being tried; no improper suggestion of any kind to the jury. The legal proposition stated in the instruction is sanctioned by *Goodwin v. State*, 96 Ind. 550, and many other decisions of this court in cases where the defense of insanity was involved.

5. Objection is made to that part of instruction numbered 18 which reads thus: "You, and you alone, are to determine for yourselves from the whole evidence whether Edward Hoover was of sound mind at the time he killed Frank Sutton." It is said that the court erred in assuming that the appellant killed Sutton. There is nothing in the point. On the trial this fact was not controverted. It was fully proved by the testimony of eyewitnesses and by the express admissions of the appellant, and these statements were not contradicted by any witness, or by any evidence, direct or circumstantial, given or offered. The only ground of defense presented to the court and jury was the alleged insanity of the appellant. *Braxton v. State*, 157 Ind. 213, 214, 61 N. E. 195, is directly in point, and it is there held that: "The first objection urged to instruction sixteen given by the court is that it assumes that 'appellant assaulted the prosecuting witness, Applegate, and therefore invades the province of the jury.' The evidence given in the cause is clear and conclusive and without conflict that appellant first attacked and knocked the prosecuting witness down, that he was rendered unconscious by the blow, and that while he was lying on the ground in that condition appellant kicked him twice on the face and head. When facts are thus established without conflicting or opposing testimony, an instruction assuming the existence or truth thereof will not work a reversal, because the error, if any, is harmless. *Thompson on Charging the Jury*, 74; *Carver v. Carver*, 97 Ind. 497, 518, 519, and cases cited; *Koerner v. State*, 98 Ind. 7, 13; *Smith v. State*, 28 Ind. 321, 327." See, also, *Whitney v. State*, 154 Ind. 573, 580, 57 N. E. 398.

6. The twenty-second instruction was merely admonitory to the jury, impressing upon them the gravity of the duty to be performed, the importance of their decision to the appellant and to the public, and the necessity for the exercise upon their part of intelligence, independence, and moral courage. A careful reading has satisfied us that it in no wise invaded the province of the jury. It assumed the existence of no fact. It was far from stating that the acquittal of the appellant would be a nonenforcement of the law. It did not convey the faintest intima-

tion that the jury should return a verdict of guilty, or that they should assess the penalty of death.

7. As stated elsewhere in this opinion, it is not contended that the verdict is contrary to the evidence, or that any errors intervene except those which we have examined. The fact that the verdict of the jury and the judgment of the trial court impose the extreme penalty of the law has caused us to search the record with the strictest care to assure ourselves that no legal right of the appellant has been violated, and to secure for him the benefit of every provision of the law to which one in his situation is entitled. A brief narrative of the facts proved may not be out of place in this opinion. At the time of the homicide—May 12, 1903—the appellant was a resident of the city of Indianapolis, and was 28 years old. He had no regular occupation, but was sometimes employed as a farm hand and at others as a day laborer. In 1899 he married the daughter of Frank Sutton. They lived unhappily, and appellant frequently quarreled with her and abused her. Frank Sutton was employed by A. F. Shover as foreman and superintendent of a garden farm owned by Shover near Indianapolis. In March, 1903, at the request of Sutton, Shover employed the appellant as a work hand, but discharged him at the end of two weeks. Appellant suspected that his father-in-law, Sutton, procured his dismissal. Appellant then removed to Indianapolis, and in the month of April, during a quarrel with his wife, he threw a butcher knife and a tin can at her inflicting a wound on her wrist. In consequence of this quarrel and assault his wife left him, and returned to her father's house. Hoover charged Sutton with separating him and his wife, and in conversations with the latter frequently cursed her father, and threatened him with violence. He made several ineffectual efforts to induce his wife to return and live with him, to which attempts Sutton made no objection. Two or three days before the murder appellant went to Noblesville and Sheridan, and on Monday, May 11, 1903, he returned to Indianapolis. Shortly after he arrived there he bought a revolver and a box of cartridges at a pawnshop. He then telephoned a message to his father-in-law, Sutton, to come to his (Hoover's) residence in Indianapolis to get certain articles belonging to his wife, saying that if Sutton did not come he would sell them. In pursuance of this request Sutton went to Indianapolis, and proceeded to carry out the goods belonging to his daughter. While he was so engaged, appellant came to the house, and assisted him in removing some bedclothes and other things. Sutton started to descend the stairway with a lot of books in his hands, when the appellant shot him four times with the revolver he had purchased, one bullet entering the wrist, one the arm

near the right elbow, and two the right side below the nipple ranging downward and penetrating the liver and one kidney. After being shot, Sutton got as far as the bottom of the stairway, when he exclaimed, "He killed me," immediately afterwards became unconscious, and expired in about five minutes. The appellant fled, but was captured before he got out of the city. When arrested, a revolver, a box of cartridges, and a razor were found upon his person. He admitted that he had shot his father-in-law, and made several conflicting statements regarding his reason for doing so.

The evidence in support of the plea of insanity was inconclusive and unsatisfactory. It was shown that when a child of seven or eight years he had three or four spasms. Two cousins were insane persons, and had been in the asylum. Appellant was morose, ill-natured, quarrelsome, and jealous. His temper was irritable and violent, and, when angry, he was malicious. At one time, upon very slight provocation, he had whipped his father. At another he had threatened to beat his sister's husband with a large club. A few weeks previous to the shooting of his father-in-law he had violently assaulted and wounded his wife. At times within a few days before the homicide his face was flushed, his eyes were red, and his manner excited or unusual. He drank liquor occasionally, but was seldom intoxicated. For some days before he killed Sutton he seemed to be brooding over his troubles, and talked of suicide. Very few of the witnesses called by the appellant were willing to say that he was of unsound mind. Many for the state testified that, in their opinion, he was sane. All the evidence of peculiarities of appearance, disposition, and conduct of the appellant was easily reconcilable with soundness of mind and an unimpaired will. Every legal element of murder in the first degree—malice, premeditation, preparation, and deliberation in carrying a deadly purpose into execution—was clearly established by the proof. Upon the whole record we cannot but conclude that no error was committed by the trial court, and that the verdict and judgment are fully and firmly sustained by the proof. Judgment affirmed.

(161 Ind. 322)

KELLEY v. CITY OF MARION.

(Supreme Court of Indiana. Oct. 27, 1903.)

INJUNCTION—IMPROVEMENT OF STREET—FEE—SIMPLE OWNERSHIP—PLEADING.

1. An owner attempting to enjoin the construction by a city of a driveway across the sidewalk in front of his lot, and basing his right on his ownership of the fee to the center of the street, must allege such ownership.

Appeal from Superior Court, Grant County; H. J. Paulus, Judge.

¶ 1. See Injunction, vol. 27, Cent. Dig. § 233.

Action by Francis Kelley against the city of Marion. From a judgment for defendant, plaintiff appeals. Affirmed.

W. S. Marshall, for appellant. G. A. Henry, for appellee.

MONKS, O. J. In the improvement of one of its streets appellee was constructing a driveway across a sidewalk to a lot east of and adjoining a lot owned by appellant in such a manner that it curved 18 inches to the west in front of appellant's lot in crossing said sidewalk. Appellant brought this action against appellee to enjoin the construction of any portion of said driveway in front of his lot and for damages. Appellee's demurrer for want of facts was sustained to the complaint, and, appellant refusing to plead further, judgment was rendered against him on demurrer.

It is insisted by appellant that the construction of any part of said driveway in front of his lot was in violation of section 21 of article 1 of the Constitution of this state. This action does not relate to any impairment of the right of ingress or egress, but to such rights only as depend, according to appellant's theory, upon his ownership of the fee to the center of the street in front of his lot. The complaint does not allege that the part of the real estate in front of his lot over which the driveway was being constructed was owned by appellant in fee, and upon appellant's theory it was for that reason not sufficient to withstand a demurrer for want of facts, under the rule declared in *Erwin v. Central, etc., Co.*, 148 Ind. 365, 46 N. E. 667, 47 N. E. 663; *Pittsburgh, etc., R. Co. v. Noftager*, 148 Ind. 101, 47 N. E. 832. As the complaint was insufficient for this reason, we will not, under the well settled rules, pass upon the constitutional question urged by appellant. *State ex rel. v. Reardon et al.* (this term) 68 N. E. 169, and cases cited.

Judgment affirmed.

(162 Ind. 132)

MENDENHALL et al. v. DIAMOND PLATE GLASS CO. et al.¹

(Supreme Court of Indiana. Oct. 28, 1903.)

APPEAL—JUSTICE OF THE PEACE—CONSTRUCTION OF STATUTES.

1. Under Burns' Rev. St. 1901, § 1337f, allowing an appeal to the Supreme Court in a civil cause within the jurisdiction of a justice of the peace when the proper construction of a statute is in question, and the question is duly presented, in a suit within the justice's jurisdiction for failure to furnish natural gas, involving the construction of a contract allowing the use of premises in operating for natural gas and requiring the furnishing of gas for dwellings on the premises, the construction of sections 7089, 7090 (Acts 1881, p. 563, §§ 2, 3), relating to landlord and tenant and the termination of the tenancy, is not involved, so as to permit an appeal to the Supreme Court, though the court construed the contract as creating a tenancy from year to year, which might be terminated without giving notice.

¹ Petition to reinstate denied.

Appeal from Circuit Court, Howard County; J. F. Elliott, Judge.

Action by Hannah E. Mendenhall and others against the Diamond Plate Glass Company and others. From a judgment for plaintiffs, they appeal. Dismissed.

B. C. Moon, for appellants. Bell & Purdum and Blacklidge, Shirley & Wolf, for appellees.

JORDAN, J. Appellants sued appellees to recover damages for the failure of the latter to furnish natural gas for domestic use under a contract executed as party of the first part, by Sarah A. Trott and Hannah E. Mendenhall and their respective husbands, and the Diamond Plate Glass Company, party of the second part. By this contract the right was granted to the said second party to have ingress and egress to and from one acre of ground, described by metes and bounds, situate in Howard county, Ind., for the purpose of drilling and operating a gas well, etc. In consideration of this right the second party agreed to furnish free to the first party, during the continuance of the contract, natural gas necessary for domestic use for two dwelling houses situated on the premises. It was provided in the written instrument in question that: "This contract shall be deemed to commence and run from the date of the signing hereof, and shall be deemed to have terminated whenever natural gas ceases to be used generally for manufacturing purposes, or whenever the second party, their heirs or assigns, shall fail to pay or tender the rental price herein agreed upon within sixty days of the date of its becoming due. And in the event of the termination hereof, for any cause, all rights and liabilities hereunder shall cease and terminate." This contract was made a part of the complaint, and plaintiffs demanded \$200 damages for the breach thereof. There was a trial by the court, and special finding of facts and conclusions of law thereon. Judgment was rendered in favor of appellants for \$10. From this judgment they attempt to prosecute this appeal.

The transcript was filed in this court on January 21, 1903. The point is raised by counsel for appellee that this is not an appealable cause, for the reason that the amount in controversy is within the jurisdiction of a justice of the peace, and therefore the appeal is forbidden by section 1337f, Burns' Rev. St. 1901, and it is insisted that it should be dismissed. Counsel for appellants, however, contend that the case falls within the exception of section 1337h, for the reason that "there is in question, and the question is duly presented, for the proper construction of a statute." The court below found that the contract set out in the complaint was executed on August 11, 1892. The ownership of the land, and certain sales thereof, and the assignment of the contract, and other matters about which no question

arises, are all shown in the special finding. It is further found that the Diamond Plate Glass Company entered upon the land in controversy under the contract, and laid pipes for the transportation of natural gas, etc., until it assigned the contract to the Pittsburg Plate Glass Company. This latter company on April 1, 1895, entered upon the premises under the contract, and continued to operate and maintain the gas pipes thereon until about May 1, 1899, when it removed the pipes from the land, and abandoned the possession thereof, and has neither occupied nor claimed the right to occupy the same since that time. It is found that this company at no time gave either an oral or written notice to appellants of their desire or intention to terminate said contract, except only such notice as might be inferred from the fact that the company tore up and removed the pipe line from the premises, and also removed its gas pipes from all other lands in the neighborhood. The court finds that the damages sustained by the plaintiffs by reason of their gas being cut off from their houses from May 15, 1899, to August 11th, of the same year, amount to \$10. The court, from the facts, construed the contract in suit as creating a tenancy from year to year, and held that the defendant had the right to terminate the tenancy and abandon the premises at the expiration of any year, without giving plaintiffs any notice of its intention to so terminate. Counsel for appellants assert that the only question presented by the record is whether the trial court properly construed sections 7089, 7090, Burns' Rev. St. 1901, the same being sections 2 and 3 of an act relating to landlord and tenant (Acts 1881, p. 563). Section 2 of this statute provides that "all general tenancies in which the premises are occupied by the consent, either expressed or constructive, of the landlord, shall be deemed to be tenancies from year to year." Section 3 declares that "all tenancies from year to year may be terminated by at least three months notice given to the tenant prior to the expiration of the year." Appellants' learned counsel is manifestly in error in his claim that the construction of these sections, or either of them, is necessarily involved in this case. What was presented to the trial court under the pleading and facts was an interpretation or construction of the written contract in suit, which, as appellants contended, had been violated by appellees in removing the gas pipes from the premises in question, and in ceasing to supply them with natural gas for domestic use. It was this written instrument which the court was called upon and which it undertook to construe, and in construing it held that a general tenancy from year to year was created, which might be terminated by appellees, without notice, at the expiration of any year. So far as the jurisdiction of this court is concerned, it can make no difference whether the trial court was right or wrong in the construction

which it placed upon the contract in suit. Before we can entertain the appeal, it must appear that there is necessarily in question the proper construction of a statute, and that such question is duly presented; and then only can the case be appealed to this court for the purpose of presenting such question.

It will be observed that the contract in controversy provides that it shall be deemed to have been terminated whenever natural gas shall cease to be used generally for manufacturing purposes. In the case of *Diamond Plate Glass Company v. Curless*, 22 Ind. App. 346, 52 N. E. 782, that court, in construing a contract virtually the same as the one herein involved, and embracing the same provisions in respect to the limit thereof, said: "It cannot be construed to be a lease for years, * * * nor would it be a tenancy from year to year, even if the relation of landlord and tenant existed between the parties." Section 7090, *supra*, in regard to the notice to be given by a landlord in order to terminate a tenancy from year to year, is in express and plain language made to apply only to the landlord. Whether the court, in its construction of the contract in question, was right or wrong in holding that appellants had the right to terminate it at the expiration of any year without giving notice, certainly does not present a question in regard to the construction of that section. It must be remembered that neither the parties nor the trial court in a cause can, by an erroneous view or a misconception of the point or points involved therein, improperly attempt to bring the construction of a statute into question, and thereby render the case appealable to this court. If the mere claim of parties in an action to the effect that the construction of a statute was in question, and was duly presented, could control, then, under such circumstances, the statute denying an appeal in cases within the jurisdiction of a justice of the peace might be easily evaded. *Deane v. State*, 159 Ind. 313, 64 N. E. 916. It follows that, as the amount in controversy in this case is within the jurisdiction of a justice of the peace, and the construction of a statute is not in question and duly presented, the appeal herein cannot be entertained, and is therefore dismissed for want of jurisdiction.

Appeal dismissed.

(161 Ind. 360)

TERRY v. BYERS et al.

(Supreme Court of Indiana. Oct. 30, 1903.)

CRIMINAL LAW—INDETERMINATE SENTENCE—PRISONS—BOARD OF MANAGERS—TERMINATION OF IMPRISONMENT—DISCRETION—CONTROL OF COURTS.

1. Burns' Rev. St. 1901, § 1906b, provides that certain criminals shall be sentenced to the custody of the board of managers of the Indiana Reformatory for a term not less than the minimum time required by the statutes as a punishment for the offense, and not more than the maximum time, subject to the rules and regula-

tions established by the board of managers, which board is authorized to terminate such imprisonment when the rules and requirements of the reformatory have been performed. *Held*, that a sentence under such section was for the maximum time prescribed by the statute, which term might be shortened by the good behavior of the person convicted, at the discretion of the board of managers.

2. The discretion of the board of managers of a reformatory to terminate an imprisonment, as authorized by the indeterminate sentence law (Burns' Rev. St. 1901, § 1906b), is not subject to the supervision or control of the courts.

Appeal from Circuit Court, Clark County; James K. Marsh, Judge.

Habeas corpus on relation of Charles Terry against Joseph P. Byers and others. From a decree remanding relator to custody, he appeals. Affirmed.

Robbins & Pentecost and J. M. Fuller, for appellant. M. Z. Stannard, Chas. W. Miller, Atty. Gen., C. C. Hadley, W. C. Geake, and L. G. Rothschild, for appellees.

DOWLING, J. The appellant filed his verified petition in the Clark circuit court for a writ of habeas corpus, charging that he was restrained of his liberty at the Indiana Reformatory by Joseph P. Byers, John G. Williams, Dr. J. Terhune, John S. McDonald, Charles E. Shively, Charles B. Bibblin, and James W. Comfort, who constituted the board of control of such reformatory. The cause of his restraint was alleged to be a certified copy of a judgment of conviction of the petitioner of the crime of larceny, rendered January 19, 1901, by the Allen circuit court, in this state, and fixing his punishment at confinement in said reformatory for an indeterminate period of from 1 to 14 years. The illegality of such restraint, it was averred, resulted from the fact that since his commitment to said institution the petitioner had faithfully observed the rules and requirements thereof, and thereby became entitled to his discharge therefrom January 19, 1902; but that the board of managers of the reformatory had falsely charged him with various infractions of the discipline of the institution, and, without giving him a hearing, had adjudged him guilty, degraded him in standing, and prolonged his term of imprisonment; and that he had already served as a convict for more than two years. The petition further stated that he had been subjected to cruel and inhuman punishments in the reformatory upon false accusations of misconduct; that he had been denied credits of time gained by good behavior, to which he was entitled; that the defendants and officers of the reformatory had neglected to furnish him the educational training required by the statute; that he believed he was being kept in the reformatory because he was skillful and obedient, and not for disobedience to any law. A copy of the rules of the reformatory was attached to the petition as an exhibit. A writ was issued, and the appellees produced the said Terry before the court

according to the exigency of the writ. The appellees moved to quash the writ for the reasons following: "(1) Because the application and complaint upon which said writ of habeas corpus was issued do not state facts sufficient to authorize the issuance of a writ of habeas corpus. (2) Because it appears from the averments of the application and complaint on which said writ of habeas corpus was issued that Charles Terry, the person named in said application and writ, was detained in the Indiana Reformatory at the time said writ was applied for and issued under a judgment of the Allen circuit court, of the state of Indiana. (3) Because it appears from the averments of said application and complaint that the above-entitled proceeding is a collateral attack on the judgment of the Allen circuit court, of the state of Indiana, under and by virtue of which Charles Terry was and is committed to the Indiana Reformatory, of which institution these defendants are the board of control." The motion to quash the writ was sustained, and the appellant remanded to the custody of the appellees. This ruling is assigned for error. The points made by counsel for appellant are: (1) That by faithful observance of the rules of the reformatory an inmate thereof becomes entitled to discharge at the expiration of the minimum term of punishment for the crime of which he was adjudged guilty; (2) that the rules adopted by the board of control for the government of the inmates of the institution are unreasonable, and not authorized by law; (3) or that, if authorized, the statute so authorizing them is unconstitutional and void.

1. Section 8 of the act of 1897 (Acts 1897, p. 73, c. 53; Burns' Rev. St. 1901, § 1906b) provides that a defendant over the age of 16 years and less than 30 years, found guilty of any crime except treason or murder in the first or second degree, shall be sentenced to the custody of the board of managers of the Indiana Reformatory, to be confined for a term of not less than the minimum time prescribed by the statutes as a punishment for such offense, and not more than the maximum time so prescribed, subject to the rules and regulations established by such board of managers. The section further declares that the board may terminate such imprisonment when the rules and requirements of such reformatory have been obeyed and performed according to the provisions of the act. As was indicated in *Miller v. State*, 149 Ind. 607, 49 N. E. 894, 40 L. R. A. 109, the punishment to be adjudged in each case of conviction is for the maximum time prescribed by the statute. This term may be shortened by the good behavior of the person in custody, and the board of managers of the reformatory is authorized, in its discretion, to terminate such imprisonment when the rules and requirements of the reformatory have been faithfully observed. This discretion of the board is not subject to the supervision or

control of the courts. It resembles that usually exercised by a board of pardons, or by the Governor of this state under the authority committed to him by the Constitution to grant reprieves, commutations of sentences, and pardons. The law confers upon the person imprisoned in the reformatory no absolute right of discharge under any circumstances until the maximum term of imprisonment prescribed as the punishment for the crime of which such inmate has been adjudged guilty has expired. The word "may," as used in the latter part of section 8, supra, must be understood in its usual acceptation, and as granting to such board permission, liberty, or discretion to terminate such imprisonment, and not as imposing on the board a duty to be performed in all cases, whether such board believes the person imprisoned entitled to his discharge or otherwise. Should this clause of the act be construed as mandatory, all discipline in the institution would inevitably be overthrown, and the board would be exposed to innumerable and constantly recurring legal controversies with the inmates over the question of the right of such inmates to a discharge. A construction of the statute which would probably be attended with such results ought not to be adopted. The rules and regulations established by the board of managers seem to us appropriate, necessary, and humane; and, even if this court had the power to review them, we would not feel inclined to criticize or condemn their requirements. They do not authorize cruel or unusual punishments, and, if such punishments should be inflicted, the civil and criminal laws of the state make ample provision for the protection of the rights of the prisoner and the punishment of the wrongdoer. Rules for the government of the reformatory are authorized by the act of February 26, 1897, and the constitutional validity of that act has been declared and affirmed by this court in numerous cases. *Miller v. State*, 149 Ind. 607, 49 N. E. 894, 40 L. R. A. 109; *Skelton v. State*, 149 Ind. 641, 49 N. E. 901; *Vancleave v. State*, 150 Ind. 273, 49 N. E. 1060; *Wilson v. State*, 150 Ind. 697, 49 N. E. 904; *Davis v. State*, 152 Ind. 34, 51 N. E. 928, 71 Am. St. Rep. 322; *Colip v. State*, 153 Ind. 584, 55 N. E. 739, 74 Am. St. Rep. 322; *Bloom v. State*, 155 Ind. 292, 58 N. E. 81; *Shular v. State* (Ind. Sup.) 66 N. E. 746.

The claim of the petitioner to be discharged from imprisonment on the ground that he has faithfully observed all reasonable rules and requirements of the reformatory prescribed by the board of managers cannot be allowed. The petition for the writ was insufficient, and the Clark circuit court properly sustained the motion to quash for the reason that the facts stated did not entitle the petitioner to his discharge from the reformatory.

There is no error in the record. Judgment affirmed.

(31 Ind. App. 553)

HERBERT v. RUPERTUS et al.

(Appellate Court of Indiana, Division No. 2.

Oct. 30, 1903.)

HUSBAND AND WIFE—DEBTS OF HUSBAND—NECESSARIES—PROPERTY OF WIFE—MORTGAGES.

1. A wife died, leaving real estate subject to a mortgage executed by herself and husband to secure a debt for money borrowed, which was used to pay living expenses, the expenses of the wife's illness, and for other family necessities. The notes given therefor were not signed by the husband, but the mortgage contained the clause that "the mortgagor expressly agrees to pay the sum of money above secured." *Held*, that the debts were those of the husband.

2. The husband's one-third interest in the real estate after the wife's death should be first applied to the payment of the debt, as between a purchaser from him and the wife's administrator.

Appeal from Circuit Court, Vanderburgh County; A. C. Hawkins, Judge.

Action by Adam Rupertus and others against Peter Herbert. From a judgment for plaintiffs, defendant appeals. Affirmed.

W. W. Ireland and Wm. Reister, for appellant. Hornbrook & Wheeler, for appellees.

ROBY, J. The special finding herein shows the following facts: Appellee Wheeler is the administrator with the will annexed of Anna M. Slinghart, who departed this life August 15, 1901, testate, the owner of the west half of lot 6, block 81, in the city of Evansville. Fred L. Slinghart was the husband of the deceased, and they were living together at the time of her death. Within 90 days after the will of said Anna M. was admitted to probate, the husband duly elected to take under the law. On October 25, 1901, he executed a warranty deed to appellant for the one-third part of the said real estate. Thereafter said administrator filed his petition to sell said real estate, making appellant a party, and it was agreed by all the parties to the proceeding that the sale be made, and that the right of each one to assert his claim to any portion of the proceeds be postponed until such sale was made and the proceeds thereof in the hands of the administrator. Thereafter the property was sold for \$810, sale approved, and cause continued in order to adjudicate the rights of the respective parties to the fund. There was a mortgage lien against said real estate of \$371.25, such mortgage having been executed by Anna M. and Fred Slinghart, who were husband and wife at the time. Two-thirds of the proceeds of the sale is sufficient to pay said mortgage. There are no claims filed, contracted before the marriage of said Anna M., who had no other property. The real estate was occupied by her and her husband as a home. The mortgage was executed to secure a loan of money which was used to pay living expenses and the expenses of decedent's last illness, she being then sick, and other incidental expenses, all of which were for fam-

ily necessities; the husband receiving the benefit of said loan by the payment of such debts and expenses. The notes given therefor were not signed by the husband. The mortgage contained a clause as follows: "And the mortgagor expressly agrees to pay the sum of money above secured," etc. Such mortgage was duly recorded eight months prior to the time that the deed was executed to appellant, who bought with full knowledge thereof. Claims against said estate are pending to the amount of \$275, and Fred Slinghart is an insolvent nonresident. Upon these facts the court stated as conclusions of law that, as between the parties, the mortgage debt was the debt of the husband; that the real estate appellant acquired from the husband was liable for its proportion of the mortgage debt. From a judgment in accordance with such conclusions the appeal is taken. Upon the death of the wife testate or intestate one-third of her real estate descended to the husband, subject to its proportion of her debts contracted before marriage. Section 2642, Burns' Rev. St. 1901. The estate thus acquired by him is not subject to the payment of the general debts of the deceased wife. *Kemph v. Belknap*, 15 Ind. App. 77, 43 N. E. 891; *Roach v. White*, 94 Ind. 510. The right conferred by the statute is absolute, except when it has been waived by agreement, or when the husband has estopped himself from claiming it. *Roach v. White*, supra; *O'Harra v. Stone*, 48 Ind. 417. The husband who, by joining with the wife, enables her to mortgage her estate, as she could not otherwise do, said mortgage containing an agreement to pay the debt secured, is estopped from denying the jurisdiction of the court to sell all the land thus mortgaged. *Pearson v. Kepner* (Ind. App.) 63 N. E. 38. The husband owes to the wife the duty of supporting and maintaining her. *Arnold v. Brandt*, 16 Ind. App. 169, 44 N. E. 936; *Nelson v. Spaulding*, 11 Ind. App. 453, 39 N. E. 168. Distribution of the fund, under the issue, depends upon the equities of the various claimants. Appellant is entitled to the husband's share. The appellee administrator is the representative of the wife. The relation of these two to the debt secured by the mortgage is therefore open to inquiry. *Johnson v. Jouchert*, 124 Ind. 105, 24 N. E. 580, 8 L. R. A. 795. Suretyship is a fact collateral to the main contract. The rights and liabilities sustained by the husband and wife to the debt do not depend upon the form in which it was evidenced. When two persons are jointly liable for the same debt, and as between themselves the debt is the debt of one of them, that one is regarded as principal and the other as surety. The inquiry is, who received the consideration, and who, according to the arrangements actually made, caught to pay the debt? *Lackey v. Boruff*, 152 Ind. 371, 376, 53 N. E. 412; *Sefton v. Hargett*, 113 Ind. 592, 15 N. E. 513; *Porter v. Waltz*, 108 Ind. 40, 8 N. E. 705. The spe-

cial finding shows that the husband received the benefit of the loan to secure which the mortgage was executed, and he expressly agreed to pay the "sum of money so secured." As between him and the wife, compelled to mortgage her home to pay debts and expenses for which it was the duty of the husband to provide, it cannot be doubted that the equity was with her, and consequently is with her administrator. That portion of the fund derived from the sale of the real estate descending to the husband should have been first applied to the satisfaction of the mortgage debt. *Pomeroy's Eq. Juris.* § 1417. The order of distribution was more favorable to appellant than the facts warrant.

Judgment is affirmed.

COUCHMAN v. PRATHER et al.¹

(Appellate Court of Indiana, Division No. 1.
Oct. 29, 1903.)

DEATH—ACTIONS—INTOXICATING LIQUORS—PLEADING—DEMURRER.

1. Burns' Rev. St. 1901, § 285, provides that when death is caused by wrongful act the personal representatives may sue therefor if the deceased might have maintained an action for the same act or omission had he lived. Section 7288 declares that a person selling intoxicating liquors in violation of the act should be liable "to any person who shall sustain any injury or damage to his person or property or means of support on account of the use of such liquors so sold." *Held*, that an administrator could not maintain an action for the death of his intestate, caused by intoxication from liquors sold contrary to the statute.

2. The question as to the right of action was properly presented by demurrer to the complaint for want of facts.

Appeal from Circuit Court, Clinton County; J. V. Kent, Judge.

Action by Harry S. Couchman, administrator, against Cyrus A. Prather and others. Judgment for defendants, and plaintiff appeals. Affirmed.

S. R. Artman and J. C. Farber, for appellant. S. M. Ralston, Ayres, Jones & Hollett, Dupree & Slack, and Morrison & Morrison, for appellees.

HENLEY, J. This action is prosecuted by appellant, as administrator of the estate of John S. Couchman, deceased, and under section 285, Burns' Rev. St. 1901. Decedent, by the averments of the complaint, became intoxicated from drinking whisky sold to him by appellees, and while in such condition fell out of his buggy on a public highway, and broke his neck, from which injury his death resulted. The trial court sustained appellees' demurrer to the complaint, and out of this ruling grows the only questions presented by this appeal. The complaint alleges that appellant is the administrator of the estate of John S. Couchman, deceased, who died intestate in Boone county, Ind., on the 23d day of May, 1901; that he left surviving him his widow and certain other heirs,

¹ Superseded by opinion, 70 N. E. 240.

uaming them; that he was at the date of his death 58 years old, by occupation a farmer, and resided about three miles from the town of Thorntown; that he was capable of earning and did earn \$1,200 per year; that appellees were engaged in the business of selling at retail, in the said town of Thorntown, and without license so to do, intoxicating liquors by the drink, and permitting such liquors to be drank upon the premises; that such unlawful sales were carried on daily from the 19th of November, 1900, until some time in June, 1901; that on the 23d day of May, 1901, and for a long time prior thereto, appellees knew and were acquainted with the decedent, and were accustomed to selling him intoxicating liquors when he was in an intoxicated condition, and knew that he was in the habit of becoming intoxicated; that appellees had prior to May 23, 1901, at different times, while they were conducting said business, been requested by members of decedent's family not to sell intoxicating liquors to him; that appellees knew that decedent possessed an uncontrollable appetite for intoxicating liquors, and was never where the same could be procured without becoming intoxicated; that on said 23d day of May, appellees did, in their said place of business, sell to decedent intoxicating liquor in less quantities than a quart, which liquor he then and there drank, from the effects of which "the said John S. Couchman became so extremely intoxicated that his mind was beclouded, and that he was in a senseless and semiconscious condition by reason of the drinking of said intoxicating liquors so sold and delivered to him by the defendants; that while the said Couchman was in the said condition, the said defendants, then and there knowing at the time that he was in such intoxicated condition, sold, bargained, and delivered to him additional intoxicating liquors in less quantities than a quart at a time, which the said John S. Couchman then and there drank in defendants' place of business, and by reason thereof and as a result therefrom became so extremely drunk, intoxicated, and unconscious of his condition and surroundings that he was wholly incapacitated for traveling, or driving or managing a horse of any disposition whatever, all of which facts the defendants then and there well knew; that, notwithstanding all of said facts, the said defendants, well knowing that the said Couchman was liable to receive fatal injuries in attempting to drive or manage a horse, and knowing that he had driven a horse to the said town of Thorntown, and knowing that he was liable to attempt to drive said horse to his home while in said condition, allowed and permitted him, the said Couchman, while in such intoxicated, helpless, and incapacitated condition, to get into his buggy, and to attempt to drive the horse hitched thereto from the said town of Thorntown to the home of said Couchman, 3½ miles distant in the country; that by reason

of his extremely drunken, intoxicated, and senseless and incapacitated condition, so produced and brought about solely by the said defendants by the unlawful sale of intoxicating liquors to him as aforesaid, the said Couchman attempted to drive his horse over the public highway to his home when he did not possess the ability to do so safely, and that while so driving in such senseless and unconscious condition as aforesaid the said John S. Couchman fell from his buggy upon his head and shoulders, then and there breaking his neck, from the effects of which he then and there died—all of which was caused by and resulted from the wrongful and unlawful acts of the defendants in selling, bartering, and furnishing to the said John S. Couchman intoxicating liquors in less quantities than a quart at a time, in violation of the law, and without a license, and in furnishing the same to the said John S. Couchman while he was in a state of intoxication, and producing thereby the aforesaid senseless and unconscious condition of him, the said John S. Couchman; that the said John S. Couchman, when not intoxicated, was able to and did drive a horse with rare skill and ability; that by reason of the facts hereinbefore alleged the estate of the said John S. Couchman, his heirs at law and the next of kin, have been damaged in the sum of \$10,000. Appellees Prather, Gillespie, and Sipes each separately demurred to the complaint. Appellees Hays and Ready filed a joint demurrer to the complaint. The demurrers all present the same question, and assign two reasons why the complaint should be held insufficient: First, because the plaintiff has not the legal capacity to sue; and, second, that the complaint does not state facts sufficient to constitute a cause of action.

It becomes necessary to first determine whether the personal representative of the decedent has a right of action under the statute of this state upon the facts stated in the complaint. By section 285, Burns' Rev. St. 1901, it is provided that: "When the death of one is caused by the wrongful act or omission of another the personal representatives of the former may maintain an action therefor against the latter if the former might have maintained an action, had he or she (as the case may be) lived, against the latter for an injury for the same act or omission." Appellant's right to maintain an action under the statute depends upon whether or not his decedent could have maintained, had he survived, an action in his own name and right for damages occasioned by the injury complained of. It is provided by section 7288, Burns' Rev. St. 1901, that "every person who shall sell, barter or give away any intoxicating liquors in violation of any of the provisions of this act, shall be personally liable, and also liable on his bond, filed in the auditor's office, as required by section four of this act (5315) to any person who shall sustain any injury or damage to his person or

property or means of support on account of the use of such intoxicating liquors so sold as aforesaid, to be enforced by appropriate action in any court of competent jurisdiction." The question then arises, can the person who is injured by his own voluntary intoxication maintain an action for damages therefor under section 7288, supra? The statute gives to any person who is injured either in person or property or means of support the right to recover damages. This not only includes the widow and children and father and mother, who may be dependent for support upon the user of the intoxicating liquors so unlawfully sold, but it also includes any person who might be injured in person or property by the reckless acts of the intoxicated person. *Wall v. State ex rel. Kendall*, 10 Ind. App. 530, 38 N. E. 190; *Baeher v. State ex rel. Chandler*, 19 Ind. App. 100, 49 N. E. 42; *Beem v. Chestnut*, 120 Ind. 390, 22 N. E. 303. The class of persons to whom the right of action is given is named in the statute, and such right of action must be limited to the beneficiaries so named. *Boyd, Adm'r, v. Brazil, etc., Coal Co.*, 25 Ind. App. 157, 57 N. E. 732; *The Maule Coal Co. v. Partenheimer, Adm'r*, 155 Ind. 100, 55 N. E. 751, 57 N. E. 710. We do not believe it was the intention of the Legislature to create a liability in favor of an individual who participates in a wrong committed, and such statutes, as is said by Black in his work on *Intoxicating Liquors* at section 291, "were intended to apply to innocent third persons, who might be injured by the fact or the consequences of the intoxication." Any other interpretation of the statute would place a premium on drunkenness and debauchery, which the Legislature did not intend. *Welty v. Railway Co.*, 105 Ind. 55, 4 N. E. 410. The statute (section 7288, supra) gives to every innocent injured person a complete remedy. In *Dunlap v. Wagner*, 85 Ind. 529, 44 Am. Rep. 42, the court said: "It is plain that a right of action exists against one who makes another drunk for the recovery for such injuries as are done by the intoxicated person 'on account,' as the statutory phrase runs, 'of the use of such intoxicating liquors.'" In the last-cited case the owner of a horse killed through the reckless driving of an intoxicated person was permitted to recover from the seller of the liquor. See, also, *Mulcahey v. Givens*, 115 Ind. 286, 17 N. E. 598. In *State ex rel., etc., v. Cooper*, 114 Ind. 12, 16 N. E. 518, a complaint of the wife was held sufficient alleging that the sales of intoxicating liquors to her husband had caused him to neglect his labor, squander his estate, and fail to provide for her. It would certainly be against all reason and justice to hold that under this section of the statute the husband could himself sue for the recovery of his squandered property and damages for his self-inflicted injuries. The damages recoverable are intended to be placed beyond the reach of the guilty parties, and inure to the

innocent injured persons who have suffered from the wrongs done. In Michigan a statute very similar to ours, and certainly as broad in its terms, reads as follows: "Every wife, child, parent, guardian, or other person who shall be injured in person, or property, or means of support, by any intoxicated person, or by means of the intoxication of any person, shall have a right of action in his or her own name, against any person or persons who shall, by selling or giving away any intoxicating liquors, have caused or contributed to the intoxication of such person or persons," etc. *Laws 1883*, p. 215, No. 191. The Supreme Court of Michigan held that under this statute only innocent injured parties could recover, and denied the right of recovery to a wife who had requested the sale of liquor to her husband. *Rosecrants v. Shoemaker*, 26 N. W. 794. And in *Brooks v. Cook*, 44 Mich. 617, 7 N. W. 216, 38 Am. Rep. 282, it was held that the intoxicated person himself had no right of action against the seller of the liquor for money stolen from him when drunk. See, also, *Engleken v. Hilger*, 43 Iowa, 503. It is no doubt true that a cause of action might arise in favor of the representative of the deceased if the case was made to rest on the ground that the intoxicating liquor was administered by force, or by a trick, or by deception amounting to a fraud on the party's will equivalent to force in overpowering it. *King v. Henkle*, 80 Ala. 505, 60 Am. Rep. 119. The action under such a state of facts would be entirely independent of section 7288, supra, and would correspond to the common-law action of trespass *vi et armis*, and could be prosecuted by the representative of the deceased under section 285, supra. We conclude, therefore, that the facts stated in appellant's complaint do not constitute a cause of action in his favor, and that the question is properly presented by the demurrer for want of facts.

The judgment is affirmed.

ROBINSON, C. J., concurs in conclusion reached.

(31 Ind. App. 548)

CABELL et al. v. McKINNEY et al.

(Appellate Court of Indiana, Division No. 2.
Oct. 29, 1903.)

REPLEVIN—JUDGMENT—MORTGAGES—EXECUTION—SIGNING—ALTERATION—AGENTS—RATIFICATION—TRIAL—CROSS-EXAMINATION.

1. Where plaintiffs in replevin took possession of the property under the writ, and there was a verdict for defendant for return of the property, plaintiffs could not complain because the verdict did not also assess the value of the property and damages for its detention, as required by Rev. St. 1881, § 549.

2. An instruction that, if defendant signed and delivered a mortgage, that constituted its execution, and, if afterwards certain material words were inserted therein by plaintiffs, then, before such mortgage would be binding on de-

¶ 1. See *Replevin*, vol. 42, Cent. Dig. § 447.

fendant, it would have to be redelivered by her, was not misleading because omitting reference to defendant's power to ratify the insertion, in view of other instructions clearly stating that defendant might ratify the act, and that, if the words were inserted with her consent, they were binding on her.

3. An instruction that if A. was attorney for plaintiffs, and acting for them in the execution of a mortgage to them, his knowledge of alterations therein was knowledge to the plaintiffs, if erroneous, as charging the plaintiffs with after-acquired knowledge of their agent, was harmless, in view of a finding that the alteration was made by A. while acting as plaintiffs' attorney.

4. Where defendant testified that she had been forced to sign the mortgage in suit, but in fact admitted its execution as it was before certain alterations, to which alone she alleged force, it was not error to refuse to permit her to be contradicted as to her statement that she did not sign, as the matter was immaterial.

5. Where defendant alleged that the mortgage sued on had been altered after its execution by her, by inserting after the description of the goods the words "in her storehouse," it was error to refuse to permit her to be cross-examined as to whether it was not her intention to mortgage the goods in her storehouse.

Appeal from Circuit Court, Monroe County; Newton Crooke, Special Judge.

Action by John M. Cabell and others against Susan F. McKinney and others. Judgment for defendants, and plaintiffs appeal. Reversed.

Alexander & Harris and Duncan & Batman, for appellants. J. H. Underwood and East & East, for appellees.

COMSTOCK, P. J. Action of replevin by appellants against appellees to recover the possession of a stock of goods, based on a chattel mortgage alleged to have been given appellants by appellee Susan F. McKinney. The defendants failing to give bond under the statute, appellants gave bond, and took possession of the goods under the writ. The answers pleaded were (1) non est factum by Susan F. McKinney, mortgagor; (2) general denial by all defendants; (3) material alteration by inserting in the mortgage after its execution, by the plaintiffs, their agent or attorney, the words "in my storeroom in Bedford"; (4) by defendants other than the mortgagor, that the mortgagor was indebted to them, and the mortgage was given to plaintiffs in pursuance of a fraudulent conspiracy between them and the mortgagor to defeat the codefendants in the collection of their debt. To this the plaintiffs replied (1) a general denial; and (2) the payment of their indebtedness. The jury returned the following verdict: "We, the jury, find for the defendants; that the property seized under the writ of replevin herein, and delivered to the plaintiffs, be returned to the defendants." On this verdict the court rendered judgment that the plaintiffs take nothing by this action; that the defendants are the owners and entitled to the immediate possession of the property described and taken under the writ of replevin, and for costs. But three questions arise on this appeal, viz., the sufficiency of

the verdict, the correctness of certain instructions, and the rulings on the admission of evidence.

It is claimed that the verdict is insufficient because it fails to find the value of the goods taken. Section 549, Rev. St. 1881, provides, "In actions for the recovery of specific personal property the jury must assess the value of the property as also the damages for the taking or detention whenever by their verdict there will be a judgment for the recovery or return of the property." In Baldwin et al. v. Burrows, 95 Ind. 81, which was an action of replevin, the verdict was general for the defendant. The plaintiff's motion for a venire de novo because of the general verdict was overruled. In passing upon the question the Supreme Court say: "A verdict for the defendant was equivalent to a verdict that the plaintiffs were not the owners and entitled to the possession of the property. If the property had been taken by the plaintiffs under the writ, this would have entitled the defendant to a verdict for the return of the property and damages for the taking of it. If it had not been so taken, no return could have been awarded or damages assessed for taking. But if the defendant was entitled to a sufficient verdict to warrant a judgment for the return of the property and for damages for taking it, but failed to obtain such a verdict, how can that harm the plaintiffs? The plaintiffs cannot complain of an error committed in their favor, and that cannot possibly do them any injury. There was no error against the plaintiffs in overruling the motion for a venire de novo." The foregoing case is decisive of the sufficiency of the verdict.

Instruction 5 given to the jury at the request of appellees was excepted to. In effect, it said that the execution of the mortgage in question consisted in its being signed and delivered; that if the defendant Susan F. McKinney signed the mortgage in suit before the words "in my storehouse in Bedford" were added to it, and delivered it in that condition to the attorney of the plaintiffs, then that would be the execution of the mortgage as it then existed, "but that, if afterwards the attorney of plaintiffs altered it by inserting the words 'in my storehouse in Bedford,' then, before such instrument could be of any binding effect upon her, the mortgage would have to be delivered by her to the plaintiffs or their attorney with the words added, for until the actual delivery of the instrument in its present form it would be a nullity." The objection made to the instruction is that it destroys any act or power of ratification. Standing alone, the instruction might be misleading. In other instructions the court charged that, if any changes were made in the mortgage with the consent of the mortgagor, it was the instrument of such person; that if the words "in my storehouse in Bedford" were written in said mortgage by John D. Alexander after it

had been signed by Mrs. McKinney, and she gave her consent for him to insert such words, then it would be her act, and she could not defend against said mortgage on that account. They were further instructed that, if the words were inserted with her knowledge and consent after its execution, it would be valid, but if they were inserted after the execution, without her knowledge, by plaintiffs or their agent or attorney, it would be invalidated, unless the mortgagor subsequently ratified the same. Other instructions given made it clear that the mortgagor had the power of ratification. We cannot conclude that the instruction complained of misled the jury.

Instruction 9 given at the request of the defendants is as follows: "If in this case you should find that John D. Alexander was the attorney of the plaintiffs, and acting for them in the preparation of the mortgage sued on, then I instruct you that the knowledge of John D. Alexander as to any alteration in the mortgage would, in law, be knowledge to the plaintiffs themselves." It is urged that by this charge all of said Alexander's knowledge obtained after the execution of the mortgage was attributed to plaintiffs; that they could be held only to possess the knowledge he acquired in the performance of the duties for which he was employed; that subsequently acquired knowledge would not relate back to the transaction. If we concede, for the sake of the argument, the claim of appellants, the error would not warrant the reversal of the judgment, in view of the fact that the jury, in answer to the interrogatories, found that the words "in my storeroom in Bedford" were not in the mortgage when Susan F. McKinney signed and acknowledged it, that they were afterwards inserted by said Alexander without her consent, and that at the time he wrote them he was the attorney of the plaintiffs.

Appellee Susan F. McKinney testified that she had been forced to sign the mortgage she delivered, by one Croxall, plaintiffs' agent. This statement appellants sought to contradict by witness Croxall. To the refusal of the court to permit this testimony, appellant excepted. Appellee admitted having executed the mortgage as it was before its alteration. It was only with reference to the instrument as delivered to Croxall that she made the statement that she was forced to do what she did. It was upon a matter not material, and the court committed no error. Upon cross-examination of the same party, she was asked if it was not her intention at the time she executed the mortgage to mortgage the goods in her storehouse. The court sustained an objection to the question. Her intention was material. If she intended to mortgage the goods in her storeroom to appellants, and the mortgage omitted the words locating them, the presumption would be that the omission was by mistake. Mr. Alexander testified that he had drawn up the

mortgage; that, after leaving the mortgage at the office of the recorder of records, he discovered the omission; that he explained the omission to appellee McKinney, and procured her consent to their insertion; and that pursuant thereto he wrote them in the instrument. Appellee denied giving her consent thereto. The jury found specially that the alteration complained of was made without her knowledge or consent. In the former appeal of this case (McKinney et al. v. Cabell et al., 24 Ind. App. 676, 57 N. E. 598), the alteration alleged was held to be a material one. An answer to the question might have affected the weight the jury gave her denial of her consent to the alteration made. The question was material. It also went to her credibility.

The judgment is reversed, with instructions to sustain appellants' motion for a new trial.

(32 Ind. App. 237)

PITZELE v. REUPING.*

(Appellate Court of Indiana, Division No. 1.
Oct. 29, 1903.)

PLEADING—TIME OF FILING—AMENDED COMPLAINT—PRESUMPTIONS.

1. Where nothing appears to the contrary, it will be presumed on appeal that the amended complaint was not filed without leave.

2. Where, in an action for rent, defendant made no objection to the filing of an amended complaint, but appeared and answered, and the same issue was tendered that would have been tendered by a complaint and supplemental complaint, and the case was tried without objection on the issue thus presented, the action must be treated as having been brought at the time the amended complaint was filed, and it could not be objected that the judgment was had for rents which had not accrued at the time suit was originally brought.

Appeal from Superior Court, Lake County; H. B. Tuthill, Judge.

Action by Louis Reuping against Charles Pitzele. Judgment for plaintiff, and defendant appeals. Affirmed.

F. N. Gavit, for appellant.

ROBINSON, C. J. On October 28, 1899, appellee filed a complaint seeking to recover rent for certain property for the months of August, September, and October, 1899. A supplemental complaint was filed for subsequently accrued rental. Upon issues formed a trial was had. On November 8, 1900, a new trial was granted, and afterwards on January 16, 1901, an "amended complaint" was filed, asking a recovery for months up to and including March, 1900. Appellant answered in four paragraphs, the first of which was the general denial. The case was submitted to a jury, and a verdict returned in appellee's favor.

The judgment includes rent accruing subsequent to the date of the filing of the original complaint, October 28, 1899, and the only

* 1. See Appeal and Error, vol. 3, Cent. Dig. § 2710.
* Rehearing denied.

question argued is that the amount recovered is, to that extent, excessive. Nothing appearing to the contrary, it will be presumed that leave was given to file the amended complaint. *Bozarth v. McGillicuddy*, 19 Ind. App. 26, 47 N. E. 397, 48 N. E. 1042. The so-called amended complaint is complete in itself, and states a cause of action. No question is made as to the sufficiency of the original complaint. The amended complaint and answers thereto present issues authorizing a recovery in an amount as large as that recovered. Appellant made no objection to the filing of the amended complaint, but appeared and answered, and the same issue was tendered that would have been tendered by a complaint and supplemental complaint. The case was tried, without objection, upon the issue thus presented. It is quite true that a judgment cannot be had for money which had not accrued at the time the suit was brought, but, so far as this record discloses, it must be held that the parties, in making the issues to be tried and in the trial, treated the action as having been brought at the time the amended complaint was filed.

Judgment affirmed.

(81 Ind. App. 517)

BROWN v. REEVES & CO.

(Appellate Court of Indiana, Division No. 2.
Oct. 27, 1903.)

TAXATION—SALE—ADVERTISEMENT—DESCRIPTION—LIEN—TAX DEED—EVIDENCE.

1. Under Burns' Rev. St. 1901, § 8631, declaring that a sale of land for taxes shall not be valid if the land is not described with reasonable certainty, a description of land in an advertisement for sale as "Lot 1 Col. W. Co.," intended for land the correct description of which was "Lot 1 in the Columbus Wheel Co. & M. T. Reeves' Addition to the City of Columbus," was insufficient.

2. A sale of land for taxes is invalid if there is a failure to comply with Burns' Rev. St. 1901, § 8601, requiring a lot to be described in the advertisement for sale as it was described on the tax duplicate.

3. Where a sale of land for taxes was invalid because of the uncertainty of description in the advertisement for sale, the court properly ascertained the amount which the purchaser had paid, together with penalties and interest, and declared the same a first lien on the property, under Burns' Rev. St. 1901, § 8632, declaring that, where a tax sale is invalid for any reason except that the land was not liable to taxation, or that the taxes had been paid, the lien of the state shall be transferred to the purchaser.

4. The effect of a tax deed as evidence under Burns' Rev. St. 1901, § 8624, declaring such deed prima facie evidence of title, is overthrown by evidence that the land was advertised under an uncertain description.

Appeal from Circuit Court, Bartholomew County; F. T. Hord, Judge.

Action by James S. Brown against Reeves & Co. From the judgment, plaintiff appeals. Affirmed.

Everroad & Cooper, for appellant. Marshall Hacker and Ralph Spaugh, for appellees.

WILEY, J. Action by appellant against appellees to quiet title to real estate. Trial by court. Finding and judgment against appellant. Appellant moved for a new trial for the reasons: First, that the decision of the court was not sustained by sufficient evidence; and, second, that the decision of the court was contrary to law—and this motion was overruled. Such ruling is the only error assigned. Appellant claims title by virtue of a tax sale, and deed thereunder.

There is one reason at least why the judgment cannot be disturbed under the evidence. The real estate was not properly described in the notice of sale. The correct description of the property in controversy is: "Lot one (1) in the Columbus Wheel Company and M. T. Reeves' Addition to the City of Columbus." It was advertised for sale for delinquent taxes as "Lot 1 Col. W. Co." The county auditor entered the sale on the register of sales in his office as follows: "1 Col. W. Co. & M. T. R. the whole." On the tax duplicate for 1885 the real estate was described as follows: "Description of land and name of Town, Col. W. Co. In Lots 1." The lot was returned as delinquent for the unpaid taxes of 1885, and was sold at tax sale February 14, 1885, for such delinquency and the taxes of 1886. Appellant, as purchaser, received a certificate of sale, but did not surrender it to the auditor or demand a deed until May 2, 1901. The description "Lot 1 Col. W. Co." is too indefinite and uncertain, and in fact is meaningless. It does not give sufficient data from which the real estate could be located. From the description a competent surveyor could not identify or find the lot. There is no means known to the science of surveying by which its correct description could be ascertained. It follows that the maxim, "Certum est quod certum reddi potest," is not applicable here, for the reason that there is no means of making certain that which is so uncertain and indefinite. The rule only applies where there is some means, either by computation, measurement, or, in such cases as this, the science of surveying, that what is uncertain may be made certain. Thus, in *Becker v. Baltimore, etc., R. Co.*, 17 Ind. App. 324, 46 N. E. 685, it was held in a street improvement case that "tract of land, north side, between Front street and O. & M. R. R.," did not describe any tract of land, and that it did not furnish any data from which its true description might be ascertained. And in *Lake Erie, etc., R. R. Co. v. Walters*, 9 Ind. App. 684, 37 N. E. 295, it was held that the description "L. E. & W. R. R. Co. Ft. front 134, Right of Way," was insufficient to fix a lien for a street assessment. To the same effect is the holding in *Cleveland, etc., R. R. Co. v. O'Brien*, 24 Ind. App. 547, 57 N. E. 47. In the case of *State ex rel. v. Casteel*, 110 Ind. 174, 11 N. E. 219, it was held that an insufficient description of the land in a tax sale will defeat the title, but will not defeat the lien. It was there said:

"The lien will hold if the purchaser can show what property was intended to be taxed, but the title will not pass if the description is defective." The same rule has been adhered to in subsequent decisions. *Morrison v. Jacoby*, 114 Ind. 84, 14 N. E. 546, 15 N. E. 806; *Millikan v. City of Lafayette*, 118 Ind. 323, 20 N. E. 847; *Ball v. Barnes*, 123 Ind. 394, 24 N. E. 142; *City of Logansport v. Case*, 124 Ind. 254, 24 N. E. 88. The sale of the real estate in controversy, upon the notice given, was invalid, and hence did not convey title under the express provision of the statute. Section 8631, Burns' Rev. St. 1901, provides that "no sale or conveyance of land for taxes shall be valid * * * if the description is so imperfect as to fail to describe the land or lot with reasonable certainty," etc. The rule, as indicated by the authorities above cited and the statute just quoted, obtains in other jurisdictions, as illustrated by the following cases: *Burns' Rev. St. 1901, § 8631*; *Wallace v. Brown*, 22 Ark. 118, 76 Am. Dec. 421; *Bidwell v. Webb*, 10 Minn. 59 (Gil. 41), 83 Am. Dec. 56; *Jackson v. Sloman*, 117 Mich. 12, 75 N. W. 282; *Upton v. People*, 176 Ill. 632, 52 N. E. 358; *Turner v. Hand County*, 11 S. D. 348, 77 N. W. 589; *Van Cise v. Carter*, 9 S. D. 234, 68 N. W. 539; *Black, Tax Titles*, § 112; *Power v. Larabee*, 2 N. D. 141, 49 N. W. 724; *Woods v. Freeman*, 1 Wall. 398, 17 L. Ed. 543; *Tidd v. Rines*, 26 Minn. 201, 2 N. W. 497; *Lawrence v. Fast*, 20 Ill. 338, 71 Am. Dec. 274.

Another reason why the sale for taxes is invalid in this case is because the lot was not advertised for sale in the description as the same was described on the tax duplicate. The statute requires this to be done. Section 8601, Burns' Rev. St. 1901. Appellees obtained title to the real estate through a sale and subsequent conveyance under a partition proceeding, and there was nothing of record to indicate that it had been sold for taxes, because the attempted description in the notice of sale and register of sales was no description at all, and therefore it was not notice to him.

The court below held that the sale was invalid, and did not convey title, but that the lien of the state was transferred to appellant, and gave him a first lien for the amount he paid, together with penalties and interest, including subsequent payments. The amount was ascertained by the court, for which judgment was rendered, and declared to be a first lien. This result is in harmony with the statute and decided cases. Section 8632, Burns' Rev. St. 1901; *Sloan v. Sewell*, 81 Ind. 180; *Reed v. Earhart*, 88 Ind. 159; *Scott v. Millikan*, 104 Ind. 75, 3 N. E. 647; *State ex rel. v. Casteel*, supra; *Travelers' Ins. Co. v. Martin*, 131 Ind. 155, 30 N. E. 1071; *Scarry v. Lewis*, 133 Ind. 96, 30 N. E. 411. The abbreviations purporting to be a description of the real estate disclosed by the notice of sale have no fixed meaning. "Col." does not stand for nor signify "Colum-

bus," "W" does not stand for "Wheel," and "M. T. R." does not stand for "M. T. Reeves." Our conclusion is that the sale was invalid, and the subsequent conveyance under it did not convey title, because of a failure to properly describe the real estate in the notice of sale.

Appellant urges upon us the proposition that a tax deed is prima facie evidence of the regularity of the sale, and of the title in the holder. This is both statutory and adjudicated law, and there is no contention to the contrary. Section 8624, Burns' Rev. St. 1901; *Richards v. Carrie*, 145 Ind. 49, 43 N. E. 949; *Doren v. Lupton*, 154 Ind. 396, 56 N. E. 849. But appellant's prima facie case as made by the tax deed is overthrown by the facts disclosed by the record, and about which there is no conflict.

Counsel have discussed other questions, but the view we have taken of the law as applied to the evidence makes it unnecessary to decide them. There is no reversible error in the record.

Judgment affirmed.

(31 Ind. App. 584)

GRAND LODGE A. O. U. W. v. MARSHALL.

(Appellate Court of Indiana, Division No. 2.
Oct. 28, 1903.)

**BENEFICIAL ASSOCIATIONS—ASSESSMENTS—
PAYMENT—SUSPENSION OF MEMBER
—RIGHTS OF BENEFICIARY.**

1. The constitution of a beneficial association, fixing the rate of assessments, and requiring that they be paid monthly, provided that 12 assessments are required to meet death losses, and directing that payments be made on a certain day in the month in which assessments are made, is sufficient to require members to pay monthly assessments.

2. Under the constitution of a beneficial association, requiring the grand recorder to call on subordinate lodges for the beneficiary funds in their respective treasuries when needed, and directing that the issuing of such call shall constitute an assessment, and shall contain a list of all deaths occurring since the last call was made, the recorder, in making such call, is required only to give a list of such deaths occurring since the last call as have been officially reported to him by the subordinate lodges.

3. Where the constitution of a beneficial association requires the call on the subordinate lodges for the beneficiary fund and notice of the assessment to be made by the grand recorder, with the approval of the finance committee, and directs that the issuance of the call shall constitute the making of the assessment, which shall be published, and a copy sent to each lodge and member, the notice of assessment and call on the beneficiary fund are sufficiently approved when signed and approved as one instrument.

4. Where the constitution of a beneficiary association provides that any member neglecting to pay any assessment regularly made shall forfeit all rights as a member, the beneficiary of a member who failed to pay an assessment after notice and compliance by the association with all the requirements of the laws of the order cannot recover the benefit.

Appeal from Superior Court, Vanderburgh County; W. M. Wheeler, Special Judge.

Action by Addie Rowena Marshall against the Grand Lodge Ancient Order United Workmen. From a judgment for plaintiff, defendant appeals. Reversed.

Charles L. Wedding, for appellant. Larz A. Whitcomb and G. K. Denton, for appellee.

WILEY, J. Appellant is a fraternal, benevolent, and mutual benefit association, and as such issued to one Charles E. Marshall, who was the husband of appellee, a certificate of membership, by the terms of which it undertook to pay appellee, as beneficiary, \$1,000 at the death of the insured, according to the terms of the certificate. The said insured died November 12, 1900, being about 16 months after the certificate was issued. Appellant refused to pay the claim, and appellee brought an action on the certificate to enforce payment. The case was put at issue, and tried by a jury, resulting in a verdict for appellee. Appellant's motion for a new trial was overruled, and judgment pronounced upon the verdict.

Two questions are presented for decision, viz.: (1) The sufficiency of the first paragraph of answer, to which a demurrer was sustained; and (2) the overruling of the motion for a new trial.

In the first paragraph of answer it is alleged that from the date of the issuing of the certificate to September, 1900, the insured paid to the financier of his lodge an assessment each and every month as specified by the beneficiary law of the order, and that each assessment was payable on or before the 28th of each month; that the said insured was bound to know the laws of the order, and did in fact have full knowledge thereof, and knew by the payment of his assessments each month from the date of his membership until September, 1900, when he neglected and failed to pay the assessment for September, 1900, on or before the 28th of the month; that not only did he have knowledge from said payments and course of business with his lodge as to his duty to pay an assessment in September, 1900, but he knew and was bound to know of the existence of the laws of the order; that in addition to the requirement to pay an assessment for said month, as set out by the constitution and by-laws, a further and additional notice was given to the insured as to such assessment by the grand recorder, calling upon all the lodges in the state, including the lodge to which he belonged, to forward the beneficiary funds in their respective treasuries, and at the same time made one assessment upon each of the members (said assessment being necessary to pay death losses), with the approval of the grand lodge finance committee, and caused such call and assessment to be published in the Hoosier Watchman, the official organ of the order in Indiana, and that a copy thereof was duly mailed to the insur-

ed, properly addressed; that by reason of his knowledge of the constitution and laws of the order, and by his course of dealing with said order, the insured was specially called upon and notified of the assessment of 72 cents for the month of September, 1900, that the same must be paid on or before the 28th of said month, and that upon failure to so pay he would be suspended; that the assessment and notice for September, 1900, were in the same form, substance, and words used and published of assessment notices and the approval of the grand lodge finance committee during each and every month during the time said Marshall was a member of the order; that, during each and every one of said months during the entire membership of the insured, he acted upon and treated said assessments, notices, and the approval of said finance committee as valid and sufficient, by paying, without objection or question, his assessments for each and all the months of his membership; that having failed to pay the assessment for September, 1900, and having paid nothing thereafter, he then and there became and stood suspended from all rights, privileges, and benefits of the order, and the beneficiary certificate sued upon thereby became null and void, and that when he died, November 12, 1900, he was not a member of appellant order, and was not in good standing, and neither he nor appellee had nor have any rights or claims whatever upon appellant. The constitution and by-laws of the order, the notice of the assessment and call upon the beneficiary fund for September, 1900, together with a copy of the Hoosier Watchman, in which the notice of the assessment and the call upon the beneficiary fund was published, and the approval of the finance committee, are all filed as exhibits to this paragraph of answer. By the demurrer the appellee admits the truth of all facts stated in the answer that are well pleaded. She therefore admits that notice of the assessment against the deceased was made for September, 1900, and also admits that said assessment was not paid, and further that other payments were never made after that. Counsel for appellee seek to avoid the force of these admissions, on the ground that the notice of the assessment was not in conformity with the laws of the order, and hence the insured was not bound by it; also that, because the assessment was not legally made, he was not required to pay, and, for his failure to pay, he did not forfeit his membership and his beneficiary rights. There are substantial substance and merit in this contention, provided the notice was illegal and not in conformity with the laws. If we correctly understand the position assumed by counsel, it is (1) that the call for the September assessment and notice does not contain a list of deaths occurring since the last call; and (2) that the call and notice were not approved by the grand lodge finance committee. These two questions depend for decision upon

the laws of the order, and the assessment and call as made.

The assessment rates of the order are fixed by its constitution, and they are graded according to the age or ages of the members. The assessment which was made against the deceased in this case on the 1st day of September, 1900, was for 72 cents; he belonging to the class against whom such assessment was authorized by the laws of the order.

Subdivisions 17, 18, 19, 30, and 39 of section 98 of the constitution, or so much of subdivision 19 as may be necessary to present the question, are as follows:

"(17) Calls and Assessments. Whenever the beneficiary fund of the grand lodge treasury shall have been reduced to a sum less than six thousand (\$6,000) dollars, or when by reason of unavoidable delay in the payment of beneficiary claims, the balance of the beneficiary fund in the grand lodge treasury would, by the payment of said claims, be reduced to a sum less than six thousand (\$6,000) dollars, then it would be the duty of the grand recorder to call upon the subordinate lodges to forward the beneficiary fund in their respective treasuries, and, at the time of making such call, to make one assessment upon each member of the order who received the workman degree, previous to the date upon which the assessment is made.

"(18) Calls, When and How Made. Every call made upon subordinate lodges to forward beneficiary funds shall be dated upon the first or second day of the month; shall contain a list of all deaths occurring since the last call was made; all necessary instructions relative to forwarding the funds called for and shall, in every case, receive the approval of the grand lodge finance committee. The issuing of such call shall constitute the making of an assessment.

"(19) Assessments, How Made. All assessments made upon the members shall be dated upon the first day of the month, except that if such date shall fall on Sunday or a legal holiday, it shall be dated on the second day of the month, and shall contain a list of all deaths occurring since the last assessment was made. Notice of such assessment shall be issued by the grand recorder with the approval of the finance committee and published in a newspaper printed and published in this state in the interests of the A. O. U. W. order, which publication is hereby constituted and made the official, legal, and sufficient notice to the members of this grand jurisdiction of assessments levied, without any further notice either from the grand or subordinate lodge officers. A sufficient number of copies of said paper shall be issued every month to supply all the members, and a copy thereof shall be mailed to the last known and usual post-office address of each member of this grand jurisdiction; and also one copy to the recorder of each lodge by its publisher, not later than the fifth day of each month."

"(30) Penalty for Failing to Pay Assess-

ments. Any member failing or neglecting to pay all the assessments made upon him for the beneficiary or relief funds to the financier of the lodge of which he is a member, on or before the twenty-eighth day of the month in which said assessments are made, shall forfeit all his rights as a member, and shall stand suspended from all the rights, benefits, and privileges of the order, from and after that date, and shall not be reinstated as herein provided."

"(39) When Rights are Forfeited. When a member shall be suspended or expelled from the order, through any cause whatever, he forfeits all rights, benefits and privileges and his beneficiaries thereby lose all rights to any portion of the beneficiary fund."

In the answer under consideration, it is averred that the Hoosier Watchman, published at the city of Evansville, Ind., was the official, legal organ of the order in this state, and that it was in that paper that the notice of the assessment against the deceased for the month of September, 1900, was published, and that a copy of that paper, containing the notice of the assessment, was duly mailed to him. A copy of that paper, marked "Exhibit C," is made a part of the answer, and the date of its issue, as shown therein, was September 3, 1900. That notice of the assessment and call for the beneficiary fund in the various lodges is, in substance, as follows:

"Official notice of assessment for Sept., Grand Lodge Ancient Order of United Workmen of Indiana, Sept. 1, 1900.

"Whole number of deaths, 717.

"Whole number of level assessments, 228.

"Number of classified assessments, 26.

"To All Members of the Ancient Order of United Workmen of Indiana in Good Standing, Sept. 1, 1900—Brothers: You are hereby notified of the following deaths occurring in the membership of the order in this jurisdiction."

Then follows a tabulated statement of the deaths occurring since the last call, and in this tabulated statement are the death numbers; the names of the members deceased; the names of the lodges to which they belong; the number of the lodge, and its location, and the dates of the deaths; the respective ages of the deceased; the causes of the deaths; the dates of their joining the order; the rate of the assessment; and the assessment number. The number of deaths reported in this assessment and call were three. Immediately after the tabulated statement is the following:

"In order to provide for the payment of the death losses above reported, you are hereby notified that the classified assessment number nine (9) for Sept., 1900, is hereby levied as per the classified table, to wit."

Then follows the classified assessment table, showing the rate of assessment against the various classes of the members according to age, ranging from 18 to 50 years and over. The notice then continues:

"This assessment is levied against all members in good standing who have received the workmen degree prior to Sept. 1, 1900, as per the attained ages, Jan. 1, 1900. The amounts enumerated in the classified assessment table must be paid to the financier of your lodge on or before Sept. 28, 1900; for failure to so comply you will forfeit all rights, benefits and privileges as a member of the order by becoming suspended."

Following this is the call upon the subordinate lodges throughout the state for the beneficiary funds in their respective treasuries, and that call is as follows: "To the Subordinate Lodges of the Ancient Order of United Workmen in the Grand Jurisdiction of Indiana: You are hereby notified of the following call for the month of Sept., 1900: Classified call No. 9. Classified assessment No. 9 will be made in the month of Sept. The beneficiary fund of the grand lodge treasury having been reduced to a sum less than six thousand (\$6,000) dollars, you are hereby notified that to provide for the death losses above reported, and furthermore provide for the prompt payment of death losses that may occur, one call is made necessary upon the beneficiary fund in the treasury of subordinate lodges, to be known as call No. 9, and to replace the money drawn from such fund by the call above enumerated. Classified Assessment No. 9 will be made in Sept."

"To Pay Classified Call No. 9. You are required to forward to Fred Baker, grand recorder, Evansville, Indiana, at once, first, the beneficiary fund on hand in your respective treasuries, collected from your members during the month of Aug. on classified assessment No. 8; second, the initial assessment of those members who received the workmen degree prior to Sept. 1, 1900, but have not been heretofore liable for assessment; third, of back assessments paid by members reinstated since the last report."

Here follow directions for remittances of this fund.

This call is signed by "Fred Baker, Grand Recorder," attested by the seal of the order, and immediately following his signature are these words: "The above orders on the beneficiary fund are hereby approved." This is signed by three members as the "Grand Lodge Committee."

If this assessment and call are in substantial compliance with the provisions of the law above quoted, then they were sufficient, and would be binding on both the insured and his beneficiary. A member of a benevolent beneficiary association is a part and parcel of the corporation, and is chargeable with a knowledge of its laws, rules, and regulations, and its manner of doing business. The notice shows the number of deaths that had occurred since the last assessment, and this must be construed to mean the deaths that had been reported to the grand recorder up to the time the notice was issued, for it is clear that, if any deaths had occurred before

the issuing of the notice which had not been reported to the grand recorder, they could not have been specified in the notice. It is the duty of the local lodges to report deaths. The rate of the assessment is also specified, the time when it should be paid, and notice given that, if not paid when due, the members failing to pay should forfeit all rights, benefits, and privileges. Counsel for appellee insist that there is no provision of the laws of the order requiring a member to pay monthly assessments, and as the answer avers such requirement, and the constitution of the order is filed as an exhibit, the exhibit must control. Subdivision 15 of section 98 of the constitution fixes the rate of assessments, and requires that they be paid monthly, provided that 12 assessments are required to meet death losses. Subdivision 30, supra, requires such payments to be made on or before the 28th of the month in which the assessments are made. This effectively disposes of counsel's objection in this regard.

It is next urged by appellee that the call upon subordinate lodges for the beneficiary fund does not contain a list of deaths occurring since the last call, as provided by subdivision 18, supra, and, as the issuing of such call shall constitute the making of an assessment, the assessment made is void, and the insured or his beneficiary is not bound by it. Subdivisions 17, 18, and 19 of the constitution should be construed together, with reference to each other, for they all pertain to the same subject-matter. They provide for a call upon subordinate lodges for the beneficiary funds in their respective treasuries when needed, and prescribe the manner of making the call, which is constituted an assessment, the manner of making the assessment, and what shall constitute notice to the individual member. There is no provision in the constitution or laws that requires the assessment and call to be issued separately, and to be two different and distinct instruments. On the contrary, the subdivisions of the constitution we have quoted contemplate that they shall constitute one instrument. Subdivision 18 says that "the issuing of such call shall constitute the making of an assessment." Subdivision 19 provides that the assessment shall be made the 1st day of the month, with certain exceptions, and shall contain a list of deaths, etc.; that it shall be published, and a copy sent to each lodge and member. In this instance the assessment and the call are one instrument, signed by the secretary. The assessment is addressed to the members of the order, and the call to the subordinate lodges. This is in harmony with the letter and spirit of the law. The assessment and call are signed by the grand recorder, and approved by the finance committee of the grand lodge. Assessments of this character are made for but one purpose, viz., to pay death losses of members of the association who have died while in good

standing. The evident purpose of the law in requiring the grand recorder to give a list of the deaths of members when assessments are made is to acquaint the members assessed with the facts upon which the assessment is based, for assessments for the beneficiary fund can only be based upon the death of members. It is made the duty of subordinate lodges to report to the grand recorder the deaths that occur in their respective lodges, and such officer can only give a list of such deaths as are officially reported to him. The answer avers that the assessment and call give a list of those who had died since the last call was made. This is a statement of a substantive and issuable fact, and we must presume that the list is a correct one, and contains the names of all those whose deaths had been officially reported. The appellee complains that the approval of the finance committee only applies to the call on the beneficiary fund, and hence is not in compliance with the laws of the order. This position is not tenable. The "above orders" are approved. This must be construed to mean and include both the notice of assessment and the call. This is made plain by the fact that the assessment and the payment thereof is the only source of the beneficiary fund. Without the payment of the assessment, there could be no beneficiary fund. The notice constitutes an order of payment, and notifies the members that, if payment is not made within a given time, their rights, benefits, and privileges will be forfeited. We think the notice of the assessment and the call on the beneficiary fund were properly approved, within the meaning of the law. Our attention is called to the rule of law that forfeitures are not looked upon with favor. We recognize the force and reason of the rule, but it is the duty of the court to declare a forfeiture upon facts which will admit of no other conclusion. We are now dealing with a question of pleading, and the facts stated therein clearly show no forfeiture. Appellant is a "fraternal, benevolent, and mutual benefit association," in the language of the complaint. As such, it depends for its existence, and the purposes for which it was organized, upon the prompt payment of assessments against its members. It has no other means of paying its death losses, and no other means is contemplated. The association and the individual member have correlative and reciprocal obligations, the one depending on the other. These obligations are that, to the end that each may derive the contemplated benefits, they must both comply with the requirements of the constitution and laws of the order. So far as the answer shows, appellant did its duty, and the insured failed in his. Members of a benevolent fraternal association are bound by, and must be held to, a knowledge of its constitution and by-laws; and, as a general proposition of law, all members must be governed by them in all their dealings with it as members

thereof. *Supreme Lodge A. O. U. W. v. Hutchinson*, 6 Ind. App. 399, 33 N. E. 816; *Grand Lodge, etc., v. King*, 10 Ind. App. 639, 38 N. E. 352. It required no affirmative action of the lodge to suspend the insured for nonpayment of the assessment. The law is well established that if, by the laws of the society, nonpayment of an assessment operates as a forfeiture, the member must elect, every time he is called upon to pay an assessment, either to pay within the stipulated time, or suffer the penalty of loss of membership and benefits by neglecting or refusing to pay within the time. *Bacon, Benefit Society*, pp. 757, 758; *Rood v. Railway Passenger, etc., Association (C. C.)* 31 Fed. 62; *Bosworth v. Western M. A. Society*, 75 Iowa, 582, 39 N. W. 903; *Maginnis v. N. O. Cotton Exchange*, 43 La. Ann. 1136, 10 South. 180. Under subdivision 80 of the constitution, supra, a member stands suspended upon failure to pay an assessment on or before the 28th of the month in which it is made. We have examined the authorities cited by the appellee in support of her contention that the assessment and call in this case were not in conformity with the laws of the order, and therefore the insured or the beneficiary was not bound by them, but the law as there declared is not applicable to the facts pleaded in the first paragraph of answer. The facts here pleaded bar a recovery in favor of appellee. This conclusion makes it unnecessary to decide questions presented by the motion for a new trial.

Judgment reversed, and the trial court is directed to overrule the demurrer to the first paragraph of answer.

(32 Ind. App. 687)

INDIANAPOLIS ST. RY. CO. v. DARNELL.¹
(Appellate Court of Indiana, Division No. 2.
Oct. 27, 1903.)

STREET RAILWAYS — PERSONAL INJURIES — NEGLIGENCE — COLLISION WITH VEHICLE — EVIDENCE — SUFFICIENCY — INFERENCE — CIRCUMSTANCES — SILENCE OF DEFENDANT — STREETS — RIGHT OF WAY.

1. In an action against a street railway company for negligently running its car into plaintiff's vehicle and injuring him, evidence examined, and held sufficient to sustain the verdict for plaintiff.

2. In an action for personal injuries the negligence of the defendant directly contributing to the injury may be shown by direct or circumstantial evidence, and may be inferred from all of the facts of the case.

3. In an action for personal injuries the purpose to commit willful injury will not be inferred when the result of wrongful conduct may be reasonably attributed to negligence or inattention.

4. Where, in an action against a street railway company for personal injuries by collision with plaintiff's vehicle, defendant gave no evidence, the jury might draw an inference of carelessness, rather than of pure accident, from the fact of such silence.

5. Though a person driving his vehicle along a street railway track in the direction traveled

¹ 2. See *Negligence*, vol. 37, Cent. Dig. § 272.

² Rehearing denied. Transfer to Supreme Court denied.

by the cars must get off the track on approach of a car, he is not required to constantly look behind him.

6. Where plaintiff was driving his vehicle along a street railway track in the direction traveled by the cars on a street on which the wagon was plainly visible to a motorman approaching from behind, plaintiff might be presumed to know that the car could only run him down by carelessness or willfulness.

Appeal from Circuit Court, Morgan County; M. H. Parks, Judge.

Action by John W. Darnell against the Indianapolis Street Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Winter & Winter, Oscar Matthews, and W. H. Latta, for appellants. Elliott, Elliott & Littleton, for appellee.

COMSTOCK, J. Appellee brought this action in the superior court of Marion county against appellant for damages caused by appellant running its car against appellee's wagon and injuring his person. It is charged that appellant was negligent in the operation of its car. The trial was had in the circuit court of Morgan county upon a change of venue before a jury, and a verdict returned upon which judgment was rendered in favor of appellee for \$6,000. It was charged in the complaint that appellee drove said vehicle upon the street car tracks of the appellant on West Morris street, in the city of Indianapolis, and there stopped and waited for a freight train to cross the street and get out of his way; that "while upon said track * * * waiting for said freight train to pass, * * * being in said vehicle, * * * defendant's car ran against the same."

Numerous errors are assigned, but in the oral argument counsel for appellant stated that the court would be asked only to pass upon the sufficiency of the evidence to sustain the verdict. Appellant introduced no evidence. At the conclusion of appellee's evidence, appellant moved the court to instruct the jury to find for the defendant. Appellee offered no evidence as to the manner of the accident but his own. His testimony is substantially as follows: "I live at 1305 Belmont avenue. Am 51 years of age, and in the milk business. On September 7, 1900, I left home about a quarter past four in the morning. It took me about thirty minutes to drive to the Belt crossing. I saw the street car tracks on Belmont avenue, where the cars turn; and all the time after I got on Reisner street I did not see any street cars. At that time in the morning cars run out there every hour. After I reached West Morris street, I drove east on the north side of Morris street—north of the tracks—to Harding street. Then I drove on the car track on the north side of the street to the switch, crossed over to the south track, and drove up to the belt on the south track. I drove within twenty-five

feet of the belt—my person was within twenty-five feet; my horse's head within fifteen feet. As I was driving across the switch, I looked to see if any car was approaching from the west. I could see back beyond Reisner street, and there was no car between Reisner street and me. There was no obstruction to the view. The track is straight. There is a downgrade from Reisner street to Harding street, and then it is upgrade to the belt. It is about nine hundred feet from Reisner street to the belt. There are two tracks on Morris street. Cars going east use the south track. West of the belt the roadway of Morris street had been worked over recently. They had put in new ties, and, instead of filling up, they had left the ends of the ties exposed, now and then, so that you could see them clear back on Harding street on the south side. The north side was very rough. Just west of the belt there is a dead track that leads from the belt to the switch. Just west of the belt there were a couple of cross-ties and some gravel between the south track and the dead track, and on the south side of the track there were long pieces of iron piled up extending back close to the sidewalk. There were two poles stood on the south side of the street, about twenty-five feet from the belt, and these irons stuck out about three feet beyond these poles. When I drove up, there were two vehicles standing in the north roadway, north of the north track—a two-horse wagon close up to the belt, and a spring wagon just behind it. The switch begins about seventy-five feet west of the belt. A long freight train obstructed my passage. As I passed the switch, the train began to pass over Morris street. I looked back to see if a car was coming, didn't see any, and passed over on the south side, and drove up to the belt and stopped. I remained in that position from three to five minutes. I looked back twice, I think, for cars. I think I looked the last time about half a minute before I was struck. I did not see a car at any time. When I looked I put my head out of the door of the wagon. I could see beyond Reisner street. All of the times when I looked I was sitting in the wagon. The doors of my wagon were in the center—one on each side. They were open. There was a glass all around the wagon sides, back and front, but the front glass had been taken entirely out, and the back window was drawn up, open, and hooked to the top of the wagon. This glass was about twelve inches in width, and the back door there was drawn up and hooked on hooks put there for that purpose. Below the glass there were two doors that closed together in the middle. They were fastened. There was no room to drive a wagon south of the tracks and between them and the obstructions, and this condition was the same up to the belt. The belt crossing is boarded. It was the custom

of the street railway company to stop their cars when nearly to the railroad, and the conductors get off and go forward and look up and down to see if there are obstructions, and then motion the car across. There was no obstruction to prevent a motorman seeing me, only my milk wagon. It was seven feet high. I was sitting in my wagon, on the south side of the wagon. I looked back twice, and saw no car. As I settled myself in my wagon, just turned around and looked up and down the belt, and just at that time the car struck me from the rear. It is my impression that it was one-half minute after I looked the last time until the car struck me. It was a very hard blow. As it struck the wagon knocking it east, my head and shoulders came out through the opening where the glass was till my head came down below or near where the bumper of the street car was. At that time I saw the motorman with his hand on the brake, whirling it around as fast as he could. Then my head struck something, and next thing that I knew I was laying on the street by the sidewalk. I did not hear the car. The noise of the freight passing over the crossing prevented my hearing the car. I did not see the car approaching. After I revived I saw the car standing with my wagon just in front of it. The next I remember I was in the ambulance. After I got home I remember the doctor setting my shoulder. The cap of my shoulder was knocked off and broken. The round bone of the shoulder was fractured. I had two or three ribs broken. I had a knot on my head, and I was hurt in the throat, and my spine was hurt. It was daylight at the time of the accident, and a clear morning. I don't know what car struck me, but none run then except those of the Indianapolis Street Railway Company. I was in bed four weeks, confined to the house about two months, and after that went about with a cane or crutch. I have regained the use of my left shoulder, but there are some adhesions to be broken up. I had a paralytic stroke seven months after the accident. I can't taste anything. I sleep poorly. I have been to the city to market with a load of roasting ears since." Cross-examination: "I was entirely familiar with Morris street, and the location of the tracks, and the way in which the cars were operated there. I had known for a week before I was hurt of the obstructions in the street on both sides of the track, just west of the belt railroad. On that morning, when I got to Harding street, I turned upon the north street car track. Before that I had been driving in the roadway. From Harding street to the switch I drove on the north track. As I got to the switch, I saw two vehicles in the roadway at the north side of the track. As I was passing over the switch I saw the freight train just beginning to go over the street. I was then about twenty-five feet west of the belt, and

I there looked to see if a car was coming. I looked out of the right door of my wagon. I saw no car. I saw beyond Reisner street. I then drove up so that my horse's head was ten or fifteen feet from the railroad. I drove the distance in a walk. I knew when and before I went in there I could not drive off the track to the south without injuring my wagon; that the obstructions of the south side of the track would prevent my driving off there. I also knew when and before I drove in there that I could not drive off that track on the north side because of the obstructions. I also knew that I could not drive ahead for probably four or five minutes on account of the freight train. The reason in my mind when I was at the switch on account of which I did not drive on the north side of the street, behind that spring wagon, was that it was rough there, and I did not want to risk breaking my bottles. Nothing prevented me from driving there, and I might have stopped. I knew that no car could come and occupy the north track until the freight train passed. I also knew that any car from the west would come on the south track. I didn't think a car was liable to come. When I looked back, it was through habit, and not because I expected to see a car. After I got up to the track I stopped and stood still until the accident. The horse was gentle, and at all times under my control and management. It was being driven by me. After the horse stopped, I looked back through the opening in the back of the wagon. Nothing obstructed the view. I saw beyond Reisner street, and saw no car. I had good eyesight and hearing. The freight train was making a great noise all the time. I knew that would interfere with my hearing an approaching car. I had good use of my limbs, and was an active man. All the time I was sitting on the seat of my milk wagon, three feet from the back end of the wagon. Both doors of the wagon were open. The doors were opposite my feet and knees. They were wide enough so that a man could readily get through them. The floor was seventeen inches above the ground. From my position it was one step out onto the ground. After I looked back the last time I sat facing east in the wagon. I looked up and down the belt, and then I was facing east. I did not see the car until after it had collided with the wagon. I did not hear it. I was ignorant of its approach. Nothing prevented me from getting out of the wagon if I had wanted to do so. I knew of the custom to stop the cars at the crossing, and had it in mind when I drove in there, but I was not expecting any car whatever. I was an active man. I had no difficulty in walking. I was not depending upon the fact that it was the custom to stop before crossing the tracks."

The general rule is that in an action for personal injuries the negligence of the defendant will not be presumed. There are

exceptions to this rule, but the facts do not bring the case before us within them. Some negligence of the defendant must be shown which directly contributed to the injury. This may be done by direct or circumstantial evidence. It cannot be defined from any rules of evidence. It must be inferred from all of the facts of the case. A jury has the right to draw from the facts proven fair and reasonable inferences. *Hedrick v. Osborne & Co.*, 99 Ind., at page 147; *Unlon, etc., Ins. Co. v. Buchanan*, 100 Ind. 72; *Terre Haute, etc., R. Co. v. Pierce*, 95 Ind. 496; *Indianapolis, etc., R. Co. v. Collingwood*, 71 Ind. 476; *Indianapolis, etc., R. Co. v. Thomas*, 84 Ind. 195; *Johnson v. Hudson River Co.*, 20 N. Y. 65, 75 Am. Dec. 375; *Schneider v. Market St. R. Co. (Cal.)* 66 Pac. 734; *Dowell v. Guthrie*, 99 Mo. 653, 12 S. W. 900, 17 Am. St. Rep. 598; *Schoepper v. Hancock, etc., Co. (Mich.)* 71 N. W. 1081-1084. The evidence shows that the view on appellant's track of the appellee's wagon, from the approaching car, was clear for a distance of 900 feet. There is no evidence fixing the speed of the car at any given point of the 900 feet. There is evidence that it passed over that distance in about one-half minute, and without warning struck the appellee's wagon. The speed, from this evidence, for at least a part of the way, was therefore great. The morning being clear, the view unobstructed, the motorman could fairly be held to have knowledge of the conditions existing at the place of the collision, and to see the appellee's peril in time to have prevented the accident by the exercise of reasonable care. It is the duty of a motorman of a street car to have it under such control that it may be stopped within a short distance if the occasion requires. From his failure to exercise reasonable care without explanation, the jury might properly draw the conclusion of negligence. But counsel for appellant insist that there is no evidence of negligence, and that the facts proven are equally consistent with any one of three theories: (a) That of pure accident, as far as the appellant or any of its employes are concerned; (b) that of negligence on the part of the appellant; (c) that of willfulness on the part of the appellant; and that they point to one theory no more strongly than to the other. The purpose to commit willful injury—the commission of a crime—will not be inferred when the result of tortious conduct may be reasonably attributed to negligence or inattention. Innocence of crime is presumed. The inference of negligence is not equally reasonable with that of inattention. This is a fact of common observation. *Jones v. U. S. Traction Co.*, 201 Pa. 344, 50 Atl. 326; *Elwood, etc., R. Co. v. Ross*, 26 Ind. App. 258, 58 N. E. 535; *Cleveland, etc., R. Co. v. Klee*, 154 Ind. 430, 56 N. E. 234. The jury had a right to put a construction upon the silence of the appellant. The manner of operating the car was known to its employes.

If the injury was due to accident, it was susceptible of easy proof. From the failure of such proof the inference of carelessness, rather than accident, might reasonably be drawn.

The presumption of negligence of the railroad company would not arise from the mere fact of the collision, but the jury might reasonably expect (the situation of appellee being apparent) explanation of the failure to stop the car in time to have avoided the collision. *Danner v. South Car., etc., R. Co.*, 55 Am. Dec. 678: "That the company did not produce witnesses to show how the accident occurred, nor explain why they omitted to do so, tends to induce the belief that they could make no defense. They had the witnesses under their control. The plaintiff may not have been present when his cattle were killed, and may not be able to discover who the persons were employed on the train when the damage was done. When a party is charged with an act or declaration which may subject him to an action, and does not deny it, his silence is construed as an admission. The same construction may be put on a party's omission to offer testimony in his defense when it is in his power to produce the witnesses who might exculpate him." "It may be generally said, however, that the person controlling the motive power of a street car must use the highest degree of care to avoid injury to a person after discovering his peril." *Nellis, St. Surface R. R.*, 299, and cases cited. See, also, 2 *Thompson on Negligence*. The inference of the negligence of appellant is the only one which can fairly be drawn from the facts.

Was appellee guilty of negligence proximately contributing to his injury? He was not a trespasser. He was on a street railway track in a public street, with as much right as the railway company. He was upon the right side of the street. Obstructions left in the street by appellant made it dangerous for him to drive north of the south track, and difficult to drive south of the south track or back to the north track after getting on the switch and starting across to the south track. There were two wagons in the way of his driving on the north side. He had no reason to believe that he would have to stop until after he had gotten on the south track. He knew that no car ordinarily ran there at that hour; that it was the custom to stop it at the crossing; that it was the duty of the motorman to give him warning; that he could be seen for 900 feet; that the car could be easily stopped, as the track was slightly upgrade for several hundred feet from Harding street to the crossing. He looked three times for an approaching car—once as he went on the track and twice after he had stopped; the last time about one-half minute before the collision. He did not see nor hear the car. If he had known of the approach of the car, it would have been his duty to have attempted to get off the track. He was not required to constantly look be-

hind him. *Wabash R. Co. v. Biddle*, 27 Ind. App. 161, 59 N. E. 284, 60 N. E. 12. The wagon was plainly visible to the motorman, and without special circumstances, which do not appear, the railway company could only have run appellee down carelessly or willfully. He may be presumed to have known this. *Tunison v. Weadock* (Mich.) 89 N. W. 703; *Vincent v. Norton, etc.*, R. Co. (Mass.) 61 N. E. 822. Under the most favorable view to be taken for appellant of the evidence, it could only be said that the circumstances were such that reasonable minds might draw different conclusions respecting appellee's fault, and then the question of due care was one of fact for the jury, and the jury have passed upon that question adversely to appellant's claim.

Judgment affirmed.

(32 Ind. App. 222)

BEAHLER v. CLARK*

(Appellate Court of Indiana, Division No. 1.
Oct. 30, 1903.)

BROKERS—COMMISSIONS FOR SALE OF REAL ESTATE—ORAL CONTRACT OF EMPLOYMENT.

1. Under Burns' Rev. St. 1901, § 6629a (Acts 1901, p. 104), providing that no contract for the payment of any sum of money for commission for the procuring by one person of a purchaser of the real estate of another shall be valid unless in writing, signed by the owner of the real estate, no recovery can be had on a common count for selling real estate under oral employment therefor.

Appeal from Circuit Court, Jasper County: S. P. Thompson, Judge.

Action by Barney Clark against William T. Beahler. From a judgment for plaintiff, defendant appeals. Reversed.

Hauley & Hunt, for appellant. Foltz, Spitzer & Kurrle, for appellee.

BLACK, J. The appellee sued the appellant upon an account for work and labor performed by the former for the latter. The appellant has presented on appeal the overruling of his demurrer to the complaint for want of sufficient facts and the overruling of his motion for a new trial. The case involves a consideration of the statute of March 5, 1901, providing that "no contract for the payment of any sum of money, or thing of value, as and for a commission or reward for the finding or procuring, by one person, of a purchaser for the real estate of another shall be valid, unless the same shall be in writing, signed by the owner of such real estate or his legally appointed and duly qualified representative." Acts 1901, p. 104 (section 6629a, Burns' Rev. St. 1901). The complaint was in the form of a common count for work and labor performed by the appellee for the appellant at his special instance and request, a bill of particulars being

filed with the complaint. Whatever may be said properly of items of the account shown by the bill of particulars, which indicate services of the appellee in seeking and finding a purchaser for land, there were some of the 20 items of the bill of particulars which did not show that the sums thereby charged were services rendered for such purpose, or in any way connected therewith. Thus there were items for services in writing letters, and in trips to a number of different specified places, and for trips to examine land. The question whether a motion to make the complaint more specific as to these items should have been sustained is not presented. The objection suggested to the complaint that it sought a recovery contrary to the statute above quoted therefore cannot be sustained.

There was a verdict in favor of appellee for \$240. On the trial it appeared in evidence that the appellee, whose business was that of a real estate agent, rendered service in procuring a purchaser for land of the appellant, a farm of 240 acres, sold to a third person. Some of the items of the complaint related on their face to such services. As to a considerable number of the items of the bill of particulars no evidence was furnished. All the other items of the bill of particulars concerning which there was any evidence related to services which entered into and constituted parts of the service of procuring the purchaser of the land, and were rendered under an employment of the appellee by the appellant to procure such purchaser. The evidence showed that the appellant hired the appellee to bring buyers and to sell the appellant's farm; that there was a commission contract, a verbal agreement between the appellant and the appellee, which was that the former would allow the latter \$240 for selling the place if the appellee could get \$85 an acre, which was the price for which the land was sold. There was evidence, introduced over appellant's objection, as to the value of the services of the appellee. *Goldstein v. Scott* (Sup.) 78 N. Y. Supp. 736, was an action to recover the value of services which the plaintiff, in his complaint, claimed to have rendered for the defendant, at her request, as a broker in making an exchange of a parcel of real estate belonging to the defendant for another piece of property belonging to a third person, the services being alleged to be reasonably worth a certain sum, no part of which had been paid. An answer showed that the promise or request, if any, charged in the complaint, was made in another state (New Jersey), and that by a certain statute of that state it was provided "that no broker or real estate agent selling or exchanging land for or on account of the owner shall be entitled to any commission for the sale or exchange of any real estate, unless the authority for selling or exchanging such land is in writing and signed by the owner or his authorized agent, and the rate of commission on the dollar shall have been

* 1. See *Brokers*, vol. 8, Cent. Dig. §§ 44, 73.

* Rehearing denied.

stated in such authority." It was urged on behalf of the plaintiff that, although a contract of employment was void by this statute, still the plaintiff might ignore that contract, and sue upon a quantum meruit for services rendered to and accepted by the defendant in the exchange of the properties; but the court said that the statute contemplated that, even when services were rendered, and property was sold or exchanged by a broker, there should be no right to compensation, unless the statute were complied with. In *McCarthy v. Loupe*, 62 Cal. 299, there were two paragraphs of complaint, one upon a contract of employment for a specified amount as commission, the second for the reasonable value of work and labor and services performed at the defendant's special instance and request. The Code of that state provided that an agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or commission should be invalid unless the same or some note or memorandum thereof were in writing, and subscribed by the party to be charged or by his agent. It was said by the court: "It is not claimed that the agreement in this case or any note or memorandum thereof was in writing. But it is claimed that the plaintiff may, nevertheless, recover what his services were reasonably worth, upon a promise implied by law by reason of the loss which he has sustained in rendering the service and the benefit received by defendant in accepting the same. * * * But no case has been brought to our attention in which it has been held where proof of employment is indispensable to a right to recover for services, that in the absence of such proof a recovery can be had. And to entitle a broker to recover commission for effecting the sale of real estate, it is indispensable that he should show that he was employed by the owner (or on his behalf) to make the sale. * * * But for the provision of the Code above cited, it may be that the absence of an express contract might be supplied by proof of usage regulating transactions of this kind. * * * It would seem, therefore, that no recovery could have been had before the Code without proof of an express contract, or of a usage regulating such transactions. The law in such a case would never imply a contract. Since the Code no express contract in a case like this can be of

any avail unless in writing. This particular kind of a contract can only be proved by the introduction of an instrument in writing." See, also, *Myres v. Surryhue*, 67 Cal. 657, 8 Pac. 523; *Shanklin v. Hall*, 100 Cal. 26, 34 Pac. 636; *McGeary v. Satchwell*, 129 Cal. 389, 62 Pac. 58; *Dolan v. O'Toole*, 129 Cal. 488, 62 Pac. 92; *King v. Benson*, 22 Mont. 256, 56 Pac. 280. Before the enactment of our statute above quoted, a contract to procure a purchaser for land was valid without being in writing. *Fischer v. Bell*, 91 Ind. 243. If, under a complaint in the form of a common count, a recovery may be had upon proof of a valid special contract, yet, when the evidence shows a contract express in all its parts, for certain designated services to be performed by the plaintiff for the defendant for a certain specified price, there can be no occasion for proof of the reasonable value of the services. The law will not imply a promise to pay the reasonable value of services as to whose value the parties have expressly contracted. That would be a changing of a contract as to the part thereof to be performed by one of the parties. It having appeared that the services for which the action was brought were rendered under a contract for the payment of a sum of money as for a commission or a reward for the procuring by the plaintiff of a purchaser for the real estate of the defendant, and that the contract was not in writing, signed by the defendant or his legally appointed and duly qualified representative, there could be no recovery, the contract upon which alone a recovery, if any, could be based, being invalid. In the absence of a statute on the subject, upon proof of an employment and services rendered under it, doubtless the reasonable value of the service might be recovered, in absence of an agreement of the parties as to its value. But in any case seeking compensation for such service there must have been an employment of the plaintiff by or for the defendant. How, in the absence of statute, the employment may be proved need not be discussed. We think that it is the true intent of our statute that there shall be no recovery of compensation for service of an agent in finding or procuring a purchaser for real estate except upon a written contract such as the statute describes.

Judgment reversed, and cause remanded for a new trial.

(31 Ind. App. 504)

NOAH et al. v. GERMAN-AMERICAN
BLDG. ASS'N OF INDIANA.(Appellate Court of Indiana, Division No. 1.
Oct. 27, 1903.)BUILDING AND LOAN ASSOCIATIONS—STOCK
CERTIFICATE—AGREEMENT BY BORROWING
MEMBER—ULTRA VIRES—REPRESENTATIONS
—ESTOPPEL—APPEAL—ERROR—SPECIFICA-
TIONS IN MOTION FOR NEW TRIAL—PLEAD-
ING—STRIKING OUT EXHIBITS—DEMURRER.

1. The error in striking out interrogatories, to be available on appeal, must appear as one of the specifications in the motion for a new trial.

2. Where the allegations of a pleading covered all the material facts stated in exhibits annexed thereto, it was not error to strike out the exhibits.

3. It was not reversible error to sustain a demurrer to certain paragraphs in a pleading where any evidence admissible under the paragraphs was admissible under other issues made in the case.

4. A debtor, when sued on the debt, cannot set up the defense of ultra vires on the part of the corporation creditor.

5. Where a stockholder of a building association becomes a borrowing member, and the agreement as to the number of payments to be made is not made a part of the bond and mortgage securing the loan, but the bond and mortgage provide that the borrower shall continue to pay the dues on the stock until it matures, the limitation placed on the number of payments in the agreement is of no avail, the contract, as represented by the bond and mortgage, being the contract by which he is bound.

6. Oral or printed statements made by agents or officers of a building and loan association in contradiction of the by-laws, which are by reference made a part of the contract with a borrowing member, or in contradiction of the language of the contract itself, whether relied on by the borrowing member or not, do not constitute the basis of an estoppel unless the representations are fraudulent.

Appeal from Superior Court, Grant County;
Hiram Brownlee, Judge.

Action by the German-American Building Association of Indiana against George W. Noah and another. From a judgment for plaintiff, defendants appeal. Affirmed.

John A. Kersey, for appellants. Carson & Thompson and St. John & Charles, for appellee.

HENLEY, J. This action was to foreclose a mortgage given by George W. Noah, then unmarried, to the German-American Building Association of Indiana. The mortgage was upon a lot in the town of Jonesboro, which lot the said Noah afterward, and before the commencement of this action, conveyed to the appellant Emma Stradley. A full and complete statement of appellee's cause of action is, we think, necessary for the proper discussion of the question presented by this appeal. Appellee's complaint, omitting the caption, the mortgage, and prayer for relief, was as follows:

"The plaintiff, the German-American Building Association of Indiana, complains of the

defendant, and says that on the 26th day of May, 1892, George W. Noah, being a member of the plaintiff association, procured an advancement to him as a loan in the sum of four hundred dollars upon four shares of the capital stock of plaintiff, with agreement on his part that he would pay monthly dues on such shares at the rate of eighty cents per month on each share, together with a premium of six per cent. per annum, and interest on said loan at the rate of six per cent. per annum, all payable on or before the 25th day of each month, until such shares should mature; also to pay all fines and assessments on such shares, all of such payments to be made without relief from valuation and appraisal laws, and with ten per cent. attorney's fees; that said agreement was in writing, and a copy thereof is attached hereto, filed herewith, made a part hereof, and for certainty is marked 'Exhibit A.' And the plaintiff further says: That on the 26th day of May, 1892, to secure the payment of the moneys provided for in said agreement, that said Noah, as an unmarried man, executed a mortgage to this plaintiff upon the following described real estate situated in the county of Grant, in the state of Indiana, to wit, lot number sixteen (16) in Love's Addition to the town of Jonesboro. That said mortgage was recorded on the 31st day of May, 1892, in Mortgage Record No. 11, at pages 203 and 204, in the recorder's office of said county; a copy of said mortgage, together with the indorsements of the recorder thereon, being filed herewith, attached hereto, hereof made a part, and for certainty is marked 'Exhibit B.' That by the provisions of said bond said obligor therein named is to pay the moneys provided by such bond until such shares shall mature according to the by-laws of plaintiff. That all the by-laws of plaintiff relating to such subject are sections 24 and 25 and 30, as follows: 'Sec. 24.—Installment stock shall be paid for in monthly installments of eighty cents, not exceeding ninety-six of which shall be required, all installments being due and payable on or before the 25th day of each month, beginning with the month in which the certificate is dated. Any member may transfer, at any time, from either plan to the other, and shall receive credit on the new certificates for the amount of the full withdrawal value of the old, at the time of the transfer.' 'Sec. 25.—Every stockholder shall receive a certificate of stock signed by the president and secretary. Shares shall mature as soon as the monthly assessment of dues, with the earnings thereon, shall amount to one hundred dollars.' That said obligor is to pay all the fees and assessments on such shares as provided for in said by-laws and that all of the provisions relating thereto in such by-laws are as follows: 'Sec. 30.—If monthly payments of dues, or of interest and premium, are not made when due, a fine of

¶ 4. See Corporations, vol. 12, Cent. Dig. §§ 1545, 1556.

ten cents per share shall be imposed for each month such payments may be in arrears.' Plaintiff further says: That since the execution of said mortgage the said defendant George W. Noah conveyed said real estate to his codefendant, Emma Stradley, who is now the owner in fee simple thereof. That said defendants, and each of them, have failed to pay the installments provided for in said bond and mortgage, so that there were on January 28, 1899, twelve (12) months' delinquent interest and premium due on said mortgage indebtedness, and twelve (12) months' fines were then due thereon, and that the same have continued delinquent to this time, together with all the months since elapsed, and that there is due plaintiff on account of such indebtedness the sum of \$166.47, to which should be added accruing premium, interest, and fines that have accrued and shall accrue since January 28, 1899, up to the time of any decree entered herein, and also premium paid by plaintiff for insurance on improvements to protect its lien, which premium defendants failed to pay, and to which should also be added ten per cent. attorney's fees."

"Exhibit A.—Know all men by these presents that George W. Noah, unmarried, of Fulton County, of the State of Illinois, is held and firmly bound unto the German-American Building Association, of Indiana, in the sum of four hundred dollars, which well and truly to be paid he binds himself, his heirs, executors and administrators firmly by these presents. Sealed with his seal and dated this 26th day of May, 1892. The conditions of this obligation are such, whereas the above bounden obligor has subscribed for four shares of stock at \$100.00 each in said association, for which shares of stock he received from said association the sum of four hundred dollars as a loan, which shares of stock are hereby transferred as collateral security for the payment of this bond, with agreement on his part that he will continue to pay monthly dues on said shares of stock at the rate of eighty cents per month on each share of stock, together with a premium of six (6) per cent. per annum on each share of stock, and interest on said loan at the rate of six per cent. per annum, all payable on or before the 25th day of each month, until such shares shall mature as provided by the by-laws of said association; also, pay all fines and assessments on such shares as provided for in said by-laws. All payments of money hereunder shall be made at the office of the association, in the city of Indianapolis, Indiana. Now, if the above bounden obligor shall well and truly keep and perform said bond in every part then the above bounden obligation to be void and of no effect; but if default be made in any part thereof, then the above bounden obligor to forfeit all the premiums, fines, assessments and interest so paid into said association, and

pay back said loan less all such dues credited thereon. All payments of money hereby secured shall be made without relief from valuation and appraisement laws, and with ten per cent. attorney's fees.

"[Signed] George W. Noah."

Appellant, Emma Stradley, answered in six paragraphs, as follows: First, payment; second, set-off in the amount paid by appellant as a borrowing stockholder, which, with the added earnings, amounted to \$642.80; third, set-off in the amount of \$642.80, being 72 consecutive monthly payments of \$7.20 each, with the earnings thereof added—the earnings being alleged to be \$124.40; fourth, that the stock certificate provides for only 72 monthly payments, and that such payments were made before the commencement of this action; fifth, that appellee's agent, by printed circular used and oral representations made in negotiating the loan, represented that the 72 payments would mature the stock and pay the debt, and that appellee was thereby estopped; sixth, that the value of the appellant's stock exceeds and more than pays the debt and interest; and that appellee had exceeded the powers and rights given it by the statute under which it was organized. The trial court sustained appellee's demurrer to the second, third, and sixth paragraphs of answer. The trial resulted in a finding and judgment for appellee in the sum of \$248.60, and foreclosing the mortgage.

It is assigned as error that the trial court erred in striking out interrogatories 43 to 91, both inclusive, and interrogatories 103 and 106. The error, if any, arising out of this action of the trial court in this regard, is not presented by the assignment of error. The question must be presented by the motion for a new trial. It does not appear as one of the specifications in appellant's motion for a new trial. It was not error to strike out the exhibits filed with appellant's fifth paragraph of answer. These exhibits consisted of printed statements of the condition of appellee company, of the plan or method of doing business, and of the profit coming to both borrowing and nonborrowing stockholders. The fifth paragraph of answer was held sufficient without these exhibits. Its allegations covered all the material facts stated in the exhibits, and upon the trial they were admitted in evidence thereunder. The foundation of the answer was not the exhibits, and, as evidence, they performed for appellants every legal service to which they were entitled. Nor did the trial court commit reversible error in sustaining appellee's demurrer to the second, third and sixth paragraphs of answer. Any evidence admissible under the second and third paragraphs was admissible under the other issues made, and the defense of ultra vires attempted in the sixth paragraph could not be made by appellant in his position as appellee's debtor. *Poock v. Lafayette Building Association*, 71

Ind. 357; Chicago, etc., Co. v. Derkes, 103 Ind. 520, 3 N. E. 239; National Bank v. Matthews, 98 U. S. 621, 25 L. Ed. 188; Thompson, Corp. §§ 6021-6040. The rule prohibiting a debtor from denying the right of the creditor to make the loan to him is well stated by Thompson in section 6040, supra, as follows: "The doctrine now is that the corporation making the loan in good faith may recover upon or enforce the security, and that the borrower will be estopped by his act of receiving the loan and keeping the money from setting up that the corporation had no power to make it."

The questions raised under appellant's motion for a new trial hardly admit of separate discussion. It is the well-settled law in this state that, where a certificate of stock of a building and loan association provides that payments thereon shall not exceed a certain number specified therein, the stockholder cannot be required to pay more than the specified number. The payment of the number of payments named in the certificate of stock may not mature it and make it worth its face value (which result the association does not guaranty), but the stock only matures when the dues paid and earnings apportioned to it amount to the face value thereof. Wayne, etc., Ass'n v. Skelton, 27 Ind. App. 624, 61 N. E. 951; Union Mut., etc., Ass'n v. Aichele (Ind. App.) 61 N. E. 11. When the stockholder becomes a borrowing member, and such agreement as to the number of payments to be made is not carried into the bond and mortgage securing the loan, but instead thereof it is provided in the bond and mortgage that the borrower shall continue to pay the dues on such stock until it matures according to the by-laws of such association, then in such case the limitation placed on the number of payments is of no avail to the borrowing member, because the contract as represented by his bond and mortgage is the contract by which he is bound, and its terms as to the repayment of the loan will be enforced. Wayne, etc., Ass'n v. Skelton, supra.

Oral or printed statements made by the officers or agents of a building and loan association in direct contradiction of the by-laws, when the by-laws are made a part of the contract by reference thereto, or when such declarations or statements are in direct contradiction of the plain language of the contract itself, whether relied upon by the person to whom made or not, cannot be made the basis of an estoppel, unless such representations are fraudulently made. The case of Hartman v. Building Ass'n, 28 Ind. App. 65, 62 N. E. 64, does not hold otherwise, and its reasoning is in line with this statement of the law. The case at bar is not within the reasoning or rule announced in Lime City v. Wagner, 122 Ind. 78, 23 N. E. 689, 17 Am. St. Rep. 342, and Building Ass'n v. Bratton, 24 Ind. App. 654, 56 N. E. 105. Both the

bond and mortgage required appellant to pay the dues until the stock matured. This she had not done. The trial court properly permitted the secretary of the appellee association to testify as to the value of appellant's stock at the time of the trial, and we think rendered a correct judgment from the evidence presented by the record.

Judgment affirmed.

(31 Ind. App. 546)

CITY OF LINTON v. SMITH.

(Appellate Court of Indiana, Division No. 2.
Oct. 28, 1903.)

MUNICIPAL CORPORATIONS—DEFECTIVE SIDEWALKS — PERSONAL INJURIES — NOTICE — PLEADING—DAMAGES—INSTRUCTIONS.

1. In a complaint against a town for personal injuries received from a defect in a sidewalk, an averment that the town had notice of the dangerous condition of the sidewalk for a long time prior to the accident was sufficient.

2. It was not necessary to prove actual notice of such a defect by the city.

3. Where instructions in their entirety contained a correct statement of the law, they were sufficient, though they included a number of inaccurate expressions.

4. Where the affidavits supporting defendant's motion for a new trial showed that the newly discovered evidence was to the effect that plaintiff, after her alleged injury, used her arm in a manner inconsistent with her claim of injury, but evidence to that effect had been introduced on trial, the motion was properly refused.

Appeal from Circuit Court, Greene County; O. B. Harris, Judge.

Action by Mary Smith against the city of Linton for personal injuries. From a judgment for plaintiff, defendant appeals. Affirmed.

Daniel W. McIntosh and Cyrus E. Davis, for appellant

ROBY, J. Appellee recovered judgment for \$410. Appellant's demurrer to the complaint was overruled, as was its motion for a new trial. The complaint was in one paragraph, "the gist of which is that appellant, a municipal corporation, was guilty of negligently permitting its sidewalks to be in and remain out of repair, and on which sidewalk appellee stumbled, fell, and was injured." It is averred that the appellant had notice of the dangerous condition of the sidewalk for a long time prior to the date of the accident. This was a sufficient averment. Notice is not a conclusion, but an ultimate fact. Chicago, etc., R. Co. v. Fry, 131 Ind. 319, 325, 28 N. E. 989; Locke v. Bank, 66 Ind. 353. It is not necessary to prove actual notice of such defect by the city. Lyon v. City, 9 Ind. App. 21, 27, 35 N. E. 128; Turner v. City of Indianapolis, 96 Ind. 51, 59. The instructions given by the court include a number of inaccurate expressions, but in their en-

¶ 2. See Municipal Corporations, vol. 26, Cent. Dig. § 1647.

tirety they contain a correct statement of the law, which is all that is required. R. Co. v. Hamer, 29 Ind. App. 426, 62 N. E. 658, 63 N. E. 778. There is no question but that appellee was injured on account of being "up-dumped" by a loose board upon a part of the street surface. It is inferable that the board was rotten. The extent of her injury is not so clear. The case was twice tried, one jury disagreeing. One reason for a new trial stated is newly discovered evidence. The affidavit supporting the motion shows that the proposed evidence tends to prove that the plaintiff, after her alleged injury, used her arm in a manner inconsistent with her claim of injury. Other evidence to the same effect was introduced on the trial, and a new trial will not be granted on account of newly discovered evidence which is cumulative. It not infrequently happens that in personal injury cases those clearly entitled to redress for bona fide injuries overreach themselves by simulating additional ones. The extent of the injuries to appellee's shoulder is a matter of some doubt, but it is quite possible that she was hurt exactly as she says she was. Nothing was claimed for ovarian injuries, varicose veins, or nervous shock. The verdict is not regarded as excessive.

Judgment affirmed.

(31 Ind. App. 512)

KEPLER v. WRIGHT.

(Appellate Court of Indiana, Division No. 1.
Oct. 27, 1903.)

SPECIFIC PERFORMANCE—PURCHASE OF LAND
—EXECUTION OF NOTE AND MORTGAGE FOR
BALANCE OF PURCHASE PRICE—NECESSITY
—FINDINGS OF FACT—CONCLUSION OF LAW—
JUDGMENT.

1. A purchaser of real estate under a contract stipulating for certain payments by him, for the execution of a deed by the grantor, and for the giving of a note for the balance of the purchase price, secured by a mortgage, may enforce specific performance without making or offering to make the note and mortgage, the execution of the deed and the execution of the note and mortgage being concurrent acts.

2. Where, in a suit for specific performance of a contract to convey real estate, the court found that the purchaser had complied with all the conditions of the agreement when he first demanded a deed to the premises, the conclusion of law that he was entitled to a deed and to possession, and that the right to have the contract specifically enforced dated from the time he first demanded a deed, was correct.

3. Under Burns' Rev. St. 1901, § 560, providing that in a special finding the court shall first state the facts in writing, and then the conclusions of law, and judgment shall be entered accordingly, a judgment must conform to the conclusions of law, and when it does a motion to modify it cannot prevail.

Appeal from Circuit Court, Wayne County; H. C. Fox, Judge.

Appeal by Amanda Wright against George T. Kepler. From a judgment for plaintiff, defendant appeals. Case transferred from the Supreme Court to the Appellate Court un-

der Act March 12, 1901 (Acts 1901, p. 565, c. 247). Affirmed.

Lynn E. Kepler, for appellant. W. A. Bond and Medsker & Medsker, for appellee.

ROBINSON, C. J. Suit for the specific performance of a contract to sell land. In appellee's complaint it is averred that in January, 1888, appellant owned a certain lot, which appellee, by a written contract, purchased, and which appellant agreed to convey to appellee. The contract, made a part of the complaint, provides that appellant "hereby leases and lets unto" appellee the lot described "at the monthly rent of the repairs and three dollars cash rent, payable monthly on the 14th day of each month." Appellant "further agrees to make to the order of Amanda Wright a warranty deed for said property when she pays one hundred dollars on the property and gives a note and mortgage for one hundred and thirty dollars at eight per cent. in advance, considering the property worth \$230, and the three dollars or other sums paid every month payments on the \$230 to be calculated as if the \$230 were to draw eight per cent. interest, payable monthly in advance, from date." It was also agreed that appellee should have no right to hold possession unless she kept the property in good repair and paid the rent in advance, and, if she failed to pay the \$3 per month, appellant should have the right to enter and take possession only after giving 30 days' written notice, unless the rent was paid before the expiration of the 30 days. It is further averred that appellee took possession under the contract, and made lasting and valuable improvements; that she paid the \$100 according to the terms of the contract; that she had paid him a sum far in excess of that amount, and has performed all the covenants incumbent upon her under the contract; that she has repeatedly demanded that appellant execute to her a warranty deed to the lot, which he has refused to do; that in December, 1900, appellant, during the temporary absence of appellee, unlawfully entered into and took possession of the premises without right or process of law, and now holds the same from appellee; that she has long since paid to appellant all the money due him by the agreement, and that, if any sum still remains unpaid, she is willing to pay the same, and brings the same into court for appellant's use and benefit; asking that the deed be executed, and for damages.

The complaint is not as specific in some particulars as it should be, but, as it does not wholly omit any material averment, such defects may be, and in this case are, cured by the special finding of facts. The complaint is not defective for want of an averment that appellee made or offered to make the note and mortgage. The execution of the deed and the execution of the note and mortgage

were concurrent acts. But, when the agreed amount was paid, the next act to be done was the making of the deed. When appellant refused to make the deed, he repudiated the contract so far as he could. After he had refused to make the deed, it would have been a useless formality to tender the note and mortgage. In *Parker v. McAllister*, 14 Ind. 12—a similar case—the court said: "By the terms of the contract, the payment of the first installment was to precede the execution of the deed by the vendor. The making of the deed was the next thing in order, for regularly no mortgage could be made by the vendee until the vendor had passed the title to him. As the vendor refused to accept the money, and, so far as he could, repudiated the contract, the tender of a mortgage could not be made, for the vendee had no legal title to the land to mortgage." See *Souffrain v. McDonald*, 27 Ind. 269; *Turner v. Parry*, Id. 163; *Blair v. Hamilton*, 48 Ind. 32; *Burns v. Fox*, 113 Ind. 205, 14 N. E. 541; *Horner v. Clark*, 27 Ind. App. 6, 60 N. E. 732. The special findings show the execution of the written contract; that immediately after the execution of the contract appellee took possession of the lot, and continued to occupy the same until about December 21, 1900, at which time, during the absence of appellee, and without her knowledge and consent, appellant took forcible possession of the premises, and has continued to hold such possession without right until the present time; that after appellee took possession she paid appellant \$3 each and every month for 89 consecutive months beginning with the month of January, 1888, and ending with the month of May, 1895; during such time she kept the property in repair, as she had agreed; during the years 1895 and 1896 appellee's husband furnished appellant, at his request, butter, meat, and eggs to the amount of \$22.85, which sum it was agreed should be applied to the purchase price of the property; that she has paid in all upon the purchase price of the property \$289.80; that at the time appellant forcibly took possession the rental value of the property was \$3 per month, of which appellee has been deprived by appellant, who has appropriated the property to his own use; that, after appellee had paid \$100, she demanded of appellant that he execute to her a deed, which he refused to do; that afterwards, and while she was in no wise in default in the execution of the contract, she again demanded a deed, which he refused, and still refuses, although appellee has at all times been ready and willing to execute the note and mortgage upon receiving from appellant a deed; that, after appel-

lee had demanded a deed, appellant voluntarily and without being required or requested so to do by appellee paid taxes on the property in the sum of \$25.28, which amount so paid appellee never agreed nor promised to repay; that the taxes accrued after the first \$100 of the principal sum in addition to the interest had been paid on the contract; that \$15.89 of this amount was for delinquent taxes; that appellee has paid to appellant, including the rental value of the property during the time appellant has wrongfully held possession, the full purchase price as stipulated in the agreement, and has complied with all the conditions of the agreement. As conclusions of law it is stated that appellee is entitled to a deed and to possession, and that her right to have the contract specifically enforced dates from the time she demanded a deed in 1895 and appellant's refusal to execute a deed. It is argued at some length that the findings are not sustained by sufficient evidence; that the court erred in its conclusions of law and in overruling certain motions to modify the judgment. The findings by the court are within the issues presented by the pleadings, and upon a careful consideration of all the evidence it is manifest that the findings are supported by the evidence. The trial court was the exclusive judge of the credibility of the witnesses. No good purpose would be subserved by a discussion of the evidence. There is evidence in the record to support the findings of fact made by the court.

There is no error of which appellant can complain in the conclusions of law upon the facts found. Appellee, under the facts found, had paid the full purchase price of the lot, and was entitled to a deed when she first made a demand for it. The conclusions of law are right upon the facts found.

Appellant's several motions to modify the judgment were properly overruled. The judgment rendered is the only judgment authorized by the conclusions of law. The motions sought only such changes in the judgment as would have made it not in accordance with the conclusions of law. If a judgment conforms to the conclusions of law, a motion to modify the judgment cannot prevail. The statute (*Burns' Rev. St.* 1901, § 560) provides that in a special finding the court shall first state the facts in writing, and then the conclusions of law upon them, "and judgment shall be entered accordingly." *Nading v. Elliott*, 137 Ind. 261, 36 N. E. 695; *Smith v. McKean*, 99 Ind. 101. There is no error in the record. The record shows that the merits are entirely with the appellee.

Judgment affirmed.

(31 Ind. App. 521)

PARKHURST et al. v. SWIFT.(Appellate Court of Indiana, Division No. 2.
Oct. 28, 1903.)**MASTER AND SERVANT—INDEPENDENT CONTRACTORS—NEGLIGENCE OF CONTRACTOR—EVIDENCE—SUFFICIENCY—PLEADING—WANT OF CONTRIBUTORY NEGLIGENCE.**

1. An elevator company contracting to place an elevator in running order in a building at a definite price, without any direction or control by the owner of the building in doing the work, is an independent contractor.

2. In an action for injuries to a servant, held that, the proximate cause of the injury being the unsafe condition of the scaffold, rendered so by the defendant company's agent, its vice principal in the work, the company was liable for the injuries.

3. In an action against the owner of a building and an elevator company for injuries sustained by plaintiff in doing the work, uncertainty in the complaint as to the relation between the defendants because of want of knowledge of the contract between them, and an allegation that the elevator company's agent represented both defendants, is not cause for reversal because of the overruling of a demurrer to the complaint, it being shown such agent was not a fellow servant.

4. Under Burns' Rev. St. 1901, § 359a, making contributory negligence matter of defense, plaintiff in an action for injuries need not plead the want of contributory negligence.

Appeal from Superior Court, Madison County; Henry C. Ryan, Judge.

County by Benjamin F. Swift against John W. Parkhurst and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Kittinger & Diven, for appellants. Ellison & Ellis, for appellee.

BLACK, J. The appellee recovered judgment against the appellant in an action for damages for a personal injury. There were three paragraphs of complaint, but before trial the appellee dismissed as to the first paragraph. The Alexandria Paper Company was a defendant with the appellants, but the court sustained its motion, at the close of the evidence, to instruct the jury to return a verdict for that defendant. A demurrer of the appellants for want of sufficient facts to each of the second and third paragraphs of the complaint was overruled.

So far as the second and third paragraphs differ one from the other, it appears from the record that the verdict was based on the third paragraph, rather than the second, and an examination of the third paragraph alone will be sufficient. It was, in substance, alleged therein that the paper company was a corporation, and that the appellants were partners doing business under the firm name of Parkhurst Bros. & Co., and were engaged in constructing elevators and in putting them in place and operation; that on and before December 14, 1890, the paper company was

constructing a large factory building in the city of Alexandria, Madison county, Ind., and at that date and immediately prior thereto the appellants, as partners, were constructing an elevator and putting it in place and operation in the factory building for the paper company; that the contract and arrangement between the paper company and the appellants by which the latter were building the elevator was to the appellee unknown; that he was a carpenter by trade, and for many weeks prior to the date mentioned he was in the employ and under the direction and control of the paper company, and working in and upon the factory building, except as hereinafter stated; that about four days prior to December 14, 1890, the paper company ordered and directed the appellee to go to work for the appellants, and in all things to obey the orders and directions of the appellants, and to work for and assist them in putting the elevator in the factory building, which directions and arrangements were agreed to and fully acquiesced in by the appellants; that, pursuant to these orders and directions, he did, about four days prior to the date mentioned, go to work for the appellants in and upon the construction of the elevator and putting it in place in the building, and he so continued to work for the appellants until the injury complained of herein; that in constructing the elevator the defendants intrusted the work and the supervision thereof wholly and exclusively to the agent and superintendent of the appellants; that his name was unknown to the appellee; that this agent and superintendent of the appellants had the exclusive supervision and control of the conditions surrounding the work, and the sole and exclusive management, control, and supervision of all the work of constructing the elevator and putting it in place and running order, and had at all times full authority to employ or discharge such hands as he deemed necessary to the proper prosecution of the work, and had at all times full and complete authority to direct when and where and how and with what tools and appliances each and every hand engaged in and upon the work of constructing the elevator and putting it in place and running order should work, and in all the work and the supervision and control thereof this superintendent acted in all things for and instead of the defendants; that on the day above mentioned, and for four days prior thereto, the appellee was and had been continuously working upon the construction of the elevator and putting it in place and running order in the factory building, and was under the exclusive control and direction of this agent and superintendent; that about three days before December 14, 1890, the appellants had cut a large hole about six by seven feet in both the second and third floors of the factory building, for the purpose of allowing the elevator to pass through these floors in its ascent and

¶ 1. See Master and Servant, vol. 34, Cent. Dig. §§ 1243, 1257.

descent when in operation, and at the same time the appellants constructed a large wooden scaffold about eight feet above the third floor, which scaffold was constructed by standing four small scantlings of timber on end on that floor, one of which was placed on the floor just outside of each of the corners of this large hole or opening on the third floor; that the appellants nailed cross-timbers to these upright scantlings about eight feet above the third floor, and laid on these cross-timbers heavy wooden boards or a flooring for the scaffold; that the appellants then braced and stayed the scaffold by nailing slats of timber from the base of each upright timber to the top of the next upright timber, and then crossing such braces with other braces at right angles and nailing the same to the upright timbers at top and bottom; that the scaffold so completed was directly over the hole above mentioned in the third and second floors—all of which facts were at all times known to the paper company; that on December 14, 1899, while the appellee, pursuant to the orders and directions of the paper company, was working for the appellants, and while he was under the exclusive and absolute control and directions of the agent and superintendent above mentioned of the appellants and the paper company, this superintendent ordered and directed the appellee to take a handsaw and saw an opening, or make a small hole, in the second floor of the factory building at the edge of the large hole in the floor, the small hole being for the purpose of an opening through which a cable rope for raising and lowering the elevator was to pass; that the appellee at once went to work sawing out the small hole, and while he was so at work the superintendent, while in the line of his duty as such, negligently and carelessly knocked loose and took away said braces of the scaffold, well knowing that the appellee was working under the same, and that it was rendered liable, by that act of removing the braces, to fall, and the timbers thereof to strike and injure the appellee; that the superintendent, when this was done, well knew that it would render the place where the appellee was at work a very hazardous and dangerous one; that about two hours after this removal of the braces, and while the appellee was still at work sawing out the hole in the second floor, the superintendent, while in the line of his duties as such, carelessly and negligently ordered one of the employes of the appellant to go upon the third floor of the factory building and climb on the scaffold to do some work thereon wholly disconnected with the work the appellee was doing; that the superintendent, at the time he so ordered the said employé to go upon the platform, well knew that his act in so ordering the employé and the act of the employé in obeying the order would render the place where the appellee was working a very dangerous and hazardous

one, and that the same was liable to throw the platform, or a part thereof, down on the appellee, and greatly injure him, and the superintendent then well knew that his act in removing the braces and his thereafter ordering the employé to go upon the scaffold made it liable to be thrown down and to fall upon and injure the appellee; that in obedience to said command of the superintendent the employé attempted to go upon the platform, when, by reason of the braces being removed from the timbers thereof and the attempt of the employé to climb upon the platform, the scaffold and the timbers thereof separated and fell apart, allowing and causing one of the heavy boards on the scaffold to fall through the hole in the third floor in such a way that it struck the appellee upon the back and side and greatly and permanently injured him. His injuries and expenses were here stated in detail. It was alleged that the appellee at no time had any knowledge or notice, before he was injured, that the braces had been removed from the frame of the platform, or that any one was ordered to go upon the platform, or was attempting or was about to go upon it; that the injury was brought about wholly and solely by reason of the negligence of the agent and superintendent and the negligence of the paper company in not providing and maintaining a safe place for him to work in, and the negligence of the superintendent in removing the braces from the scaffold and ordering said employé to go and causing him to attempt to go upon the scaffold as aforesaid, and thereby making the place where the appellee was at work an unsafe, dangerous, and hazardous one in which to work; that by his said injuries so received he was damaged in the sum of, etc., for which he demanded judgment against each and all of the defendants.

With the general verdict in favor of the appellee the jury returned answers to interrogatories, and the court overruled a motion of the appellants for a judgment in their favor thereon notwithstanding the general verdict. It was thus specially found that the appellee had been working as employé doing general carpenter work for the paper company prior to December 10, 1899; that the paper company contracted with the appellants to furnish and put in an elevator in the factory building for the sum of \$325; that a man named Gentry came to Alexandria, where the factory was, to put the elevator in the factory, and the paper company supplied three men from its employes to assist in the putting in of the elevator, in the putting in of which the appellee was injured. These three men were Benjamin F. Swift, the appellee, and one Weaver and one White; all three being regular employes of the paper company. The paper company settled with these three men for their wages, the same as it had been doing regularly, for the time

they worked in putting up the elevator. The paper company afterward settled with the appellants, and paid them the first contract price, less the amount of wages of the three men; and this was all the paper company paid to the appellants. Interrogatory 10 and the answer thereto were as follows: "Did Parkhurst Bros. & Co. directly employ the plaintiff and Weaver and White to assist in putting up the elevator where the plaintiff was injured? Answer. Yes, by their agent." It is found that the three men assisted in putting up the elevator by direction of the superintendent or agent of the paper company for them to assist Gentry in putting it up. There was no employment of the three men to assist in putting up the elevator other than the general employment by the paper company for which they had been working for some months, and they were directed by the agent or superintendent of the company to assist in putting up the elevator. Interrogatory 14: "If the plaintiff did any work in putting up the elevator, in the work of which he was injured, under any other employment than his employment by the Alexandria Paper Company, you may state when he was so employed and by whom. Answer. The morning the elevator man came, by Parkhurst & Co.'s agent." The paper company, after it had made its contract with the appellants, agreed with them that it would furnish a part of the labor of putting in the elevator, and that the amount of the labor so furnished should be deducted from the contract price, and that it would pay them \$325, less the value of the labor furnished; and the paper company paid to the appellants that sum less the value of such services. All this was at Gentry's request. The jury found that there was evidence that Gentry bore to the appellants the relation of agent. He came, not to assist in the putting up of the elevator, but to put it up. He had authority given him by the appellants to employ or discharge others in the work of putting in the elevator. He did not make any contract with the appellee or Weaver or White for them to work in putting in the elevator. The members of the firm of Parkhurst Bros. & Co., at the time when that firm was putting in the elevator and when the appellee was hurt, were the appellants. They constituted a partnership. The duty of Gentry, under and by virtue of his employment by the appellants, was to install the elevator. His authority to hire or discharge men for the appellants was as their agent. Gentry and the appellee and Weaver and White were the only persons that worked on the job. They all worked at manual labor, and assisted each other in the entire work until the appellee was injured. On the day on which the appellee was injured, the persons, or a portion of them, engaged in the work, built a scaffold eight feet high on the third floor of the building over the hatchway

which had been cut out for an elevator. The parties engaged in putting in the elevator had been working in and about the scaffold until about noon of the day of appellee's injury. Appellee was a carpenter of 10 or 11 years' experience. The second floor had been laid around and near the hatchway. The appellee was engaged in the afternoon in sawing a small hole through the floor in the second story, for the rope of the elevator, immediately east of the hatchway, and connected therewith. A board was laid from north to south across the hatchway close to its east side. The appellee was standing or kneeling on the board and sawing out the small hole. One of the braces had been taken from one side of the scaffold on the third floor just before noon of the day on which he was injured. Weaver was present, and saw the brace taken away, and knew it was taken away. While appellee was engaged in sawing the small hole, Gentry, Weaver, and White were engaged in the basement in some duties about the elevator work, and while they were there Weaver took some grease, and went to the third floor to grease some pulleys which had been put up over the scaffold there. When he got to the third floor he did not know that, if he undertook to climb upon the scaffold from which the brace had been removed, or upon the southeast part thereof, the scaffold would thereby be pulled apart, and be liable to let a board on the scaffold fall down. He attempted to climb up the southeast corner of the scaffold, and in doing so he pulled the scaffold apart, and let a board fall, which struck and injured the appellee. He could not have climbed in safety upon the scaffold at another place. He climbed up the scaffold without thinking or paying any attention to the fact that the brace had been removed. He did not know, before he undertook to climb up, that, if he did so, he would pull the scaffold apart, and did not undertake to climb up carelessly and negligently, and without thinking what he was doing. There were not at that time about the scaffold or on the third floor any other persons who were or had been engaged in the work of putting in the elevator, or concerned in that work, when Weaver undertook to climb upon the scaffold. The appellee was not injured by Weaver's unthoughtedly undertaking to climb upon the scaffold when he knew that to do so would pull it apart and let the board fall. The scaffold was immediately over the opening or hatchway on the third floor through which the elevator was to pass, and the opening or hatchway through which the elevator was to pass in the second floor was immediately under that in the third floor, and under the scaffold. The appellee knew that the scaffold on the third floor was built over the hatchway or opening in that floor. If he had been standing on the floor of the second story where he was at work, when

he was injured, sawing the opening in that floor, the board which fell would have struck him. He was standing or kneeling on a plank across the hatchway, bending over and sawing, with one foot on the board and one on the floor. To an interrogatory asking if there was anything in the way of his standing on the floor and sawing a hole in the floor, at which work he was engaged when injured, the jury answered in the affirmative. It would not have been a safer place for him to have sawed the hole to stand or kneel on the floor than to stand or kneel on the plank. He could have performed the work he was engaged in doing by standing or kneeling on the floor immediately east of the hole he was sawing in the floor, but at a disadvantage; and he could not thus have done the work as well as by standing or kneeling upon the board across the hatchway and immediately west of the hole he was sawing, on account of the elevator guide. The injury was not caused by the unthoughtful act of Weaver doing what he knew would cause the scaffold to separate and cause the board to fall. There was nobody near or about Weaver to see him when he attempted to climb up the scaffold. It was answered that Weaver would not have climbed up the scaffold at a place where it would have been safe, and would not have pulled the scaffold apart, if he had thought about the danger which he knew existed. When he attempted to climb up the scaffold, he immediately realized that he had pulled it apart, and at once called out in a loud voice to watch out below, and the board continued to fall from the scaffold and struck the appellee. The appellee had been assisting in the work on the elevator on which he was injured along with other men working on the elevator on the scaffold on the third floor. He went with Gentry from that floor to the second floor a short time before he was injured, and when he started down he left Weaver and White on the third floor, and the appellee at once commenced sawing out the hole, in the work at which he was injured. He knew that Weaver and White were assisting, along with himself and Gentry, in putting in the elevator.

The general subject of the duty of the master to provide for the servant a safe place and safe appliances for his work need not be discussed. The case proceeded upon the theory of the liability of the appellants for failure to properly discharge such duty. The most important discussion of counsel has reference to the relation of the parties concerned. The work undertaken by the appellants was in their special line of business, and the providing of the elevator and placing it in the building in running order constituted one entire undertaking for a single definite price, the materials and labor to be provided by the appellants, the paper company providing only the building in which it was placed, and the

appellants being responsible to the paper company for the result alone, and not being under its control and direction in the doing of the work. It seems sufficiently clear that the appellants were independent contractors. The appellee and Weaver and White had been continuously the servants of the paper company. That company had not contracted to provide any of the necessary labor or assistance, but at the request of the agent of appellants it furnished the three workmen, for whose services the appellants paid indirectly by allowing a deduction of the amount of their compensation from the contract price, the wages of the workmen being directly delivered to them by the paper company. While these men were thus employed, they were not under the control and direction of the paper company as to their work, but they were for the time and in that work the servants of the appellants, and were under the entire control and management of the agent, Gentry, who alone represented the appellants on the ground and in the work, with full control as to the manner of performance and authority to employ the needed assistance and to discharge workmen so engaged by him. The fact that Gentry himself performed manual labor along with the men so provided by the paper company did not render him any the less the superintendent and sole representative of the appellants in the work of putting in the elevator. It was more convenient and to the advantage of the appellants that he should thus engage in the work, whose needs he understood. It was as if an independent contractor had himself taken manual part with his workmen. Gentry was a vice principal, and the appellee, while a servant of the appellants for the occasion, was not his fellow servant in the doing of the work in which he was injured. The duty of the appellants to provide and maintain a safe place for the appellee in the doing of the work of his employment was devolved upon Gentry, and the appellants were responsible for the manner in which he performed that obligation. The act of Weaver in attempting to climb upon the scaffold caused it to spread, and the board to fall and injure the appellee; but that act was one for which the scaffolding should have been sufficient. It was rendered insufficient, not in its original construction, but by the removal of the brace. Weaver did an act which was not improper to be done, and which might have been done safely if the appliance which he was required to use had been a proper one. The proximate cause of the injury was the unsafe condition of the scaffold, rendered so by Gentry, through whom the appellants had the right to accept or reject the services of the appellee, and control and direct him; the will of Gentry, and therefore of the appellants, being represented in the result and in the details of the work performed by the appellee.

Higgins v. Western Union Tel. Co., 156 N. Y. 75, 50 N. E. 500, 66 Am. St. Rep. 537, was an action for a personal injury sustained by the plaintiff while engaged in using an elevator in the defendant's building. A contractor for restoring the building, which had been injured by fire, was to furnish elevators, and they had been placed in the building. The contractor had not completed his contract, and had not turned over the elevators to the owner of the building, but they were still subject to the contractor's use in carrying material and workmen. The plaintiff, a plasterer, in the employ of the contractor, was directed by him to plaster the elevator shaft, for which purpose the elevator was used as a platform. It was necessary to move the elevator up and down, and the contractor, instead of using one of his own men for that purpose, found it more convenient and economical to procure a man who was a general servant of the defendant, and in his employment, for the purpose of running the elevator for passengers—a use permitted during some portions of the day. The plaintiff's injury was caused by the negligent act of this conductor of the elevator. It was held that the conductor was engaged, not in the work of the owner of the building, but in that of the contractor, and the former was not responsible for the injury. The court said that the true test in such cases is to ascertain who directed the movements of the person committing the injury, and quoted from *Rourke v. White Moss Colliery Co.*, L. R. 2 Com. Pl. Div. 205, as follows: "But when one person lends a servant to another for a particular engagement, the servant, for anything done in that particular employment, must be dealt with as the servant of the man to whom he was loaned, although he remains the general servant of the man who lent him." See, also, *Cotter v. Lindgren*, 106 Cal. 602, 39 Pac. 950, 46 Am. St. Rep. 255; *Brown v. Smith*, 86 Ga. 274, 12 S. E. 411, 22 Am. St. Rep. 456; *Powell v. Construction Co.*, 88 Tenn. 692, 13 S. W. 691, 17 Am. St. Rep. 925; *Pioneer Construction Co. v. Hansen*, 176 Ill. 100, 52 N. E. 17; *Miller v. Minnesota*, etc., R. Co., 76 Iowa, 655, 39 N. W. 188, 14

Am. St. Rep. 258; *Scarborough v. Ala. Midland R. Co.*, 94 Ala. 497, 10 South. 316.

The uncertainty of the complaint as to the relation between the paper company and the appellants because of the appellee's alleged want of knowledge of the contract between them, and the allegation to the effect that Gentry represented all the defendants, cannot work a reversal of the judgment because of the overruling of the demurrer. It is sufficiently shown that he was not a fellow servant with the appellee. It turned out, as shown by the findings of the jury, that Gentry was the superintendent of the work, representing therein the appellants as independent contractors; and the source of the payment of the wages of the appellee could not alone determine the question as to who was his master for the time being.

Under the statute of 1899 (Acts 1899, p. 58; section 359a, Burns' Rev. St. 1901) it was not necessary for the appellee to plead want of contributory negligence. There is nothing in the special findings of the jury irreconcilably in conflict with the general verdict. The evidence might have supplied facts necessary to support the general verdict, whose existence is not affirmed or denied by the special findings. Thus it appears in the evidence that the brace was knocked off the scaffold by the direction of Gentry in the course of the work on the elevator, and was not thereafter restored; that Weaver went alone from the basement to the third story to grease some pulleys above the scaffold by direction of Gentry, and that appellee had no notice of the removal of the brace, and no notice that Weaver or any other person was in the third story, until he heard him call, "Look out!"

The sufficiency of the evidence is questioned, but we are unable to disturb the conclusion of the jury thereon. Some questions are also made concerning the admission of evidence and relating to instructions to the jury, but they do not seem of sufficient importance to warrant the lengthening of this opinion by discussion thereof. We do not find any reversible error in the record.

Judgment affirmed.

(176 N. Y. 317)

SMITH v. CHESEBROUGH et al.

(Court of Appeals of New York: Oct. 30, 1903.)

WILLS—CONSTRUCTION—VOID INTERMEDIATE TRUST—EFFECT.

1. Testator devised and bequeathed his residuary estate in trust to his executors to pay the income to his wife for life, with power at any time to sell his real estate in their discretion, with the provision that on her death the residuary estate should be transferred to certain permanent trustees. On the death of his wife testator executed a codicil revoking the provision for her benefit, and directed his executors to hold the residuary estate, and invest and reinvest the income for two years after his death, when the residuary estate and the accumulated income was to be transferred to the trustees of the permanent trust. *Held*, that neither the provisions creating the permanent fund nor those in the will granting the power of sale, were revoked by the codicil, though the direction to hold and invest the income and principal of the residuary estate for two years before transferring them to such permanent fund constituted an unlawful suspension of the power of alienation, in violation of Real Property Law, §§ 32, 51 (Laws 1896, pp. 565, 568, c. 547), since such invalid provision did not deprive the executors of the power of sale, nor destroy the existence of the permanent trust, but only affected the time when the permanent trust should take effect, which thereby became the time of the testator's death.

Appeal from Supreme Court Appellate Division, Second Department.

Action by Ellsworth C. Smith against Amos S. Chesebrough and others. From an order of the Appellate Division (81 N. Y. Supp. 570) affirming an interlocutory judgment in favor of plaintiff, defendant Cranstoun appeals by permission. Reversed.

The following are the questions certified: "(1) Was not a valid power to sell the real property described in the complaint given to appellant by his testator, Nicholas H. Chesebrough? (2) Did said Chesebrough's testamentary disposition of said real property illegally suspend the power of alienation thereof? (3) Should not said Chesebrough's invalid direction to accumulate the rents, interest, and income be eliminated by the court, and the rest of his testamentary plan upheld?"

P. Harwood Vernon, for appellant. Paul Eugene Jones, for respondent Smith.

WERNER, J. This is an action for the partition of certain real estate described in the complaint situate in the counties of New York and Richmond, in this state, and of which Dr. Nicholas H. Chesebrough, a resident of the state of New Jersey, died seised on April 6, 1899. The plaintiff and certain of the defendants, who are collateral relatives and heirs at law of the late Dr. Chesebrough, assert ownership to this real estate by reason of the alleged partial intestacy of the latter, while the defendant Cranstoun and others claim title thereto as trustees under his will and codicil, upon the construction of which the issue depends. Dr. Chesebrough's will was executed in the state of

New Jersey on the 23d day of October, 1897. It first provided for the payment of his debts and funeral expenses, and then for certain specific legacies to relatives and various institutions. The residue of the estate he devised to his executors and to the survivor of them, in trust to hold the same, to collect the rents, income, and interest therefrom, and to pay them over to the wife of the testator during her life. The executors were also given a power of sale, with discretion as to the time of its execution, and were directed to invest the proceeds of sales, and the interest and income therefrom to pay to the wife during her life. The foregoing devise to the executors was limited upon the further trust that upon the death of the testator's wife the residue of the estate and all moneys realized from the investment of the same then remaining be conveyed and paid over to six designated trustees, who were directed to found and erect in the town of Summit, in the state of New Jersey, an institution to be known as "The Chesebrough Protestant Orphan Asylum." The specific directions which relate to the establishment and execution of this ultimate trust are not material to this discussion, but it may be stated in passing that they are concededly valid under the laws of New Jersey, and would be valid in this state if they were to be executed here. Laws 1893, p. 1748, c. 701; *Allen v. Stevens*, 161 N. Y. 122, 55 N. E. 568. In February, 1899, the testator executed a codicil, in which he made certain changes in specific bequests, revoked the provision for his wife, who had died after the execution of the will, and then directed his surviving executor to invest the net rents, interest, and income to be collected by him in safe securities, or to deposit the same in bank so as to draw interest, until the expiration of two years after testator's decease, and at that time, instead of after the death of testator's wife, "to assign, transfer, convey, and pay over" the residue of the estate and all moneys realized from the investment of the same, or of the rents, issues, and income thereof, to the six designated trustees for the purposes of the ultimate trust above referred to. In all other respects the original will was ratified and confirmed.

The courts below have held that the power of sale given by the will was revoked by the codicil, and that the direction to the executor in the latter instrument to hold and invest both principal and income for a definite period of two years after testator's death before transferring the same to the ultimate trustees constituted an unlawful suspension of the power of alienation, under section 32 of the real property law (Laws 1896, p. 565, c. 547), which invalidated the will, and vested the title to the premises described in the complaint in the plaintiff and the other heirs at law of the testator. We are unable to concur in that view of the case. While the codicil does direct the surviving executor

to hold and invest both principal and income of the estate for a definite period fixed by years instead of lives, and does therefore unlawfully suspend the power of alienation, and provide for the unlawful accumulation of income (sections 32, 51, Real Property Law [Laws 1896, pp. 565, 568, c. 547]), it does not follow that the will must fail altogether. If the invalid parts of the codicil can be expunged without essentially changing or destroying the testator's general testamentary scheme, the valid parts of the will should be upheld, under the rule applied by this court in the case of *Kalish v. Kalish*, 166 N. Y. 377, 59 N. E. 917, and in many other cases there cited. In the *Kalish Case* we said: "It is axiomatic that courts cannot make new wills for testators who have failed to make valid wills for themselves. While recognizing the force of this truth, courts have from the earliest times been compelled to choose between the alternatives of setting aside certain wills altogether or of cutting out simply their void provisions. This necessity has led to the rule, which is now firmly established in this state, that when the several parts of a will are so intermingled or interdependent that the bad cannot be separated from the good, the will must fail altogether; but when it is possible to cut out the invalid provisions, so as to leave intact the parts that are valid, and to preserve the general plan of the testator, such a construction will be adopted as will prevent intestacy, either partial or total, as the case may be." A brief analysis of the will and codicil before us will suffice to disclose the peculiar application of this general rule to the case at bar. In the original will there were, first, the specific legacies to various persons and institutions; second, the life estate of the testator's wife; third, the ultimate trust in the six named trustees for the orphan asylum to be founded. The only relation that the life estate and the ultimate trust bore to each other was that the execution of the latter was to await the termination of the former. The power of sale, although related to each of these estates, is not dependent upon either of them. The direction to sell is peremptory, but the time of its execution is discretionary, so that it clearly survived the life estate. The testamentary scheme of the original will was therefore indisputably valid. The only changes sought to be effected by the codicil were, first, the elimination of the life estate, the occasion for which had passed with the death of the testator's wife; and, second, the postponement until two years after the testator's death of the physical transfer of the residuary estate and its accumulations to the ultimate trustees. Under the original will the estate devised to the ultimate trustees was a vested remainder, the possession and enjoyment of which depended upon the duration of the life estate of the testator's wife. The ultimate trust was not revoked

by the codicil, and the nature of the estate devised to the ultimate trustees was not changed, but the testator made an attempt to postpone the enjoyment thereof, which was in contravention of the statute, and therefore void. By taking out of the codicil the invalid provision for postponement, the only change in the testator's plan for the disposition of his residuary estate is that the physical possession of the remainder is accelerated so as to take effect upon the testator's death instead of two years later. In all other respects the testamentary scheme is not only essentially, but literally, preserved. By expunging the invalid part of the codicil, the testator's partial intestacy is avoided, and the real substance of his will is effectuated in its entirety.

The case of *Garvey v. McDevitt*, 72 N. Y. 556, relied upon by the respondents, seems to us clearly distinguishable from the case at bar. In the *Garvey Case* the trust was held to have been void in its creation, as it could not have been valid without creating an unlawful suspension of the power of alienation during the trust term of four years. In the case at bar we have a trust valid in its inception, and remaining so after the excision of the invalid directions in the codicil.

The first, third, and fourth questions certified to us are answered categorically in the affirmative. The second certified question is answered in the affirmative as qualified and explained in the opinion. These answers require a reversal of the order and interlocutory judgment appealed from, the dismissal of the complaint, with costs, and final judgment for the appellant in accordance with the foregoing views, with costs in all courts.

PARKER, C. J., and O'BRIEN, BART. LETT, MARTIN, VANN, and CULLEN, JJ. concur.

Order and judgment reversed, etc.

(176 N. Y. 324)

TORGE v. VILLAGE OF SALAMANCA.
(Court of Appeals of New York. Oct. 30, 1903.)
MUNICIPAL CORPORATIONS — CHANGE OF GRADE — ASSESSMENT OF DAMAGES — PROCEDURE — GRADE CROSSING — PARTIES.

1. Laws 1883, p. 100, c. 113, as amended by Laws 1884, p. 342, c. 281, and Laws 1894, p. 330, c. 172, providing that, when the grade of a street in an incorporated village is changed so as to injure the property of abutting owners, they may apply to the Supreme Court for appointment of commissioners to determine the damages, which shall be a charge on the village, is not repealed by the village law (Laws 1897, c. 414, pp. 420, 456, §§ 159, 342, subd. 4), providing for assessment of damages when the grade of a street is changed by the authorities having control of the street, except so far as it might apply to a change of grade of a street by the legally constituted authorities of a village which has exclusive control of the street.

2. A railroad grade crossing was changed to an undergrade crossing by the railroad company and the village, under an order of the

board of railway commissioners authorized by Heydecker's Gen. Laws, pp. 3291-3296, c. 39, §§ 62-69, relating to the change of railroad crossings at grade, so that an alteration of the grade of the street was rendered necessary. *Held*, that an owner of abutting property could maintain a proceeding for damages caused thereby, under Laws 1883, p. 100, c. 113, as amended, by applying to the Supreme Court for appointment of commissioners, to which proceeding the railroad company was a necessary party, as the damages were caused by an improvement towards the existence of which the railroad company, under the law, is obliged to contribute.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Proceeding by Caroline Torge against the village of Salamanca. From an order of the Appellate Division (83 N. Y. Supp. 672) reversing an order of the special term appointing commissioners to appraise the damages sustained by reason of a change of grade in the front of plaintiff's property, she appeals. Reversed.

Niles C. Bartholomew, for appellant. G. W. Cole and Henry P. Nevins, for respondent.

CULLEN, J. The petitioner was the owner and possessor of premises in the village of Salamanca, situate at the intersection of Main street and the Erie Railroad. In the year 1900 the village, by its board of trustees, applied to the board of railroad commissioners, under the provisions of section 62 of the railroad law (Heydecker's Gen. Laws, pp. 3291-3296, c. 39, §§ 62-69), to have the crossing of the street over the railroad, which at the time was at grade, changed to an under-grade crossing. Such proceedings were had that in April, 1901, the commissioners made an order directing the change to be made according to certain plans and specifications. The improvement rendered necessary an alteration of the grade of Main street in front of the appellant's premises. Thereupon the trustees of the village passed a resolution changing the grade of the street to accord with the plans of the new crossing approved by the railroad commissioners. Thereafter, and within 60 days from the completion of the work, the appellant filed a claim for damages arising from the change of grade with the board of railroad commissioners and with the clerk of the village. The trustees of the village failed to agree with the appellant as to the compensation to be made to her. She then applied to the Supreme Court for the appointment of three commissioners to ascertain and determine the amount of her damage. The village resisted the application, filing an answer to the appellant's petition. A trial was thereupon had, and an order made appointing commissioners. On appeal the Appellate Division (83 N. Y. Supp. 672) reversed the order of the special term and dismissed the proceedings.

As the order of the Appellate Division was a final order, an appeal lies to this court.

Matter of Munn, 165 N. Y. 149, 58 N. E. 881. We are thus brought to the merits of the controversy. The learned counsel for the respondent contends that the appellant is not entitled to any compensation, because the village authorities did not have exclusive power to make the change in the crossing. The learned Appellate Division did not pass on this question, but held that, if the appellant was entitled to compensation, she could not recover it by this proceeding. To determine these questions, it is necessary to review the legislation on which the appellant's claim is based. Under the settled law of this state, damage caused to an abutter by change of the grade of a street by the municipal authorities was *damnum absque injuria*. *Radcliff's Ex'rs v. Mayor, etc.*, of Brooklyn, 4 N. Y. 195, 53 Am. Dec. 357; *Helser v. Mayor, etc.*, of N. Y., 104 N. Y. 68, 9 N. E. 866. The hardship of this rule, however, was early appreciated, and legislation was passed to secure abutters who improved their property on the faith of the established grade of a street from alteration of that grade without compensation. So, in 1883, a statute (Laws 1883, p. 100, c. 113) enacted that, whenever the grade of any street or highway in any incorporated village should be changed so as to injure or damage the buildings or real property adjoining such highway, the owners thereof might apply to the Supreme Court for the appointment of three commissioners to ascertain and determine their damages, which damages should be a charge on the village, town, or other municipality chargeable with the maintenance of the street or highway so altered or changed. This statute was amended in 1884 (Laws 1884, p. 342, c. 281) and in 1894 (Laws 1894, p. 330, c. 172). The amendments relate merely to matters of procedure, the latter statute directing that the provisions of the condemnation law should be applicable to the appointment of and the powers and duties of the commissioners appointed under it. In 1897 was enacted the general village law (Laws 1897, p. 306, c. 414). By section 159, p. 420, it is provided that "If a village has exclusive control and jurisdiction of a street or bridge therein, it may change the grade thereof. If such change of grade shall injuriously affect any building or land adjacent thereto, or the use thereof, the change of grade to the extent of the damage resulting therefrom, shall be deemed the taking of such adjacent property for a public use." The remainder of the section prescribes the procedure to be followed, and is a substantial re-enactment of the previous law on that subject. It is contended by the counsel for the respondent that the village had not exclusive control of the highway at the intersection of the railroad, and that a change in the grade of the street at that point could be effected only by an order of the railroad commissioners in proceedings taken under section 62, p. 3291, of the railroad law, and

that hence the appellant's case does not fall within the terms of the section of the village law. But to entitle the appellant to compensation, it was not necessary that her case should fall within the terms of the village law. The provisions of the act of 1883 are broad and comprehensive. They provide that, whenever the grade of a street or highway in a village shall be changed, the abutter shall be entitled to compensation for damages sustained thereby. "Due notice of such application shall be given to the person or persons having competent authority to make such change or alterations." It is then provided that the damages shall be a charge against the village or municipality chargeable with the maintenance of the street or highway. It will thus be seen that all that is necessary to bring a case within the statute is that the grade shall be legally changed or altered. It is not necessary that it shall be changed or altered by the village authorities. All that was decided on this subject in *Matter of Whitmore v. Vil. of Tarrytown*, 137 N. Y. 409, 33 N. E. 489, was that the village was not liable for the unauthorized acts of its street commissioner. That this is the true construction of the statute of 1883, and that it was not intended by the village law to limit the abutter's right to compensation, is made clear by section 342, p. 456, of the latter statute, which reads: "The following acts and parts of acts are hereby repealed: * * * (4) Chapter 113 of the Laws of 1883, and the acts amendatory thereof, so far as they relate to the change of grade of streets or bridges by village authorities." Unless the right of compensation for change in the grade of a street was general, and applicable to all cases where the change of grade was made by authority of law, and unless it was intended to continue such general liability, it is difficult to see why the repeal of the statute of 1883 was not made absolute, instead of qualified and limited. There is no reason why an abutter whose property is injured by a change of grade made in the interest of the general public, traveling either on the highway or on the railroad, should be less entitled to compensation than where such change is dictated solely by local considerations.

We now reach the position taken by the Appellate Division—that, whatever may be the appellant's rights, she is not entitled to enforce them by this proceeding. Having decided that the appellant's rights are secured by the act of 1883, which we hold is still extant, it follows that she is, in any view, entitled to maintain the proceedings authorized by that statute. As already said, the proceedings under the village law are substantially the same as those prescribed by the law of 1883. At least, the requirements of the former act are no greater than those of the latter. It was not necessary for the petitioner to specify under what law she sought to proceed, provided she complied

with all the requisites of the statute on which her rights were founded. The learned court below thought that the provisions of section 63, p. 3292, of the railroad law, which enact that, in case of the change of a grade crossing, the municipality, if unable to obtain the same by purchase, shall acquire the lands, rights, or easements necessary for the improvement by condemnation under the condemnation law, and that the railroad company shall have notice of such proceedings, and the right to be heard therein, were exclusive and inconsistent with the right of the appellant to maintain this proceeding. We see no such inconsistency. All proceedings of this character, whether prescribed by the act of 1883, by the village law, or by the railroad law, are to be taken under the condemnation law; the only difference that I perceive being that the railroad law contemplates the company or municipality as being the moving party, while the act of 1883 and the village law casts the burden of instituting the proceedings on the abutter who asserts that he has been damaged. There is no difficulty, however, in the harmonious and concurrent working of both statutes. In the proceeding before us, as the damage for which the appellant seeks to recover was occasioned by an improvement toward the expense of which the railroad company is required to contribute its ratable proportion, that company is entitled to be made a party thereto, and to be heard therein as provided by the railroad law. Thus the rights of all parties can be secured. But the general rule is that where a right not existing at common law is given by a statute, and a remedy for the enforcement of that right prescribed, the right can be enforced only through the statutory remedy. *Dudley v. Mayhew*, 3 N. Y. 9; *Heiser v. Mayor, etc.*, of N. Y., 104 N. Y. 68, 9 N. E. 866. We should therefore be loath to hold, unless the language of the statute plainly requires such a result, that in any particular case the remedy prescribed by the act falls when as a result of such a ruling the right might fall also. Nor do we perceive the difference between the rule of damages that obtains in proceedings under the railroad law and that which obtains under the act of 1883 and the village law which is suggested by the Appellate Division. It is true that the latter statutes provide in express terms for setting off benefits against injuries. But this is the rule under the railroad law, so far as compensation is sought for consequential injuries. This was so held in the *Elevated Railroad Cases*. *Bohm v. Metr., etc.*, 129 N. Y. 576, 29 N. E. 802, 14 L. E. A. 344. The right secured to an abutter to compensation for a change in the grade of a street is substantially the grant to him of an easement in the street to have it maintained at its existing grade, and any such easement created by the statute is in every respect analogous to those invaded in the *Elevated Railroad Cases*.

The order of the Appellate Division, so far as it dismissed the appellant's petition, should be reversed, and the proceedings remitted to the special term, with directions to the appellant to make the Erie Railroad Company a party thereto, with costs to the appellant at the Appellate Division and in this court.

O'BRIEN, BARTLETT, MARTIN, VANN, and WERNER, JJ., concur. PARKER, C. J., not voting.

Order reversed, etc.

(178 N. Y. 313)

WATERTOWN CARRIAGE CO. v. HALL.

(Court of Appeals of New York. Oct. 30, 1903.)

BANKRUPTCY—DISCHARGE—EFFECT—EMBEZZLEMENT.

1. Under Bankr. Law 1898, § 17 (Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428]), expressly excepting from debts released by a discharge in bankruptcy debts created by fraud, embezzlement, or misappropriation of money while acting in a fiduciary capacity, where a complaint in conversion alleges that defendant wrongfully embezzled plaintiff's money the legal import is that he became possessed of it in a fiduciary capacity, and his answer setting up a discharge in bankruptcy as a defense is demurrable as insufficient in law.

Appeal from Supreme Court, Appellate Division, Third Department.

Action by the Watertown Carriage Company against Edwin L. Hall. From an order of the Appellate Division (77 N. Y. Supp. 1028) affirming an interlocutory judgment sustaining a demurrer to the answer, defendant appeals. Affirmed.

C. H. Sturges and Willard J. Miner, for appellant. Joseph Nellis and Levi H. Brown, for respondent.

O'BRIEN, J. The complaint in this action alleged that the plaintiff upon the day specified was the owner and entitled to the immediate possession of the sum of \$65 in money, consisting of bills, bank notes, and currency, but in what particular denominations the plaintiff was unable to more particularly state; that on the day named, prior to the commencement of the action, the defendant did fraudulently and unlawfully convert, misappropriate, and embezzle said money; that before the commencement of the action the plaintiff duly demanded the aforesaid sum of money of the defendant, but the defendant refused, and still refuses, to deliver the same to the plaintiff; and the plaintiff was damaged in the sum of \$65, with interest from the day of said conversion, misappropriation, and embezzlement. The defendant, among other matters, interposed an answer as a distinct and separate defense to the cause of action stated in the complaint, and as a bar to the same a dis-

charge in bankruptcy. To this separate defense the plaintiff demurred on the ground that it was insufficient in law upon the face thereof, and this demurrer has been sustained by the courts below.

The only question, therefore, presented by this appeal is whether a discharge in bankruptcy is a good defense to a cause of action such as is stated in the complaint herein. There would, I think, be very little difficulty in disposing of this question except for numerous decisions of the courts giving construction to corresponding provisions of the bankrupt acts of 1841 (Act Aug. 19, 1841, c. 9, 5 Stat. 440) and 1867 (Act March 2, 1867, c. 176, 14 Stat. 517). These decisions have been elaborately reviewed and discussed by counsel, and the difference between these statutes and the present bankrupt law (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]) pointed out. In the view that we take of the case, it is not necessary to refer to these decisions, since, in our opinion, they are not controlling, if at all applicable, upon the question now presented. The order sustaining the demurrer was interlocutory, and hence was not reviewable in this court without a certificate from the court below. We have that certificate in the record, and the question certified is in these words: "Is a discharge in bankruptcy properly pleaded as a defense to any cause of action alleged in a complaint?" Of course, a cause of action may be stated in a complaint to which a discharge in bankruptcy would be a good defense, but that is an abstract question that is not pertinent to any issue or question in this case, and, if we are to take the question literally and according to the clear and broad language employed, there would be nothing in the record that this court has the power to review, and the appeal should be dismissed. But doubtless it was the intention of the parties and the purpose of the learned court below to have the question arising upon the demurrer finally passed upon by this court. We will therefore assume that what was intended by the question was, not whether a discharge in bankruptcy is a good "defense to any cause of action," but whether it is a good defense to the cause of action stated in the complaint in this action. In other words, does the defendant's discharge in bankruptcy protect him in this action from liability resulting from his act in "fraudulently and unlawfully converting, misappropriating, and embezzling" the \$65 of the plaintiff's money? The answer to that question is to be found in the plain language of the present bankrupt law enacted in 1898 (Act July 1, 1898, c. 541, § 17, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428]), as follows: "A discharge in bankruptcy shall release a bankrupt from all his provable debts, except such as (1) are due as a tax levied by the United States, the state, county, district, or municipality in which he resides; (2) are judgments in actions for

frauds, or obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity." The cause of action stated in the complaint is plainly excepted from the operation of the discharge as a release of the defendant from liability. It does release him from certain debts and obligations, but not from liability for the cause of action stated in the complaint, and hence the answer setting up the discharge as a defense was open to demurrer, and so it has been held since the enactment of the present bankruptcy law. *Frey v. Torrey*, 70 App. Div. 166, 75 N. Y. Supp. 40, affirmed on opinion below. 175 N. Y. 501, 67 N. E. 1082; *Crawford v. Burke*, 201 Ill. 581, 66 N. E. 833. These views sufficiently answer the question certified as we have construed it. The charge in the complaint is that the defendant did wrongfully and fraudulently embezzle and misappropriate the plaintiff's money, and the legal import of these words is that he became possessed of it in a fiduciary capacity, and so the order appealed from should be affirmed, with costs.

PARKER, C. J., and GRAY, BARTLETT, HAIGHT, MARTIN, and VANN, JJ., concur.

Order affirmed.

(176 N. Y. 331)

PEOPLE v. WHITE.

(Court of Appeals of New York. Nov. 10, 1903.)

MURDER — EVIDENCE — CONFESSIONS — COMPETENCY.

1. Evidence on trial of an indictment for murder reviewed, and held sufficient to sustain conviction.

2. An undersheriff, pretending to be the friend of a defendant imprisoned under a charge of murder, obtained from him a confession. Held, that the confession was not for that cause incompetent, if otherwise competent.

3. Where confessions were submitted to the jury with instructions to disregard them if they were made by threats, or acts of intimidation, or other unlawful means, and unless they were fairly obtained and corroborated, a verdict of conviction based in part upon a confession obtained by deception will not be set aside.

Appeal from Supreme Court, Trial Term, Oswego County.

Frank White was convicted of murder, and appeals. Affirmed.

L. W. Baker and Frederick G. Spencer, for appellant. Udelle Bartlett, for respondent.

VANN, J. The homicide which gave rise to this appeal occurred on Sunday, the 15th of September, 1901. At about half past 3 in the afternoon of that day the body of George Clare, the deceased, was found in a potato patch upon his farm, situated about four miles east of the city of Oswego. The potato patch was an uninclosed part of a large field, 80 rods east of the farmhouse in which Mr. Clare had resided with his family for several years. There were four bullet wounds in the body—one on the radial side of the left forearm, commencing halfway between the elbow and wrist, and ending just above the outer part of the wrist joint, where the bullet was extracted. The second was under the left arm, and over the fifth rib, the bullet having glanced and entered the breast, where it was found about three inches from the point of entry. The third bullet entered at the outer angle of the left eyebrow, and lodged behind the eye. It did not penetrate the brain, but crushed the orbital arch, and caused some congestion through concussion. The fourth entered "partly on the back, or between the back and the side," cut some sinners from the tenth rib, glanced upward just over the surface of the liver, wounded the lower end of the right lung, passed through the left ventricle of the heart, and was found in the front part of the body at the left border of the breast bone. Neither the first nor second wound was serious; the third would not necessarily have been fatal, although it might have resulted in death from inflammation after a few days; but the fourth, in the opinion of the physician who made the autopsy, caused instant death. The bullets were such as are in common use in revolvers known as No. 32 in caliber, and there was no indication, from powder marks on the clothing or otherwise, that they were fired at very close range. From 20 to 25 feet northeast of the body the hat of the deceased was found, and about 30 feet southeast of that point the vines had been pulled from a hill of potatoes, and were lying near it, while there were four or five potatoes on top of the hill. A few days later an axe, somewhat concealed by the grass and weeds, which were thick and high, was picked up a few feet from the potato hill. No pocket-book, or money, or weapon of any kind was found upon the body or near it, and no tracks were observed.

The deceased was a well to do farmer about 52 years of age, who had owned the farm upon which he resided for a good while. His family consisted of his wife, who was about 15 years younger than himself; William and Russell, grown-up sons by his first marriage; Pearl, a young daughter of Mrs. Clare by her first husband; and the defendant, who had been the "hired man," working on the farm for six weeks. His name is Frank White, but he was there known only as Harry Howard. During the afternoon be-

¶ 2. See Criminal Law, vol. 14, Cent. Dig. § 1196.

fore the tragedy all the children went away to spend the Sabbath, and did not return until Sunday night. The defendant also was away the night before, having driven to Oswego with Mr. and Mrs. Clare, but, while they returned home, he remained in the city until the next morning. Upon their arrival at Oswego the defendant asked the deceased for \$2 on account of his wages, when Mr. Clare went with him to a store, took out his pocketbook, got a bill changed, and handed him the amount asked for. At that time Mr. Clare had a \$10 bill, a \$5 bill, and some smaller bills left, and the defendant had an opportunity to see that he had money in his possession. The next morning Mr. Clare took his pocketbook from his pocket to give his wife an account for work that some one had done for him, and she observed, as she testified, that he then had a \$5 bill and a \$10 bill besides some silver. After giving her the statement, he put his pocketbook in the right-hand pocket of his trousers, and he had the same trousers on when he was found dead in the afternoon. Four or five days before his death Mr. Clare came into the house with the defendant, who is a colored man, but nearly white, and said to Mrs. Clare, according to her evidence, "Our man is going to leave us, and you had better watch him, and see that he doesn't take anything that doesn't belong to him." The defendant promptly answered, "Mr. Clare, you don't think I would take anything that didn't belong to me, do you?" when Mr. Clare said to him, "I never saw a nigger yet that wasn't a thief," and during the conversation charged him with stealing things from the house, and called him a thief two or three times. The defendant denied the charge as often as it was made. When the defendant was in Oswego the night before the homicide, he told a young lady that Mrs. Clare was a very nice woman, but he thought Mr. Clare was mean to her, and added, "It wouldn't be well for him to be mean to her when I am around." The defendant at this time was about 20 years of age and had lived in the county of Oswego for six years. Of a low grade of intelligence, he did not know his own age, or the number of his brothers and sisters, or other facts of like character. In the spring of 1901, a few months before the homicide, he was discharged from the jail of Oswego county, where he had been confined for a year—during the first six months upon a sentence for assault and battery, and the rest of the time because he failed to give bail to keep the peace. He was arrested soon after he entered the Clare homestead at about 11 o'clock Sunday night. He was first handcuffed, and then searched, and among the articles found upon him were 55 cents in money, a half pint bottle one-third full of gin, some powder for the face, a finger ring belonging to Mrs. Clare, which she said was usually kept on a stand in her bedroom, but which had disappeared three days before, and a revolver

cartridge of 32 caliber, so embedded in the corner of his right coat pocket as to be somewhat concealed. When the ring was produced, he said he found it in the yard, but on the trial he swore that Mrs. Clare had given it to him. When the cartridge was found he said, apparently with indignation, that some one had put it in his pocket while the search was in progress, but the sheriff and his officers swore that this was not so. In response to questions put by the arresting officer and others he declared that he had been in Oswego all day, and that he took his breakfast and dinner there at Cordingly's Hotel. When asked soon after by the coroner if he had a revolver, he replied that he never had owned or carried one. He also said at different times and in the presence of several persons that he had not been on the Clare farm that Sunday until he came back late at night, but had spent the day at Oswego, except as he went off for a swim, and that he had taken breakfast, dinner, and supper at Cordingly's Hotel. On the way to jail he told the sheriff he had arrested the wrong party, and that he ought to have taken Mrs. Clare. He insisted that he was innocent.

On the trial two witnesses testified that about a week before the homicide the defendant, while at a livery stable in Oswego, took a package of tobacco from his pocket, and in doing so pulled out a revolver. When asked why he carried it, he said he was held up on the road once, and should run no more chances. A pawnbroker of Oswego testified that two or three weeks before Mr. Clare was killed the defendant showed him a small revolver, 32 in caliber, with a pearl handle. It was loaded, and he was told to put it back in his pocket.

The clerk of the Cordingly Hotel testified that the defendant spent Saturday night there, and the next morning paid for his lodging, but that he did not take breakfast or dinner that day, which was the Sunday in question. The defendant, however, returned to the hotel at about 5 o'clock in the afternoon, and asked if he could have supper, but was told that it would not be ready until an hour later. The girl who waited on the table at the hotel swore that he took neither breakfast nor dinner there, but did have supper at about 6 o'clock. There was other evidence to the same effect.

Many witnesses testified that in the neighborhood of 12 o'clock on the day of the homicide they saw the defendant going east toward the Clare farm, and some of them conversed with him. He was also seen by several witnesses going from the direction of the Clare farm west toward Oswego about 3 o'clock in the afternoon. Two witnesses saw him come out of an orchard into the highway, and start east toward the farm, which was about one mile away. After they were out of sight, he was seen by other witnesses to turn around and walk west toward

Oswego. From the orchard to the farm, a person going across through the woods would be substantially concealed from observation. The defendant was not seen by any witness within less than a mile of the Clare farm on the day in question, until his return late at night.

The sheriff of the county, who kept the jail, testified that the next night after his arrest the defendant asked him what he had heard, and the sheriff said: "We hear enough. You told us last night coming home you didn't have a revolver, and weren't out at the Clare's. To-day we locate you with a revolver. It looks bad for you. If we don't get that gun that you shot this man with, its going hard with you." The defendant replied, "I never shot the man." The conversation then continued: "Q. Who did shoot this man? A. Mrs. Clare. Q. Where did she shoot him? A. In the potato field. Q. Where were you?" The defendant hesitated, and then said, "I stood in the lane about forty rods off." The sheriff said: "Frank, if Mrs. Clare shot this man, we have got to have that revolver. We want to convict her. You can tell us where we can find it, so that we can go and get it." The defendant replied, "I will go to-night." The sheriff said, "You can tell us so that we can go just as well," and thereupon the defendant said that he hid the revolver by a beech tree in the first piece of woods beyond a big corn field. The next afternoon the sheriff took some heavy clothes to the defendant, which he had asked for, and said, "Frank, how came you in that lane?" The defendant answered that he had a date there with this woman. The sheriff said, "Then you made this up between you?" and the defendant replied: "Yes, but she shot him before I got there. He was pulling up a hill of potatoes when she plugged it into him." He then refused to talk further, saying that the sheriff was paid for getting evidence against him. The next day the sheriff and undersheriff took the defendant in a hack to the Clare farm, and on reaching a certain point he got out, and, handcuffed to one of the officers, led them across lots about 80 rods to a beech tree, pointed toward the roots, and said, "You look in there, and you will get the gun." A revolver was found at the place indicated, concealed under a covering of leaves and dirt three inches thick, and when it was taken out the defendant said, "That's the gun." The revolver was of 32 caliber, with a pearl handle, and in it were two empty shells and two loaded cartridges. After this the defendant did not talk with the sheriff any more, but the undersheriff wormed himself into his confidence by making him believe he was his friend, and wished to help him, and thus by gross deception, but without threats, persuaded him to make further disclosures. On one occasion the sheriff sent for the defendant's shoes, and when he asked for the reason the undersheriff said it was for use in

reference to tracks. The defendant then said: "Darn those shoes. I ought to have got it fixed. One of them was worn right through on the ball." Five days after the revolver was found the undersheriff said to the defendant: "Things look a little dark. I would like that pocketbook, or something to work on." The defendant immediately asked, "What kind of a scheme would it be to get that pocketbook, get it into Mrs. Clare's room, in her bed or somewhere, where it might be found?" The officer replied, "Perhaps a good one," and the defendant said, "Supposing we do that?" and was told, "Very well, but where is the pocketbook? Can you go and tell us where it is?" and the defendant said he would. The sheriff and undersheriff at once took him to the Clare farm again, and stopped at the point where he directed. Although it was after dark, he led them to a stump not far from the tree where the revolver had been found, and said, "Look in there, and you will find the pocketbook." A pocketbook was found under some dirt and leaves beneath the stump. There were some papers but no money in it, and it was identified as the one which Mr. Clare was in the habit of carrying. After this the defendant, believing that the undersheriff was his friend, talked freely with him, and on one occasion told him that he returned to the farm from Oswego, going through a ravine, some woods, and a big cornfield, and entered the back door of the barn, where he saw Mr. Clare. He told him the cows were in the potatoes, and Mr. Clare went to the house, but came out at once, and they walked along together and drove out the cows. They returned through the potato patch, and while there he said to Mr. Clare, "I wonder how the potatoes are?" Mr. Clare laid down the axe which he had taken in order to repair the fence, stooped over, and commenced to dig potatoes with his hands; and, as the defendant continued, "I fixed him there." He was asked, "Did you shoot him?" and he answered: "Twice. I came back through the big cornfield into the woods, hid the pocketbook, hid the gun, went through the ravine out into the Hall road, and back to Oswego City."

The defendant made separate statements to three fellow prisoners, according to their testimony, while in jail at Oswego. Frank Cavanaugh, who was confined for petit larceny, and had been convicted before for selling whisky without a license, and attempting to break jail, testified that the defendant asked him to tell the sheriff that he shot Mr. Clare that Sunday afternoon, and that Mrs. Clare told him to. He added that he thought this would get him off with a sentence for life. To George Le Clair, who was awaiting trial for stealing a horse, he said that, after going across lots, he entered the barn on the Clare farm, and, seeing Mr. Clare, told him the cows were in the potatoes and corn. Mr. Clare said they would go down and drive

them out, but before starting he went to the house for a short time. They then drove the cows out, fixed the fence, and while crossing the potato field had an argument in relation to the defendant's wages. The defendant finally said to Mr. Clare, "You son of a bitch, your days are numbered right here," and, pulling out a revolver, shot him in the left side, and he started to run and "hollered." When about seven feet away, he turned round to see if the defendant was coming after him, and was shot over the eye, but did not fall. Clare started toward the defendant, put his hands up to defend himself, when the defendant shot the third time and hit him in the arm. Clare then got pretty close to him, and the defendant did not want to get blood on himself, so he sprang to one side, shot again, and stayed there until Mr. Clare was dead. He then put his hand into the pockets of the deceased, took out a pocketbook, and backed away, covering his tracks until he reached a stone wall, when he walked down the wall to the end, jumped off into a heap of brush, got on the grass, walked over to a piece of woods, and buried the pocketbook, after he had taken \$15 out of it. He took three empty shells out of the revolver, put in a good one, hid it under the roots of a tree, and left for Oswego. The same witness testified that after this, and but two days before the trial began, he had another talk with the defendant, who asked him to tell the district attorney that he was in the barn drunk; that Mrs. Clare knew he was there, and brought him whisky; that she unbuttoned the bosom of her dress, pulled out a pocketbook, and told him to take the pocketbook and revolver, and go hide them, or she would shoot him. The witness further testified that the defendant told him that if he would say this to the district attorney, and swear to it, and he swore to it himself, he would get off with a life sentence.

Harvey Halsted testified that he had been convicted of petit larceny three times, but claimed that on one occasion he was innocent. He swore that in November, after the homicide, the defendant told him that he was in the barn with Mr. Clare, who went to the house for something, but came back, and they both went to the lot to put out the cows. They got into a little dispute. The defendant said to Clare, "Your days are numbered here," pulled out the gun, and shot him in the left side. Mr. Clare whirled, and he shot him in the arm and over the eye, and then Clare started to run and he shot him in the back, stayed over him until he was dead, took his pocketbook, backed away, brushing out his tracks as he went, got on the stone wall, walked until he came to a grass lot, jumped off into a brush heap, and from there went off and planted the gun and pocketbook. He found between \$12 and \$15 in the pocketbook. He also said in the same conversation that at this time Mrs. Clare was over in the corn lot a little way from the po-

tato patch, so that, if he did not make sure of her husband, she would; that she had a gun in her stocking leg, and he saw the prints of it when she was running for the house from the corn lot.

Mrs. Clare testified that on Sunday morning her husband started to carry the milk to the factory at about 20 minutes of 9, looking at the clock just before, and saying he was late. He returned in about two hours, and shortly before Homer Spencer, a neighboring farmer, came in. Upon the return of Mr. Clare he went with Mr. Spencer to the barn, and about 1 o'clock Mr. Clare came back to the house alone, stayed a few minutes, and returned to the barn. Five minutes later he came to the house, remained for a minute, and went out toward the barn. This was about half past 1 or 20 minutes of 2, and Mrs. Clare never saw her husband again alive. She was getting dinner at the time, and soon after, seeing two young ladies known as the Sheldon girls, whom she knew well, driving by, she went out, and hailed them, and invited them in to dinner. They objected at first, but upon her urgent and repeated solicitations finally hitched their horse and went into the house. Mrs. Clare finished her preparation for dinner, waited a half hour after the meal was ready, went out on the porch, and called her husband, but he did not come, and then the three sat down to the table. Just as she finished her dinner, but before the Sheldon girls were through, and at about a quarter of 3, Spencer returned. Twenty minutes later the girls left, when Mrs. Clare and Spencer went to the barn, passed through it, went down a lane to a pair of bars, and at that point she saw a cow in the farther corner of the field where the potato patch was. She told Spencer to go over there and look for Mr. Clare, and, if he did not find him, to call Mr. Hall, who was cutting corn in an adjoining field. Spencer went over toward the cow, and in doing so passed through the potato patch, where he saw the body of Mr. Clare, lying face downward between the rows. He called Mrs. Clare and Mr. Hall, and both came. No one touched the body, as it was understood that this would not be lawful until the coroner arrived. Mrs. Clare did not go up close to the body of her husband, but, standing off a little distance, wept, and asked Mr. Hall to examine and see if he was dead. Mr. Hall did so without touching the body, and pronounced him dead. No blood was observed at this time. They then went for help, and notified the coroner. Mrs. Clare had a policy of insurance upon the life of her husband for \$1,000, which was promptly paid. Mr. Clare owned two farms, and left no will.

Spencer, Hall, and the Sheldon girls testified to the same story in substance, so far as their observation extended, but with some variations. Both of the girls observed that Mrs. Clare put the meat that was left after

dinner back on the stove to keep it warm. Mr. Hall heard shots during the day, as he did every Sunday at that time of year, but none in quick succession, or from the direction of the potato patch. He was working all day in the field until called over to see the body, except while he was at dinner between 1 and 2 o'clock. He thought that he resumed work about a quarter of 2, and that it was from one to two hours later when he was hailed by Spencer. The rustling of the cornstalks made some noise, which might have affected his ability to hear, and the farther end of the rows of corn was quite a distance from the potato patch. Two neighbors, father and son, swore that Spencer was at their house from about half past 12 until 2 or half past. Some of these witnesses were called by the prosecution and others by the defense.

The defendant, sworn as a witness in his own behalf, testified that Mr. Clare gave him \$2 on Saturday night and that he had about 75 cents or a dollar besides. He spent the night at Cordingly's Hotel, and had breakfast in the dining room, being waited upon by the regular waitress, whom he identified as a witness sworn for the people. After going about town a little while, he went over to Black creek to go in swimming. This was a mile or more from the Clare farm, and, after dressing, he went through the woods, and entered the back door of the barn. On his way he saw a man cutting corn in Mr. Hall's cornfield. He went through the barn to the front door, when Mrs. Clare came where he was, and said, "Hello, Harry," and he replied, "Hello, Mrs. Clare. Where is Mr. Clare?" She answered, "I don't know," when he said "I have a note for him." She asked, "What about?" and then pulled him over to the side of the barn, took out a pocketbook and revolver, and poked them into his right coat pocket. He asked her what that was for, and she said that Mr. Clare and she went down into the cornfield and drove out the cows. After fixing the fence, they went over into the potato lot, and he started to pull up some vines, when she shot at him twice. The defendant asked her what for, and she said that she and Mr. Clare had an argument together. The defendant asked her what she put the things in his pocket for, and she told him to go over somewhere back in the woods and hide them. He said he would like some dinner first, but she told him to go back to the city after he hid the things, and not to come back until night, because she had company, and didn't want him around there. He then hid the revolver and pocketbook, one by a stump and the other at the side of a beech tree; started for Oswego, and reached there at about half past 4 or 5 o'clock. He took supper at 6, walked around town a while, procured a bottle of gin, and returned to the Clare farm, reaching the house between 11 and 12 o'clock. Soon after, he was arrested, handcuffed, and

searched. When the cartridge was found, he denied, with some warmth, that he ever put it in his pocket, and said that the arresting officer or somebody else had put it in. He declared that he found the ring in the yard, took it to Mrs. Clare, who gave it to him, saying that he had been a good boy, but asking him not to wear it when Mr. Clare could see it on him. He admitted that he owned a revolver, which he bought two or three months before, with a box of cartridges, but said that he left it, with the cartridges, in his stand drawer, when he went to Oswego, Saturday night. He testified that he was dosed with whisky in the jail until he told where the revolver and pocketbook were. He admitted that he went with the officers and pointed out the places where the articles were hid, but insisted that he was drunk at the time. He denied absolutely making the statements to Cavanaugh, Le Clair, and Halsted as sworn to by them. He said that he did not open the pocketbook, but observed three shells in the revolver just before he buried it. He was not positive that the revolver in evidence was his, but said that it was just like the one he had. He denied substantially, but not all, the statements that the sheriff and undersheriff testified he had made to them, and swore that before he told where the revolver was the undersheriff said he wanted it to put in Mrs. Clare's bed. The defendant's testimony at the critical point where he stated what took place between Mrs. Clare and himself in relation to hiding the revolver and pocketbook was given with great hesitation, and seven different times he was urged by court or counsel to "go on." Mrs. Clare, when recalled, denied the story told by the defendant about the revolver and pocketbook, and swore that she did not see him during the day. She also denied that she had given him the ring. There was evidence tending to show that the construction of the barn was such as to make it impossible for her to pull him over to the north, as he testified. Two witnesses swore that he said he did not see Mrs. Clare that day. Six witnesses testified that no whisky was ever given to prisoners in the jail, and the three officers in charge said that none was at any time given to the defendant.

There was much more evidence, but, having stated the salient points, we are compelled to omit the rest, in order to restrict our opinion to reasonable limits. It is obvious that, independent of the alleged confessions, there was a case for the jury. Four shots were fired in succession, and the last bullet, which caused immediate death, entered the back part of Mr. Clare's body, apparently when he was trying to escape. This warrants the inference that the fatal shot was fired with the deliberate and premeditated design to effect death, and characterized the crime as murder in the first degree. *People v. Ferraro*, 161 N. Y. 365, 55 N. E. 931; *People v. Majone*, 91 N. Y. 212.

There was some evidence of motive, inadequate, to be sure; but, as we have said, while the motive to murder can never be adequate, it may be obvious. The criminal records of this court show that even a smaller sum of money that Mr. Clare is supposed to have had upon his person when he was killed has been the sole inducement to the gravest of crimes. Our records also show that insulting words, recently uttered, sometimes inflame the mind, and lead to murder for the purpose of revenge. The defendant had the means and the opportunity of perpetrating the crime. The revolver used was his own, and he admits that he was at the Clare farm at about the time of the murder. He hid the pocketbook and the revolver. While the money was not found upon him, and he was not shown to have spent it, still it appeared that he was in Oswego for four or five hours during the evening after the homicide, and that he there had an opportunity to dispose of it. The statements of a person made when he is first charged with a crime have some bearing upon the question of his guilt. *People v. Conroy*, 97 N. Y. 62, 80. They are by no means conclusive, and undue weight should not be given them, for innocent men sometimes lie in order to divert suspicion from themselves. When the defendant was arrested, he denied that he had a revolver, or that he was at the Clare farm during the day of the homicide, and insisted that he took dinner at Cordingly's Hotel; but these, with other statements, were not only shown to be false, but he admitted they were false when on the witness stand. He himself pointed out the places where he had hidden the revolver and the pocketbook, and told how he approached the Clare farm in the shelter of the forest. He neither denied nor explained why, when he came out of the orchard and saw the carriage, he at first walked back toward the farm, and, after the carriage was out of sight, turned around and went on toward Oswego. His effort to fasten the crime upon Mrs. Clare has little support in the evidence, aside from his own testimony, and his conflicting statements throw doubt upon his final story. His hesitation at a suggestive point in his testimony may have been owing to the excitement caused by his situation, or to the natural difficulty of describing that which never happened. It was for the jury, who saw and heard him testify, to decide whether he spoke the truth. The evidence against him was so strong that it would have been strange if they had accepted his account with no substantial corroboration.

No exception was argued by the learned counsel for the defendant, whose brief would have been of greater aid to the court if it had stated the facts fairly, and had cited the folios where the evidence to support his statements could be found. A fair statement of the facts is essential to a proper presentation of an appeal. An unfair statement is

certain to be discovered, and, when discovered, affects the force of the entire brief. When the facts are not open to review, they should be stated as found, or as presumed to have been found. When the facts are to be reviewed, it is proper for counsel to state them as he claims they should have been found in accordance with the weight of evidence, citing the folios where the evidence appears in the record, but on the crucial points he should also state the testimony opposed to his theory, so that the court may have before it a faithful picture of the whole case. A failure to observe these rules increases the labor of the court, and reflects upon the integrity of the brief.

There was but one exception to the charge, which was afterwards waived, and the exceptions relating to evidence do not merit discussion. It is insisted that, whether the point is raised by exception or not, the confessions of the defendant should not have been received, or at least should not have been submitted to the jury for consideration, because those made to the undersheriff were obtained by improper methods, while those made to fellow convicts were unreliable, not only on account of the character of the witnesses, but because those witnesses were in charge of the sheriff and subject to his influence. It is provided by statute that the confession of a defendant may be given in evidence against him unless it was made upon a stipulation for freedom from prosecution, or under the influence of fear produced by threats. It is not, however, sufficient to warrant a conviction, without additional proof that the crime has been committed. Code Cr. Proc. § 395. There was evidence to bring all the confessions within the permission of the statute, but none to bring any of them within the prohibition thereof, except the statement of the defendant himself, which was denied by several witnesses. It is clear from the facts already stated that the confessions were corroborated, one in nearly every particular, and the others in several substantial particulars. The statute does not require corroboration in every respect in order to authorize a conviction upon confessions, but only in the single particular, "that the crime charged has been committed." *People v. Deacons*, 100 N. Y. 374, 377, 16 N. E. 676; *People v. Jaehne*, 103 N. Y. 182, 199, 8 N. E. 374. While we do not sanction the deception practiced by one of the officers in charge of the defendant, the court could not exclude the confessions made to him on that account. Deception was used in order to induce the defendant to tell the truth. No inducement was held out to him to confess guilt, unless there was guilt. The confession to the undersheriff was made to him not as a public officer, but as a supposed friend. It is not sufficient to exclude a confession by a prisoner, as we have held, "that he was under arrest at the time, or that it was made to the officer in whose custody he

was, or in answer to questions put to him, or that it was made under the hope or promise of a benefit of a collateral nature." *Cox v. People*, 80 N. Y. 500, 515. Confessions induced by the use of decoy letters, by the false assertion that some of the accomplices of the prisoner were in custody, or made to a detective disguised as a confederate, or upon the promise that they will not be disclosed, have been received in evidence with the sanction of courts of high authority. *Campbell v. Commonwealth*, 84 Pa. 187; *Commonwealth v. Knapp*, 9 Pick. 496, 20 Am. Dec. 491; *Commonwealth v. Tuckerman*, 10 Gray, 173; *State v. McKean*, 36 Iowa, 343, 14 Am. Rep. 530; *State v. Fortner*, 43 Iowa, 494. Cautious and hesitating as courts have always been in regard to confessions made by a person when under arrest to those in authority over him, they have not gone so far as to exclude them simply because they were procured by deception, provided they were voluntarily made. *People v. Wentz*, 37 N. Y. 303. They are careful, however, to leave the credibility of the witness who practiced the deception and the circumstances under which the confessions were made to the consideration of the jury. The test is whether the prisoner had any inducement to tell a falsehood against himself, or felt compelled to speak for any reason when he preferred to remain silent. *Balbo v. People*, 80 N. Y. 484, 490; *Murphy v. People*, 63 N. Y. 590; *Commonwealth v. Knapp*, supra; *Wharton, Criminal Ev.* (9th Ed.) § 658. In all cases inquiry should be made whether the defendant spoke through fear or in the expectation of immunity, and when he is under arrest it should also be asked whether he spoke to the magistrate, or to the officer in charge, or in their presence, because he felt that he was compelled to for any reason. The competency of a confession is to be determined by the trial court upon the facts in evidence at the time it is offered. It is proper—and such was the course pursued in this case—to allow a preliminary examination by the defendant's counsel to test its competency before it is received. After it is received, if a question of fact arises as to its voluntary character, the jury should be instructed to wholly disregard it, unless they find that it was voluntarily made, without threat or menace by acts, words, or situation, and without compulsion, real or apprehended, and without the promise, express or implied, that the defendant should not be prosecuted, or that he should be punished less severely. The question of fact whether any of the confessions fell within the prohibition of the statute or of the rules of evidence was submitted to the jury, and they were instructed to disregard them if they were made under the influence of fear produced by actual or covert threats, or through promises, acts of intimidation, or other unlawful means, and unless they were voluntary, fairly obtained, and not procured by inquisitorial compulsion or other improper

methods. The defendant cannot justly complain of the course thus pursued by the trial judge, which was authorized by a recent decision of this court. *People v. Cassidy*, 133 N. Y. 612, 613, 30 N. E. 1003.

The confessions, made separately to the three prisoners, were competent, and the credibility of the witnesses was for the jury. There is no evidence that any of these witnesses was under the influence of threats, or hope, or that the defendant's statements to them were not wholly voluntary. While the confessions differ in some substantial particulars, they agree in others of the utmost importance. The situation and condition of the body, the location of the stone wall, hat, axe, and potato hill with the potatoes lying on top, the fact that the cows were out, and that an axe was needed to fix the fence, and other facts proved beyond doubt, are of peculiar significance when considered in connection with the confessions.

The charge of the court was impartial, clear, and comprehensive. At its close the counsel for the defendant stated that they had no exception to it, and nothing but commendation for it. The record is free from reversible error. The verdict was not against the weight of evidence nor against law, and justice does not require a new trial.

The judgment should therefore be affirmed.

PARKER, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, and MARTIN, JJ., concur.

Judgment of conviction affirmed.

(176 N. Y. 351)

PEOPLE v. ADAMS.

(Court of Appeals of New York. Nov. 10, 1903.)

CRIMINAL LAW—EVIDENCE—UNREASONABLE SEARCHES—CONSTITUTIONAL LAW—POLICY PLAYING.

1. Const. U. S. arts. 4, 5, relating to security against unreasonable searches and seizures, does not apply to actions in courts of the state of New York.

2. In the trial of a criminal case, the court will not take notice of the manner in which witnesses have possessed themselves of private papers, or other articles of personal property, material and properly offered in evidence.

3. On a trial, under Pen. Code, § 344a, of an indictment for policy playing, evidence as to private papers and property belonging to defendant alleged to have been unlawfully seized by police officers, and introduced in evidence for the purpose of establishing the handwriting of defendant on certain policy slips, does not compel him to become a witness against himself, in violation of Const. art. 1, § 6.

4. Pen. Code, § 344a, relating to policy gambling, and making it unlawful to have in possession the apparatus used in such gambling, is not unconstitutional, as an unauthorized interference with the ownership of private property.

5. Pen. Code, § 344b, making the possession of a policy gambling apparatus presumptive ev-

¶ 2. See Criminal Law, vol. 14, Cent. Dig. § 877.

idence of possession thereof in violation of section 344a, making it unlawful to have such an apparatus in possession, simply prescribes a rule of evidence, and is constitutional.

6. Pen. Code, § 687a, fixing a maximum and minimum punishment, is not unconstitutional.

7. Where, in a prosecution for policy gambling, the apparatus used for that purpose is introduced in evidence, the manner of obtaining possession of it is immaterial, and refusal to allow evidence of the nonexistence of a search warrant at the time of its removal from the place occupied by defendant is immaterial.

Appeal from Supreme Court, Appellate Division, First Department.

Albert J. Adams was convicted of the crime of knowingly having possession of a writing, paper, and document representing and being a record of a chance, share, and interest in numbers sold in a gambling game commonly called "policy," and of knowingly having possession of papers and devices such as are commonly used in carrying on and playing the game called "policy," in violation of section 344a of the Penal Code, and appeals from an order of the Appellate Division affirming the judgment (83 N. Y. Supp. 481). Affirmed.

The sections of the Penal Code under which conviction was had, read as follows:

"Sec. 344a. A person who keeps, occupies or uses, or premits to be kept, occupied or used, a place, building, room, table, establishment or apparatus for policy playing or for the sale of what are commonly called 'lottery policies,' or who delivers or receives money or other valuable consideration in playing policy, or in aiding in the playing thereof, or for what is commonly called a 'lottery policy,' or for any writing, paper or document in the nature of a bet, wager or insurance upon the drawing or drawn numbers of any public or private lottery; or who shall have in his possession, knowingly, any writing, paper or document, representing or being a record of any chance, share or interest in numbers sold, drawn or to be drawn, or in what is commonly called 'policy,' or in the nature of a bet, wager or insurance, upon the drawing or drawn numbers of any public or private lottery; or any paper, print, writing, numbers, device, policy slip, or article of any kind such as is commonly used in carrying on, promoting or playing the game commonly called 'policy'; or who is the owner, agent, superintendent, janitor, or caretaker of any place, building, or room where policy playing or the sale of what are commonly called 'lottery policies' is carried on with his knowledge or after notification that the premises are so used, permits such use to be continued, or who aids, assists, or abets in any manner, in any of the offenses, acts or matters herein named, is a common gambler, and punishable by imprisonment for not more than two years, and in the discretion of the court, by a fine not exceeding one thousand dollars, or both.

"§ 344b. The possession, by any person other than a public officer, of any writing,

paper, or document representing or being a record of any chance, share or interest in numbers sold, drawn or to be drawn, in what is commonly called 'policy,' or in the nature of a bet, wager or insurance upon the drawing or drawn numbers of any public or private lottery, or any paper, print, writing, numbers or device, policy slip, or article of any kind, such as is commonly used in carrying on, promoting or playing the game commonly called 'policy,' is presumptive evidence of possession thereof knowingly and in violation of the provisions of section three hundred and forty-four-a."

The facts, so far as material, are stated in the opinion.

L. Laffin Kellogg and Alfred C. Petté, for appellant. William Travers Jerome, Dist. Atty. (Howard S. Gans, of counsel), for the People.

BARTLETT, J. (after stating the facts). As this is a unanimous decision of the Appellate Division of the Supreme Court that there is evidence supporting or tending to sustain the verdict of the jury, it is only necessary to consider the facts sufficiently to determine the questions of law presented by this appeal.

It appears that the defendant occupied an office in the city of New York, wherein were his desk, trunk, tin boxes, and other articles of personal property. On a certain occasion when the defendant was in his office, the officers of the law appeared and stated that they had a search warrant. The defendant replied, in substance, before they proceeded to execute the same, that it was not his office, and that they would proceed at their peril. The officers thereupon placed the defendant under arrest and searched the premises. A large amount of papers was seized, which may be divided into two classes: (1) The papers referred to in the section of the Penal Code under which this indictment was found; (2) and papers relating to the private affairs of defendant. The evidence discloses in detail the manner of conducting the gambling game known as "policy," from which it appears that certain papers are sent to a central point from different offices or places in the city where the game is conducted, known as "manifold sheets." Among the papers seized in defendant's office were 3,500 of these manifold sheets, upon some of which were indorsements and entries in his handwriting. At the trial these manifold sheets were introduced in evidence as papers described in section 344a of the Penal Code. The private papers of the defendant were introduced in evidence for the double purpose of furnishing standards of his handwriting, and also tending to prove that the office in which the papers relating to the game of policy were found was occupied by him. There were also other books and papers put in evidence, in the handwrit-

ing of the defendant, relating to the entries on the manifold sheets, that need not be more particularly described.

The first point made by the learned counsel for the appellant is that by reason of the seizure of defendant's papers, as in the manner described, the defendant's constitutional right to be secure in his person, papers, and effects against unreasonable searches and seizures was violated, and he was also thereby compelled to be a witness against himself, in contravention of the fourth, fifth, and fourteenth articles of the amendments to the Constitution of the United States, and article 1, § 6, of the Constitution of the state of New York, and section 11 of the Bill of Rights of this state.

Articles 4 and 5 of the amendments to the Constitution of the United States do not apply to actions in the state courts.

This first point, as stated, involves two distinct propositions, that must be separated in considering them. The first is an alleged violation of the Bill of Rights, which protects a citizen against unreasonable searches and seizures, and the other is an alleged violation of the Constitution by compelling a person in a criminal case to be a witness against himself.

There were two classes of papers seized at the time the search warrant was executed. The legality of the seizure of the papers described in the section of the Penal Code under which the indictment was found cannot be successfully challenged. It therefore remains to consider the effect of seizing the private papers of the defendant. In *Greenleaf on Evidence* (volume 1, § 245a) the learned author says: "It may be mentioned in this place that though papers and other subjects of evidence may have been illegally taken from the possession of the party against whom they were offered, or otherwise unlawfully obtained, this is no valid objection to their admissibility, if they are pertinent to the issue. The court will not take notice how they were obtained—whether lawfully or unlawfully—nor will it frame issues to determine that question." In *Commonwealth v. Tibbetts*, 157 Mass. 519, 32 N. E. 910, it was held as follows: "Evidence which is pertinent to the issue is admissible, although it may have been procured in an irregular or even an illegal manner. A trespasser may testify to pertinent facts observed by him, or may put in evidence pertinent articles or papers found by him while trespassing. For the trespass he may be held responsible civilly, and perhaps criminally, but his testimony is not thereby rendered incompetent. *Commonwealth v. Dana*, 2 Metc. 329, 337; *Commonwealth v. Lottery Tickets*, 5 Cush. 369, 374; *Commonwealth v. Intoxicating Liquors*, 4 Allen, 593, 600; *Commonwealth v. Welsh*, 110 Mass. 359; *Commonwealth v. Taylor*, 132 Mass. 261; *Commonwealth v. Keenan*, 148 Mass. 470 [20 N. E. 101]; *Commonwealth v. Ryan*, 157 Mass.

403 [32 N. E. 349]; 1 *Greenleaf's Evidence*, §§ 254a, 229; 1 *Taylor's Evidence*, § 922; 1 *Bishop's Crim. Proc.* (3d Ed.) § 246." In this state the same principle has been recognized in *Ruloff v. People*, 45 N. Y. 213, and a kindred principle in *People v. Van Wormer*, 175 N. Y. 188, 195, 67 N. E. 299. The underlying principle obviously is that the court, when engaged in trying a criminal cause, will not take notice of the manner in which witnesses have possessed themselves of papers or other articles of personal property which are material and properly offered in evidence. In the case before us, if there has been any illegal invasion of the rights of this defendant by reason of alleged unlawful searches and seizures of private papers, his remedy is in an independent proceeding, not necessary to be considered at this time. We do not wish to be understood as expressing an opinion in regard to the seizure of defendant's private papers. When the officers entered the defendant's office, he assured them he did not occupy it, and that they would proceed at their peril. It is beyond dispute that the question as to who occupied the office was most material in connecting the defendant with the manifold sheets and other papers seized, relating to the game of policy, and that the private papers were important in this connection. The same may be said as to the standards of defendant's handwriting.

The next question is whether this defendant was compelled to be a witness against himself, in violation of the Constitution of this state (article 1, § 6). The appellant's counsel places great reliance upon the case of *Boyd v. United States*, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746, holding that an act of Congress which authorizes a court of the United States, in revenue cases, on motion of the government attorney, to require the defendant or claimant to produce in court his private books, invoices, and papers, or else the allegations of the attorney be taken as confessed, was unconstitutional, being repugnant to the fourth and fifth articles of the amendments to the Constitution of the United States. Article 4 deals with searches and seizures, and article 5 contains language identical with our state Constitution, already quoted, to the effect that no person "shall be compelled in any criminal case to be a witness against himself." In the case at bar the defendant was not sworn as a witness, nor was he required to produce any books or papers. So far as this case is concerned, as already pointed out, the manner in which the witnesses for the people became possessed of the documentary evidence is a matter of no importance. We are of the opinion, therefore, that the defendant was not, in any legal sense, called upon to be a witness against himself in this criminal proceeding.

The next point argued by the appellant's counsel is that sections 344a and 344b of the

Penal Code, under which the indictment was found and the conviction had, are unconstitutional and void, for the reason that the defendant has been deprived of his liberty and property without due process of law, in violation of both the federal and state Constitutions. We have here presented two distinct questions. We are unable to agree with the contention of appellant's counsel that these sections are to be read together. Section 344a creates the crime of which the defendant stands convicted. It is complete in itself, and is in no way dependent upon the provisions of section 344b. The latter section establishes a rule of evidence only.

As to the alleged unconstitutionality of section 344a of the Penal Code: By article 1, § 9, of the Constitution of this state, it is provided as follows: "Nor shall any lottery or the sale of lottery tickets, poolselling, bookmaking, or any other kind of gambling, hereafter be authorized by law within this state." Section 336 of the Penal Code provides: "It is unlawful to keep or use any table, cards, dice or any other article or apparatus whatever, commonly used or intended to be used in playing any game of cards or faro, or other game of chance, upon which money is usually wagered, at any of the following places," etc. Section 344a immediately follows a section of the Penal Code dealing with keeping betting and gambling establishments, and is an amplification of the law looking to the suppression of gambling; it being aimed at the game of policy, so called, which offered an opportunity to the poorer classes of making trifling bets, and who could ill afford to lose their small earnings. The papers referred to in section 344a are to be regarded the same as the tools of a burglar or the general gambling apparatus which are dealt with in the Penal Code. The Legislature, in addition to its ample general powers in dealing with the crime of gambling, has the sanction of the Constitution of the state. The Legislature, in order to protect game, has made it an offense for a person to have in his possession game birds of the kind specified after a certain date. *Phelps v. Racey*, 60 N. Y. 10, 14, 19 Am. Rep. 140. This court said in the case last cited: "The Legislature may pass many laws, the effect of which may be to impair or even destroy the right of property. Private interests must yield to the public advantage. All legislative powers not restrained by express or implied provisions of the Constitution may be exercised. * * * The measures best adapted to this end are for the Legislature to determine, and courts cannot review its discretion. If the regulations operate in any respect unjustly or oppressively, the proper remedy must be applied by that body." See, also, *People v. Buffalo Fish Co.*, 164 N. Y. 93, 58 N. E. 34, 52 L. R. A. 803, 79 Am. St. Rep. 622. We have in the game laws a more extreme exercise of the legislative power to interfere with the ownership of property for the public good than is disclosed in the

section under consideration. We are of the opinion that this section is constitutional.

Section 344b provides that the possession by any person, other than a public officer, of certain papers used in carrying on, promoting, or playing the game commonly called "policy," is presumptive evidence of possession thereof knowingly and in violation of the provisions of section 344a. The learned trial judge, in charging the jury, called their attention to this statute, and explained its application and limitations. To this charge no exception was taken, and the question of the constitutionality of this section, therefore, is not presented. In *People v. Spiegel*, 143 N. Y. 107, 113, 38 N. E. 284, it was held that a party may waive the benefit of even a constitutional provision. As this is a question of public importance, we will disregard the alleged waiver and consider the merits. As already stated, this section creates no offense, but prescribes a rule of evidence, subject to certain limitations. In *People v. Cannon*, 139 N. Y. 32, 42, 43, 34 N. E. 759, 762, 36 Am. St. Rep. 668, this court said: "It is said the Legislature can create and define a crime, but it cannot declare what shall be prima facie evidence of its commission. Whether the crime as defined by the Legislature has been committed by the accused is a question for the court and jury, and it is claimed that no direction to the court or jury as to what shall be considered prima facie proof can be given by the Legislature. * * * The Legislature of this state possesses the whole legislative power of the people, except so far as such power may be limited by our Constitution. *Bank of Chenango v. Brown*, 26 N. Y. 467. The power to enact such a provision as that under discussion is founded upon the jurisdiction of the Legislature over rules of evidence both in civil and criminal cases. This court has lately had the question before it. *Board of Com'rs of Excise v. Merchant*, 103 N. Y. 143 [8 N. E. 484, 57 Am. Rep. 705]. * * * It cannot be disputed that the courts of this and other states are committed to the general principle that even in criminal prosecutions the Legislature may, with some limitations, enact that when certain facts have been proved they shall be prima facie evidence of the existence of the main fact in question." This principle has been approved in a number of states. The Legislature, in the section under consideration, has gone a step further, and provided that the possession by any person, other than a public officer, of the various papers and writings used in carrying on, promoting, or playing the game commonly called "policy," is presumptive evidence of possession thereof knowingly and in violation of the provisions of section 344a. In other words, the Legislature has cast the burden of proof upon the person who has in his possession these incriminating papers. The fullest opportunity is afforded him to rebut this statutory presumption. The exercise of this power is clearly within

constitutional limitations, and calculated to aid the people in prosecuting persons engaged in this form of gambling.

The appellant, in discussing this section, raises the additional point that it is class legislation, for the reason that it excepts from its provisions public officers. It is argued that a notary public is a public officer, and that he might be knowingly in possession of these papers used in the game of policy with impunity. It is true, if we give a literal construction to the language of this section, that the statement is warranted; but the rule is that all statutes must be reasonably construed, and in this case it is obvious that the Legislature intended to except those public officers who in the discharge of their official duties were necessarily at times the custodians of these papers. The section under consideration is clearly constitutional.

The appellant makes the further point that the statute under which the defendant was sentenced to imprisonment for a term, the minimum of which shall be not less than one year, and the maximum shall be not more than one year and nine months, is unconstitutional. Section 687a of the Penal Code was enacted in 1901 (Laws 1891, p. 1115), presumably in the interest of defendants who had never before been convicted of a felony. The fixing of a maximum and minimum sentence is to be considered in connection with the law relating to prisons. Sections 74-83, 2 Birdseye's Rev. St. [3d Ed.] pp. 2737-2739. In brief, it is provided (section 77) that the superintendent of State Prisons shall cause to be kept a record of each prisoner therein confined upon an indeterminate sentence; and, if it shall appear (section 78) to the board of commissioners of paroled prisoners that there is a reasonable probability that such prisoner will live and remain at liberty without violating the law, the board is permitted to release him on parole after service of the minimum sentence, but until the expiration of the maximum term he is not absolutely discharged, and is liable to rearrest if he violates his parole. This is a merciful exercise of legislative power, which has been repeatedly approved by the Supreme Court. This form of legislation has been sustained by the courts of many other states. The provisions to which attention has already been called, relating to the release of paroled prisoners, remove some of the objections urged by the appellant. The legislation complained of is constitutional, and in the interest of the defendant, who stands before the court charged with a first offense.

The appellant, in his final point, argues that the court erred to the prejudice of the defendant in refusing to allow evidence as to the nonexistence of a search warrant at the time the papers were removed from the office of defendant. We have already pointed out that the court will not take notice of the allegation that the possession of the papers offered in evidence on a criminal trial has

been unlawfully acquired. It follows that the questions asked of the witness Cuff were immaterial. The fact that an officer engaged in the search of defendant's office for papers testified that there was a search warrant does not vary the situation.

The judgment of conviction and the order appealed from should be affirmed.

PARKER, C. J., and GRAY, O'BRIEN, HAIGHT, MARTIN, and VANN, JJ., concur.

Judgment of conviction and order affirmed.

(176 N. Y. 371)

MARTIN v. CITY OF NEW YORK.

(Court of Appeals of New York. Nov. 10, 1903.)

MUNICIPAL CORPORATIONS—DE FACTO CLERK—PAYMENT OF SALARY—RIGHT OF DE JURE CLERK.

1. The city of New York is not liable to a clerk in the office of the board of aldermen, who had been removed, and was reinstated by mandamus, after appointment of another in his place, because he had been removed without an opportunity to present an explanation in writing, for his salary from the date of his removal to the date of his reinstatement, where during such interval the salary had been regularly paid to the person who had been appointed in his place.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Frank J. Martin against the city of New York. From a judgment of the Appellate Division (81 N. Y. Supp. 412) affirming a judgment for defendant, plaintiff appeals. Affirmed.

A. S. Gilbert, for appellant. George L. Rives, Corp. Counsel (Theodore Connolly and Terence Farley, of counsel), for respondent.

VANN, J. For several years prior to the 1st of October, 1900, the plaintiff was a clerk in the office of the clerk of the board of aldermen of the city of New York, but on that day he was removed, and A. Joseph Porges was forthwith appointed in his place. Mr. Porges occupied the position, performed the duties, and was paid the salary from the 1st of October, 1900, until the 24th of January, 1901, when the plaintiff was reinstated by mandamus, because he had been removed without "an opportunity to present an explanation in writing." *People ex rel. Martin v. Scully*, 56 App. Div. 302, 67 N. Y. Supp. 839. The object of this action was to recover the salary attached to the position during the period while it was paid to the wrongful incumbent. The foregoing facts having been admitted at the trial, the court directed a verdict in favor of the defendant, and after affirmation of the judgment by the Appellate Division the plaintiff came here.

It is well settled in this state that "payment to a de facto public officer of the salary of the office, made while he is in posses-

* 1. See *Municipal Corporations*, vol. 36, Cent. Dig. § 261.

sion, is a good defense to an action brought by the de jure officer to recover the same salary after he has acquired or regained possession," and that the remedy of the latter is by action against the former. *Dolan v. Mayor*, etc., of N. Y., 68 N. Y. 274, 280, 281, 23 Am. Rep. 168; *McVeany v. Mayor*, etc., of N. Y., 80 N. Y. 185, 36 Am. Rep. 600; *Terhune v. Mayor*, etc., of N. Y., 88 N. Y. 247; *Demarest v. Mayor*, etc., of N. Y., 147 N. Y. 208, 41 N. E. 405. These decisions rest upon the principle that the public cannot be compelled to pay twice for the same services, and that the officer charged with the duty of paying salaries is not required to go behind the commission or the certificate of election, and, at his peril, decide difficult questions of fact or law, but may make payment to the person who occupies the office and performs its duties. It is, however, insisted that the rule does not apply to this case, because the plaintiff was not a public officer, but an employé holding a contractual relation to the city, and the following cases are relied upon to support the position: *Steinson v. Board of Education* of N. Y., 165 N. Y. 431, 59 N. E. 300; *Graham v. City of New York*, 167 N. Y. 85, 60 N. E. 331. There is an important distinction between the cases cited and the one in hand, because in neither of the former was the position filled, and no one was paid for services rendered by a de facto occupant. The rule governing payments to a de facto officer is founded in public policy, and applies with the same force to payments made to a de facto occupant of a position of public employment, although not an officer. In deciding those cases, as is obvious from the opinions, we did not intend to disturb the rule laid down in *Higgins v. Mayor*, etc., of N. Y., 131 N. Y. 123, 30 N. E. 44. In that case an honorably discharged soldier, appointed by the mayor of the city of New York to a position as laborer at the fixed compensation of \$2 a day, was wrongfully discharged, another person was appointed in his place, and was paid by the city until the veteran was reinstated by legal proceedings. We held that he could not maintain an action to recover the stipulated wages for the period while the position was filled by the intruder, and that the city was not bound to make any compensation to him for the time he was not in actual service. *Terhune v. Mayor*, etc., of N. Y., supra, was followed, and the principle applicable to a de facto officer was applied to the de facto incumbent of the position then under consideration, because the reason for the rule which controlled the decision in the one case applied with equal force to the other.

We distinguish the case now before us from those relied upon by the appellant, and, following the *Higgins Case*, hold that the defendant is not liable to the plaintiff for the salary of the position in question during the period between the date of his removal and the date of his reinstatement, because during

that interval the salary of the position was paid to another, who, by an appointment regular upon its face, held the position, performed the duties thereof, and was paid the compensation attached thereto.

The judgment should be affirmed, with costs.

PARKER, C. J., and GRAY, HAIGHT, MARTIN, CULLEN, and WERNER, JJ., concur.

Judgment affirmed.

(176 N. Y. 374)

COLE et al. v. ANDREWS.

(Court of Appeals of New York. Nov. 10, 1903.)

EXECUTORS AND ADMINISTRATORS—ADVANCEMENTS—INTEREST.

1. Where a writing executed by a son acknowledged that his father furnished him with a certain sum of money, which was a debt due the father, and which might be collected after the father's death by his legal representatives, either by treating it as a loan, or as an advancement to be deducted from the son's share, where the executor did elect to treat it as a loan, interest should be allowed from the time of such election, and not from the time the money was advanced.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Thomas H. Cole and others, executors of Christopher Swezey, deceased, against Minnie E. Andrews, administratrix of Frank E. Swezey. From a judgment of the Appellate Division (82 N. Y. Supp. 152) affirming, as modified, a judgment for plaintiffs, defendant appeals. Affirmed.

John A. Thompson and W. W. Thompson, for appellant. Edgar J. Phillips and Frank M. Avery, for respondents.

PARKER, C. J. This action was brought by the executors of Christopher Swezey against the administratrix with the will annexed of his son, Frank E. Swezey, to recover moneys furnished to the latter by his father. Plaintiffs' claim rests on the following instrument: "I, Frank E. Swezey, a son of Christopher Swezey, hereby acknowledge that at this date I am indebted to him in the sum of \$2,961 advanced to me by him between March 1, 1893, and November 14, 1898. I hereby agree that the same shall be charged against any portion of the estate of Christopher Swezey that may fall to me under any will that he may leave, and that the same may be and shall be charged as an advancement against such portion. I further agree that the same may be held as a debt due by me to the estate of said Christopher Swezey if the executors or administrators of said estate desire to treat the same as a debt, and the same may be offset against the share or portion so coming to me or otherwise in form so as to accomplish the

charging of the same against either the real or personal property which I may inherit from said Christopher Swezey." This instrument contains four clauses: (1) "I, Frank E. Swezey, a son of Christopher Swezey, hereby acknowledge that at this date I am indebted to him in the sum of \$2,961 advanced to me by him between March 1, 1893, and November 14, 1893." This clause acknowledges the liability. (2) "I hereby agree that the same shall be charged against any portion of the estate of said Christopher Swezey that may fall to me under any will that he may leave, and that the same may be and shall be charged as an advancement against such portion." This authorizes the deduction of the sum, as an advancement from any part of the father's estate falling to the son under any will of the father. (3) "I further agree that the same may be held as a debt due by me to the estate of said Christopher Swezey if the executors or administrators of said estate desire to treat the same as a debt." This clause authorizes the executors or administrators of the estate of the father, if they so elect, to treat such sum as a debt due the estate—a chose in action. (4) "And the same may be offset against the share or portion so coming to me or otherwise in form so as to accomplish the charging of the same against either the real or personal property which I may inherit from said Christopher Swezey." This clause authorizes the charging of the said sum, as an advancement, against the son's share in the father's estate should the latter die intestate. The instrument is an acknowledgment that the father has furnished a specified sum of money to the son; that it is not a gift, but a debt due the father, and that it may be collected after the decease of the father by his legal representatives; and, further, that the sum may be collected, at the election of those legal representatives, (1) by treating the sum furnished to the son as a loan, and enforcing it; or (2) by treating it as an advancement, and deducting it from the son's share in the estate. We think the Appellate Division was right in modifying the judgment by deducting the interest for the time prior to the day when the executors elected which remedy they would pursue.

The judgment should be affirmed, with costs.

GRAY, O'BRIEN, HAIGHT, MARTIN, CULLEN, and WERNER, JJ., concur.

Judgment affirmed.

(69 Ohio St. 75)

HULL v. ALEXANDER, County Treasurer.

(Supreme Court of Ohio. Oct. 13, 1903.)

COLLECTION OF DELINQUENT TAXES—ACTION BY COUNTY TREASURER.

1. The action by the county treasurer for the collection of delinquent personal taxes authorized by section 2853, Rev. St. 1892, must be for

taxes standing charged on the duplicate of the current year, or the delinquent duplicate.

(Syllabus by the Court.)

Error to Circuit Court, Crawford County.

Action by W. L. Alexander, Crawford county treasurer, against J. C. F. Hull. Judgment for plaintiff was affirmed by the circuit court, and defendant brings error. Reversed.

On the 18th day of January, 1901, W. L. Alexander, then treasurer of Crawford county, began his action against J. C. F. Hull for the recovery of \$1,048.20, taxes and penalty claimed to be due to said county from said Hull for delinquent taxes on shares owned by said Hull in the Second National Bank of Bucyrus, Ohio, which shares had been returned by the cashier to the county auditor for taxation, and the valuation and taxes by him placed on the duplicate for the years 1892, 1893, 1894, and 1895. Taxes claimed for the year 1892, \$198.14, penalty \$19.81; for the year 1893, taxes \$166.05, penalty \$16.61; for the year 1894, taxes \$275.07, penalty \$27.51; and for the year 1895, taxes \$313.65, penalty \$31.36; total taxes claimed, \$952.91, penalties \$95.29; making in all \$1,048.20. Mr. Hull refused to pay the full amount of these taxes, claiming that he was entitled to deduct his debts from the value of his national bank shares; and so the matter stood until in August, 1895, the board of county commissioners, by resolution adopted and recorded, empowered the then county treasurer, John Blyth, to compromise and settle all doubtful claims for taxes due and unpaid September 15, 1895, in such way as to him should appear best, and from time to time report to the board his doings for its approval. Under this resolution the then treasurer and Mr. Hull effected a compromise and settlement of the taxes on said bank shares; Mr. Hull making an affidavit as to the amount of his indebtedness, and the treasurer deducting that amount from the valuation of the bank shares, and ascertaining the amount of tax on the balance left for the years 1892, \$39; 1893, \$32.40; and 1894, \$124.55; total, \$195.95—which sum Mr. Hull paid to Mr. Blyth, the then treasurer, on the 11th day of January, 1896, and took a receipt therefor from the treasurer, and which receipt is as follows:

"Treasurer's Office, Crawford Co., Ohio, Bucyrus. Received of J. C. F. Hull the whole installment of taxes charged for the years 1892, 1893 and 1894, on the following property in Bucyrus township, to wit: [Here follow the years, valuation, rate, and taxes on said shares.]

"The above sum is received in settlement of delinquent taxes on national bank shares owned and retained by J. C. F. Hull, and is for the sum found due to the county treasurer after deducting from the par value of said bank shares the bona fide debts of the owner, having filed his affidavit of said in-

debtedness, and having made his claim for deductions under the national banking laws of the United States. John Blyth,

"County Treasurer."

This settlement was made while the treasurer had the duplicate of 1895 in his hands for collection, and the delinquent taxes of 1892, 1893, and 1894 had been carried forward upon that duplicate. As the taxes of 1895 were also on the same duplicate, but not yet delinquent, it is not clear why they were not settled and paid at the same time. But the record shows that they were allowed to remain unpaid until December 30, 1896, when they were settled and paid, as shown by the following receipt:

"No. 2025, Treasurer's office, Crawford Co., Ohio, Bucyrus.

"I Received of J. C. F. Hull the whole installment of taxes charged for the year 1895, on the following property in Bucyrus township, to wit:

"The above is in full settlement of taxes charged against J. C. F. Hull on national bank stock, said Hull having filed affidavit of his indebtedness and asked the same to be deducted from the par value of said bank shares under the national banking laws, and said amount being the true amount found due the county after said deductions were made.

"Delinquent.

"1895. Value, \$4,500; amount of tax, \$124.20.

John Blyth,

"County Treasurer Collector."

After the settlement and payments as above shown, no part of the taxes sued for was carried forward or placed upon the duplicate delivered by the county auditor to the county treasurer for any of the years subsequent to said payments, and said taxes so sued for did not appear on the duplicate for the year 1900; being the duplicate in the hands of the county treasurer at the time he commenced his action, on January 16, 1901.

Mr. Hull, in his answer, pleaded these settlements and payments as conclusive, and also claimed that the treasurer had no power to sue for or collect taxes not on his duplicate for the current year, and that at least he should have credit for the amounts paid to the treasurer. The treasurer claimed that the said settlements were void for want of power in the parties to make the same; that he could sue for any taxes at any time lawfully assessed and standing unpaid upon any duplicate, whether for the current year or any past years; and conceded that Mr. Hull should have credit for the amounts paid.

The above are the conceded and controlling facts.

The case was tried to a jury, and many questions raised upon the introduction of testimony, especially as to the old duplicates, but which need not be specially noticed in this opinion, as we dispose of the case upon the question of the power of the treasurer to maintain the action.

At the close of plaintiff's testimony the defendant made a motion to the court, in effect, to arrest the testimony from the jury, and to direct a verdict in his favor, for the reason that the action is not authorized by statute upon the duplicates of the dates mentioned in the plaintiff's petition, and for the further reason that the evidence offered by the plaintiff was not sufficient to entitle the plaintiff to a verdict in his favor. The court overruled the motion, and the jury brought in a verdict in favor of the plaintiff for \$728.05. A motion for a new trial was overruled, and judgment entered on the verdict. Proper exceptions were taken throughout the trial. The circuit court affirmed the judgment. Thereupon the cause was brought here for the purpose of reversing the judgments of the courts below.

Harris & Sears, for plaintiff in error. Finley & Gallinger, for defendant in error.

BURKET, C. J. (after stating the facts). It is clear that Mr. Hull had no right to deduct his debts from the valuation for taxation of his national bank shares during the years 1892 to 1895, both inclusive, and that the state of Ohio during said years did not recognize such right, and did not accept the case of *Whitbeck v. Mercantile National Bank*, 127 U. S. 193, 8 Sup. Ct. 1121, 32 L. Ed. 118, as deciding that such right existed; but, on the contrary, held that such right did not exist; and in such holding the state has been upheld by the Supreme Court of the United States. *Niles v. Shaw*, 50 Ohio St. 370, 34 N. E. 162; *Chapman v. Bank*, 56 Ohio St. 310, 47 N. E. 54; *Bank v. Chapman*, 173 U. S. 205, 19 Sup. Ct. 407, 43 L. Ed. 669; and *Bank v. Ayers*, 160 U. S. 660, 16 Sup. Ct. 412, 40 L. Ed. 573.

The question as to whether debts are required by the federal statute as to national banks to be deducted from the valuation of shares in a national bank for taxation is a federal question, and has been finally settled by the Supreme Court of the United States; but the manner in which a state shall regulate its internal tax system, is not a federal question, and, so long as shares in a national bank are not taxed at a higher rate than other moneyed capital, the federal courts cannot interfere, even though they might think that the state system of taxation was unjust and oppressive. So long as the injustice and oppression rest equally on national bank shares and other moneyed capital, the remedy must rest with the state. *Kirtland v. Hotchkiss*, 100 U. S. 498, 25 L. Ed. 558; *Memphis Gaslight Co. v. Shelby Co.*, 109 U. S. 398, 3 Sup. Ct. 205, 27 L. Ed. 976.

There has therefore been no change in the judicial holdings in this state as to the taxation of shares in a national bank for the years in question, and, while some county auditors may have followed the rule supposed to be laid down in the *Whitbeck Case*, the subsequent case of *Bank v. Chapman*, 173

U. S. 205, 19 Sup. Ct. 407, 43 L. Ed. 669, shows that there was an erroneous construction of the Whitbeck Case; and an erroneous construction of a former decision will not serve to protect those who have acted under and in pursuance of such error, and cannot serve as *stare decisis*, because such decision, when properly construed, never stood, and does not now stand. It is urged that Mr. Hull could have enjoined this tax under the Whitbeck Case, but that this is not so is shown by the fact that Mr. Niles failed in his case, as did also Mr. Chapman in his, and both relied upon the Whitbeck Case.

It is therefore clear that at the time of these two settlements Mr. Hull owed the full amount of taxes then standing on the duplicate against him. Whether the first settlement had sufficient validity to bar a further collection may well be doubted, but it is clear that it induced the auditor to omit the unpaid portion of the taxes from all subsequent duplicates. The taxes of 1895 did not become delinquent until June 20, 1896, and were not included within the authority of the resolution of the commissioners of August 6, 1895, because that resolution only covered taxes due and unpaid on the 15th day of September, 1895. It would seem, then, the treasurer had no authority to make the settlement of December 30, 1896, but he did make it, and received the money from Mr. Hull, and gave him a receipt therefor, as above shown; and that settlement, though it may have been unauthorized, induced the county auditor to omit the unpaid portion of the taxes from the next duplicate, and he never thereafter placed said unpaid taxes upon any duplicate. After the treasurer had received and collected the duplicates for the years 1897, 1898, 1899, and had in his hands for collection the duplicate of 1900, all without said unpaid taxes being entered upon any of them by the county auditor, the county treasurer brought this action for the collection of unpaid taxes which had not been on any duplicate after the years 1895 and 1896, and which duplicates had been settled between the county auditor and county treasurer as provided by sections 1043, 1044, 1115, Rev. St. 1892, and no longer remained in his hands for collection, and with which he was no longer charged by the county auditor. If the county treasurer could maintain an action on such old duplicates, which had been thus settled, and from which he had been discharged from liability, it must be by virtue of some statute, because an officer, as a general rule, can maintain an action in his official capacity for the collection of public funds only when authorized by statute. By section 2855, Id., the county auditor is required to make a delinquent tax list or duplicate immediately after the August settlement, and deliver the same to the county treasurer on the 15th day of September, annually. By section 2856, Id., the treasurer is required to proceed forthwith to col-

lect the taxes and penalty on said duplicate by any of the means provided by law, which would include a collection by civil action. But in the case at bar the civil action was not founded on "said duplicate" (that is, the delinquent duplicate), but upon certain old defunct duplicates, no longer in the hands of the treasurer for collection. The action was therefore not authorized by said section 2856.

It is urged, however, that the action is authorized by section 2859, Rev. St. 1892. That section is as follows: "When any personal taxes, heretofore or hereafter levied, shall stand charged against any person, and the same shall not be paid within the time prescribed by law for the payment of such taxes, the treasurer of the county, in addition to any other remedy provided by law for the collection of such personal taxes, is hereby specially authorized and empowered to enforce the collection by a civil action in the name of the treasurer of such county against such person for the recovery of such unpaid taxes; and it shall be sufficient, having made proper parties to the suit, for such treasurer to allege in his bill of particulars or petition that the said taxes stand charged upon the said duplicate of said county against such person, that the same are due and unpaid, and that such person is indebted in the amount appearing to be due on said duplicate, and such treasurer shall not be required to set forth in his petition any other or further special matter relating thereto, and said tax duplicate shall be received as *prima facie* evidence on the trial of said suit of the amount and the validity of such taxes appearing due and unpaid thereon, and of the non-payment of the same, without setting forth in his bill of particulars or petition any other or further special matter relating thereto; and if, on the trial of the action, it shall be found that such person is so indebted, judgment shall be rendered in favor of such treasurer so prosecuting such action as in other cases; and the judgment debtor shall not be entitled to the benefit of the laws for stay of execution or exemption of homestead, or any other property, from levy or sale on execution in the enforcement of any such judgment." This section was originally passed March 31, 1877, and was entitled "An act to secure the collection of delinquent taxes." 74 Ohio Laws, p. 69. It was slightly amended May 11, 1878 (75 Ohio Laws, p. 485), and carried into the Revised Statutes of 1880, and has remained the same ever since. It will be noticed that it provides for the collection of personal taxes which were levied either before or after the passage of the act, and stand charged against any person, and not paid within the time prescribed by law—delinquent personal taxes. "When personal taxes stand charged against any person" means charged upon some duplicate in the hands of the treasurer for collection, and not upon some old defunct duplicate. This clearly appears from what

follows—"and the same shall not be paid within the time prescribed by law for the payment of such taxes." This implies a charge against a person which can be discharged by simple payment, without invoking any other process or requirement; and the only charge against a person in favor of the treasurer that can be so paid is a charge upon the current duplicate or delinquent list in his hands for collection. This is made clear by sections 1084, 1085, Rev. St. 1892. Section 1084, after requiring the treasurer to keep an account of all moneys received and paid out by him, provides that "no money received for taxes charged on the duplicate of the current year, shall be by the treasurer entered on his account with the county, until he has made his semi-annual settlement with the county auditor." And section 1085 provides that "all payments of money into the county treasury of every description, except the payment of taxes charged on the duplicate, and made before the return by the treasurer of the delinquent list for unpaid taxes, shall be paid to the county treasurer on the draft of the county auditor, in favor of the treasurer." It is made clear by this section that payment of taxes standing charged on the duplicate of the current year can be made to the treasurer direct, without warrant or draft from the county auditor, because the duplicate is his warrant for receiving the same; and it is further clear that payment of taxes standing charged on the delinquent duplicate can be made direct to the treasurer until the return by the treasurer of the delinquent list, but that, after the return of the delinquent list, payment can be made only upon the warrant or draft of the county auditor, because after the return of the delinquent list the treasurer has no warrant or duplicate in his hands for collection, and, in case payment of taxes should then be made to him, the auditor would have no account thereof; and therefore, in order to keep the proper charge against the treasurer, the statute requires that he have either a duplicate or draft from the auditor authorizing him to receive the money, and such duplicate, whether of the current year or of delinquent taxes, and such draft, enable the auditor to have in his office at all times a charge against the treasurer for all money paid to him.

In all our tax legislation, the only duplicates mentioned are the duplicate of the current year and the delinquent duplicate, and all charges of taxes are required to be kept on one or the other of such duplicates, and nothing is provided as to collections or actions on old duplicates of former years; and therefore the words "said duplicate," in section 2859, must be construed as referring to the duplicate of the current year or the delinquent duplicate.

Again, the county treasurer is strictly a collector of taxes, and not a tax inquisitor or taxing officer. He performs his whole duty

when he collects the money charged upon the tax duplicate and delinquent list delivered to him by the auditor for collection, or charged upon a warrant or draft delivered to him by the auditor authorizing him to receive money; and he is not authorized by statute to hunt up and collect old, stale claims not placed on the duplicate or delinquent list of the current year by the auditor. The auditor is the taxing officer, and the treasurer the collecting officer. When people have so arranged their taxes, either by payment or otherwise, as to have the charge removed from the duplicate, the place to begin to have such taxes again placed on the duplicate and made a charge against such person is in the office of the auditor; and the treasurer has no authority to revive, sue for, or collect such taxes, until again placed on the duplicate by the auditor.

It is therefore clear, upon the conceded facts in this case, that the treasurer had no power or authority to bring or maintain this action; that the court erred in admitting the old duplicates in evidence, and erred in overruling the motion of defendant to arrest the testimony from the jury, and for judgment in his favor. The judgment of the circuit court, and also that of the common pleas, will be reversed, and the said motion of the defendant below will be sustained, and the petition dismissed.

Whether at this late day the auditor can place the unpaid portion of Mr. Hull's taxes on the duplicate, so as to enforce their payment, is not involved in this case, and is not here decided. No attempt has been made by the auditor to again place said unpaid taxes on the duplicate. Should such attempt be made, it will then be proper to decide the question. The question is not now before us. Neither is the validity or invalidity of said settlements decided. The treasurer not having the power to bring the action on the old duplicates, he could not in any unauthorized action test the validity of the settlements.

Judgments reversed, and judgment for plaintiff in error.

DAVIS, SHAUCK, and PRICE, JJ., concur.

(161 Ind. 369)

BINGLE v. STATE.

(Supreme Court of Indiana. Nov. 3, 1903.)

LARCENY — INDICTMENT — ALLEGATION OF OWNERSHIP OF PROPERTY—SUFFICIENCY—APPEAL—RECORD—BILL OF EXCEPTIONS.

1. An indictment for larceny, alleging that the property stolen was the personal property of several persons named, "as trustees of" a church, was not bad for failing to state that the property belonged to the church, stating its corporate name, where it was not averred that the church was ever incorporated.

2. Where the record on appeal in a criminal case showed that what purported to be a bill of exceptions was not embraced in the transcript, but was attached thereto, following the

certificate of the clerk, stating that "the above and foregoing transcript" contained true and complete copies of all the papers and entries in the case, but in no way identifying the bill of exceptions, and did not show that the bill of exceptions was filed after it was signed by the judge, the evidence was not in the record; Burns' Rev. St. 1901, § 1916 (Rev. St. 1881, § 1847; Horner's Rev. St. 1901, § 1847), providing that all bills of exceptions in a criminal case must be made and presented to the judge, and must be signed by the judge and filed by the clerk.

Appeal from Circuit Court, Spencer County; T. J. Reinhard, Special Judge.

James Bingle was convicted of larceny, and appeals. Affirmed.

Bennett & Crenshaw, for appellant. Union W. Youngblood, Pros. Atty., C. W. Miller, Atty. Gen., A. C. Hadley, L. G. Rothschild, and W. C. Geake, for the State.

MONKS, C. J. Appellant was charged by indictment with the crime of petit larceny. Trial, verdict of guilty, and finding that appellant was 44 years of age. The errors assigned challenge the sufficiency of the indictment, and the action of the court in overruling appellant's motion for a new trial.

The indictment charged that the property stolen was the "personal goods and chattels of Robert T. Lang, Andrew J. Bauman, Daniel Ehret, Uriah McCoy, and Jacob Scammarhorn, as trustees of the Ebenezer United Brethren Church." Appellant contends that the property alleged to have been stolen was the property of the United Brethren Church, and not the property of the trustees, and that it should have been alleged in the indictment that the property stolen belonged to the church, stating its corporate name. It is insisted by appellant that for this reason the indictment was bad, and the court erred in overruling his motion to quash. It is not alleged in the indictment that the Ebenezer United Brethren Church was ever incorporated, and we cannot presume that it was, as against an allegation that the article stolen was the property of the persons named "as trustees" of the church. It has been held in this state that a church incorporated under our statutes may sue and be sued in the names of the trustees. Gaff v. Greer, 88 Ind. 122, 124, 125, 45 Am. Rep. 449, and cases cited. It is clear, however, that a church congregation which has never been incorporated may act by trustees chosen from time to time by the members of such congregation, and the title to and possession of the property, real and personal, of such congregation, may be in the trustees. In such cases actions concerning said property may be in the individual names of the trustees. Dwenger v. Geary, 113 Ind. 106, 121, 14 N. E. 903; Beatty v. Kurtz, 2 Pet. 566, 7 L. Ed. 521. It is evident that the objection urged is not tenable.

The questions presented by the motion for a new trial depend for their determination upon the evidence, which the Attorney Gen-

eral insists is not in the record, because what purports to be an original bill of exceptions is not embraced in the transcript, but has been attached to the transcript, following the certificate of the clerk. The certificate of the clerk states that "the above and foregoing transcript contains full, true, and complete copies of all the papers and entries in the cause, except affidavits and counter affidavits filed in support of the same, as required by the foregoing precept, as the same appears of record in my office." What purports to be the original bill of exceptions follows said certificate, and is in no way referred to or identified by said certificate. Neither is there anything in the record or certificate showing that said bill of exceptions was filed after it was signed by the judge. Upon the authority of Butt v. Lake Shore, etc., R. Co., 159 Ind. 490, 65 N. E. 529; De Hart v. Board, etc., 143 Ind. 363, 41 N. E. 825; Ewbank's Manual, § 32 and section 116, p. 169; section 1916, Burns' Rev. St. 1901 (section 1847, Rev. St. 1881; section 1847, Horner's Rev. St. 1901); Drake v. State, 145 Ind. 210, 217, 218, 41 N. E. 799, 44 N. E. 188, and cases cited; Merrill v. State, 156 Ind. 99, 103, 104, 59 N. E. 322, and cases cited; Indiana, etc., R. Co. v. Lynch, 145 Ind. 1, 3, 43 N. E. 934, and cases cited; Louisville, etc., R. Co. v. Schmidt, 147 Ind. 638, 652, 46 N. E. 344; Makepeace v. Bronnenberg, 146 Ind. 243, 249, 45 N. E. 336; Ayres v. Armstrong, 142 Ind. 263, 264, 41 N. E. 522, and cases cited; Elliott's App. Proc. § 805—we hold that the evidence is not in the record.

Judgment affirmed.

(205 Ill. 23)

O'DONNELL v. MacVEAGH et al.

(Supreme Court of Illinois. Oct. 26, 1903.)

MASTER AND SERVANT—FREIGHT ELEVATORS—USE BY SERVANTS—INJURIES—DEFECTIVE APPLIANCES—EMPLOYMENT OF CONDUCTOR—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

1. Where, in an action for the death of a servant by falling down an elevator shaft, it was alleged that the accident was caused by reason of the dangerous condition of the appliances, and the only defect proved was that one of the automatic gates was bulged out, but there was no testimony that such gate was bulged at the time of the accident, the direction of a verdict for defendant on such issue was proper.

2. Where a master had provided deceased with other means for reaching the various floors of the building than by riding on a freight elevator not intended to carry passengers, and it appeared that deceased had been in defendant's employ for seven years, and had used the elevator but once before, and was entirely ignorant of its operation, defendant was not liable for his death by falling off such elevator by reason of defendant's failure to employ an elevator conductor to operate the same.

3. In an action for the death of a servant by falling down an elevator shaft, evidence held to show that deceased was guilty of such contributory negligence as precluded recovery.

Appeal from Appellate Court, First District.

Action by Patrick H. O'Donnell, as administrator of the estate of Christian P. Lorenzen, deceased, against Franklin MacVeagh and others. From a judgment in favor of defendants, affirmed by the Appellate Court, plaintiff appeals. Affirmed.

Edgar Bronson Tolman, for appellant. Pam, Calhoun & Glennon (Albert E. Dacy, of counsel), for appellees.

RICKS, J. This is an action of trespass on the case, begun by plaintiff in error in the circuit court of Cook county to recover damages for the death of Christian P. Lorenzen. Upon a hearing in the trial court, a peremptory instruction to find the defendants not guilty was given the jury at the request of defendants in error. The plaintiff in error sued out of the Appellate Court a writ of error, and on a hearing in that court the judgment was affirmed. The Appellate Court, having granted a certificate of importance, the case is brought to this court upon a writ of error.

The declaration contained five counts. The first three were based upon the violation of certain sections of the Municipal Code, but on the trial of the case no evidence was introduced under these counts. The fourth count alleged that on October 7, 1898, the defendants were possessed of and were using a certain freight and passenger elevator in a building occupied by them in Chicago, by means of which premises it became and was the duty of said defendants to maintain the said elevator, and the appurtenances thereof, in such a condition as to be reasonably safe for use by persons who should ride thereon, but said defendants, disregarding their said duty, and while so controlling and operating said elevator, wrongfully and negligently suffered the said elevator and its appurtenances to be and remain and be operated in a dangerous condition, so that the same was unsafe to ride on; and while said Christian Peter Lorenzen, with all due care and caution on his part for his own safety, was in the employ of said defendants, and, in the discharge of his duties as such employé, was being carried on said elevator from the basement of said premises towards the third floor of said premises, not knowing the said dangerous condition of said elevator, said dangerous condition not being apparent to persons of ordinary knowledge and prudence, he, said Lorenzen, by reason of said defects of said elevator and of its appurtenances, and by reason of the dangerous condition thereof, was then and there thrown down and fell down said elevator shaft, and killed by said fall. The fifth count contains the same allegation as to the possession, control, and operation of a certain freight elevator as set out in the former count, and of the duty "to operate said elevator in such manner as to be reasonably safe for use by persons who should ride thereon," and as a breach of duty the count alleges that the defendants "wrong-

fully and negligently suffered said freight elevator to be operated by one of their employes not on said elevator, where the said persons so operating said elevator could not see the persons who might be on said elevator, or see whether or not they were getting on or off of said elevator, or whether or not they had completed the act of getting on or off said elevator, or whether or not they were in such a position on said elevator as to be safe for said elevator to be in motion." It then alleges that while said Lorenzen, with due care and caution on his part for his own safety, was in the employ of said defendant, and in the discharge of his duty as such employé, and being carried on said elevator from the basement of said premises towards the upper floor of said premises, he, said Lorenzen, "by reason of the fact that the said elevator was then and there being operated by a person not on said elevator, in such a position that he, the said person so operating said elevator, could not see him, the said Christian Peter Lorenzen, nor the said elevator," said Lorenzen was, by reason of the aforesaid defective and dangerous method of operation of the said elevator, then and there thrown down and fell down said elevator shaft, and killed by said fall.

The only question presented to this court arises upon the peremptory instruction given by the trial court to the jury. This question is one of law, and is, was there evidence adduced before the jury, which, with all the legitimate and natural inferences to be drawn therefrom, fairly tended to support the cause stated in the declaration, or any count thereof?

Only two witnesses were produced upon the trial,—the widow of the deceased, who did not know of her own knowledge how he came to his death, and gave only general information as to his age, occupation, etc., and one Charles Schreiber, who was employed by the defendants as engineers; he being the only witness who gave testimony as to what occurred on the evening in question. His evidence is substantially as follows: "On the 7th or 8th of October, 1898, I was employed by Franklin MacVeagh & Co. in their refinery. There was one engine there, and the elevator engine. I had charge of both of them. There was just the one elevator. The building was four stories and a basement. There was no person there in charge of or operating that elevator. It was used by every man in the place except that man that got killed. It was a freight elevator to take freight up and down. I was there about a year and two months before the death of Lorenzen. Lorenzen was there when I came. I seen him until he got killed. It was around seven or eight o'clock in the evening. At that time I was engineer for the building. My duties were to look after the machinery, repairs, and one thing and another around the place. At the time of the

occurrence I was up on the third floor. I went up on the elevator and got off at the third floor. I next went to pack a couple of valves up there on the third floor at the kettles. After I packed the valves I went back to the elevator. I wanted to go down. I hollered at the elevator. I wanted to take it up. I looked over into the shaft. A man was coming up. Mr. Greenwood was coming up. He told me to wait. I says, 'All right.' I heard Mr. Greenwood holler that he was coming up. I looked over the elevator, and waited to see why the elevator didn't come. When I looked over the gate into the elevator shaft I seen Greenwood there, and old man Lorenzen on the elevator. As soon as I saw the elevator coming up, I stepped back from the elevator. It stopped at the second floor, and it stopped between the second and third floor, because I stepped back just before or at the time the elevator stopped at the second floor. I gave Mr. Greenwood instructions to send the elevator up to me when he got off; that I would stop it and take the old gentleman up—Mr. Lorenzen. Well, he started the elevator up to come to me. In the meantime he hollered to me that Mr. Lorenzen was in the elevator shaft—not to touch the elevator. He told me not to touch the elevator—that the old man was caught in it; and the elevator came up past the third floor, and I stopped the elevator there. When I called down to Mr. Greenwood to send up the elevator, he said he would send the elevator up to me. He said, 'All right,' he would send it up. I knowed where the old man wanted to go. The elevator came up to the third floor empty. After the time that I looked over and saw the elevator below, and Mr. Lorenzen on it, I did not see the elevator or him on it again. I did not look over again. When the elevator came up, I stopped it. It got beyond the floor. I seen there was nobody in it. I left it stand there. I heard the racket that the old man was down in the shaft, and I left the elevator standing on the third floor, and I walked down to the second floor, and saw the gates broke. The gates which were connected with this elevator work automatically with the elevator. When the elevator went up, they opened; when she went down, they open also. These gates closed when the elevator was in motion after it had passed the floor. The condition of this gate on the second floor, when I got there, was all right, only that the grooves that she ran in on one side were jammed out—sprung out of those grooves. We untied the gate off of there, and we took off this piece that starts the gate up and down. There was a kind of up and down business that started this gate where the ropes went into, and we put a piece of two by four in front of the elevator for a bar—a cross-piece—and then we ran ahead. I got the elevator down from the third floor to the second. I goes down to the basement. In the meantime they had the old gentleman

over to the hydrant in the basement. I saw him there. He was breathing his last. That is all I seen of it. I stayed there about ten minutes. He was dead before I went away. I then went and took the elevator down, and commenced to run up and down to see if everything was all right on the elevator. Lorenzen's body was taken away in the patrol wagon. There was a superintendent in charge of this building—a Mr. Lemke. I had a talk with him about this elevator about two months before this accident. I told him to put a man on that elevator; if they did not, there would be something happen there, and he would be held responsible. Lemke made no reply. During the time I was there the elevator remained the same—the same elevator, the same machinery. After Lorenzen was found dead, I ran the elevator down, and the machinery was all right. I was the engineer in charge of the machinery. I done the firing myself. I was alone there. I did not have any man in the basement to help me, only when I done work in the building. They gave me almost everybody. They had a man named Julius who worked there. I don't remember whether he was there the day of the accident or not. I don't know whether or not he was the first man who got to Lorenzen. I hollered that the elevator was on the third floor. There was a bell on the elevator. I rung and hollered, both. At the same time I looked over into the shaft and saw Mr. Greenwood on the elevator at the ground floor. I saw Mr. Lorenzen get on with him. I saw them get on. I could see the elevator start to go upward. I could see it by the cable. As soon as the elevator started I stepped back, so that I would not get caught on the gates. I went back a foot or a foot and a half from the gates as soon as I saw the elevator coming from the second floor. I remained at that distance away until the elevator came up to the third floor. During all the time I was about a foot away from the shaft. I could not see the elevator after it started up—all I could see were the cables moving. If the elevator didn't stop at the second floor, it came pretty near it. I couldn't see the elevator stop at the second floor. The last time I saw the elevator was when it was leaving the first floor. I saw the cable. The next time I saw the elevator was when it was even with and had passed the third floor. Then I stopped it. The gates on the elevator were the Richardson safety gates. The elevator was operated—propelled—by steam, and the steam was supplied from the engine in the basement. There were two engines in the basement—the elevator engine and another engine. The main engine in the basement had a supply pipe which ran over to the other engine and supplied steam for the elevator engine. I had no fireman. I done my own firing. Nobody else had any charge of the engines except me. The engine was in first-class condition before and after the accident. The appliances on the elevat-

or, with the exception of the gates, were in working order—with the exception of the gate that was bulged out. No repairs were made on the elevator, except to replace this gate. Otto Lemke was the superintendent in charge of this building. He was the man who gave orders around there. There was nobody else who gave orders except him. Lorenzen, Greenwood, and I were all working under Lemke. There was no intermediate man between Lemke and us. He was the only man who had authority to give orders, and the rest of us all worked under him. I had no authority to give Greenwood orders or Lorenzen orders, and Lorenzen had no authority to give me orders. I got my orders from Lemke. When I stepped away from the shaft I could see the elevator cables. Greenwood was a kind of porter. He kind of marked up goods and got them down on the first floor, and one thing and another like that."

Mrs. Lorenzen also testified she saw deceased when he went to work the morning of the injury. She said he never drank intoxicating liquors, that the condition of his health and body was good, and that at the time of the accident his hearing and eyesight were unimpaired.

We think it clear that there is no proof of the cause of action alleged in the fourth count of the declaration. There is no evidence which tends to show that the elevator or its appurtenances were in a dangerous condition. On the contrary, the evidence shows all the appliances of the elevator were working in a proper and reasonably safe manner. The record is entirely barren of any testimony tending to show that the gate to the elevator was bulged out at the time of the accident.

Neither did the evidence in the case sustain the fifth count of the declaration. Plaintiff in error has devoted much space in his argument to the proposition that it was the duty of defendants in error to employ an elevator conductor to pilot this elevator for the safety of the passengers. The evidence shows beyond question that the elevator was a freight elevator, and was used for transporting freight from floor to floor in the building. The defendants in error had not provided this elevator as a conveyance for plaintiff in error's intestate, but had provided him with other means to reach the various floors of the building. The evidence shows that, although Lorenzen had been in the employ of defendants in error for seven years, he had never used this elevator before, or at least not more than once before, the time of his injury. Lorenzen was not required, in the performance of his duties, to be upon the freight elevator. Indeed, he had no business thereon; and, when defendants in error had provided him with a reasonably safe means of transportation between the floors, they are not answerable to plaintiff in error for any injuries that may have occurred to Lo-

renzen by reason of his seeking out this dangerous means of conveyance, with the operation of which he was entirely ignorant. *Jorgenson v. Johnson Chair Co.*, 169 Ill. 429, 48 N. E. 822.

Again, the evidence is uncontradicted that Lorenzen was guilty of a high degree of negligence, which contributed to his injury. Plaintiff in error discusses this proposition as though Lorenzen was in the exercise of due care for his own safety if he took proper care of himself after getting on the elevator; but Lorenzen's negligence which contributed mostly to this injury consisted in getting on the elevator at all, and in his remaining in the elevator alone, when he was entirely unfamiliar with the operation thereof, trusting to reach his destination in safety by having Greenwood send the elevator on from the second floor, and expecting it to be stopped by Schreiber on the third floor. So far as the evidence discloses, defendants in error exercised due care in providing this elevator, for the purposes for which it was intended, with all the equipment that was necessary; and it is also clearly established that the elevator and its attachments were in good and safe working order, and the evidence does not show that for the purpose of carrying freight it was necessary, in the operation of this elevator, that any one should be placed in charge of it and ride upon it while being operated. If plaintiff in error's intestate desired to appropriate this elevator to other uses than those for which it was placed there by defendants in error, for his own personal convenience, he did so at his own peril. The evidence does not show the existence of such a custom on the part of defendants in error's employes in riding upon this elevator, or such knowledge on the part of defendants in error of such custom, as would require them to make provision therefor, by placing some one especially in charge of this elevator to operate it. Furthermore, the record is entirely barren as to evidence as to the manner in which plaintiff in error's intestate came to his death. It is not shown that he was injured because there was no conductor in charge of the elevator, nor was it shown that the accident was due to defective machinery. So far as it appears from the evidence, Lorenzen would have been as likely to have come to his death in the manner he did, had there been a conductor in charge of the elevator, and in the proper discharge of his duties. It plainly appears he was not to get off at the second floor, but was to go above the third floor, where Schreiber was located, and who was to stop the elevator at the third floor when it reached there, and take Lorenzen to the floor to which he desired to go. To charge defendants in error with liability, there must have been a duty that was not observed or performed, the failure of which was the inducing cause of the injury, and this, we think, the evidence wholly fails to show.

As there was, under the evidence, no ground whatever upon which plaintiff in error could recover, the court properly instructed the jury to find a verdict for defendants in error.

The judgment of the Appellate Court will be affirmed. Judgment affirmed.

(204 Ill. 616)

TRAINOR v. GERMAN-AMERICAN SAVINGS, LOAN & BUILDING ASS'N.

(Supreme Court of Illinois. Oct. 26, 1903.)

EVIDENCE—BOOKS OF ACCOUNT—FORMULATION—BOOKS OF CORPORATION.

1. At the beginning of each week a clerk employed by the secretary of a building association prepared a list of members from whom payments were due. At the close of the week the secretary would redeliver the list, with annotations of payments received, and the clerk would then enter such payments on the books. The secretary did not testify that the entries on the list were true, and there was no evidence that the entries, as transcribed, were compared with the lists. *Held*, in an action against a member, that no foundation was laid for the admission of the books, under Hurd's Rev. St. 1899, p. 859, c. 51, § 3, providing that any party or interested person may testify to his account book, and the items therein contained; that the same is a book of original entries; and that the entries therein were made by himself, and are true and just.

2. The books of a corporation are, as to matters pertaining to the dealings of a corporation with one of its members as an individual, not books of a public nature, and not admissible in evidence in a suit by the corporation against a member to enforce an indebtedness in favor of the corporation on that ground, but only when brought within the rule authorizing the introduction of private books of account in evidence.

Appeal from Appellate Court, First District.

Bill by the German-American Savings, Loan & Building Association against John C. Trainor. From a decree of the Appellate Court (102 Ill. App. 604) affirming a decree for plaintiff, defendant appeals. Reversed.

Charles J. Trainor and Fred S. Moffett, for appellant. W. J. Lavery, for appellee.

BOGGS, J. This is an appeal from the judgment of the Appellate Court for the First District affirming a decree of foreclosure entered in the circuit court of Cook county on a bill in chancery filed by the appellee association against the appellant.

The appellee association was organized under the act entitled "An act to enable associations of persons to become a body corporate to raise funds to be loaned only among the members of such association," in force July 1, 1879. 1 Starr & C. Ann. St. 1896, p. 1045, c. 32. The appellant became a stockholder in the association, and procured three loans from it, which were secured to be paid by mortgages or trust deeds on certain real estate, and he became liable to pay certain weekly installments as dues and certain monthly installments of interest upon this

money so borrowed by him. He also became liable to have fines assessed against him in the event he should make default in such payments of dues or interest. The ascertainment of the amount which the association was entitled to be decreed to recover from the appellant involved an examination of the payments of weekly dues and monthly installments of interest so made by the appellant from September, 1890, to the date of the filing of the bill, in 1897, and also as to the payments of various fines assessed against him during the same period on account of alleged defaults in the payments of the dues or interest. There was, however, but little dispute as to payments made by the appellee prior to April 12, 1893, or after July 27, 1895, but between those dates there was sharp conflict in the proof. The truth as to such payments was of material and vital importance to the rights of the parties. During this period from April, 1893, to July, 1895, one Joseph Schlenker was secretary of the association, and continued to serve in that capacity until some time in August, 1899. He was a witness for the appellee company, but at the close of his testimony in chief became ill, mentally or physically, and his cross-examination was deferred for some weeks, during which time he went to California. On his return his testimony was completed, and he soon after became bankrupt, and was found to be in arrears with the appellee association in the sum of about \$4,000.

The association had adopted the plan of providing each member with a passbook, to be presented by the member to the secretary of the association on making any payment of dues, interest, or fines, for the purpose of having the secretary enter in such passbook the fact of such payment, and the date and amount thereof. The appellant subscribed for stock and secured loans on September 24, 1890, January 5, 1891, and February 14, 1901, and on each of said dates received one of such passbooks. On April 12, 1893, the appellant and the proper officials of the association examined the state of their accounts, and the appellant surrendered his three passbooks, and the association issued him a fourth passbook, on which was transcribed the aggregate of the payments previously entered on the three passbooks. On July 27, 1895, the appellant seems to have surrendered this fourth passbook and received the fifth passbook, but the fifth passbook did not show any payments which had been previously made. The appellant produced the testimony of a number of different witnesses, and also testified himself, to the effect that, during the period covered by the fourth passbook, each time when he made weekly payments of dues to the association he paid the sum of \$33.50, and that each time when he paid monthly installments of interest to the association he paid \$67, and that such payments were entered by the secretary of the

association on this fourth passbook. Said Joseph Schlenker was secretary of the association during all of the time in question, and in that capacity received all moneys paid by the members to the association.

Over the objection of the appellant, the association was permitted to introduce the books kept by its secretary, for the purpose of showing payments of dues and interest by its members, and the status of the accounts between the association and its members. These books contained entries of payments made by the appellant of only \$12.50 per week as dues, and only \$58.34 per month as interest, during all of the period covered by the fourth passbook. Evidence was produced showing the first, second, third, and fourth passbooks were in the possession of the association at the time of the institution of the suit; that these four passbooks were delivered by the association to one Louis Weber, an attorney at law and solicitor in chancery, whom it had employed to prepare the bill herein for foreclosure against the appellant. Mr. Weber prepared the bill and filed it on December 21, 1897, but early in the course of the litigation became insane, and subsequently died, and was succeeded as solicitor for the association by W. J. Lavery. The appellant produced as a witness Mr. John N. Flamming, who testified that he was a clerk and stenographer in the office of Mr. Weber during the time that gentleman was preparing the original bill filed in the cause for a decree of foreclosure against the appellant, and that Mr. Weber then had in his possession four passbooks which had been issued by the appellee association to the appellant; that Mr. Weber told Schlenker, the secretary of the association, that the passbooks did not show the amount due from appellant to be the amount claimed by Schlenker to be due from him; that Schlenker insisted that the books of the association kept by him, as secretary, showed the correct amount to be due from the appellant, but that Weber told Schlenker the passbooks could not be made to show that amount; that the witness, at the dictation of Mr. Weber, prepared the bill for foreclosure in typewriting, leaving the amount claimed to the appellee association from the appellant blank; that Schlenker and Weber had a number of conferences about the matter, and that Schlenker finally told Mr. Weber to put "the figures" as he gave them in the bill for foreclosure, and that Mr. Weber said to him he would have to prove them to be correct on the trial, and directed the witness to insert in the bill the amount as claimed by the books kept by Schlenker, the secretary, and the witness wrote in the amount with a pen. Mr. Flamming made other statements as to the items of payments which appeared upon the passbooks, which tended to support the contention of the appellant upon that point. Mrs. Weber, wife of the deceased solicitor, also gave testimony to the effect that she

saw the passbooks in question in the possession of her husband while he was employed as solicitor for the association. The association did not produce the passbooks, though properly notified so to do, but presented proof to the effect it was not within its power to find or produce the books. The master ruled that the books kept by or under the direction of Schlenker, as secretary of the association, were admissible in evidence, and adjusted the accounts between the appellant and the association largely from the items appearing upon the books. Exceptions to such action on the part of the master were overruled, and the amount of the decree was determined upon consideration of the account as shown by the books. The true rule governing the introduction of the books of the association in evidence in support of the claim of the association against one of its members must therefore be determined.

We do not think the books were admissible on the ground that appellant was a member of the association, and its books therefore evidence against him, or that a foundation was made in the proof for the admission of the books as books of account, under the provisions of our statute. Section 3 of chapter 51 (Hurd's Rev. St. 1899, p. 859) relates to the admissibility in evidence of books of account, and is as follows: "Where in any civil action, suit or proceeding, the claim or defense is founded on a book account, any party or interested person may testify to his account book, and the items therein contained; that the same is a book of original entries, and that the entries therein were made by himself, and are true and just; or that the same were made by a deceased person, or by a disinterested person, a non-resident of the state at the time of the trial, and were made by such deceased non-resident person in the usual course of trade, and of his duty or employment to the party so testifying; and thereupon the said account book and entries shall be admitted as evidence in the cause."

It appeared in the case at bar that the entries here involved were written in the books of the association by one Herman Muehleisen, who was employed by Mr. Schlenker, the secretary of the association, to do clerical work for him. Mr. Muehleisen had no personal knowledge of the payments made by the appellant which he recorded in the books. At the close of each week Mr. Muehleisen would make a list of the names of all the members of the association from whom payments of dues and interest were due to be made during the following week, and deliver the list to Mr. Schlenker, the secretary, who would receive all payments made, and note the same on the list. At the end of the week Mr. Schlenker would deliver the list to Mr. Muehleisen, with his notations of payments thereon, and Mr. Muehleisen would make the entries on the books of the association from the lists so given him by Mr.

Schlenker. Mr. Muehleisen testified these lists, or pay sheets, as they were called, were kept for a time in the vaults of the association, but that he did not know what had become of them, or any of them. None of such pay sheets or lists from which entries had been made were produced. The entries on the lists or pay sheets were made by Schlenker. He did not testify the entries on the lists or pay sheets were true, nor was there any testimony to show that the entries as transcribed from the slips to the books were compared with the entries on the lists or pay sheets, and found to be correct.

Apart from the inquiry whether, as the slips or pay sheets were kept until the close of the week, and then transcribed, the books should be regarded as books of original entries, we think it clear the preliminary proof was not sufficient to justify the admission of the books under and by virtue of said section 3 of said chapter 51, entitled "Evidence," etc. In *Redlich v. Bauerlee*, 98 Ill. 134, 38 Am. Rep. 87, the entries were written on a slate and copied on the books, and we held the books admissible. But the evidence showed that the entries were made by one Keppleberg at the time of the transactions, and that Bauerlee transcribed the entries from the slate onto the books. Keppleberg testified the entries were true and correct, and the proof showed that, after the entries were transcribed from the slate to the books, Bauerlee and Keppleberg compared the slate and the books, and ascertained that the items on the slate had been correctly copied on the books. In *Chisholm v. Beaman Machine Co.*, 160 Ill. 101, 43 N. E. 796, we held that where the party who makes the entry on the books has no personal knowledge of their correctness, but makes them from items furnished by another, it was essential the party who furnished the items should testify to their correctness, or that such satisfactory proof as the transaction was susceptible of should be made. In 9 American & English Encyclopedia of Law (2d Ed.) p. 919, it is said: "In order to entitle a book of account, made up of entries transcribed from temporary memoranda, to be read in evidence, it has been held that such book must be supported not only by the suppletory oath of the party who made the entries in the book, but that the person who made the temporary memoranda in the first instance, where the entries in both cases were not made by the same person, must also be called to prove that, at or about the time the charges were made, articles were delivered or work performed of a character similar to those charged in the book." Tested by these rules thus announced, it is manifest the evidence in the case at bar did not justify the admission of the books of the association in evidence as ordinary books of account.

It is urged that the books of a private corporation, as between the members of the corporation, are of the nature of public books,

and for that reason admissible in evidence. Such books are evidence of the election of officers of the corporation and other corporate acts and proceedings, for the reason the books are for these purposes in the nature of public books or documents. 1 Greenleaf on Evidence, § 494; 9 Am. & Eng. Ency. of Law (2d Ed.) § 895. But we think it well, and moreover justly, settled, that the books of a corporation are, as to matters pertaining to the dealings of a corporation with one of its members as an individual, not books of a public nature, and not admissible in evidence in a suit by the corporation against a member to enforce an indebtedness in favor of the corporation upon that ground, but only when brought within the rule established by the statute authorizing the introduction of private books of account in evidence. In *Rudd v. Robinson*, 126 N. Y. 113, 28 N. E. 1046, 12 L. R. A. 473, 22 Am. St. Rep. 816, it was said: "After a careful consideration of all the cases which have come to our attention, we can perceive no principle upon which the account books of a corporation can be evidence against a member of the corporation of the accounts and entries therein made, in a suit brought by the corporation or its representatives against him to enforce his liability upon such account. The officers and bookkeepers of a corporation are in no sense his agents. Individually he has no control over their acts, and has no responsibility therefor, and in making the entries they do not, in any legal sense, represent or bind him. * * * It would be quite a dangerous, and we think startling, proposition, to hold that a clerk or other officer in a business corporation could enter charges in its books of account against a director or stockholder which could be proved in favor of the corporation by the mere production of the books, thus throwing upon him, or his personal representatives after his death, the burden of explaining the entries or showing them to be untrue, and we believe the doctrine has no support in principle or authority. A corporation seeking to enforce a claim against one of its directors or stockholders must establish it by the application of the same rules of evidence which are applied in an action brought by an individual to enforce a claim against any defendant." In 9 American & English Encyclopedia of Law (2d Ed.) p. 893, it is said: "The books of a corporation are admissible in evidence in a controversy between the corporation and its members in matters pertaining to the corporate proceeding and acts, but where the corporation deals with its members as with individuals—in which case they sustain the relation of strangers to it—the corporation books are not admissible against the members as evidence of such private contracts and dealings; and, in the application of this principle, directors of the corporation and stockholders thereof stand upon the same footing." The proceeding at bar has for its

end the establishment of an indebtedness in favor of the corporation against the appellant, and the books of the corporation are only admissible in evidence for the purpose of proving the alleged indebtedness of the appellant after the foundation for such admission has been made by the requisite preliminary proof as is required to authorize the reception in evidence of the books of account of a private individual or firm. As we have before seen, the necessary preliminary proof was not made, and it was error to accept the books in evidence.

We have stated the condition of the proofs sufficiently to demonstrate that the error was so prejudicial as to require reversal of the decree.

As the decree must be reversed, and the cause remanded to be heard again, other contentions raised and discussed by counsel need not be adverted to, as the cause may never again come into this court, and, if it does, it must be upon a different record, which may not raise such contentions, or, if it does raise them, will present them upon a different state of proofs than that now before us.

The judgment of the Appellate Court and the decree of the circuit court are each reversed, and the cause is remanded to the circuit court for further proceedings consistent with the views herein expressed. Reversed and remanded.

(204 Ill. 611)

THOMAS et al. v. CITY OF CHICAGO.

(Supreme Court of Illinois. Oct. 26, 1903.)

EMINENT DOMAIN—STREETS—CONDEMNATION—JURY—ISSUES DETERMINABLE—OWNER-SHIP OF PROPERTY—PRESCRIPTION.

1. 4 Starr & C. Ann. St. p. 166, c. 24, par. 59, relating to the taking of private property for public improvements, provides that a jury shall be impaneled to ascertain the compensation and damages, and determine whether or not any lot assessed in said proceeding for which objections have been filed has been assessed more than it will be benefited by the improvement. *Held*, that a jury appointed under such section had no authority to consider the question as to whether or not the city had acquired title to property sought to be taken for street purposes by prescription.

Appeal from Superior Court, Cook County; Joseph E. Gary, Judge.

Proceeding by the city of Chicago, for the assessment of damages for the taking of certain property for street purposes, against Charles H. Thomas and others. From a judgment in favor of the city, defendants appeal. Reversed.

Sherman C. Spitzer and Enoch J. Price, for appellants. Edgar Bronson Tolman and William M. Pindell (Charles M. Walker, Corp. Counsel, of counsel), for appellee.

BOGGS, J. On the 10th day of February, 1902, the city council of the city of Chicago,

in pursuance of the recommendation of the board of local improvements of the city, adopted an ordinance, the first section whereof provided that Princeton avenue should be opened from West Forty-Sixth street to West Forty-Sixth Place, in said city, and that certain lots and parts of lots in the said section of the ordinance fully described should be condemned for the purpose of so extending the said avenue on and over the said lots and parts of lots. The third section of the said ordinance provided that the just compensation to be paid to the owners of the lots and parts of lots so to be taken for the purpose of opening the avenue should be paid by special assessments on the property to be benefited by the extension of the avenue. The fourth section directed that a petition be filed in the superior court of Cook county for the purpose of determining the just compensation so to be made for the private property to be taken, and also to determine what property will be benefited by the said improvement, and in what amount. This was a petition filed in the said superior court of Cook county, in pursuance of such ordinance, under the provisions of sections 13, 14, art. 9, of the city and village act, approved June 14, 1897, in force July 1, 1897 (4 Starr & C. Ann. St. p. 161, c. 24, pars. 49, 50). Commissioners appointed by the court reported that the appellants were the owners of record, respectively, of the lots and parts of lots described in the ordinance, over and upon which the avenue was to be opened, and that they had estimated the total just compensation to be paid them for the lots and parts of lots so to be taken and damaged was \$6,810. The commissioners also reported that certain other lots and parts of lots described in the report would be benefited by the proposed extension and opening of the avenue, and in their report gave the names of the owners of the lots and parcels of land so to be benefited, and the estimate of the commissioners of the amount each of said properties would be benefited, by the opening of the avenue. When the cause came on to be heard, the appellants, as the owners of the lots and parts of lots sought to be condemned, filed objections to the commissioners' report, the substance of such objections being that their estimate of the just compensation was too low. Certain, if not all, of the owners of the property to be assessed as benefited by the opening of the proposed avenue, filed a number of objections to the assessment of benefits against their property—among other objections, that (1) the town of Lake in the year 1871 purchased the lots which it was proposed to condemn from one Isaac Starr, Jr., and laid out the avenue over said lots, and the same had been used as a public street for over 30 years; and (2) that the said lots had been used as a public highway for more than 20 years. A jury was impaneled under the provisions of section 23 of the city and village

¶ 1. See Eminent Domain, vol. 18, Cent. Dig. § 546.

act (4 Starr & C. Ann. St. par. 59, c. 24, p. 166), which controls the proceedings in such cases, and provides that a jury shall be impaneled to ascertain the just compensation to be paid to the owners of the lots and parts of lots to be condemned, and also to hear and determine whether any piece or parcel of property had been assessed more than it would be benefited by the improvement. On the hearing of these issues before the jury, the court, over the objection of the appellants, who were parties to the proceeding as owners of the property to be condemned, permitted proof to be produced in support of the insistence of the objectors that a street or highway existed, by prescription, over the lots and parts of lots which the petition of the city asked should be condemned.

The appellants offered to produce in evidence a decree in chancery entered in the superior court of Cook county at its July term, 1893, on a bill filed by one George E. Cook (through whom the objectors held title) against the city of Chicago, and also offered the bill and the demurrer of the city thereto. The bill alleged that Cook was the owner of the lots here sought to be condemned; that he had never dedicated or opened a street over them, or authorized any one else so to do; that the city was claiming the right to use and improve the lots as a street, and was threatening to take possession thereof. The decree recited that the demurrer to the bill had been overruled, and that the city elected to stand by its demurrer. The decree perpetually enjoined the city from attempting to enter upon said lots for the purpose of opening and extending Princeton avenue until the same should be condemned, and just compensation therefor paid. This decree and the record of the proceedings in the case were held not competent to be admitted in evidence. The jury returned a verdict that the lots and parts of lots sought to be condemned "has been for more than twenty years a public highway, and that the same is the property of the city of Chicago." Motions for a new trial and in arrest of judgment were overruled, and exceptions taken, and judgment was entered "that the property described in the petition, and the interest of each and all of the respondents herein named as owners, are subject to the rights of the public to use the same as a public highway, and that therefore the petition for condemnation of said property should be, and hereby is, dismissed." The owners of the lots and parts of lots sought to be condemned have prosecuted this appeal.

The judgment must be reversed. The proceeding is purely statutory, being under the authority of an act of the General Assembly approved June 14, 1897, in force July 1, 1897, entitled "An act concerning local improvements." The jury was impaneled by virtue of the provisions of section 23 of the act (4 Starr & C. Ann. St. par. 59, c. 24, p. 166). The section provides a jury shall be impan-

eled "to ascertain the just compensation to be paid to all such owners of property to be taken or damaged; * * * and shall also determine whether or not any lot, piece or parcel of land assessed in said proceeding, for which objections have been filed, has been assessed more than it will be benefited by said improvement." The authority of the jury arises solely out of the statute, and is restricted to that conferred by the statute. The jury had power to investigate and determine only as to the issues which the statute authorized them to decide. Substantially the same questions as to the power of a jury under the proper construction of similar statutes were presented in *Goodwillie v. City of Lake View*, 137 Ill. 51, 27 N. E. 15; *Gage v. City of Chicago*, 146 Ill. 499, 34 N. E. 1034; and *Newman v. City of Chicago*, 153 Ill. 469, 38 N. E. 1053, and in each of the cases we held that the only issues proper to be considered and determined by the jury were those specified in the statute authorizing the jury to be impaneled.

Whether a street exists, by prescription, on and over the lots owned by the appellants, if not already adjudicated by the proceedings and decree in the court of chancery between Cook and the city of Chicago, may be investigated and determined by some proper proceeding in a court of competent jurisdiction to decide that contention. The present proceeding was instituted under the authority of a statute authorizing it to be begun only upon the theory no street existed there, and that the lots were private property, and it must proceed to final judgment, if at all, in that view.

The judgment is reversed, and the cause will be remanded for such other and further proceedings as to law and justice shall appertain. Reversed and remanded.

(204 Ill. 595)

UNITY CO. v. EQUITABLE TRUST CO. et al.

(Supreme Court of Illinois. Oct. 26, 1903.)

TRUST DEED—BONDS—AUTHORITY OF TRUSTEE—FORECLOSURE—PARTIES—ASSIGNOR OF LEASE—SOLICITOR'S FEES—ALLOWANCE—PROOF—ULTRA VIRES—REPLICATION—WAIVER.

1. Where a defendant joins in taking proof on the filing of an incomplete replication, and a hearing is had on the pleadings and proof without objection, defendant thereby waives objections to the replication.

2. Though an officer of a trustee under a trust deed to secure the purchasers and holders of certain bonds stated to the grantor during negotiations for the issuance of new bonds for the old ones that the trustee controlled the old bonds, and would see that they were surrendered for the new ones, this is not evidence against the holders of the old bonds, and does not place on them the burden of proving such officer's want of authority in a suit to foreclose the trust deed for nonpayment of the old bonds.

¶ 1. See *Equity*, vol. 19, Cent. Dig. § 667; *Pleading*, vol. 39, Cent. Dig. § 1389.

3. The president of a corporation issuing bonds for the purpose of taking up old bonds secured by a trust deed and securing additional funds retained the bonds with which it was sought to secure additional funds, and used them as security in borrowing money for the corporation. *Held*, that he was not a necessary party to a foreclosure suit under the trust deed.

4. A person having a leasehold interest in real estate, which he has assigned to another, is not a necessary party in a suit to foreclose a trust deed given by the assignee, though he may be liable for the rent on the original lease.

5. In foreclosure proceedings under a trust deed providing for solicitor's fees, it is competent to take proof of the value of the solicitor's services at the conclusion of the testimony in chief, and to include therein the services which it is reasonable to expect will be rendered.

6. Where a corporation, against which it was sought to foreclose a trust deed, objected to the introduction in evidence of the deed and the bonds secured thereby on the ground that it had exceeded its power in executing them, it was proper to include an investigation of the question of ultra vires in allowing solicitor's fees, although that question was not raised by the answer.

7. That the president of a corporation had possession of bonds issued by the company, and was endeavoring to sell a portion of them, and in default of such sale was borrowing money thereon for the purposes of a company, is not evidence that he owned the bonds, or was a necessary party in proceedings to foreclose the trust deed by which they were secured.

Appeal from Appellate Court, First District.

Bill by the Equitable Trust Company and others against the Unity Company and others to foreclose a trust deed. From a judgment of the Appellate Court (107 Ill. App. 449) affirming a decree for complainants, the Unity Company appeals. **Affirmed.**

On January 25, 1890, John P. Altgeld leased from Tobias G. Richardson lots 4 and 5 in the assessor's division of original lots 3, 4, and 5 in block 37, original town of Chicago, for the term of 99 years, at an annual rental of \$18,000, payable quarterly. On June 25, 1890, this leasehold estate was conveyed to the Unity Company, of which John P. Altgeld was president. The Unity Company erected thereon a 16-story office building, known as the "Unity Building." On July 1, 1891, appellant issued 300 bonds of \$1,000 each, maturing July 1, 1911, to which were attached interest coupons due and payable on the 1st day of January, April, July, and October of each year. To secure the purchasers and holders of these bonds, appellant conveyed its leasehold property and building to the Jennings Trust Company, now the Equitable Trust Company, as trustee, and covenanted that, in case of default in the payment of the rent under the lease according to the terms thereof, or in case of default in the payment of interest on the bonds, continuing for 30 days, the holders of a majority of the bonds might elect to declare the principal of the bonds due. The trust deed further provided that on or before July 1st of each year, commencing in 1896, the appellant should deposit with the trustee a sufficient sum to retire 20 of these bonds, and that in

case of default therein the holders of the bonds might declare them due. Appellant made default in the payment of rent on July 1, 1899, and on October 1, 1899, and failed to meet the payments of interest due October 1, 1899. Up to December 15, 1899, the date of the filing of the bill herein, it had failed to deposit any money with the trustee for the purpose of retiring the 20 bonds per year. On January 1, 1895, the appellant issued 400 bonds, each for \$1,000, similar in every respect to those issued in 1891, except their date, maturity, and the time at which redemption of 20 bonds per year should commence, which was fixed at July 1, 1899. These bonds were issued to exchange for the 300 bonds issued in 1891, and to raise \$100,000 additional to pay debts being carried by the appellant. A trust deed similar to that given in 1891 was executed to the Equitable Trust Company, as trustee, to secure this issue, and 300 of the bonds were placed with the trustee to exchange for those outstanding. The remaining 100 bonds were in the hands of Gov. Altgeld, as president of the Unity Company, to be sold. He first offered them to Walsh, who declined to buy. He then deposited 60 of them with the Chicago National Bank to secure his individual note for \$35,000. Ten of these he afterwards withdrew, which made a total of 50 in his hands to be otherwise disposed of. Some of these he sold—how many does not appear. He paid his note of \$35,000 to the Chicago National Bank and took up the 50 bonds left as collateral with that amount of money borrowed from the Illinois National Bank, and to secure his note for that amount to the latter bank he deposited with that bank 64 of the 100 bonds which had been in his hands for sale. This second trust deed recites that the property is subject to the trust deed of 1891; that the Unity Company agrees that 300 of the 400 bonds secured by it shall be deposited with the trustee, and held by it for the purpose of exchange and delivery to the holders of the 300 bonds issued in 1891. It authorizes the trustee to make the exchange, and provides that, when all of the first issue have been taken up by the trustee in exchange, they shall be canceled, and the lien discharged.

Altgeld testified that John R. Walsh, president of the Equitable Trust Company, agreed with him to cancel the bonds issued in 1891 upon the delivery to the Equitable Trust Company of 300 bonds of the issue of 1895. Walsh denies this agreement. The evidence shows that the Equitable Company, at the time of this alleged agreement, owned practically none of the bonds issued in 1891; that they had been sold by the trustee to numerous persons; and that John R. Walsh owned none of them. At the time this proceeding was commenced, the trustee had not sold, exchanged, or in any way disposed of any of the bonds issued in 1895, but it still had them in its possession.

On November 15, 1899, a majority of the holders of the bonds issued in 1891 notified the trustee, in writing, of the several defaults of the appellant, expressed their election to declare the principal of the bonds due, and requested the trustee to take immediate possession of the property, and proceed to foreclose the trust deed. In pursuance of these notices and requests, the Equitable Trust Company, on November 23, 1899, served a written demand upon the appellant for the amount due upon its bonds. On the same date the Unity Company, by a written instrument, surrendered possession of the property to the trustee, as provided for in the trust deed, and acknowledged its inability to comply with the demand.

This bill to foreclose was filed by the Equitable Trust Company, holder of 13 of the bonds, and the owners of the balance of the issue of 1891, against the Unity Company and the holders and owners of the additional 100 bonds of the 1895 issue. The tenants of the building were also made defendants. Altgeld was not made a party to the proceeding. An answer was filed by the Unity Company, alleging that under an agreement with John R. Walsh, president of the Equitable Trust Company, the bonds issued in 1895 were to be exchanged and substituted for those issued in 1891; that, relying on this agreement, as represented to them by Altgeld, several persons purchased bonds of the issue of 1895, and that by reason of the agreement aforesaid the bonds and trust deed of 1895 supersede and take the place of those of 1891, so that proceedings cannot be brought to foreclose the trust deed of 1891; also alleging that this proceeding is brought in violation of an agreement not to foreclose immediately after the Equitable Trust Company took possession of the building. A replication was filed by appellees thereto, which, however, was not signed by appellees or their solicitor. No objection was made by appellant to this incomplete replication. The cause was referred to the master, who took testimony offered by each party, and upon his report being filed a hearing was had, and a decree was rendered by the circuit court of Cook county finding that the trust deed of 1891 was a prior lien to that of 1895, and ordering a sale of the property to satisfy the debt and interest, which amounted to \$328,917.75, and the costs of the proceeding. It also ordered that a solicitor's fee of \$7,500 be allowed to complainants' solicitor for his services herein. An appeal was taken by the Unity Company, only, from this decree to the Appellate Court for the First District, where the decree was affirmed, and that company now appeals from the judgment of the Appellate Court.

Henry C. Noyes, for appellant. Azel F. Hatch, for appellees.

SCOTT, J. (after stating the facts). In this case the complainants filed to the an-

swer of appellant a pleading in the ordinary form of a general replication, which, however, is unsigned. Appellant argues that under these circumstances the answer must be treated as true, and refers to the case of *Grunenberg v. Smith*, 58 Ill. App. 281. In that case a hearing was had upon bill and answer. The law is well settled that where, as here, the defendant joins in taking proof, and a hearing is had upon the pleadings and proof without objection, the defendant thereby waives the filing of any replication whatever. *Marple v. Scott*, 41 Ill. 50; *Durham v. Mulkey*, 59 Ill. 91; *Jones v. Neely*, 72 Ill. 449.

The decree of the court below is attacked on the ground that an arrangement was made between John P. Altgeld, then president of appellant, and John R. Walsh, president of the Equitable Trust Company, by which 300 bonds of the issue of 1895 were to be substituted for the bonds of 1891, to foreclose which this suit is brought. Gov. Altgeld testified that he had a conversation with John R. Walsh some time in the autumn of 1894, in which Walsh stated, in substance, that, if the Unity Company would make a trust deed to the Equitable Trust Company to secure \$400,000 in bonds of \$1,000 each, and deliver them to the Equitable Trust Company, Walsh or his company would "see that the old bonds are surrendered and canceled"; and that Walsh at the same time stated that he and his company controlled the old bonds, and that he would not only secure the substitution of the new bonds for the old ones, but that he would sell the additional bonds for the Unity Company, and, pending the sale, would advance the money for the additional 100 new bonds. Walsh flatly denies that any such conversation ever took place, or that any such arrangement was ever made. Whether such contract was entered into or not, it is apparent that the substitution never was made, and that the old bonds never were canceled. There is no evidence in the record that at the time Altgeld says this conversation took place it was in the power of Walsh to bind the then holders of the bonds. If it be true that he stated that he controlled the bonds, such statement would not be evidence against the holders, nor would such statement made by him cast upon them the burden of showing that he was not authorized to act for them, as is insisted by counsel for appellant. This record fails to show, therefore, any satisfaction of the bonds of 1891, or any substitution of the new bonds for the old bonds, or any valid agreement made between the Unity Company and the holders of the old bonds for the surrender of the old bonds and the substitution of the new ones.

The same reasoning applies to the contention that an agreement was made between Walsh and Altgeld whereby the trust deed was not to be foreclosed immediately after the possession of the building had been delivered to the trust company. The record

discloses no evidence of any power in Walsh to make any such contract for or on behalf of the holders of the bonds of 1891.

Appellant states that John P. Altgeld was the owner of 64 bonds of the issue of 1895, which, at the time this suit was commenced, were held by the receiver of the Illinois National Bank as collateral security to a note of Altgeld's for the sum of \$35,000. Such ownership is proven, it is said, by the undisputed fact that Altgeld had possession of these bonds at the time he delivered them as security to the bank in question. As president of the Unity Company, Altgeld originally had possession of the entire issue of bonds of 1895. Three hundred of those bonds he deposited with the trust company to be exchanged for the old bonds. He says that Walsh refused to advance the money on the remaining 100 bonds when he was requested to do so, and that he (Altgeld) thereupon borrowed from the Chicago National Bank \$35,000, and deposited 60 of these bonds as collateral security, and afterwards withdrew 10 of them. The loan at the Illinois National Bank was obtained to take up this note at the Chicago National Bank, and when the note for the money so obtained for this purpose was given 64 of the new bonds were deposited as collateral to Altgeld's note. We think it evident that John P. Altgeld, as the president of the Unity Company and for the Unity Company, was endeavoring to sell the additional 100 new bonds, and, failing a sale, was engaged in borrowing money thereon for the purposes of the company. He had possession of these bonds as the officer of the company. His possession of them under the circumstances is no evidence that he owned them, and does not show that he was a necessary party to this suit. We do not determine who is the owner of the equity in those 64 bonds. All we decide in reference thereto is that there is no evidence in this record that such equity is the property of Altgeld or his estate.

The Unity Building stands on ground which was leased by John P. Altgeld from the owner thereof at an annual rental of \$18,000. This leasehold interest was transferred by Altgeld to the Unity Company, and is the interest covered by the trust deed of 1891. This suit is to foreclose an interest in real estate which had been conveyed by John P. Altgeld. He was the assignor of appellant, but was not on that account a necessary party to this suit. He retained no interest in the real estate, but, had he done so, he would not have been a necessary defendant, because the foreclosure proceedings can only affect the interest which had passed to the Unity Company, and not that which Altgeld retained; and the fact that he remained liable for the payment of the rent on the original lease, if such liability remains, in no

wise alters the situation. This suit does not affect the liability of the Unity Company for the payment of rent to the owner of the fee.

A solicitor's fee of \$7,500 was allowed to complainants for their solicitor's fee herein, under a provision in the trust deed. This is objected to on the ground that the proof fixing the amount thereof was taken just prior to the close of the complainants' evidence in chief before the master, at a time when it was not known and could not be known what services would be rendered by complainants' solicitor, and that, therefore, no basis existed upon which any fee could be fixed. Complainants followed what we believe to be the invariable practice in foreclosure suits, which is to take the proof fixing the value of the solicitor's fee with the other evidence in chief to support the bill. In taking the proof at that time it is necessary to anticipate the work thereafter to be done by the solicitor, and it is entirely proper for the witness on the part of the complainant to state in detail, and, if he fails so to do, for the cross-examiner to ascertain, exactly what services thereafter to be performed are covered by the fee fixed by the witness. After the hearing and prior to the passing of the decree, if it appear to the court that anticipated services were not rendered, or that services were rendered that were not anticipated, it will be proper to again refer the matter of solicitor's compensation to the master, that he may take evidence and make a finding that will fix the fee at a proper amount. In a foreclosure suit the duty of complainant's solicitor is not ended, in case there is a sale, until he has attended upon the sale, secured the distribution of the proceeds of the sale and a decree approving the master's report of sale, and striking the case from the docket. It is impossible, therefore, that the taking of the testimony to fix the value of his services should be postponed until the services are all rendered.

Among other items covered by the amount fixed for the solicitor's fee in this case was an investigation of the question of ultra vires in reference to the first bonds and trust deed, and, as no such defense was made by answer, it is urged that compensation for that investigation should not have been included. When the trust deed which this bill was filed to foreclose, and also when the bonds which it secured were offered in evidence, appellant objected because the execution of the trust deed and the bonds for the purpose for which they were executed was beyond the power of the Unity Company. We are therefore of the opinion that the service in question was properly included among those for which an allowance could rightfully be made under the trust deed.

The judgment of the Appellate Court will be affirmed. Judgment affirmed.

(176 N. Y. 377)

MAAS v. GERMAN SAVINGS BANK IN CITY OF NEW YORK.

(Court of Appeals of New York. Nov. 10, 1903.)

FOREIGN ADMINISTRATOR—COLLECTION OF ASSETS—RIGHTS OF DOMESTIC ADMINISTRATOR.

1. Where a savings bank pays a deposit standing in the name of a decedent, in good faith, to his administrator appointed in another state, such payment is good as against an administrator appointed in the state, of which appointment the savings bank had no notice, though the appointment was recorded in the surrogate's office, where there were no creditors in the state.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Charles Maas, administrator of Frieda Maas, deceased, against the German Savings' Bank in the city of New York. From a judgment of the Appellate Division (77 N. Y. Supp. 256) reversing a judgment of the Appellate Term affirming a judgment in favor of plaintiff, plaintiff appeals. Affirmed.

Thomas F. Gilroy, Jr., for appellant. Erwin I. Spink, for respondent.

HAIGHT, J. Frieda Maas died at her residence in Guttenberg, Hudson county, state of New Jersey, on the 15th day of November, 1898, leaving, her surviving, a son and daughter, both minors and residents of the same place. On the 23d day of August, 1899, the surrogate of Hudson county, N. J., issued letters of administration upon her estate to Frederick Maas, a brother of her deceased husband. After his appointment he presented a certified copy of his letters of administration to the defendant bank, together with her passbook, and demanded the payment to him of the amount which the decedent had upon deposit, and thereupon the bank paid over such balance to him. Prior thereto, and on the 9th day of March, 1899, the plaintiff, Charles Maas, another brother of the decedent's deceased husband, applied and had issued to him letters of administration upon her estate by the surrogate of New York county, in this state; and, after the defendant bank had paid the amount on deposit with it to the administrator appointed in New Jersey, he served a notice of his appointment upon the defendant, and demanded the payment to him of the amount of such deposit. The bank having refused, this action was brought to recover the amount thereof. Upon the trial the facts were agreed upon. It does not appear that the decedent had any creditors in this state, and it is conceded that the defendant bank, in making its payment, did so in good faith, without actual notice that letters of administration had been issued in this state. The question thus presented is as to whether the plaintiff, under such circumstances, can recover.

The succession to and the distribution of

the estate of an intestate is governed by the law of the domicile, and, where an administrator has been appointed and has properly qualified in the state of the domicile, he is vested with power to receive payment of the debts owing to the intestate, and to take possession of the assets, and give proper acquittances therefor, wherever the debtors or the holders of the assets may be—within or without the state. But where the debtor or the holder of the assets is in a foreign jurisdiction, and the debts are not paid or the assets surrendered to the administrator of the place of the domicile of the decedent, the courts of the foreign jurisdiction will not enforce the recovery of such debts or assets until the administrator has procured ancillary letters, or a new administrator has been appointed under the laws of the place where the debts exist or the assets may be. Matter of Prout, 128 N. Y. 70-74, 27 N. E. 948, 13 L. R. A. 104; Parsons v. Lyman, 20 N. Y. 103; Petersen v. Chemical Bank, 32 N. Y. 21, 88 Am. Dec. 298; Matter of Butler, 38 N. Y. 397; Despard v. Churchill, 53 N. Y. 192; Matter of Hughes, 95 N. Y. 55; Vroom, Administratrix, v. Van Horne, 10 Paige, 549, 42 Am. Dec. 94; Appeal of Gray, Jr., 116 Pa. 256-262, 11 Atl. 66, 70; Wilkins v. Ellett, 9 Wall. 740, 19 L. Ed. 586; Wilkins v. Ellett, 108 U. S. 256, 2 Sup. Ct. 641, 27 L. Ed. 718; Matter of Election of Cape May, etc., 51 N. J. Law, 78-82, 16 Atl. 191; Schluter v. Bowery Savings Bank, 117 N. Y. 125, 22 N. E. 572, 5 L. R. A. 541, 15 Am. St. Rep. 494. In the latter case, Earl, J., in answering the claim that the administrator derived his authority from the state of New Jersey, and that a payment could not legally be made to him, says: "Payment to the personal representative is good, because at the death of the intestate he becomes entitled to all his personal property, wherever situated, and, having the legal title thereto, he can demand payment of choses in action; and a payment to him made anywhere, in the absence of any conflicting claim existing at the time, is valid. It is true that, if the defendant had declined payment, the foreign administrator could not have brought action in this state to enforce it. But a voluntary payment to such an administrator has always been held valid. Therefore, in receiving this payment, Mr. Knittel was the representative of the deceased, and able to give an effectual discharge to the defendant." In that case a will of the decedent was subsequently found and admitted to probate. It was, however, held that the letters of administration theretofore issued were not void, and, until they were revoked, persons dealing with the administrator in good faith were protected. It is thus apparent that the administrator of the domicile was vested with the power to collect all of the outstanding debts owing to the intestate, and that where payments were made to him in good faith the debt was discharged. So far all of the authorities ap-

pear to be in accord. This narrows the discussion to the question arising out of the fact that an administrator had been appointed in this state before the administrator of the domicile had applied for and obtained the deposit in the defendant bank.

Statutory provisions for the issuing of ancillary letters appear as early as the first revision of the statutes, and, with some changes, have been continued to the present time. The purpose of such letters was undoubtedly intended to aid foreign executors and administrators in the collection of claims against persons residing in this state, and to operate as a protection for home creditors. We consequently have provisions authorizing the surrogate to require security of administrators sufficient to protect creditors (Laws 1863, p. 694, c. 403); and finally the surrogate is authorized by his decree on final accounting of administrators, after having fully protected the rights of the creditors within this state, to transmit the money and other personal property remaining of the decedent, to the state, territory, or county where the principal letters were granted, to be disposed of pursuant to the laws of that state. Code Civ. Proc. §§ 2700, 2701.

It is thus apparent that the plaintiff, upon receiving letters of administration in this state, became entitled to the assets of his intestate, and had the right to collect from the defendant the amount she had on deposit in the bank at the time of her decease. He, however, was required to act with reasonable dispatch. He could not be permitted to remain silent and suffer the administrator of the domicile to collect the debts and carry away the assets, without objection or the disclosing of his appointment as administrator in this state to the persons owing the debts or having the custody of the assets, and then recover from them. As we have seen, the plaintiff was appointed administrator in this state on the 9th day of March, 1899, and for five months and a half thereafter he remained idle, taking no steps to give notice to the defendant bank of his appointment, or to make any demand upon it to pay him the amount on deposit, until after the administrator of the domicile had called upon the bank for payment, and received the amount due from it to the estate. We consequently conclude that the act of the bank, in making the payment to him in good faith, without knowledge that another administrator had been appointed in this state, operated as a discharge of the indebtedness.

It is contended on behalf of the plaintiff that the defendant had constructive notice of the appointment of an administrator in this state, arising out of the fact that the appointment of the plaintiff was a matter of record in the surrogate's office. We, however, are not inclined to adopt this view. Such a rule would seriously interfere with the collection of debts, and would become

exceedingly burdensome to debtors. It might be impossible for them to determine the counties in the state in which the decedent had personal property. It would therefore become necessary for them to examine the records of every surrogate's office in the state, in order to determine whether an administrator had been appointed.

The judgment should be affirmed, and judgment absolute ordered for the defendant upon the stipulation, with costs.

PARKER, C. J., and GRAY, O'BRIEN, MARTIN, and WERNER, JJ., concur. CULLEN, J., not voting.

Judgment accordingly.

(176 N. Y. 363)

BUCKHOUT v. CITY OF NEW YORK.

(Court of Appeals of New York. Nov. 10, 1903.)

TAXATION—ASSESSMENT—CONDEMNATION BY CITY—LIABILITIES.

1. The report of commissioners in condemnation proceedings brought by the city of New York, awarding a certain sum to the owner of land for the land and improvements thereon, taken for a street, was confirmed in December, 1897. By resolution of the board of street opening and improvement under the statute the title to the land vested in the city on the preceding 6th of July. The property was listed and valued as of the second Monday of January, 1897, but the assessment roll was not confirmed until August 24, 1897, after the title had passed to the city. *Held*, that the tax never became a lien on the land so as to render the owner liable therefor.

Gray, J., dissenting.

Appeal from Supreme Court, Appellate Division, First Department.

Action by James Buckhout against the city of New York. From a judgment of the Appellate Division (81 N. Y. Supp. 723) entered in favor of defendant on submission of controversy, plaintiff appeals. Reversed.

Charles L. Guy, for appellant. George L. Rives, Corp. Counsel (Theodore Connolly, James M. Ward, and David Rumsey, of counsel), for respondent.

VANN, J. On the 6th of November, 1896, the proper authorities of the city of New York took the initial steps to acquire certain real property belonging to the plaintiff situate in said city. On the 22d of December, 1896, commissioners of estimate and assessment were appointed, and on the 19th of February, 1897, a resolution was adopted by the board of street opening and improvement, as authorized by statute, providing that title to said land should vest in the city on the 6th of July following. On the 23d of December, 1897, the report of the commissioners, made seven days before, was confirmed, whereby the plaintiff was awarded the sum of \$127,312.50 "for land and improvements." The improvements were worth

about \$6,000. On the second Monday of January, 1897, the plaintiff, then a resident of the city of New York, was "assessed upon the said property by name as its owner for purposes of local taxation for the year 1897." No application was made by the plaintiff to correct the assessment, and on the 24th of August, 1897, the local taxes for that year were duly confirmed, and the amount extended opposite the description of the plaintiff's land was the sum of \$945. On the 15th of January, 1898, the whole amount of said award was paid over to the plaintiff, but only upon the condition required by the comptroller that he should deposit his certified check for the sum of \$1,100, as security for the payment of said taxes, provided it should be held that they were chargeable against him. It was understood that the check should be retained by the comptroller until the determination of the question whether the unconfirmed taxes of 1897, standing against the property at the time title thereto vested in the city of New York, "should properly be deducted from the amount of said check," which has not been cashed, but is held by the comptroller to await the result of this action. Upon the submission of the controversy, the plaintiff demanded judgment for the sum of \$1,100, or the return to him by the defendant of his check for that amount, while the defendant demanded judgment for the amount of said taxes for the year 1897. The Appellate Division, by a divided vote, overruled the contention of the plaintiff, and ordered judgment in favor of the defendant for the amount of said taxes. From the judgment entered accordingly the plaintiff appealed to this court.

The award is presumed to cover the value of the land at the time when title passed to the city, but the owner is also entitled, "in addition to the value of" the property at that date, "to the amount of all taxes and assessments levied or imposed upon the property" after that date "which shall have been actually paid by the owner." *Matter of Mayor, etc., of N. Y.*, 167 N. Y. 627, 628, 60 N. E. 1116. If, however, after the passing of title, the owner remains in possession and receives an income from the property, it is to be deducted from or applied upon the taxes so paid. *Matter of Mayor, etc., of N. Y.*, supra; *Matter of Board of Education of N. Y.*, 169 N. Y. 456, 459, 52 N. E. 566. It does not appear, and cannot be presumed, that the plaintiff had the use of the land after the title vested in the city, and hence, if he had paid the tax in question, according to the authorities cited, he would have been entitled to receive the amount thereof in addition to the value of the property at the time of appropriation. *Id.* When *Matter of Mayor, etc., of N. Y.*, supra, sometimes cited as *Matter of Riverside Park*, was before the Appellate Division, Mr. Justice Patterson, who wrote for that court, said: "We

conceive the proper rule in this case to be that interest and taxes are to be added to the award, but, as an offset, a deduction may be made of rentals actually received by the owner, or, where rentals have not been received, of the value of the use and occupation of the premises from the date of the appropriation of the property to the time of the award. As these subjects of deduction are in the nature of offsets, we are of the opinion that the burden is upon the city to show what amounts should be allowed by way of deduction." 59 App. Div. 603, 606, 69 N. Y. Supp. 742. When that case came to us certain questions were certified for decision, and among them the following: "In a proceeding to ascertain the compensation which shall be paid to the owners or persons interested in real property, the title to which is acquired under chapter 152 [page 296] of the Laws of 1894, are the owners of such real property entitled, in addition to the value of said real property on the date of the passage of said act, to the amount of all taxes and assessments levied or imposed upon the property sought to be acquired after the passage of the act and which shall have been actually paid by said owners?" We affirmed the order appealed from, answered the question certified in the affirmative, and adopted Justice Patterson's opinion. While that case arose under a different statute from that under which the plaintiff's land was condemned, the provisions of both are the same in substance so far as the vesting of title, the award, and the effect thereof are concerned. The court below sought to distinguish that case from the one under consideration on the ground that in the former the award was of a fixed sum "subject to the lien of all unpaid taxes, assessments, and water rates," while it does not appear that the award in this case contained any statement upon the subject of unpaid taxes. The statement of facts upon which the controversy now before us was submitted simply says that the plaintiff was awarded "the sum of \$127,312.50 for land and improvements," and it cannot be presumed, under all the circumstances, that the commissioners took into account or included in the award the tax in question.

According to the statute in force when the tax was in form assessed, real property in the city of New York was listed and valued as of the second Monday in January, and from that date until the 1st of May valuations thus made could be corrected, but after that date the books were closed, to enable assessment rolls to be prepared for delivery to the municipal assembly on the 1st Monday of July. *City Charter, Laws 1897*, pp. 317-319, 325, c. 378, §§ 889, 892, 895, 907. The assessment rolls were perfected by the action of the municipal assembly, which fixed the amount of the tax upon each piece of property; and on or before the 1st of September

the completed rolls were delivered, with the proper warrants attached, to the receiver of taxes, who was thereupon required to collect the amounts as extended in a column opposite the valuations. *Id.* pp. 325, 326, §§ 909, 910. The municipal assembly did not finally act upon the rolls in question until the 24th of August, which was one month and sixteen days after title to the land formerly belonging to the plaintiff had passed from him to the city. The taxes never became a lien upon the land, which on the 6th of July was transferred by the act of the defendant from the status of assessable property to that of property exempt from taxation because it was owned by the city. When the valuation was made, condemnation proceedings were in progress, and by due course of procedure the city became the owner of the property more than six weeks before the assessment was completed. Condemnation is, in substance, a compulsory sale, and, so far as its effect upon concurrent taxation is concerned, may properly be treated the same as if the sale had been voluntary. If the plaintiff had voluntarily conveyed his land to the defendant on the 6th of July, 1897, the city would have taken the same title as an ordinary grantee, and even a covenant by the plaintiff in the deed that the premises were free and clear from all incumbrances would not have enabled the city to compel him to pay the tax. *Lathers v. Keogh*, 109 N. Y. 583, 17 N. E. 131; *Dowdney v. Mayor, etc.*, of N. Y., 54 N. Y. 186. As was said by Judge Gray in the case first above cited: "Until the amount of the tax is ascertained and determined, no lien or incumbrance exists by reason thereof, and we think that the proper construction of this covenant [against incumbrances] merely calls for the freedom of the property, at the time of the conveyance, from what can be considered an incumbrance upon the property; not freedom from some undetermined matter which may ripen into a charge, imposed as a lien by law, but freedom from a visible and ascertained incumbrance."

Whether, as a general rule, a completed tax creates a debt against the owner as a primary liability, with a lien on the land as security, or not, we think that in this case the passing of title to the city exercising the taxing power before the assessment ripened into a lien destroyed the basis and consideration for the tax, and prevented the enforcement thereof either as a personal liability or a lien. A tax, whether imposed upon property or upon the person of the owner on account of his ownership of the property, cannot be enforced if, before the tax becomes a lien, the city suspends its power of taxation by taking the property away from the owner through the power of eminent domain. The city cannot tax and condemn at the same time. The exercise of the power of condemnation, when completed, excludes the power of taxation, so far as the property taken is concerned. After the 6th of July,

1897, when the city took the property as its own, it could not lawfully fix the amount of the tax, or extend it to the column opposite the valuation, or take any step to convert the assessment or valuation previously made into a complete tax, definite in amount, and capable of enforcement. Taxation cannot create a debt until there is a tax fixed in amount and perfected in all respects. It is not enough to lay the foundation, but the structure must be built. There cannot be a complete tax laid upon real estate until it is so perfected as to become a lien, because until then the amount cannot be known. The rights of the owner and the city became fixed on the day when title vested in the latter, and unless at that time there was a tax which could be enforced as a debt without further action to fix the amount, there never was, for after the city had taken the property by force, and had it as its own, it could not, by proceedings on its part, create or perfect a personal liability against the owner on account of that property. A city cannot eat its cake and have it any more than a citizen. It cannot commence proceedings to tax, then take away the property, and after that complete the process of taxation. From the moment the plaintiff ceased to be the owner he was relieved of all the burdens of ownership. The power of taxation by the city ceased when the power of eminent domain destroyed private ownership and turned the property over to the city. It was the act of the city itself in condemning the property which brought about this result, for, if the appropriation had been by a railroad company, it would have had no effect upon the right to mature and collect the tax.

Jurisdiction to assess in the city of New York on the first Monday of January ordinarily gives jurisdiction to complete the assessment regardless of transfers or changes of residence in the meantime. Grants of property voluntarily made, after it has been listed and valued, but before the tax is confirmed and completed, do not concern the city nor prevent it from taking the course of procedure prescribed by statute. Such were the facts in the cases chiefly relied upon by the respondent, which hold that ordinary changes of ownership do not affect subsequent action to complete the tax, but this was not an ordinary change, nor one for which the city had no responsibility. It is not a case of sale by one citizen to another citizen, which would not arrest action by the city to mature the tax, but of condemnation by the taxing power itself of the property of a citizen, which necessarily precludes further efforts by that power to finish and fasten a liability on the former owner because he once owned the property. By no act of his did he cease to be the owner, and by no act of the city, after it became the owner, can a personal liability be completed and enforced against him.

For these reasons we think that the judg-

ment of the Appellate Division should be reversed, and judgment rendered in favor of the plaintiff for the return to him by the defendant of his check for \$1,100, unpaid, or, in default thereof, for the amount of said check, with costs in both courts.

PARKER, C. J., and HAIGHT, MARTIN, CULLEN, and WERNER, JJ., concur. GRAY, J., dissents on ground that it is to be presumed that the commissioners, in making their award at a time subsequent to the levying of the annual tax, took into consideration the amount of the plaintiff's indebtedness therefor.

Judgment reversed, etc.

(176 N. Y. 403)

CONOLLY v. HYAMS.

(Court of Appeals of New York. Nov. 10, 1903.)

MECHANIC'S LIEN—DISMISSAL—LIMITATIONS—NEW TRIAL.

1. A mechanic's lien filed January 24, 1889, and an action to foreclose the lien brought February 15, 1889, was dismissed on the merits August 4, 1899, for failure to furnish architect's certificate of performance of the work, as required by the contract. The judgment on appeal was modified March 9, 1900, by striking out the words "on the merits" and "affirmed as modified." March 15, 1900, plaintiff began a new action. *Held* not barred by Laws 1885, p. 588, c. 342, § 6, and Laws 1897, p. 522, c. 418, § 16, providing that a lien shall not continue for more than one year from the time it is filed, unless an action is brought within that time to foreclose it. The first action being commenced within that time, the cause was saved by Code Civ. Proc. § 405, providing that, if an action be commenced within the time limited, and be determined in any other way than by a voluntary discontinuance and dismissal for neglect to prosecute, or a final judgment on the merits, the plaintiff may bring a new action for the same cause within one year after such reversal or termination.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Henry A. Conolly, surviving partner of the firm of E. D. Conolly & Sons, against Rosalie Hyams, individually and as executrix of Joel E. Hyams. From a judgment of the Appellate Division (82 N. Y. Supp. 1097) affirming a judgment for plaintiff, defendant appeals. Affirmed.

M. S. Gutterman, for appellant. Leopold Leo, William Haupt, and Benjamin Yates, for respondent.

CULLEN, J. The action was brought to foreclose a mechanic's lien on real property situated in the city of New York. There is but one question presented by this appeal which survives the unanimous decision by the Appellate Division; that is, whether the plaintiff's lien had been lost prior to the commencement of this action. Notice of the lien was duly filed on the 24th day of January, 1889. The plaintiff commenced an action in the Court of Common Pleas to foreclose such

lien on February 15, 1889. In that action the plaintiff was defeated for failure to produce a certificate from the architect of the performance of the work, and judgment was entered therein dismissing the complaint on the merits on August 4, 1899. On appeal the Appellate Division, on March 9, 1900, modified the judgment by striking therefrom the words "on the merits," and affirmed it as modified. On March 15, 1900, the plaintiff commenced this action to foreclose the lien, and has recovered judgment therein.

The appellant contends that under the provisions of section 6, c. 342, p. 588, of the Laws of 1885, and those of section 16 of the lien law of 1897 (chapter 418, p. 522), which are substantially the same, both plaintiff's lien and his money claim were lost by the length of time which elapsed between the filing of the lien and the commencement of the present action. These provisions enact that a lien shall not continue for a longer period than one year after the notice of the lien has been filed, unless within that time an action is commenced to foreclose the lien, and a notice of the pendency thereof filed with the county clerk. The respondent claims that his cause of action is saved by section 405 of the Code of Civil Procedure, which provides that, if an action be commenced within the time limited therefor, and be terminated in any other manner than a voluntary discontinuance, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff may commence a new action for the same cause after the expiration of the time so limited and within one year after such reversal or determination. If this section applies, then it is conceded that the present action was brought in time. But the appellant insists that the case is governed exclusively by the provisions of the mechanic's lien law, and does not fall within the section of the Code cited. In support of this claim he relies on the decision of this court in *Hill v. Board Supervisors Rensselaer Co.*, 119 N. Y. 344, 23 N. E. 921. That was an action brought under chapter 428, p. 800, of the Laws of 1855, to recover compensation for the destruction of plaintiff's property by a mob or riot. The act provided that "no action shall be maintained under the provisions of this act unless the same be brought within three months after the loss or injury." An action within the time limited was brought in the County Court, but, the claim exceeding in amount the jurisdiction of that court, the action was dismissed. Subsequently, and after the expiration of three months from the time of the loss, another action was commenced in the Supreme Court. It was held by this court that the provisions of section 405 of the Code did not apply, and the action could not be brought after the statutory period. The language of the act of 1855, however, is very different from that of the mechanic's lien law. The first statute provided that no action should be maintained un-

less brought within three months. Thus the very action in which the plaintiff could alone obtain compensation was forbidden by the express terms of the statute. The provisions of the lien law relating to the case now before us enact that the lien shall cease unless an action be brought thereon within one year. But this provision of the statute has been complied with. Therefore the application of the beneficial provisions of section 405 of the Code does not contravene the commands of the statute. The tendency of the latest decisions of this court has been to extend to all claims the benefit of the exceptions given by the Code of Civil Procedure to the bar of the statute of limitation, except where there is an express statute or contract to the contrary. So, in *Hayden v. Pierce*, 144 N. Y. 512, 39 N. E. 638, it was held that the provisions of section 401, declaring that when the cause of action accrues against a person who is without the state the action may be commenced against him within the time limited therefor after his return into the state, applied to the case of a rejected claim against the estate of the deceased person, and that the claim was not barred by the lapse of six months, prescribed by section 1822. In *Titus v. Poole*, 145 N. Y. 414, 40 N. E. 228, it was held that the provisions of section 405 of the Code, which we have discussed, applied to rejected claims against the estate of deceased persons, notwithstanding the short statute of limitations against such claims. In *Hamilton v. Royal Insurance Company*, 156 N. Y. 327, 50 N. E. 863, 42 L. R. A. 485, an insurance policy provided that no action thereon should be maintained unless commenced within 12 months after the fire. It was held that the provisions of section 399 of the Code, providing that an attempt to commence an action in a court of record shall be deemed equivalent to the commencement thereof, applied to the contract, and that a delivery of the summons to the sheriff within the time limited was a sufficient compliance with the terms of the policy. The principle of these decisions controls the disposition of this case, and in conformity therewith we hold that the present action was brought in time.

The judgment appealed from should be affirmed, with costs.

PARKER, C. J., and GRAY, O'BRIEN, HAIGHT, MARTIN, and WERNER, JJ., concur.

Judgment affirmed.

(176 N. Y. 424)

WALLACE et al. v. McECHRON et al.

(Court of Appeals of New York. Nov. 10, 1903.)

TAX SALE—VALIDITY—STATEMENT BY STATE COMPTROLLER—OMISSION—EVIDENCE—CANCELLATION OF DEED—LIMITATIONS.

1. Where, because of the failure of the State Comptroller to render a proper statement of un-

paid taxes, a taxpayer defaulted in the same, a subsequent deed by the Comptroller in 1886 in pursuance of a tax sale made in 1871 for the unpaid taxes omitted from the statement of the Comptroller does not divest the owner of his title.

2. Laws 1896, p. 841, c. 908, § 132, providing that a Comptroller's deed recorded for two years shall be conclusive evidence that the sale and proceedings were regular, and that the conveyance shall be subject to cancellation by reason of the payment of taxes, or by reason of the levying of taxes by a town or ward having no right to assess the land, or by reason of any defect affecting the jurisdiction on constitutional grounds, if application is made to the State Comptroller or action is brought in the case of sales made prior to 1895 within one year from the passage of the act, is not applicable to a sale on default of the owner of property, caused by the omission of the State Comptroller to furnish him with a correct statement of taxes due on his land, whether considered as a statute of limitation or curative act, so that the owner is not precluded from asserting his title in an action for partition because of his failure to sue to cancel such deed within the prescribed time.

Appeal from Supreme Court, Appellate Division, Third Department.

Action by Fannie F. Wallace and others, executors of Edwin R. Wallace, against William McEchron and others. From a judgment of the Appellate Division (82 N. Y. Supp. 556) affirming a judgment for defendants, plaintiffs appeal. Reversed.

Homer Weston, for appellants. George N. Ostrander, for respondent.

OULLEN, J. The action was brought for the partition of a tract of 1,100 acres of wild lands in the county of Hamilton. The complaint alleged that the plaintiffs were seised of two undivided thirds of the lands in question, the defendant the International Paper Company of the other third, and that the defendant William McEchron, the respondent on this appeal, claimed some interest therein. On the trial the plaintiffs deduced their title through several mesne conveyances and wills from a conveyance by the state in 1845. The respondent traced his title from a deed from Alfred C. Chapin, Comptroller, to Warren Curtis and Benjamin F. Baker, December 29, 1886, and recorded in the office of the clerk of Hamilton county on February 7, 1887, executed in pursuance of a sale of the lands made in 1871 for the nonpayment of a tax for \$1.17 imposed in the year 1862 for the construction of a highway through Herkimer, Hamilton, and Lewis counties, directed to be laid out by chapter 347, p. 732, Laws 1853, as amended by chapter 451, p. 1061, Laws 1859. The counsel for the appellants claims to have established on the trial that such tax was actually paid by the plaintiffs' predecessor in title. But the trial court found to the contrary, and that finding, having been unanimously affirmed by the Appellate Division, is conclusive upon us. The trial court, however, further found that in November, 1886, one Munn, then the mortgagee or owner, applied to the Comptroller or

the State for a statement of the unpaid taxes upon the property, and that the Comptroller rendered one to her, which "purported to contain a statement of all taxes due on said property, but in fact did not contain a statement of said road tax." Munn paid all the taxes so returned to her by the Comptroller, and obtained from him a receipt in full. Without narrating the other facts in the case, it is sufficient now to say that the trial court held that the record of the Comptroller's deed to Curtis and Baker, and the failure of the plaintiffs to bring any action or proceeding to cancel or annul the same within one year, operated, under the provisions of section 132 of the tax law (chapter 908, p. 841, Laws 1896), to bar and divest all the plaintiffs' rights.

The practice of the appellants in making the respondent a party to the action, although he claimed in hostility to them, is justified by the decision of this court in *Satterlee v. Kobbe*, 173 N. Y. 91, 85 N. E. 952. While, under the findings of the trial court, we must assume that the road tax was not paid, it appears that the failure to pay it was occasioned by the neglect of the Comptroller or his clerks to return its amount to the owner on her request. It was made the duty of the Comptroller, under section 46, art. 2, tit. 3, c. 13, pt. 1, p. 406, Rev. St. (1st Ed.), to give any person requesting it a statement of the tax, interest, and charges due on any piece of land. It has been decided by this court that, where the default of the taxpayer is caused by the failure of the public officer or his clerks to render a proper statement of the unpaid taxes, a sale made for unpaid taxes omitted from the statement cannot divest the owner of his title. *Van Benthuyzen v. Sawyer*, 36 N. Y. 150; *People ex rel. Cooper v. Registrar of Arrears*, 114 N. Y. 19, 20 N. E. 611. The sale of the lands to Curtis and Baker was therefore void as against the plaintiffs, and we are thus brought to a consideration of the effect of the record of the Comptroller's deed under section 132 of the tax law.

The learned courts below based their determination of the case on the decisions of this court in *People v. Turner*, 145 N. Y. 457, 40 N. E. 400, and *Meigs v. Roberts*, 162 N. Y. 371, 56 N. E. 833, 76 Am. St. Rep. 322. Those cases involved the construction and effect, not of the statute now before us, but of earlier enactments of a somewhat similar character. Such statutes have been viewed by this court both as curative acts and as statutes of limitations. It is to be observed, however, that none of them has been enacted in the ordinary form either of a curative act or of a statute of limitations. In terms, they provide that after a certain lapse of time, and in certain contingencies, a Comptroller's deed shall be conclusive evidence of certain facts. It therefore becomes necessary, when any case involving the construction and effect of one of these statutes is presented, to

closely scrutinize and carefully analyze the statute, to see whether as to such case the statute applies, and, if applicable, whether its operation is that of a curative act or of a statute of limitations. In the *Turner* and *Roberts* Cases the operation of the statute there under review was prospective, and it was held that the acts were statutes of limitations. In the present case the contrary is the fact. The Comptroller's deed and its record were prior to the enactment of the tax law. It is elementary constitutional law that while the Legislature may shorten the time allowed for the prosecution of claims or assertion of rights, even as to claims and rights existing at the time, it must leave a reasonable time after the enactment of such a law in which such rights and claims may be asserted and enforced. A contrary rule would enable the Legislature to arbitrarily transfer the property of one person to another. The first part of section 132 of the tax law provides that every conveyance theretofore executed by the Comptroller, which has been recorded for two years in the office of the proper county clerk, shall be conclusive evidence that the sale and proceedings prior thereto were regular. Had the section stopped at this point, no one would contend that the law could be upheld as a statute of limitations. It could only operate as a curative act subject to all the limitations on the power of the Legislature to pass such an act that are pointed out in the case of *Meigs v. Roberts*. The section then proceeds: "But all such conveyances and certificates, and the taxes and tax sales on which they are based, shall be subject to cancellation, by reason of the payment of such taxes, or by reason of the levying of such taxes by a town or ward having no legal right to assess the land on which they are laid, or by reason of any defect in the proceedings affecting the jurisdiction upon constitutional grounds, on direct application to the Comptroller, or in an action brought before a competent court therefor: provided, however, that such application shall be made, or such action brought in the case of all sales held prior to the year eighteen hundred and ninety-five, within one year from the passage of this act." The counsel for the respondent contends that by these later provisions the appellants were given one year in which to bring the proper action for the enforcement of their rights and the assertion of their title. If this were the fact, then it might well be argued that the act operated as a statute of limitations, and the question would be presented whether the time allowed was reasonable, and whether it could apply in favor of a claimant who had not entered into possession. But the difficulty with this statute lies just here. It does not give an owner for the term of one year after the passage of the act an unqualified right to institute an action or proceeding to cancel the hostile tax sale or deed, but only to assail it on three grounds specified: (1)

That the taxes have been paid; (2) that the town or ward had no legal right to assess the land; (3) a defect affecting the proceeding on constitutional grounds. Now, it happens that the thing which we hold rendered the tax sale void in the present case falls in neither of the three classes. Therefore it follows that, so far from having a year, the plaintiffs never had an instant after the statute went into effect in which to assert or enforce their rights. It would require neither great ingenuity nor much reflection to suggest many other grounds that would render a tax sale void, yet would not be included in the cases specified in the statute. Whether, with the right to bring an action being thus restricted and qualified, section 132 of the tax law can be held to operate in any respect as a statute of limitations in the case of past conveyances, it is unnecessary to determine. It is obvious that it can have no such effect as against the right or claim of the plaintiffs which was excluded from enforcement by such restrictions.

The law if treated as a curative act is no more efficacious. While the Legislature may by subsequent enactment cure defects or irregularities in proceedings to impose a tax, if they relate to requirements that the Legislature might in the first instance have dispensed with, where the proceedings are so fatally defective that no title passes it cannot by a curative act transfer the title of one person to another. *Cromwell v. MacLean*, 123 N. Y. 474, 25 N. E. 932; *Joslyn v. Rockwell*, 128 N. Y. 334, 28 N. E. 604.

As these views dispose of the present appeal, and may dispose of the entire litigation, we deem it unnecessary to discuss the other serious grounds of attack on the judgments below.

The judgment appealed from should be reversed, and a new trial granted; costs to abide the event.

PARKER, C. J., and GRAY, O'BRIEN, MARTIN, and WERNER, JJ., concur. HAIGHT, J., not sitting.

Judgment reversed, etc.

(176 N. Y. 420)

LEHIGH VALLEY RY. CO. et al. v. ADAM et al., Grade Crossing Com'rs.

(Court of Appeals of New York. Nov. 10, 1903.)

RAILROADS—GRADE CROSSINGS—DUTIES OF COMMISSIONERS.

1. Laws 1888, p. 601, c. 345, Laws 1890, p. 469, c. 255, and Laws 1892, p. 732, c. 353, constituting the Buffalo grade crossing acts, provide that the general plan to be adopted shall be amended only in matters of detail, and that the amendment shall not extend beyond the plan theretofore adopted, under which contracts have been let, but that contracts made with railway companies may be changed by agreement, but not otherwise. The commissioners adopted a plan providing for no change of grade

of any railroad running through the city in March, 1893, as then constructed. *Held*, that they could not compel a railroad company to reconstruct its terminals, and change the elevation of its tracks to comply with a plan proposed in 1890, where such plan is not a modification of the plan of 1893, but an extension thereof.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by the Lehigh Valley Railway Company and others against Robert B. Adam and others, grade crossing commissioners of the city of Buffalo. From a judgment of the Appellate Division (75 N. Y. Supp. 515), reversing a judgment for plaintiffs and granting a new trial, they appeal. Reversed.

Martin Carey and James McC. Mitchell, for appellants. Spencer Clinton, for respondents.

WERNER, J. The grade crossing commission of the city of Buffalo is a body of statutory creation and jurisdiction. Chapter 345, p. 601, Laws 1888; chapter 255, p. 469, Laws 1890; chapter 353, p. 732, Laws 1892. The question before us is whether that body had jurisdiction in 1890 to impose upon the Lehigh Valley Railway Company the burden of elevating its tracks in accordance with the plan then adopted. The answer to that question is to be found in the statute (chapter 353, p. 732, Laws 1892), which is the latest legislative grant of power to the commission, and which provides that the commissioners "shall adopt a general plan for the relief of the city from the present and prospective obstructions of the streets of the city by railroads crossing the same at grade and may from time to time alter, amend, or modify the same as to any detail, but said general plan when adopted, shall not extend beyond the general plan heretofore adopted by said commission under which contracts have already been entered into, nor shall the same be extended; they may make contracts on behalf of the city with any railroad company or companies to carry out the purpose of this act, and may, by agreement with the contracting company, alter, modify or change any contract heretofore or hereafter made by them."

This statute contains three emphatic limitations: (1) The general plan to be adopted may be amended only in matters of detail; (2) it shall not be extended beyond the general plan heretofore adopted, under which contracts have been entered into; (3) contracts heretofore or hereafter made with railroad companies may be changed by agreement between the contracting parties, but not otherwise. Under this statutory authority, thus limited, the commission, in November, 1893, adopted a general plan which provided for no change in the grade of the Lehigh Valley Railway Company as then constructed and operated, and which left undisturbed the street crossings at grade over its right of way.

What was the physical situation of the Lehigh Valley Railway Company when the general plan of 1893 was adopted? It came into and ran through the city of Buffalo above grade to a point east of Louisiana street, where it descended to grade, and thus crossed the latter street and Chicago street; thence along the bed of Scott street to Michigan street, crossing the same at grade; and then over its own property to its terminal station at Washington street. This has been the unchanged physical condition of the right of way of that railroad in the city of Buffalo from 1882, when it first began to operate, with the single exception that in 1888, after the passage of the first grade crossing act, and after the adoption of the first general plan by the grade crossing commission, the grade at the Michigan street crossing was slightly changed to conform to the plan for a viaduct over other railroads. This change was made pursuant to the contract of November, 1888, between the commissioners and the railway company.

What was the change proposed under the plans and procedure of the commission in 1899? It involved the elevation of the Lehigh tracks over a distance of three-fourths of a mile upon a structure of stone and iron or steel. In effect, it also required the reconstruction of its terminal structures, sidings, and switches. The most cursory glance at the proposed plans discloses the magnitude and importance of the projected change.

Was this proposed change a mere amendment in some detail of the general plan of 1893, or was it a substantial extension of the plan? The undisturbed findings of fact of the trial court present a conclusive answer to this question. The trial court has specifically found that the proposed change is an extension of the engineers' plan of 1888, of the general plan of 1888 under which the contract of that year between the plaintiff and defendant was entered into, and of the general plan of 1893.

The reversal by the Appellate Division of the judgment entered upon that finding must be presumed to have been based upon questions of law (section 1338, Code Civ. Proc.), so that the fact as found by the trial court must stand for the purposes of this review. If we go a step further, however, and concede for the purposes of the argument that what is called a finding of fact is really a conclusion of law, we cannot escape the conviction that it was sound and just as applied to the conceded facts of the case. We think that the learned trial court was right in holding that the proposed plan for the elevation of the Lehigh Valley Railway Company's tracks in 1899 was an extension of the general plan of 1893, and that the learned Appellate Division erred in deciding that it was a mere modification, in some detail, of that previous plan.

This view necessarily leads to the conclusion that the commissioners were without

power to impose upon the Lehigh Valley Railway Company the burden of changing its railroad to conform to the proposed plan of 1899.

Since the question before us is not whether such power could have been, or can be, granted by the Legislature, but simply whether it was granted under the acts above referred to, we may here properly end the discussion of the subject by stating that the judgment of the Appellate Division must be reversed, and that of the trial court affirmed, with costs to the plaintiff in all courts.

PARKER, C. J., and GRAY, O'BRIEN, HAIGHT, MARTIN, and CULLEN, JJ., concur.

Judgment reversed, etc.

(176 N. Y. 333)

GRUBE v. HAMBURG-AMERICAN S. S. CO.

(Court of Appeals of New York. Nov. 10, 1903.)

COLLISION—PERSONAL INJURIES—DUTIES OF VESSELS.

1. In an action to recover for the alleged wrongful death of plaintiff's intestate, who was drowned as the result of a collision between defendant steamship and a pilot schooner on which he was employed, it was proper to instruct the jury that it was the duty of those on the schooner, when approaching another vessel, to have a lookout, and keep a man at the wheel.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Minnie Grube, administratrix of John Grube, against the Hamburg-American Steamship Company. From a judgment of the Appellate Division (82 N. Y. Supp. 429) affirming a judgment for plaintiff, defendant appeals. Reversed.

Everett P. Wheeler, for appellant. Gilbert D. Lamb, for respondent.

WERNER, J. The Appellate Division (82 N. Y. Supp. 429) has unanimously affirmed the judgment entered upon the verdict for the plaintiff herein. Upon the record presented to us we deem it necessary to discuss only a single question, and that is raised upon the refusal of the trial court to charge two requests which we think defendant's counsel was entitled to have submitted to the jury. A brief statement of the material facts will disclose the relevancy and importance of these requests. The action is one for damages for alleged negligence which resulted in the death of plaintiff's intestate. On the 17th day of August, 1901, the steamer *Alene*, owned by the defendant, and the pilot schooner *James Gordon Bennett*, owned by a New Jersey corporation, collided in the vicinity of Scotland lightship in the harbor of New York, with the result that the schooner went to the bottom, and carried several of

her crew with her. Among those who perished was plaintiff's intestate. One of the questions litigated was that of jurisdiction, which depended upon conflicting evidence, and which, upon the record before us, the unanimous affirmance below has concededly and conclusively resolved in favor of the plaintiff. Another contested question was that of defendant's alleged negligence, and this in turn depended, in some degree, upon the existence or absence of negligence in the sailing of the schooner, in the wreck of which plaintiff's intestate lost his life. Defendant contended, and introduced evidence tending to prove, that at the time of the collision there was no one at the wheel of the schooner, and that she had no lookout. This was controverted by evidence tending to show that all hands were on deck of the schooner, with the exception of four pilots and the steward, the plaintiff's intestate.

As it is conceded that plaintiff's intestate was free from contributory negligence, the trial court correctly charged that concurring negligence in the navigation of both vessels would not defeat plaintiff's right to recover, because, if that were the fact, she could bring her action against either or both of the guilty parties. But, on the other hand, it is obvious, even upon the somewhat nebulous state of the record with reference to the relative positions of the vessels just before the collision, that the question of defendant's negligence depended somewhat upon the degree of care exercised in the navigation of the schooner. It was, therefore, important that any request bearing directly upon that subject should have been explicitly charged.

The requests referred to were as follows: "(4) When the schooner had changed her course, and headed to the westward, it was Captain Mix's duty to keep a man at the wheel, and not allow her to drift before the wind. (5) It was also his duty to keep a lookout after the schooner had changed her course, and was headed to the westward." Upon these requests the court charged: "It is the claim of the defendant that at the time of the accident there was no one at the wheel of the schooner, and that there was no lookout. It is for you to say, in the light of all the evidence, just what the facts are; and if you find them to be as claimed by the defendant, it is still for you to say whether those omissions, if they were omissions, contributed to the happening of the accident." We are inclined to the view that this charge did not fairly and fully cover the requests, and that the defendant was entitled to have a charge substantially in the language of the requests. While, as we have said, negligence on the part of those in charge of the schooner would not necessarily absolve those in command of the steamer from the charge of negligence, yet the questions of separate and concurring negligence were so interdependent that the rules of law pertaining to these questions, above all oth-

ers, should have been clearly and precisely stated to the jury. As an abstract proposition, it goes without saying that the duties of wheelman and lookout upon vessels navigating the high seas are of the highest importance, and in cases of collision their conduct is always the subject of minute scrutiny. As applied to the case at bar, the effect of the alleged absence of two such important functionaries in the management of the schooner presented, of course, a question for the jury, but the defendant had the right to a proper charge upon that subject.

It would undoubtedly be going too far to say that the refusal of the court to charge as requested was clearly controlling of the verdict found, and yet it would not be going far enough to arbitrarily assume that it had no effect whatever. Therefore we think the refusal to charge as requested was error, for which the judgment herein should be reversed, and a new trial granted, with costs to abide the event.

PARKER, C. J., and GRAY, O'BRIEN, HAIGHT, and CULLEN, JJ., concur. MARTIN, J., not voting.

Judgment reversed, etc.

(176 N. Y. 386)

In re GARVER.

(Court of Appeals of New York. Nov. 10, 1903.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—ACTION TO SET ASIDE—ELECTION.

1. Where a judgment creditor sues to set aside an assignment for the benefit of creditors on the ground of fraud, and is successful as to a portion of the property transferred to the assignee, but he obtains no benefit from the judgment, it is not an election by him to take in hostility to the assignment, and he may take under it, and his judgment constitutes no bar to such relief.

Bartlett and Vann, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, First Department.

In the matter of the application of John A. Garver, assignee for the benefit of creditors of J. B. Brewster & Co., for the appointment of a referee. From an order of the Appellate Division (82 N. Y. Supp. 594) adjudging that the First National Bank of the City of New York and others were entitled to share in funds in the hands of the assignee he appeals. Affirmed.

On or about October 11, 1895, J. B. Brewster & Co. executed an instrument in writing purporting to be a general assignment for the benefit of creditors, with preferences, to John A. Garver, appellant in this proceeding. Under such instrument Garver took possession of the property of J. B. Brewster & Co., consisting of machinery, fixtures, carriages, and other personal property. In order

¶ 1. See *Assignments for Benefit of Creditors*, vol. 4, Cent. Dig. § 872.

to set aside this assignment with preferences, the respondents commenced actions against the corporation, its general assignee, and the preferred creditors, in aid of their outstanding executions, and a stipulation was made that these actions should abide the result of the actions commenced by the Home Bank, which actions are as follows: On or about November 18, 1895, the Home Bank commenced an action against John A. Garver, impleaded with J. B. Brewster & Co. and others, to have the said general assignment set aside as fraudulent and void as to it. Judgment therein was finally obtained declaring the assignment fraudulent and void as to the bank, and providing for the appointment of a receiver. Before the above judgment was obtained a temporary receiver was appointed, who, on entry of judgment, rendered an accounting, and turned over all the property in his hands to the permanent receiver appointed under the judgment, who retained the same until the Appellate Division modified the judgment by striking out all provisions relating to the appointment of a receiver, affirming it in all other respects. The property coming into the hands of the temporary receiver was the nonleviable property, and such leviable property as was left after the expenditure by the assignee of about \$7,000 in payment of wages of employés. Among the nonleviable property was an insurance policy on the life of J. B. Brewster for \$50,000, upon which the corporation had procured a loan of \$16,000, subject to which loan the policy had been assigned to James B. Cone. This assignment was declared void by the judgment before mentioned. The temporary receiver sold some of the leviable property to the amount of \$5,000, and paid that amount upon the loan of \$16,000. The permanent receiver sold more of the leviable property to the amount of \$1,375.05, at the instance of the Home Bank, to pay a premium on the policy, leaving little or no leviable property and about \$2,000 in cash and the policy as the sole assets. This policy has since been paid to the assignee, J. B. Brewster having died. On the accounting of the permanent receiver, the referee found that the Home Bank had no lien on the nonleviable property, including the insurance policy, and directed that all the property be restored to the general assignee. The bank then tried to reach the insurance policy, but was unsuccessful. It then commenced another action against the general assignee, and joined the sheriff as a nominal party, for the purpose of obtaining an adjudication that it, by reason of previous judgments, had a lien upon all the then leviable property, and also upon the proceeds of certain leviable property which the assignee had in his hands. This action was dismissed upon the ground that the issue involved had previously been determined. Claims were then filed with the assignee, and allowances claimed pro rata. The as-

signee refused to allow the claims, and made application to the court for a referee to determine the validity of the claims. The court denied the application for a reference, and adjudicated the claims to be valid, and ordered the assignee to receive and file the claims. The Appellate Division sustained their decision, and it is from that order this appeal is brought to this court.

James M. Beck, for appellant. Henry B. Twombly, William B. Putney, and Richard B. Kelly, for respondents.

PARKER, C. J. (after stating the facts). The banks which are respondents herein were judgment creditors of J. B. Brewster & Co., a corporation which made a general assignment for the benefit of creditors, with preferences. An action was brought by one in behalf of all in aid of their outstanding executions, praying that as against plaintiff the assignment and all preferences therein should be declared null and void as to leviable property. Judgment was granted for the relief asked for in the complaint, and a receiver was appointed, and was authorized to, and did, take control of the property from the assignee. Subsequently the greater part of the leviable property was sold, and the avails thereof devoted in the main to the payment of employés—who were entitled to be paid first by statute—and in paying a premium loan of \$16,000 on a policy of \$50,000 upon the life of J. B. Brewster, obtained for the benefit of the corporation; the policy being subject to that lien when assigned to one Cone. The assignment to Cone was, by the judgment to which we have referred, set aside, and it became necessary to pay the moneys advanced by Cone in order to secure the benefit of the policy to the creditors of the corporation. The proceeds of this policy, collected upon the death of J. B. Brewster, constituted all the assets of the estate that remained for distribution among the judgment creditors.

The Appellate Division modified the judgment by striking out the appointment of a receiver, and requiring him to turn over the moneys in his hands to the general assignee, but in all other respects the judgment was affirmed. The effect of this modification—after the personal property had been sold, and the avails disposed of, as pointed out—was to prevent the banks from receiving anything on account of their executions, for there was no longer any leviable property. By this blunder in procedure the leviable property had been disposed of for the benefit of the assigned estate, and hence the only way open to the banks, which had prosecuted the litigation resulting in a fund to be distributed among the creditors, where otherwise there would have been none, was to present their claims to the assignee. But the assignee seemed to think they ought not to share with the general creditors—the beneficiaries of the

banks' vigilance in prosecuting an action resulting in the setting aside of the assignment to Cone, and making necessary the distribution of the net proceeds of the policy. So the assignee took steps under the statute to have the court determine whether the judgments of the banks should be admitted as claims against the assigned estate. The assignee made no question about the validity of those claims as against J. B. Brewster & Co. He could not well have done so, for they were established by judgments. Nor did he claim that they had been wholly or partly paid, nor that it was inequitable that the banks should share in the distribution of money which but for their action would not have been available for distribution. Instead the assignee claimed there was a rule of law which, applied to the facts detailed, would prevent the banks from obtaining an equitable share of the remaining assets. The doctrine of election of remedies was invoked to work out the result the assignee seemed to desire. And if it be true that when the general assignment was made it became necessary for the banks to determine whether they would take under the assignment, or in hostility to it, then the assignee's objection was well founded, for the banks, promptly discovering that their claims would not be paid under the general assignment, made an attack upon it to the extent, at least, that it transferred the leviable property to the assignee.

Now, whatever may be the rule in other jurisdictions, it is not the law in this state that the commencement of an action to attack the validity of an assignment operates to deprive the party commencing such action from sharing with other general creditors in the proceeds of the assigned estate in the event that such action shall prove fruitless in result. That question was before this court and carefully considered in *Mills v. Parkhurst*, 126 N. Y. 89, 28 N. E. 1041, 13 L. R. A. 472, in which case certain judgment creditors of an insolvent debtor brought an action to set aside as fraudulent his assignment for benefit of creditors, in which they were eventually defeated. While an appeal was pending in this court from a judgment dismissing the complaint, proceedings were taken to distribute the assigned estate, and objection was made by other creditors to the allowance of the claims of those judgment creditors upon the ground that they were proceeding in hostility to the assignment in prosecuting their action. The trial court and the General Term were persuaded that the doctrine of election of remedies was applicable to the situation, and refused to allow the judgment creditors to share in the estate; but in this court it was held that the doctrine had no application. The kernel of the very careful and somewhat elaborate reasoning by which the conclusion was logically established was that the doctrine of election of remedies applies to cases where there is

by law or by contract a choice between two remedies which proceed on opposite and irreconcilable claims of right. In such a case a party having resort to one remedy is bound by his first election, and hence barred from the prosecution of the other. But an assignment for the benefit of creditors is in no sense a contract between the debtor and his creditors, and does not depend for its validity in law upon their assent. Where a debtor has acted without fraud in fact or in law, and has complied with the requirements of the statute, the assignment will stand, notwithstanding the opposition of a creditor, and by such opposition the latter is not deprived of his right to a distributive share under it. And it is undoubtedly true, as the learned judge said who wrote the opinion, that a contrary rule "would come so near to lending aid and encouragement to attempts at fraudulent assignments as to render its adoption impossible." The discussion of the court in that case is alike applicable to this one, and the decision is in point and controlling.

It is suggested, however, that it is possible to found a different ruling in this case from the one made in *Mills' Case* upon the fact that in *Mills' Case* plaintiffs were unsuccessful, while in this case plaintiff succeeded. In other words, that where a judgment creditor elects, without justification, to attack the general assignment upon the ground that the assignor intended to cheat and defraud creditors, his claim may share in the estate after the judgment has gone against him, but, if a judgment creditor successfully attacks a general assignment on the same ground, he may not share in the distribution of a fund which may be the result of such litigation. It has been argued that while in the first case it can no longer be said in this state that there was an election of remedies because *Mills' Case* has so decided, it may nevertheless be said in the latter case, because in *Mills' Case* plaintiffs failed to show the fraud, while in this case plaintiff succeeded. But argument, if any there be to offer, in support of such position, is fully met by authority, though it would hardly seem that authority is necessary to support the proposition that whether there has been an election of remedies is not determinable by the result of the suit, but is by its commencement. In *Moller v. Tuska*, 87 N. Y. 166, plaintiffs sold and delivered a quantity of sugar to parties who immediately transferred it to defendants, and then went into voluntary bankruptcy. Plaintiffs immediately brought action to recover possession of the goods on the ground of fraud, but, while the action was pending, proved a claim in bankruptcy as for goods sold, and received from the assignee in bankruptcy a dividend thereon. Later the register in bankruptcy expunged the claim from the record on the ground that the action brought by plaintiffs was in disaffirmance of the sale, and thereafter demanded and received back the dividend.

Subsequently, in the action brought against the transferee to recover possession of the goods, a motion was made to dismiss the complaint on the ground that, by proving the claim in bankruptcy and taking the dividend, plaintiffs affirmed the sale, and had no longer any right to the goods. The motion was granted, but the General Term and this court were of a different opinion; the ground of the decision being that as plaintiffs had, on discovery of the fraud, an election of remedies—either to disaffirm the sale and recover the property, or to sue for the principal—they manifested their election by bringing the action to recover the possession of the goods, and were bound by such election, and while they subsequently presented their claim to the assignee, who accepted it and paid a dividend thereon, nevertheless, because of the election necessarily made by plaintiffs in the commencing of their action, there was no debt on the part of the estate in bankruptcy to them, and the assignee was without power by his acceptance of the claim and payment of a dividend to create a debt where none existed, and hence could not affect the estate by an attempt to assent to a rescission of the election. It is therefore the settled law of this court that an election of remedies is determined by the commencement of an action, and not by the result of it; and *Mills' Case*, supra, requires the holding that the commencement of an action to set aside an assignment on the ground of fraud does not constitute an election to take in hostility to an assignment, within the doctrine of election of remedies, and hence a creditor may take under the assignment notwithstanding his attack upon it.

Since the foregoing was written it has been suggested for the first time that it is not, after all, the doctrine of election of remedies that has been invoked, but a remedy without a name that works out the same result. It is conceded that this new remedy could not be applied in *Mills' Case*, supra, and it should be conceded that, if it could not be applied in that case, it should not be in this, for very obvious reasons. The only difference between that case and this is that in that one the action failed, and in this it succeeded, which means that in that case the assignor was not guilty of fraud, while in this case the assignor was adjudged guilty of fraud. But in the first case the court pointed out that the creditor should not be deprived of his share of the assets for bringing an unsuccessful litigation, because to do so would lend "encouragement to attempts at fraudulent assignments." It is safe to say that that reason is certainly as applicable to a case where the fraud both exists and is proved. Otherwise the legal situation would be: It is well to bring an unsuccessful action at great cost to the fund in order to discourage fraud; but it is not well to discourage fraud too much, so be careful not to establish it, for a penalty is visited upon

one who brings such an action and succeeds.

It is said that the doctrine of *res adjudicata* has application to this situation, and will so operate as to deprive plaintiff of its share of the fund that would have no existence but for its litigation. There have been two adjudications prior to this one. In the first place, it was adjudicated between J. B. Brewster & Co. (before the assignment) and the Home Bank that J. B. Brewster & Co. was indebted to it. The judgment into which that litigation ripened stands. Its validity as an adjudication is not challenged, and cannot be; and it has never been paid. That being so, the court has no power to deprive the plaintiff in that judgment of its share in the general assets of J. B. Brewster & Co., for the judgment establishes the claim, and carries upon its face the right to share with other claims in the assigned estate.

The second adjudication was made in an action brought by the Home Bank against the assignor, J. B. Brewster & Co., and the assignee, and it adjudges that the assignor was guilty of fraud which rendered the assignment void as to the bank, and set aside a transfer of a policy of insurance, a part of the proceeds of which constitute the entire assets now to be distributed. While the court adjudged necessarily that the bank had the right to pursue the remedy which it did, it did not attempt to determine that the bank had no other remedy, and that, should it fail to secure money enough by that proceeding to satisfy its claim, it could not resort to other proceedings to reach the property, if any should be discovered, of the assignor, and to share in the distribution of the assigned estate; and, that being so, it is difficult to see how it can be said that the judgment in that action affects in any way the valid judgments which the bank now properly insists should share in the distribution of the fund among the general creditors.

The order should be affirmed, with costs.

BARTLETT, J. (dissenting). A reference to some facts in this complicated case is essential for the purpose of making clear the points I seek to make. The chronology is important. The firm of J. B. Brewster & Co., carriage manufacturers in the city of New York, made a general assignment for the benefit of creditors to John A. Garver on the 11th day of October, 1895. Prior to that time several banks and the Spring Perch Company, creditors of the assignors, had recovered judgments at law on their claims, and issued executions which were then outstanding in the hands of the sheriff. Shortly after the execution of the general assignment and transfers these judgment creditors brought separate actions in equity attacking the general assignment and other transfers of property as fraudulent; also in aid of the executions in the hands of the sheriff, it being alleged that the general assignment and other transfers were obstacles to making the levy upon such

of the assigned property as was subject thereto. It was thereupon stipulated that the suit of the Home Bank, which was begun in November, 1895, should be tried, and the others abide the result. It was conceded at the trial of this latter suit that the assignee was not guilty of intentional fraud in connection with said assignment and transfers in which he was concerned. The suit of the Home Bank resulted in a decision setting aside the general assignment and transfers attacked as fraudulent, as to the bank, thus removing all obstacles to an immediate levy of the executions.

It is at this point that we encounter irregularities of practice resulting in wasting the assets of this estate to a very large extent. The Special Term (41 N. Y. Supp. 203) judgment under this decision was entered on July 10, 1896. The plaintiff erroneously treated the action as a judgment creditors' suit after execution returned unsatisfied, instead, as it really was, an action to remove obstacles to the levying of executions outstanding under judgments at law. The result of this error was the entry of a judgment which extended the temporary receivership (a temporary receiver having been appointed *pendente lite* at the time the action was begun) to a permanent receivership then created of all the property of the assignors, including nonleviable property, over which the court had no jurisdiction in that action. The judgment further provided that the temporary receiver should account and pay over to the permanent receiver the assets in his hands. Upon appeal the Appellate Division modified this judgment by striking out the provisions as to a receivership, thereby leaving the judgment in proper form, the leviable property to be redelivered to the assignee "to the end that the plaintiff may levy its executions upon such property, and sell the same to satisfy such executions or judgments upon which they were issued." The judgment was so amended by the Appellate Division May 4, 1897. 44 N. Y. Supp. 54.

It thus appears that at the time of the Special Term judgment, July 10, 1896, the judgment creditors were at liberty, had they followed the proper practice, to issue their executions against the leviable property, and a similar opportunity was afforded them when the Appellate Division modified the judgment, as above stated, May 4, 1897. It is apparent that these judgment creditors were not content to follow leviable property which was in existence at that time, but were reaching out for assets that could not be dealt with in aid of the executions. After the Special Term judgment had been so modified, the plaintiff entered an order of reference to take and state the accounts of the permanent receiver. The referee in this accounting made his report December 2, 1897, in which he found, among other things, that the plaintiff had no lien upon the nonleviable assets, including a life insurance policy for \$50,000 on the life

of J. B. Brewster, and directed all the property to be restored to the assignee. Thereupon the plaintiff made a motion at Special Term to set aside and disaffirm the report of the referee. At the same time a motion was made by the assignee to overrule the exceptions and confirm the report. The Special Term sustained the exceptions of the plaintiff, and directed the permanent receiver to pay to the sheriff of the county of New York the balance of cash in his hands, to be applied on account of plaintiff's executions, and to deliver to the sheriff carriages and lumber, to the end that the same might be sold to satisfy the executions. It was further ordered that the receiver should deliver the policy of insurance to the defendant upon receiving the sum of \$6,272.25 from the proceeds thereof. The defendant appealed from this order to the Appellate Division, where it was reversed, and the report of the referee in all respects confirmed. *Home Bank v. J. B. Brewster & Co.*, 33 App. Div. 330, 53 N. Y. Supp. 867. The plaintiff appealed from this latter order to the Court of Appeals, where the appeal was dismissed on the ground that it was an order in the action, and not appealable. 159 N. Y. 526, 53 N. E. 1126. This order was entered about April 25, 1899. Early in November, 1898, after the Appellate Division had confirmed the report of the referee, the permanent receiver, after the defendant had made a motion to punish him for contempt for failure to comply with the directions of the referee's report, paid over to the assignee the sum of \$866.86, and also delivered to him certain carriages. We thus have leviable assets in the hands of the assignee at this time. It appears that on November 18, 1898, after due notice, the assignee sold all of said carriages at public auction, receiving therefor the sum of \$2,219.90, which shows clearly the amount of leviable assets in the hands of the assignee, and which, with a quantity of lumber, had theretofore been in the possession of the permanent receiver ever since the Special Term judgment of July 10, 1896. During this entire period there was no obstacle to levying under the executions.

It is argued that, the leviable property having been disposed of for the benefit of the assigned estate, these judgment creditors, who had prosecuted litigations resulting in a fund to be distributed among the general creditors, where otherwise there would have been none, are entitled to come in and share therein with the other general creditors. A few more facts will shed light at this point. Prior to the judgment of July 10, 1896, the court made an order, upon the joint affidavit of the temporary receiver and assignee, authorizing them to pay out of the funds in their possession the sum of \$16,000, constituting a lien on the said policy of life insurance, together with interest thereon, and to hold the policy jointly during the pendency of the action. The interest amounted to

\$1,048. This sum of \$17,048 was accordingly paid to the American Deposit & Loan Company, the temporary receiver contributing \$5,000, and the assignee \$12,048. The temporary receiver and the assignee were at that time in joint control of the estate, the action not having proceeded to judgment in the Special Term. It appears in the accounting of the permanent receiver before the referee that the assignee advanced the further sum of \$3,862.76 on account of premiums due on the said policy, making with said sum of \$12,048 the total of \$15,710.76 that he advanced to protect the policy.

It is thus established that the assignee had made the greater part of the advances necessary to protect the policy of life insurance, and would have had no difficulty in caring for the same entirely, had it not been for the fact that he was improperly deprived of the full control of the possession of the assigned estate by a judgment that was unauthorized by law, and was practically set aside by the Appellate Division; that learned court having declared the receivership and the removal of the estate from the assignee's control to be wholly irregular.

I have before stated that the erroneous practice of the plaintiff in the Home Bank Case had, to a great extent, wasted this estate. The attorney for the temporary receiver was awarded the sum of \$1,028.30 for counsel fee and disbursements. The attorney for the permanent receiver was awarded the sum of \$1,118.38 as counsel fee and disbursements. The referee received the sum of \$300 for his services. The assignee also states in his affidavit in this proceeding that the estate has been put to other very great expense by reason of the litigation arising from this irregular practice.

These general statements of the assignee will be better appreciated when it is understood that the Home Bank began a second action against the assignee and the sheriff of the county of New York, wherein it demanded, in a complaint verified December 20, 1899, the following relief: (1) That it may be adjudged and determined that the plaintiff the Home Bank had and has a lien upon all leviable property of said J. B. Brewster & Co., which has come into the hands or possession of the defendant Garver, and which was in the city and county of New York at the time of the issuing of the several executions hereinbefore referred to, and that the said lien attach to and follow the proceeds of the said leviable property which has come into the possession of the said defendant Garver; (2) that the defendant Garver account for and deliver and pay over to the sheriff of the county of New York all said leviable property or its proceeds as may be sufficient to satisfy the said executions upon the judgments recovered by the plaintiff against J. B. Brewster & Co., hereinbefore set forth; (3) for further relief. The action was carried through the courts with this re-

sult: The Special Term dismissed the complaint. The Appellate Division and this court affirmed the judgment (*Home Bank v. Garver*, 172 N. Y. 632, 65 N. E. 1117), without opinion.

The facts of this case thus disclose that the judgment creditors, throughout all of these litigations, were confined simply to their remedy to reach leviable assets; that they failed to properly pursue it, and neglected to lay hold of such assets in the possession of the permanent receiver and the assignee, when no obstacles stood in their way of enforcing the executions in the hands of the sheriff. It remains to consider whether, on this state of facts, these judgment creditors are estopped, by years of wasting litigation, from proving their debts as general creditors in the assignment proceedings.

It has been frequently held that a creditor who receives any benefit under a general assignment cannot afterwards attack it. It would seem, from parity of reasoning, that a creditor who has successfully attacked the assignment and other transfers, and had them set aside as fraudulent as to him, who has had the way opened to him to enforce his executions at law, and who has failed to realize valuable assets because he did not avail himself of the remedy at law placed in his hands, should also be estopped. It is apparent that the technical rule as to election of remedy, illustrated by a long line of decisions, has no application to the present case. I refer to those authorities which deal with parties between whom existed a relation created by contract, and in some of which the plaintiff rescinded the contract and brought replevin for goods procured by fraud, and in others stood upon the contract. *Morris v. Rexford*, 18 N. Y. 552; *Kinney v. Kiernan*, 49 N. Y. 164; *Moller v. Tuska*, 87 N. Y. 166; *Rodermund v. Clark*, 46 N. Y. 354; and many other cases. In the case before us the relation between the parties is not contractual, but is created by law—by the statute which provides for the execution of general assignments for the benefit of creditors, and the distribution of estates thereunder. This court has held (*Mills v. Parkhurst*, 126 N. Y. 89, 26 N. E. 1041, 13 L. R. A. 472) that it should be open to any creditor to attack the general assignment on the ground of fraud, and if he fails he may, notwithstanding this futile effort, prove his debt in the assignment proceeding. This decision obviously rests on considerations of public policy which permit the attack, and the further fact that the attacking creditor had not disturbed the assignee in the custody and management of the estate, as he was defeated. In such a case there is no election of remedy by the mere beginning of the action, as the rights of the creditor are determined by the result of the action. If he fails, he may still prove his debt under the general assignment. If the creditor succeeds in his action and enters final judgment, what is the logical, legal re-

sult? In beginning his action, as we have seen, he is not held to the strict rule of election of remedy, but he must abide the result. In the case before us the plaintiff is confronted by its own final judgment securing to it the relief for which it sued, to wit, the removal of obstructions to its execution in the hands of the sheriff, and permitting that officer to levy on all personal property subject thereto. The plaintiff is thereby estopped by the doctrine of *res adjudicata*. It is not a question of election of remedy, but a remedy exhausted, pursued to a final judgment of record, declaring the general assignment void as to it, and granting the relief for which it prayed. A judgment bars any action or proceeding inconsistent with its provisions. *Steinbach v. Relief Fire Ins. Co.*, 77 N. Y. 498, 33 Am. Rep. 655; *Fields v. Bland*, 81 N. Y. 239. In the case in 77 N. Y. 498, 33 Am. Rep. 655, it was held that when a party has elected to sue upon a written contract, and has been defeated, he cannot thereafter bring an action to reform the contract. Judge Earl said (page 502, 77 N. Y., 33 Am. Rep. 655): "This is a case, it seems to me, where the doctrine of *res adjudicata* must apply, and bar a recovery, unless plain principles of law, which have always been regarded as important in the administration of justice, are disregarded." In the case at bar the plaintiff came into court, and said, in substance, it had a judgment at law, with execution in the hands of the sheriff. The general assignment was an obstacle to a levy. Its removal was asked. The court by judgment granted this relief, and must not the doctrine of *res adjudicata* be applied, unless plain principles of law are disregarded? The uncontradicted facts of this case, already recited, show that for a long period of time the plaintiff failed to levy on personal property when it might have done so, every obstacle having been removed by the decision and judgment of the court.

No case has been called to my attention in this court holding that where a creditor has proceeded to final judgment, and succeeded in having a general assignment declared fraudulent as to him, he having received substantial benefits under his judgment, or was entitled to the same, nevertheless he could come in as a creditor and prove his claim thereunder. Two cases in this court were cited by the courts below in favor of the plaintiff. In the case of *Mills v. Parkhurst*, 126 N. Y. 89, 26 N. E. 1041, 13 L. R. A. 472, a creditor sought to prove his claim after having failed in his attack upon the assignment. All that was actually decided or could be determined was that such a creditor might prove his claim, notwithstanding his unsuccessful suit. The court said (page 95, 126 N. Y., page 1043, 26 N. E., 13 L. R. A. 472): "A creditor's only alternative, if he is not content to take what would thus come to him, is to endeavor to set aside the deed or assignment if he deems himself possessed of

the requisite evidence of its invalidity at law. If there is any election for him to make, it can only be with respect to what remedies may be available to him in order to right himself upon his judgment against the assignee and to avoid the assignment. * * * It in no wise militated against the right of the appellant, if defeated upon that issue, to share in the assigned estate on the basis of the distribution provided in the debtor's deed to his assignee." The reasoning of this opinion clearly recognizes the possibility of a situation where a creditor, succeeding in his attack upon the assignment, may place himself in a position which would preclude him from proving his claim. The case of *Groves v. Rice*, 148 N. Y. 227, 42 N. E. 664, is distinguishable in its facts from the case before us. In that case the creditor was held to have so recognized the assignment, for the purpose of gaining an advantage thereunder, that he was estopped from attacking it. It is a case where the doctrine of estoppel was applied in order to protect the assignee and creditors. In the case before us the doctrine of *res adjudicata* controls.

I am of opinion that the fund now in the hands of the assignee is only a small residue, preserved to the estate, notwithstanding the litigations of the judgment creditors, by the persistent efforts of the assignee to save something for the general creditors after the unwarranted and unnecessary receiverships, accountings and unauthorized actions had run their asset-wasting course.

The orders of the Special Term and Appellate Division should be reversed, and the claims of the respondents disallowed, with costs.

O'BRIEN, MARTIN, CULLEN, and WERNER, JJ., concur with PARKER, C. J. VANN, J., concurs with BARTLETT, J.

Order affirmed.

(184 Mass. 318)

SIMPSON v. PRUDENTIAL INS. CO. OF AMERICA.

(Supreme Judicial Court of Massachusetts.
Hampden. Nov. 25, 1903.)

INFANTS — CONTRACTS — INSURANCE — REASONABLENESS — AVOIDANCE — STATUS QUO — DEMAND AND NOTICE BY AGENT — SUFFICIENCY.

1. A contract of life insurance is not a necessary, or within the class of contracts which, as a matter of law, are beneficial to, or binding on, an infant.

2. The reasonableness and prudence of an infant's contract is immaterial, where it is not one which, as a matter of law, is binding upon him.

3. A life insurance company, on avoidance by an infant of a policy taken out by him, is not entitled to retain out of the premium the cost to it of keeping the policy in force.

4. The appointment by an infant of an agent to make demand on a life insurance company for the return of premiums paid by him, and to give notice of his rescission of the contract of

insurance, is not a void, but, at most, a voidable, act; and, if not avoided, demand and notice by such agent are sufficient.

Appeal from Superior Court, Hampden County; Elisha B. Maynard, Judge.

Action by one Simpson, by her next friend, against the Prudential Insurance Company of America. From a judgment for defendant, plaintiff appeals. Reversed.

N. P. Avery, for appellant. Harlan P. Small, for appellee.

MORTON, J. The plaintiff in this case is a minor, and brings this action, by her next friend, to recover the premiums paid by her on a life insurance policy issued to her by the defendant. The case was heard upon agreed facts, and judgment was ordered for the defendant, and the plaintiff appealed. The policy was what is termed a 20-year endowment policy, for \$500; and the agreed facts state that there was no fraud or undue influence practiced upon the plaintiff by the defendant or its agents, and that the contract was a reasonable and prudent one for a person in the plaintiff's situation and condition in life. Before the action was brought, the plaintiff, through her attorney, had notified the defendant that she repudiated the policy and the contract contained in it, and demanded a return of the sums she had paid as premiums. The premiums paid amounted to \$54, and it is agreed that the expense to the defendant of keeping the policy in force was \$28.72. The defendant contends that this should be deducted from, or set off against, the premiums, if the plaintiff is allowed to recover for them.

It is manifest, we think, that, however reasonable and prudent it may be for an infant to take out a policy of life insurance, it does not come within the class of necessities, or within the class of contracts which have been held, as matter of law, to be beneficial to, and therefore binding upon, an infant. It is only when the contract comes within the class of contracts which, as matter of law, are binding upon an infant, that the question of its reasonableness and prudence is material. *Tupper v. Cadwell*, 12 Metc. 559, 46 Am. Dec. 704.

The defendant contends that this contract having been executed, in part, at least, the plaintiff cannot recover without making the defendant whole for the expense to which it has been subjected. But that would be compelling the plaintiff to carry out, to that extent, a contract which is not binding on her, and which she may avoid. *Morse v. Ely*, 154 Mass. 458, 28 N. E. 577, 26 Am. St. Rep. 263. It is well settled in this commonwealth, whatever may be the law elsewhere, that, in order to avoid a contract, an infant is not obliged to put the other party in statu quo. *Gillis v. Goodwin*, 180 Mass. 140, 61 N. E. 813, 91 Am. St. Rep. 265, and cases cited; *White v. New Bedford Cot. Waste Corp.*, 178 Mass. 20, 59 N. E. 642.

The defendant further contends that there has been no rescission because the notice and demand were made by an attorney, and an infant cannot appoint an agent or attorney, and the authority of a *prochein ami* is only commensurate with the writ. *Cassier's Case*, 139 Mass. 458, 1 N. E. 920; *Miles v. Boyden*, 3 Pick. 213; *Burns v. Smith* (Ind. App.) 64 N. E. 94; 1 Am. & Eng. Ency. of Law (2d Ed.) 940. If we assume that the bringing of the suit did not of itself constitute all the rescission and demand that was necessary, then we are of the opinion that the appointment of an agent for the purpose of giving notice of rescission and making a demand was not such an act, under the circumstances of this case, as could be held, as matter of law, to be prejudicial to the plaintiff, and therefore void, but that it was, at the most, only voidable, and therefore the notice and demand, until avoided by the plaintiff, would be sufficient. *Whitney v. Dutch*, 14 Mass. 457, 7 Am. Dec. 229; *Towle v. Dresser*, 73 Me. 252.

Judgment reversed, and judgment for the plaintiff.

(154 Mass. 429)

THOMPSON v. BARRY et al.

(Supreme Judicial Court of Massachusetts.
Essex. Nov. 25, 1903.)

RESCISSION OF DEED—REPRESENTATIONS OF AGENT AS TO KIND OF PURCHASER—APPARENT AUTHORITY.

1. Fraudulent representations of the purchaser's agent that the purchaser was a man of means, with a small family, who wanted the lot, which was next to the vendor's residence, for a home, whereas the purchaser was a Catholic corporation, which wanted it for a church site, is ground for rescission.

2. It is within the apparent scope of a purchasing agent to give the name of the purchaser, or state the class to which he belongs.

3. The right of one who owns a lot to have a sale set aside for fraudulent representations of the purchaser to him is not affected, except as to who shall be plaintiff, by the fact that another held the legal title for his benefit.

4. Fraud of the purchasing agent in misstating the kind of purchaser he represents is independent of, and not affected by, restrictions in the deed.

5. The vendor's right to rescission of the deed for fraudulent representations of the purchaser's agent as to who was the purchaser is not affected by his having paid part of the agent's commissions.

Report from Superior Court, Essex County; Wm. Schofield, Judge.

Suit by Thompson against Barry and another. The justice ruled for plaintiff, and reported the case. Decree for plaintiff.

Wm. H. Niles, for plaintiff. Hurlburt, Jones & Cabot and Boyd B. Jones, for defendants.

KNOWLTON, C. J. On the hearing of this suit the presiding justice found that the plaintiff was entitled to relief, and ordered a decree in his favor. As the defendants desired to take the opinion of the full court upon the questions of law involved, the judge

decided not to enter the decree, and leave the defendants to their right of appeal, with a report of facts to complete the record under Rev. Laws, c. 159, § 23, but availed himself of his power under Rev. Laws, c. 159, § 29, to reserve and report the case, instead of entering a decree. According to the terms of the reservation, if the ruling was right, the decree is to be entered; otherwise such decree as justice and equity require. This is the correct practice in all cases in which the justice desires to present the case to this court without an appeal and a report under section 23.

The defendants contend that the false representations of the defendant Barry, the agent of the defendant corporation in the purchase of the property, did not constitute actionable fraud. The agent deliberately and intentionally deceived the plaintiff in regard to the party who was purchasing. In fact, he was acting for the Roman Catholic archbishop of Boston, a corporation, which was endeavoring to buy the land as a site for a Roman Catholic church or chapel. The land was situated on Elmwood Road, between the lot owned by the plaintiff, upon which he had erected an expensive house and stable, where he has resided for about 10 years, and a lot owned by one Earp, upon which he erected a house which he occupies as a home. The plaintiff inquired of the agent whether a Catholic was going to buy the property, and the agent became aware that the plaintiff had a prejudice against Catholicism, and he studiously concealed from the plaintiff the fact that the defendant corporation was the intending purchaser, and that the land was intended to be used as a site for a Roman Catholic church or chapel. He believed that the disclosure of these facts would affect the price, and feared that it might defeat the sale. He had previously been informed by the plaintiff that the land would not be sold except to be occupied by a nice dwelling house to be used as a residence. He informed the plaintiff that his customer was a married man, whose family consisted of a wife and two children; that he was employed by the New York, New Haven & Hartford Railroad Company in a high position, at a salary which he estimated to be at least \$6,000 per year; that he was amply able to build and occupy a nice dwelling house; and said, "I will guaranty it is as good a house as yours, or the next one above." The house next above is the dwelling house of Mr. Earp. The deed was made to the agent, and two days later the agent made a conveyance to his principal, the defendant corporation, which speedily made a contract for the construction of a cellar for a chapel to be erected upon the lot, designed to seat 492 persons. The court found that the erection of such a chapel would greatly diminish the value of the plaintiff's property.

Without considering the representations which were promissory, there is enough to

show that a gross fraud was practiced upon the plaintiff. A Roman Catholic corporation, which was the owner and builder of churches, was a very different party, in reference to the ownership and probable use of a lot of land, from a man with a small family, employed in a high position, at a large salary, by a great corporation. In determining whether to make a sale, the plaintiff might be glad to sell to the latter because of the probability that he would put the land to a use which would increase the value of the plaintiff's other property, and be entirely unwilling to sell to the former because of the probability that it would put the land to a use which would greatly diminish the value of his estate. A statement as to the position or character of the purchaser was a statement of an existing, material fact, in reference to which an intentional falsehood, if relied upon, would be an actionable fraud.

There can be no doubt that it is within the scope of the apparent authority of a purchasing agent to give the name of the purchaser, or to make other statements which will show to what class he belongs; and if he fraudulently represents him to be the head of a family seeking a home, when in fact the buyer is a corporation seeking a site for a factory or a church, his principal must take the consequences of his fraud.

The fact that the legal title to the lot was held by a third person for the plaintiff's benefit is immaterial. The plaintiff was the real owner; he conducted the negotiations for himself; and his rights, as against these defendants, except as to the party who is to bring the suit, are the same as if he had been the holder of the legal title. The fraud as to the kind of purchaser to whom the plaintiff was selling is independent of the provisions of the deed in regard to restrictions, and is not affected by them. Nor are the rights of the plaintiff diminished by the fact that he paid a part of the commission of the purchaser's agent. It is found that in the matters relied on by the plaintiff the agent was acting for the defendant corporation, although the corporation was ignorant of his fraud.

Decree for the plaintiff.

(184 Mass. 416)

STOWELL et al. v. ASHLEY et al.

(Supreme Judicial Court of Massachusetts.
Bristol. Nov. 25, 1903.)

STREETS—LAY-OUT—ORDER OF COMMISSIONERS—COLLATERAL ATTACK—JUSTIFICATION FOR TRESPASS—DAMAGES—HOW RECOVERABLE.

1. An order of a board, having jurisdiction for that purpose, for the lay-out of a public street, even if defective by reason of its failure to name the precise time within which the owner might remove the walls, fences, and trees, cannot be attacked collaterally for that reason, but can be reviewed only on certiorari.

2. An action of the competent board for the lay-out of a public street furnishes legal jus-

tification for such acts of those acting under its authority as are reasonably necessary for the construction of the street.

3. Conceding that by reason of failure to give notice to remove walls, fences, and trees, a property owner is entitled to recover the value of the things removed in the laying out of a public street, such damages are not recoverable in tort, but only in a petition under the statute for damages caused by the laying out of a street.

Report from Superior Court, Bristol County; Henry K. Bealey, Judge.

Action by one Stowell and others against one Ashley and others. Case reported to the Supreme Judicial Court. Judgment entered for defendants.

J. L. Gillingham, for plaintiffs. Benj. B. Barney, for defendants.

HAMMOND, J. This is an action of tort, in the nature of trespass, for entering upon the land of the plaintiffs and cutting down and carrying away certain trees and shrubs growing thereon, and doing other acts more particularly described in the declaration. It appeared that the acts complained of were done by the defendants acting under the order of April 23, 1894, passed by the proper authorities, purporting to lay out a public street over the locus; and it was not denied by the plaintiffs that in the construction of the street the acts were reasonably necessary. The plaintiffs contend that the order was "defective, in that no time was given in which to remove the walls, fences, and trees," and further that "even if it should be said that the lay-out was not invalid, in whole or in part, it was still the duty of the board," before entering upon the land, to give notice to the plaintiffs to remove the walls, fences, and trees, and that, since no such notice was given, the entry was a trespass. Upon the facts shown in this case, the board by which the order was passed had jurisdiction over the subject of the lay-out of the street, and even if the order was defective by reason of its failure to name the precise time within which the owner might remove the walls, fences, and trees, the validity of the order cannot for that reason be attacked collaterally. Certiorari is the only proper remedy. There is a difference in this respect between the proceedings of a town and those of a board like this. *Robbins v. Lexington*, 8 Cush. 292; *Taber v. New Bedford*, 135 Mass. 162; *Foley v. Haverhill*, 144 Mass. 352, 11 N. E. 554, and cases there cited. The order, therefore, must stand, and it furnishes a legal justification for such acts of the defendants as were reasonably necessary for the construction of the street.

Under the form of the report, it is not necessary to consider whether the fair construction of the order is, as claimed by the respondents, that the owner should have a reasonable time to remove his property, and that such time had elapsed before the defendants committed the acts complained of,

because, even if, by reason of lack of notice to remove, the plaintiffs were entitled to the value of the things removed, the damages for the loss are not recoverable in an action of tort, but they would form a part of the sum recoverable in a petition under the statute for damages occasioned by the laying out of the street. *White v. Foxborough*, 151 Mass. 28, 23 N. E. 652.

The ruling that upon all the evidence the plaintiffs were not entitled to recover was right, and, in accordance with the terms of the report, judgment is to be entered for the defendants. So ordered.

(184 Mass. 444)

GRAY v. CHASE et al.

(Supreme Judicial Court of Massachusetts. Suffolk. Nov. 25, 1903.)

FRAUDULENT CONVEYANCES—BANKRUPTCY—TRUSTEE—WHEN TITLE VESTS—DOWER—APPEAL.

1. Where one who has been insolvent for a long time, and has unsecured debts, conveys real estate without consideration, he is presumed to intend to hinder and delay his creditors, though no actual fraudulent intent be shown.

2. Where real property is conveyed without consideration, to prevent an attachment by a creditor, and the grantee executes a lease to the grantor's wife, but reserves no rent, and she pays taxes and interest on mortgages, it is immaterial that the grantee did not know the fraudulent purpose of the conveyance, and it should be set aside on suit by the trustee in bankruptcy of the grantor.

3. A decree against both the grantee in a fraudulent conveyance and his lessee with notice of the fraud, on suit of the trustee in bankruptcy of the grantor, for the difference between the rental value and sums paid by the lessee for taxes and interest on mortgages, is not objectionable as imposing a double liability, since both are discharged on payment by either.

4. A voluntary grantee in a fraudulent conveyance of real estate, though he has no knowledge of the fraud, is liable to the trustee in bankruptcy of the grantor, not only for the real estate, but also for the rents and profits he should have received from it.

5. Under Act July 1, 1898, c. 541, § 70a, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451], a trustee is vested with the title of the bankrupt as of the date he was adjudged a bankrupt; a subsequent clause in the section which mentions "property which, prior to the petition, he could by any means have transferred," referring merely to the class of property that passes.

6. In a suit by a trustee in bankruptcy to set aside a deed from the bankrupt (since deceased) to his wife, the filing by her of a suggestion of her husband's death, without any further action, is insufficient to entitle her to dower.

7. Where defendants, but not plaintiff, appealed in a suit which involved an accounting, he cannot, in the appellate court, raise the point that credits were erroneously allowed them.

Appeal from Superior Court, Suffolk County; Henry K. Braley, Judge.

Bill in equity by one Gray against Irene Chase and others. From a decree in favor of the plaintiff, defendants appeal. Affirmed.

¶ 1. See *Fraudulent Conveyances*, vol. 24, Cent. Dig. § 188.

H. J. Jaquith, for appellants. Richard D. Ware, for appellee.

LATHROP, J. This is a bill in equity, brought by the trustee in bankruptcy of the estate of Nathaniel E. Chase, who was adjudicated a bankrupt on his own petition on April 3, 1900, to have the defendants Irene Chase and Charles M. Chase ordered to deliver up certain conveyances and to release their rights in two parcels of land. There were other defendants, who are not now parties to the suit. The case was sent to an auditor, who made a report, which was amended by leave of court, and there were several supplemental reports of the auditor. The controversy relates to two parcels of land in Boston—one No. 4 Chestnut street; and the other formerly the rear part of the first parcel, and now the rear of No. 9 Walnut street. The auditor's report states many facts, some of which have now become immaterial. The other facts may be summarized thus: Nathaniel E. Chase bought the house numbered 4 Chestnut street for the sum of \$19,500, of which \$16,500 was paid by a mortgage given by him to his vendor, and the remaining \$3,000 was paid by a check of his wife's, she having money of her own. Subsequently Nathaniel E. Chase made several mortgages, all of which have been found to be valid. One of these, for \$10,000, was to a third person, who held it for the benefit of Mrs. Chase on account of the \$3,000 advanced by her for the purchase of the house and for other advances subsequently made. In this state of affairs, on December 16, 1897, the rear of the lot No. 4 Chestnut street was conveyed by Nathaniel E. Chase to a third person, who conveyed it to Mrs. Chase. Neither the third person nor Mrs. Chase paid any consideration for it. Mrs. Chase at this time had agreed to purchase the lot of land No. 9 Walnut street, and desired to have the rear portion of the Chestnut street lot, which adjoined the lot No. 9 Walnut street, annexed to the latter estate. Releases were obtained from the holders of the first and second mortgages on the rear portion of the Chestnut street lot, and two mortgages held by Mrs. Chase were canceled (the \$10,000 mortgage being afterwards given in their place). The parcel was then conveyed by Mr. Chase to one Reynolds, to whom the lot No. 9 Walnut street was also conveyed by its owners. Reynolds conveyed the two parcels to Mrs. Chase, who thereupon gave a mortgage on the same to one Chamberlain for \$16,000, which mortgage is still outstanding. The auditor found that Mr. Chase received no consideration for his conveyance to Reynolds. The auditor further found that there was no evidence that this conveyance was made by Mr. Chase or accepted by his wife with any fraudulent intent, or for the purpose of hindering or defrauding creditors. On or about February 26, 1898, Mr. Chase conveyed his equity in the estate No. 4

Chestnut street, subject to the mortgages thereon, then amounting to \$25,000, to Edwin M. White, by a deed in which Mrs. Chase did not release dower. No consideration was paid for this conveyance, and the auditor has found that the property was not transferred in good faith, but to prevent its attachment by creditors of Mr. Chase. After this conveyance, a paper in the nature of a lease was made by White to Mrs. Chase, who has continued ever since to occupy the house as she did before, paying no rent, but paying interest on the mortgages, taxes, and other expenses of carrying the property. The auditor further found that the real purpose of the conveyance to White was to prevent its attachment in a threatened suit by the executrix of an attorney at law who had a claim for professional services against Mr. Chase at the time the conveyance to White was made, but that there was no direct evidence that this specific purpose was known to White at the time. In his supplemental report the auditor found that the actual rental value of the estate No. 4 Chestnut street is \$1,500. He also annexed a copy of the paper signed by White, dated March 25, 1898, in which he stated that he, as owner of the estate No. 4 Chestnut street, accepted Mrs. Chase as his tenant at will, she to pay as rent the taxes levied or assessed on the premises, and the interest as it became due on three mortgages of \$14,000, \$1,000, and \$10,000, which were secured on the premises, and all interest that should accrue upon said mortgages, to the end of her tenancy, and to do all necessary repairs.

The case was then heard before the chief justice of the superior court upon the auditor's report and certain exhibits and agreed facts which are unimportant. The chief justice made a memorandum of his findings, which was afterwards incorporated in an interlocutory decree filed February 12, 1902. By the terms of this decree it was ordered that the defendant White should release to the plaintiff the premises described in the bill and known as No. 4 Chestnut street, as conveyed to him by the deed of February 28, 1898, and that he make, execute, and deliver to the plaintiff a deed of the same; that Mrs. Chase make, execute, and deliver to the plaintiff a good and sufficient release of all her right, title, and interest in the real estate conveyed to her by Charles D. Reynolds, being the original rear part of No. 4 Chestnut street; that White account to the plaintiff for what should have been received for rent and use and occupation of the premises No. 4 Chestnut street at the rate of \$1,500 a year from April 1, 1900, up to the present time, so far as the same is in excess of the sum actually paid by Mrs. Chase during that time for taxes, interest, and necessary repairs on the estate; that Mrs. Chase account to the plaintiff for rent, use, and occupation of the estate No. 4 Chestnut street at the rate of \$1,500 a year from April 1, 1900, to the pres-

ent time, less sums actually paid by her during that time for taxes; and that the cause be recommitted to the auditor to state the accounts between the parties, and the amounts for which the defendants should severally be charged. On March 5, 1902, the defendants appealed from this decree.

On January 24, 1902, Mrs. Chase filed a paper suggesting the death of her husband, and stating that her right of dower was now vested. No action appears to have been taken on this suggestion, nor does the matter appear to have been called to the attention of the court. Subsequently the auditor filed a report under the interlocutory decree, and this was not considered by the court as satisfactory. The case was recommitted to the auditor, who found a balance due from Mrs. Chase of \$869.29, being the difference between the rent due from her and the interest paid on the first and second mortgages, taxes, and repairs. He also found that Mr. White was liable for the same amount, based on the same figures. The case was again heard, and a final decree was entered, by which, "in addition to said interlocutory decree of February 12, 1902," the defendants Mrs. Chase and Mr. White were severally ordered to pay the sum of \$869.29, with costs, within 30 days. From this decree the defendants appealed.

Why an auditor, instead of a master, was appointed in this case there is nothing in the record to show, and it may be that technically his report should be treated as that of a master (*Falmouth v. Falmouth Water Co.*, 180 Mass. 325, 62 N. E. 255), and that, so treated, nothing is open, unless an exception in regard to it is filed to the report (*Popple v. Day*, 123 Mass. 520; *Roosa v. Davis*, 175 Mass. 117, 55 N. E. 809). It appears from the memorandum of the chief justice of the superior court that there were exceptions filed to the first report, which were waived. No other exceptions appear to have been filed, nor were any requests for rulings made. But as the sending of the case to an auditor, instead of a master, was the act of the court, and not of the parties, we are disposed to treat the case more liberally, and to decide it upon its merits, though we do not intend to have our action in so doing considered as a precedent for the future.

1. The first question arises in regard to the parcel of land at the rear of No. 4 Chestnut street, which was annexed to the Walnut street estate, and which was conveyed by Mr. Chase to his wife through a third person. The auditor has found that Mr. Chase received no consideration for the conveyance, but that there was no evidence that this conveyance was made by him or accepted by her with any actually fraudulent intent, or for the purpose of delaying or hindering creditors. This finding of the auditor was not followed by the chief justice of the superior court. In *Livingston v. Hammond*, 162 Mass. 375, 376, 38 N. E. 908, where a case was

heard by a judge of the superior court without a jury, and the only evidence was an auditor's report, it was said by Mr. Justice Knowlton: "The judge was not obliged to accept the conclusions of the auditor upon the facts stated in the report, but might consider all the facts in their relation to one another, and draw any proper inferences from them, and reach any conclusion that they would warrant." In the case before us Mr. Chase was insolvent, and had been so for many years. The conveyance was without consideration, and he was heavily indebted. The auditor drew the inference that the conveyance was not to delay and defraud creditors. The chief justice of the superior court drew the opposite inference, and we cannot say, on a review of the facts, that he was wrong. The husband received no advantage from the conveyance. His indebtedness was not diminished, and he received nothing. His wife gave him nothing, and suffered nothing, and incurred no liability as a consideration for his transfer. Her arrangements with third persons to make her husband's conveyance more valuable to her has nothing to do with the subject of consideration between her husband as grantor and herself as grantee. The case therefore falls within the ordinary rule that one who is deeply in debt, and especially when he is insolvent, and who makes a voluntary conveyance which takes property away from his creditors, is presumed to intend the natural consequences of his act, which is to hinder and delay his creditors. The effect of the transaction was to put the lot into his wife's hands, and to leave the indebtedness unpaid, the mortgage debts with less security, and two other debts with no security.

2. The next question relates to the transfer of the equity of redemption by Mr. Chase to the defendant White of the property No. 4 Chestnut street. The auditor has found that the real purpose of the conveyance was to prevent the attachment by the executrix of a creditor on whose claim judgment had been obtained. The fact found by the auditor that there was no direct evidence that the specific purpose of the conveyance was known at the time to White was immaterial. He was not a bona fide purchaser for value, and there is enough in the report to warrant the chief justice of the superior court in directing a release of this equity from White.

3. The next question relates to the accounts. The defendant contends that the final decree imposes a double liability upon White and Mrs. Chase for \$869.29—that is, that each must pay this amount—and is wrong; but we do not understand that this is the meaning and effect of the decree. The justice of the superior court evidently considered both as wrongdoers, and ordered a decree against both, but as, in an action at law against two wrongdoers, satisfaction of

a judgment against one is all that the plaintiff is entitled to (*Corey v. Havener*, 182 Mass. 250, 65 N. E. 69), so in equity a payment by one would discharge the other.

4. The principal objection raised by the defendants on the accounts is in charging White with the amount which he should have received as rent and for use and occupation of the estate from April 1, 1900, to the date of the interlocutory decree, February 12, 1902. Treating White as a fraudulent grantee, there can be no doubt that he should be held liable. He was a mere volunteer, and a wrongdoer, and should be held to account for all which might have been made from the premises. 1 Story, Eq. Jur. (12th Ed.) 514a. See, also, *Hubbell v. Currier*, 10 Allen, 333; *Jones v. Reeder*, 22 Ind. 111; *Thompson v. Bickford*, 19 Minn. 17 (Gil. 1); *Hack v. Norris*, 46 Mich. 587, 10 N. W. 104. Treating Mrs. Chase as a fraudulent grantee, we see no reason why she also should not be charged with the rent which she should have paid. By the adjudication in bankruptcy the title to the property vested in the trustee, the lease from White to her ceased, and she became a tenant at sufferance of the trustee. See *Bunton v. Richardson*, 10 Allen, 260.

5. The memorandum of the chief justice of the superior court directed the accounting to begin from the adjudication in bankruptcy of Chase. It is stated in the auditor's report that Chase was adjudicated a bankrupt on his own petition April 3, 1900. The interlocutory decree of February 12, 1902, directed the accounting to begin from April 1, 1900, and the accounting was so made. There would seem to be some error in the date stated by the auditor, or it may be that it appeared, when the interlocutory decree was signed, that the petition was filed by Chase on April 1st, and that that was taken as the date on which the accounting was to begin. Two of the clauses of section 70a of the bankruptcy law of July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451], read as follows: "The trustee of the estate of a bankrupt, upon his appointment and qualification, * * * shall * * * be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt," and "property which prior to the filing of the petition he could by any means have transferred, or which might have been levied upon and sold under judicial process against him." It is generally considered that the first clause refers to the date when the property passes, and that the latter clause refers to what passes. In *re Harris*, 2 Am. Bankr. R. 359; In *re Barrow* (D. C.) 3 Am. Bankr. R. 414, 98 Fed. 582; In *re Pease*, 4 Am. Bankr. R. 578; In *re Burka* (D. C.) 5 Am. Bankr. R. 12, 104 Fed. 326; In *re Elmira Steel Co.* (D. C.) 5 Am. Bankr. R. 484, 109 Fed. 456; *Collier on Bankruptcy* (3d Ed.) 456; *Id.* (4th Ed.) 510, and cases cited; *Lowell on Bankruptcy*, 508. While there may be some error

of fact on this point in the case before us, enough does not appear to show that there was any error of law, or to enable us to correct any error of fact.

6. It is argued that pending the litigation Mr. Chase has died, and Mrs. Chase is now, as against the plaintiff, entitled to dower in the premises. There was a suggestion of his death filed in the superior court, but it does not appear that anything more was done. There was no amendment of the answer of Mrs. Chase, nor does it appear that the matter was in any way called to the attention of the court. It is settled that a suggestion of insolvency or bankruptcy is not enough. *Dunbar v. Baker*, 104 Mass. 211; *Holland v. Martin*, 123 Mass. 278; *Dalton-Ingersoll Co. v. Fiske*, 175 Mass. 15, 55 N. E. 468. The same rule applies to the death of a party. *Reid v. Holmes*, 127 Mass. 326. Furthermore, nothing appears to have been done in relation to Mrs. Chase's dower, and we are not called upon to determine whether Mrs. Chase is entitled to dower as against the plaintiff. Such a question is not properly before us.

7. There are several other points taken in the defendants' brief, but none of them seems to require further consideration.

8. The plaintiff did not appeal, but contends that no credit whatever should have been allowed the defendants. We are of opinion that this point is not open to him. It was open to him to contest any point made by the defendants on their appeal, but beyond that he could not go unless he also appealed.

Decree affirmed.

(184 Mass. 399)

MELLEN v. OLD COLONY ST. RY. CO.

(Supreme Judicial Court of Massachusetts.
Bristol. Nov. 25, 1903.)

STREET RAILROADS—INJURY TO CHILD—NEGLIGENCE OF PARENTS—QUESTIONS FOR JURY.

1. In an action against a street railway company for an injury to a child through the negligence of the company, the question whether the father exercised due care in permitting the child to go into the yard, which was inclosed, to play, from whence she went into the street, was for the jury.

2. A child of three years was permitted by her father to go into the yard to play with an older sister of 9 years and a neighbor's child aged 10. The yard was inclosed, and the gate was kept closed. After going into the yard, the children wandered into the street, and the younger child was struck by a street car. *Held*, that it was for the jury whether the child was under the charge of her older sister after they left the yard and went on the street.

Exceptions from Superior Court, Bristol County; F. Lawton, Judge.

Action by Esther Mellen, by next friend, Michael Mellen, against the Old Colony Street Railway Company. Judgment for plaintiff.

¶ 1. See Negligence, vol. 37, Cent. Dig. § 352.

and defendant brings exceptions. Exceptions overruled.

J. W. & Chas. R. Cummings, for plaintiff.
J. M. Swift, for defendant.

LORING, J. This is a case in which the father of a family of six children allowed the plaintiff, a child of 3 years and 3 months, to go into the yard to play with her older sister, aged 9 years and 9 months, and with the daughter of a neighbor, aged 10. The father lived in a tenement to which was attached a large, roomy yard, shut in by a gate, which was kept closed by a strong spring. On the day in question he was at home, tapping the shoes of one of the children, and his wife was nursing the baby. After going into the yard to play, the children wandered off into the street, and the plaintiff was run over by a car of the defendant while she was crossing Bedford street on her way home. The defendant asked the presiding judge to order a verdict for it "on the ground that there was not sufficient evidence to go to the jury of due care on the part of Katie Mellen, the person who defendant claims had the plaintiff in charge at the time of the accident." This was refused. The case was submitted to the jury under suitable instructions, to which no exception was taken, and which are not set forth in the bill of exceptions.

We are of opinion that it was at least a question for the jury whether, in the first place, the father exercised due care in letting the plaintiff play in the yard, and whether, in the second place, the plaintiff was under the charge of her older sister after they left the yard and went upon the street. Of the first question there can be no doubt. In this case the yard was closed by a gate, and in that respect differs from *Cotter v. Lynn & Boston Railroad*, 180 Mass. 145, 61 N. E. 818, 91 Am. St. Rep. 267, and comes within *Powers v. Quincy & Boston Street Railway*, 163 Mass. 5, 39 N. E. 345. In addition, the plaintiff was put under the charge of her older sister while playing in the yard, and so the case is within cases like *Mulligan v. Curtis*, 100 Mass. 512, 97 Am. Dec. 121, and *Collins v. South Boston Railroad*, 142 Mass. 301, 7 N. E. 856, 56 Am. Rep. 675. The father testified that when the neighbor's daughter came in and asked the older sister to go and play, he said, "You take Essie [the plaintiff] with you," "and go right in the yard and play." When the three children left the yard, it was at least a question for the jury whether the plaintiff continued to be under the charge of her older sister, or was in the position of a child who has got out on the street without fault on the part of its parents, and whose rights depend upon the exercise by it of that care which may reasonably be expected from children of its age; as in *Slattery v. O'Connell*, 153 Mass. 94, 26 N. E. 430, 10 L. R. A. 653; *Butler v. New York, New Haven & Hartford Railroad*, 177

Mass. 191, 58 N. E. 592; *O'Brien v. Hudner*, 182 Mass. 381, 65 N. E. 788. Whether the plaintiff continued to be under the charge of her sister when the children left the yard depends upon this: Did the father put the plaintiff under the charge of the older sister for the afternoon, with an injunction to stay in the yard, or was she allowed to play in the yard under the charge of the older sister? It was at least a question for the jury which was the true nature of the permission that the father gave. If the plaintiff's rights depended on the exercise by her of the care which may reasonably be expected from a child of her age, there was evidence for the jury that the plaintiff exercised due care. For these reasons we are of opinion that the plaintiff had a right to go to the jury on this ground, and for that reason the ruling requested was rightly refused. Exceptions overruled.

(184 Mass. 368)

MORRIS v. BOSTON & M. R. R.

(Supreme Judicial Court of Massachusetts.
Worcester. Nov. 25, 1903.)

RAILROADS—PERSONAL INJURIES—WORKMAN ON TRACK—FAILURE TO LOOK AND LISTEN—CONTRIBUTORY NEGLIGENCE.

1. In an action by a section hand run into by a wild engine pushing a snowplow, held, that plaintiff was not in the exercise of due care.

Exceptions from Superior Court, Worcester County; B. Stevens, Judge.

Action by one Morris against the Boston & Maine Railroad. There was judgment for plaintiff, and defendant brings exceptions. Exceptions sustained.

Jas. E. & Jos. W. McConnell, for plaintiff.
Chas. M. Thayer and J. Otis Sibley, for defendant.

LORING, J. This is an action brought by a section hand run into by a wild engine pushing a snowplow. It was the plaintiff's duty to clear out a switch the day after the heaviest snowstorm of the year—a storm which left the snow "waist high all over the tracks." The switch in question was east of Wachusett Station. Going west from the switch, the place of the accident, Wachusett Station was about 200 yards distant, on the right side of the track; and a little west of the station was a sharp curve, also on the right. About 4 o'clock in the afternoon of the day after the storm, the plaintiff began to clear this switch for the second time that day. The switch led from the east-bound track to a side track running parallel with it, and re-entering the east-bound track beyond Wachusett Station. There was no cross-over to the west-bound track at this point. The switch led from the side track to the east-bound track, and ended there. The plaintiff testified, and the jury were warranted in finding, that the snow lay three feet deep "in between the west and east

bound track, and about the same on both sides"; that "the snow was piled high alongside of the track," and in the center "between the tracks." It was not snowing at the time, but the wind was blowing very hard, "and the snow was drifting so that it was blinding, almost, so that you could hardly see." The point in question was on an embankment where the wind had a clean sweep. Soon after the plaintiff went to work a west-bound freight train passed, and the guard on the cowcatcher was throwing the snow to such a distance that the plaintiff not only got off the west-bound track, but crossed over to the other side of the east-bound track to let it go by. After this train passed, the plaintiff looked each way, and continued digging snow; standing between the east-bound and west-bound tracks, bending over, with his back to the west, and looking to the east. The reason given by him for this was that he could see some 100 yards only; that against trains running west he had no protection, and against trains running east he relied on the whistle and the bell, which he knew were called for by the rules of the company. Only a moment after he looked both ways, the engine with the snowplow came round the curve without sounding the whistle or ringing the bell, coasting down a grade of 60 feet to the mile, with steam shut off; and he was struck by it, or by the snow it threw off. It appeared that the foreman had told the plaintiff, with other employes, the day before the accident, to look out for themselves and keep out of the way of trains, and that a fellow workman had given him the same warning that afternoon.

The defendant asked the presiding judge to order a verdict for the defendant on the ground that the plaintiff was not in the exercise of due care. This was refused, and a verdict was found for the plaintiff. We are of opinion that the defendant's exceptions to the refusal to give that ruling must be sustained. By the nature of his employment, a section hand on a steam railroad must look out for passing trains, and such is the settled law of the commonwealth. *Shepard v. Boston & Maine Railroad*, 158 Mass. 174, 33 N. E. 508; *Lynch v. Boston & Albany Railroad*, 159 Mass. 536, 34 N. E. 1072; *St. Jean v. Boston & Maine Railroad*, 170 Mass. 213, 48 N. E. 1088; *Jean v. Boston & Maine Railroad*, 181 Mass. 197, 63 N. E. 399; *Dolphin v. New York, New Haven & Hartford Railroad*, 182 Mass. 509, 65 N. E. 820. See, also, *Shea v. Boston & Maine Railroad*, 154 Mass. 31, 27 N. E. 672. The rule of law is the same elsewhere. *Aerkfetz v. Humphreys*, 145 U. S. 418, 12 Sup. Ct. 835, 36 L. Ed. 758; *Pennsylvania Railroad v. Wachter*, 60 Md. 395; *Carlson v. Cincinnati, Saginaw & Mackinaw Railroad*, 120 Mich. 481, 79 N. W. 688. This was enforced in the case at bar by rules 26 and 739 of the defendant railroad, and by a caution to that effect given to the plaintiff by his foreman the day before the accident, and by

a fellow workman on the very day in question.

The plaintiff, however, contends that the jury were warranted in finding for him; that they were warranted in finding that his work was such that he had to stand between the tracks, and to turn his back to a train coming on the east-bound track; that he had a right to rely on the whistle and the bell required by rules 95b and 705 to warn him of a train on that track, and, if not, he used his eyes so far as his work admitted of his doing so. We are of opinion that the plaintiff is right in his contention that the evidence warranted a finding that he had to stand between the two tracks. But we are of opinion that he was bound to look for trains coming from the west as well as for trains coming from the east. We see no reason why the plaintiff could not have stood at a right angle to both tracks, in place of facing the west-bound track and turning his back on the east-bound. If he had done so, he could have kept an eye out for trains coming in either direction. Rules 705 and 95b were not made for the protection of sectionmen, and he had not the right to rely on them that he would have had if they had been imposed as a duty on those in charge of the train, to be performed for his benefit. The most that can be said of the rules requiring a wild train to whistle before a curve, and requiring all trains to ring the bell on passing a station, is that they are "admissions of what precautions are proper, and so far as they may have led those to whom they were committed to expect conduct in accordance with them," as was said in *Shepard v. Boston & Maine Railroad*, 158 Mass. 174, 33 N. E. 508. But it is settled that they did not excuse the plaintiff from using his eyes. *St. Jean v. Boston & Maine Railroad*, 170 Mass. 213, 48 N. E. 1088. See, also, in this connection, *Wheelwright v. Boston & Albany Railroad*, 135 Mass. 225; *Sullivan v. Fitchburg Railroad*, 161 Mass. 125, 36 N. E. 751; *Davis v. New York, New Haven & Hartford Railroad*, 159 Mass. 532, 535, 34 N. E. 1070. It is also settled that the fact that the plaintiff had to bend over to do his work did not excuse him from using his eyes. *Lynch v. Boston & Albany Railroad*, 159 Mass. 536, 34 N. E. 1072; *St. Jean v. Boston & Maine Railroad*, 170 Mass. 213, 48 N. E. 1088. The plaintiff was not entitled to go to the jury on the issue that he exercised due care in using his eyes. He testified that he looked both ways just a moment before he was struck. Whatever "just a moment" might be found by a jury to mean under other circumstances, it could not be found to mean that the plaintiff looked in time to see the snowplow coming from around the curve just west of Wachusett Station, or after it came round the curve. There was no evidence at the trial as to the speed at which the snowplow was coming. The plaintiff cannot be taken to have looked at the time he ought to have looked.

The plaintiff has placed great reliance on *Murran v. Chicago, Milwaukee & St. Paul Railway*, 86 Minn. 470, 90 N. W. 1056. The question of the plaintiff's due care in that case depended upon whether the plaintiff was excused from using his eyes by the presence of a third person on whom he had a right to rely for warning, as was the case in *Davis v. New York, New Haven & Hartford Railroad*, 159 Mass. 532, 34 N. E. 1070. In the case at bar he was relying on a warning from the wild engine, and on that alone.

Exceptions sustained.

(161 Ind. 891)

VENEZIANA v. MORRISSEY.

(Supreme Court of Indiana. Nov. 5, 1903.)

APPEAL—RECORD—BILL OF EXCEPTIONS—SIGNATURE—FILING.

1. Under Burns' Rev. St. 1901, § 641 (Rev. St. 1881, § 629; Horner's Rev. St. 1901, § 629), providing that bills of exceptions shall be filed after being signed by the judge, a bill of exceptions not showing that it was so filed after being signed forms no part of the record.

Appeal from Circuit Court, St. Joseph County; Andrew Anderson, Special Judge.

Action by Charles Veneziana against Andrew Morrissey. From a judgment for defendant, plaintiff appeals. Affirmed.

Charles A. Davey, for appellant. William Hoynes and Hubbard & Hubbard, for appellee.

MONKS, C. J. Appellant brought this action against appellee to recover damages for libel. The cause, on the motion of appellee, was dismissed by the court on May 9, 1902, as appellant claims, on account of the failure of appellant to file an undertaking to secure the costs, in compliance with the order of court made under section 598, Burns' Rev. St. 1901 (section 589, Rev. St. 1881; section 589, Horner's Rev. St. 1901). Several rulings of the trial court are assigned for error, and it is claimed by appellant that by these rulings he was denied the rights guaranteed by section 12 of article 1 of the Constitution of this state. Bills of exceptions, showing the rulings of the court challenged by the assignment of errors, have been embraced in the transcript; but, as there is nothing in the record showing that said bills of exceptions were ever filed with the clerk after they were signed by the judge, they form no part of the record, and cannot be considered. Section 641, Burns' Rev. St. 1901 (section 629, Rev. St. 1881; section 629, Horner's Rev. St. 1901); *Merrill v. State*, 156 Ind. 99, 103, 104, 59 N. E. 322, and cases cited; *Indiana, etc., Co. v. Lynch*, 145 Ind. 1, 3, 43 N. E. 934, and cases cited; *Louisville, etc., R. Co. v. Schmidt*, 147 Ind. 638, 652, 46 N. E. 344; *Makepeace v. Bronnenberg*, 146 Ind. 243, 249, 45 N. E. 336; *Ayres v. Armstrong*, 142 Ind. 262, 264, 41 N. E. 522, and cases cited; El-

lott's App. Proc. § 805; *Ewhank's Manual*, § 32. We are therefore compelled to hold that there is nothing in the record to sustain the errors assigned by appellant.

Judgment affirmed.

(161 Ind. 378)

PEELLE v. STATE.

(Supreme Court of Indiana. Nov. 4, 1903.)

FORCIBLE ENTRY—CRIMINAL LIABILITY—AFFIDAVIT—DESCRIPTION OF PREMISES—SUFFICIENCY—APPEAL—JURISDICTION—IMPOSITION OF FINE—EXCEPTIONS—STATUTES—TITLES.

1. Acts 1901, p. 57, c. 45 (Burns' Rev. St. 1901, §§ 4346-4346d) "concerning town officers," and relating to their election, conferring on the town clerk the powers of justices of the peace, and prescribing the procedure in trials before him, is not in conflict with Const. art. 4, § 19, providing that every act shall embrace but one subject, which must be expressed in the title.

2. In a prosecution under Burns' Rev. St. 1901, § 2055, for forcible entry on certain premises, an affidavit charging that accused unlawfully took possession of a certain dwelling house and land in a certain county, in the possession of a named owner, is sufficiently certain in the description of the premises.

3. Where all matters pertinent are admissible under a plea of not guilty, the sustaining of a demurrer to a special plea is harmless.

4. In a prosecution under Burns' Rev. St. 1901, § 2055, for forcible entry, it is not incumbent on the state to prove that the tenant dispossessed was in "rightful" possession of the premises, it being sufficient to show a "peaceable" possession.

5. An exception to the contents of a written charge is insufficient to present a question as to an oral statement made in connection with the charge.

6. An oral direction to the jury as to the form of their verdict is not improper, though request has been made for written instructions.

7. Under Burns' Rev. St. 1901, § 1706, providing that the justice of the peace shall have concurrent jurisdiction with the criminal court and circuit court to try and determine all cases of misdemeanor punishable by fine only, where a cause within the concurrent jurisdiction is tried before a justice, and appealed to the circuit court, the trial is de novo, and the circuit court is not limited, in the imposition of the fine, to the amount assessed by the justice.

Appeal from Circuit Court, Starke County; John C. Nye, Judge.

Henry H. Peelle was convicted of unlawfully taking possession of a certain dwelling house and lands, and he appeals. Affirmed.

Robbins & Pentecost, for appellant. C. W. Miller, Atty. Gen., L. G. Rothschild, C. C. Hadley, W. C. Geake, and E. D. Salisbury, for the State.

HADLEY, J. The transcript was filed in this appeal June 27, 1903, subsequent to the taking effect of the act of 1903 (Acts 1903, p. 280, c. 156) amendatory of section 7 of the act of 1901 (Acts 1901, p. 566); and, the appeal involving a constitutional question, the whole case is before us for decision.

An affidavit charging appellant with forcible entry, under section 2055, Burns' Rev.

* 1. See Appeal and Error, vol. 3, Cent. Dig. § 2402; Exceptions, Bill of, vol. 21, Cent. Dig. § 97.

* 4. See Forcible Entry and Detainer, vol. 22, Cent. Dig. § 192.

St. 1901, was filed before M. T. Hepner, clerk of the town of Knox. The venue was changed to a justice of the peace, before whom appellant was convicted, and appealed to the circuit court, where he was again convicted, and prosecutes a further appeal to this court.

The questions properly reserved and presented by the assignment are: (1) The constitutionality of the act approved February 28, 1901, concerning town officers (Acts 1901, p. 57); (2) the sufficiency of the affidavit; (3) the sufficiency of a special plea; (4) the correctness of certain instructions given and refused; (5) the validity of the judgment.

1. The first question has recently been decided by this court adversely to the appellant's contention. *B. & O. Ry. Co. v. Town of Whiting* (Oct. 6, 1903) 68 N. E. 266.

2. The affidavit upon which the prosecution was had is in these words: "That on November 15, 1902, at the county of Starke and state of Indiana, one Henry Peelle did then and there, violently, with menace, force, and arms, to wit, sledge, ax, and shotgun, and without authority of law, unlawfully take possession of a certain dwelling house and lands in said county situate, which said dwelling house and lands were then and there and theretofore in the lawful possession of one Albert Clark; contrary," etc. The objection made to the affidavit is its uncertainty in the description of the premises entered. This being a prosecution for a forcible entry, and restitution being neither demanded nor contemplated, the description of the premises is sufficient, under the rule declared in *Strong v. State*, 105 Ind. 1, 4 N. E. 293.

3. The motion to quash having been overruled, appellant filed what he terms a special plea setting forth with much detail and elaboration a history of the contract between the prosecuting witness and appellant, the nonperformance of the prosecuting witness, the liberality of appellant, and the motive that prompted the prosecution. The sustaining of the demurrer to this plea was at least harmless, since all matters pertinent to the case were admissible in evidence under the plea of not guilty.

4. Appellant complains of the giving of the second, fourth, and sixth instructions to the jury. The single objection urged to these instructions is common to all three, and is to the effect that it was incumbent upon the state to prove that the tenant dispossessed by the defendant had not only the peaceable, but the rightful, possession of the premises. The court, in charging the jury, limited the essential proof touching the prosecuting witnesses' occupancy to "peaceable possession," omitting the word "rightful," and this was correct. If the defendant had no right to enter, but did so by forcibly expelling one who had no lawful right, but was in the peaceable possession, the law denounces the act the same as if the possession had been rightful as well as peaceable. The action

of forcible entry or detainer cannot be employed, in either its civil or criminal form, to try the right or title to property. *Swailes v. State*, 4 Ind. 516; *Higgins v. State*, 7 Ind. 549; *Archey v. Knight*, 61 Ind. 311; *Vess v. State*, 93 Ind. 211. "In a prosecution of this kind," said the court, at page 218, in the last case cited, "the defendant can neither go into evidence to disprove the title of the complainant, nor to establish his own, as the question is not one of civil right, but of public concern, affecting the public peace. The offense, considered as an injury merely, is against the possession of the prosecuting witness, and not against his title." The instructions are in the record by bill of exceptions. At a proper time the defendant requested the court to instruct the jury in writing. It is shown that by the last instruction, being No. 11, the court directed the jury that if they found from all the evidence that the defendant was guilty as charged, beyond a reasonable doubt, they should find and return, in substance, this form of verdict: "We, the jury, find the defendant, Henry Peelle, guilty of the charge in the affidavit, and fix his punishment at a fine of — dollars. —, Foreman." It is noted in the bill that this instruction is indorsed on the margin as follows: "Excepted to April 1, 1903. *Robbins & Pentecost, Attys. for Defendants.*" The bill then proceeds: "That in giving instruction No. 11 the court, after reading the form of verdict as far as the words 'at a fine of,' stated orally to the jury these words, 'any sum not exceeding one thousand dollars.' That to the giving of instructions numbered 2, 4, 5, 6, 7, 8, and 11, the defendant at the time excepted, and noted his exceptions on the margin of the respective instructions excepted to." No complaint is made about the substance of instruction No. 11, but an effort is made to question the action of the court in stating to the jury orally the words above set out, after having been requested to instruct the jury in writing. He must fail in this, however, because there is nowhere within the pages of the record anything to show that the defendant excepted, or even objected, to the oral statement of the court. The exception noted is to the contents of the charge, and not to the method of giving a part of it. If the court did wrong, to the defendant's injury, he should have complained at the time, and given the court an opportunity to right it at a time when he could have done so. Besides, it has been held by this court that oral directions to the jury as to the form of their verdict, to reject evidence, to answer interrogatories, and the like, are not instructions, and not in violation of the court's duty, when under a request for written instructions. *Bradway v. Waddell*, 95 Ind. 170, 175; *Trentman v. Wiley*, 85 Ind. 33, 36; *McCallister v. Mount*, 73 Ind. 559, 566; *Stanley v. Sutherland*, 54 Ind. 339.

5. The fine assessed by the justice of the

peace was \$13, and that assessed by the jury in the circuit court was \$35, and appellant contends that the verdict is contrary to law, in this: that it being a prosecution begun before a justice, or, rather, before a town clerk, who had only the power of a justice of the peace, the circuit court had no jurisdiction on appeal to assess a greater fine than the justice might have assessed; the insistence being that as the justice possessed no jurisdiction under section 1706, Burns' Rev. St. 1901, to assess a punishment beyond a fine of \$25, the circuit court on appeal had no greater authority. We cannot agree with the appellant in his exposition of the statute. The question involved is not one of jurisdiction at all. The appellant having been charged with a misdemeanor punishable by fine only, the justice of the peace had concurrent jurisdiction with the criminal and circuit court to try it. Section 1706, *supra*. In such case the justice's right to try and determine, which constitutes jurisdiction, is just as complete as that of the circuit court; and, if it shall appear that a fine not exceeding \$25 is an adequate punishment, he may render final judgment and end the case, but, if the trial discloses that an adequate punishment will exceed \$25, the justice must so find, so determine, and hold the prisoner to bail for his appearance before another court, which has the same power to hear and determine, but larger power to punish. Section 1705, Burns' Rev. St. 1901. The limitation is not upon the justice's power to try, but upon his power to punish. This case does not belong to that class to which *Nace v. State*, 117 Ind. 114, 19 N. E. 729, and *Horton v. Sawyer*, 59 Ind. 587, belong, where the law provides that the minimum fine or judgment shall be greater than the justice has power to render. In this class of cases the trial of the justice would necessarily be a nullity, and hence it is held that he has no jurisdiction, and none is conferred upon the circuit court by appeal. The judgment in this case was rendered by a court of undoubted jurisdiction, and its appeal carried the case into the circuit court, there to be tried upon the original affidavit, it is true, but *de novo*, and in all other respects disposed of precisely as other like cases originating in the latter court, assessing whatever punishment is deemed just, within the limits of the statute. *Wisehart v. State*, 104 Ind. 407, 4 N. E. 156.

Judgment affirmed.

(161 Ind. 364)

MILBOURNE v. STATE ex rel. MILBOURNE.

(Supreme Court of Indiana. Nov. 3, 1903.)

HUSBAND AND WIFE—ABANDONMENT—ACTION BY WIFE FOR RECOVERY OF STATUTORY PENALTY—INSTRUCTIONS—CONSTRUCTION OF STATUTES—APPEAL—REVIEW.

1. In the absence of any statement of points, a mild suggestion of error in an instruction presents no question for review on appeal.

2. In an action under Burns' Rev. St. 1901, § 7298a, providing that any male person who, being at the time under or liable to a prosecution for seduction or bastardy, fraudulently marries the female who has been seduced, or who is the mother of the bastard child, with the intention of avoiding the prosecution, and who within two years thereafter abandons his wife or neglects to provide for her, etc., shall be liable to an action for the recovery of a penalty, an instruction that the evidence admitted tending to show the treatment of the husband by the wife might be considered by the jury, together with the other evidence in the case, in determining the relations existing between the husband and the wife, and, if the husband abandoned the wife, whether he had any sufficient cause therefor, was not erroneous, as informing the jury that the evidence could only be considered on the question whether he had any sufficient cause to abandon the wife.

3. The word "abandon," in Burns' Rev. St. 1901, § 7298a, providing that any male person, who, being at the time under or liable to a prosecution for seduction or bastardy, fraudulently enters into a marriage with the female who has been seduced, or who is the mother of the bastard child, with the intention of thereby avoiding such prosecution, and who, within two years after the marriage, shall abandon his wife, or cruelly or inhumanly mistreat his wife, or fail and neglect to reasonably provide for her support, shall be liable to a penalty, means a physical abandonment, and does not include a constructive abandonment.

Appeal from Circuit Court, Hancock County; E. W. Felt, Judge.

Action by the state, on the relation of Kate L. Milbourne, against Clarence R. Milbourne. From a judgment for plaintiff, defendant appeals. Certified from Appellate Court, under subdivision 1, § 1337, Burns' Rev. St. 1901. Affirmed.

Marsh & Cook, for appellant. James F. Reed and J. E. McCullough, for appellee.

GILLET, J. This is an action to recover a penalty under the act of March 8, 1895 (Acts 1895, p. 167, c. 78; section 7298a et seq., Burns' Rev. St. 1901). The cause was put at issue by a general denial, and there was a verdict and judgment for appellee. Appellant filed a motion for a new trial, which was overruled, and he reserved an exception. It is assigned as error that the court erred in overruling appellant's said motion. Appellant has not made any formal statement of his points, as required by rule 22 (55 N. E. v) of this court, but we gather from his brief that he questions the propriety of the action of the court below in giving instructions 6 and 7.

It is contended that the first of said instructions is erroneous, under the case of *Stanbrough v. Stanbrough*, 60 Ind. 275, wherein the following language is used: "Abandonment," in the sense in which it is used in the statute under which this proceeding was commenced, may be defined to be the act of willfully leaving the wife, with the intention of causing a palpable separation between the parties, and implies an actual desertion of the wife by the husband. To show, therefore, that a wife had to leave her husband for cause, does not make out

a case of abandonment by the husband, under this statute." The language above quoted was used in construing the act of March 7, 1857 (Acts 1857, p. 94; section 6984 et seq., Burns' Rev. St. 1901). The instruction in question informed the jury that certain acts on the part of the wife did not amount to an abandonment of her husband. There has been no attempt to bring the evidence into the record. We infer from the instruction that there was evidence tending to show that, prior to the abandonment charged by relatrix, she had done certain acts that it was claimed constituted an abandonment on her part. In instruction No. 5 the court, in substance, gave to the jury as the law the statement which we have quoted from *Stanbrough v. Stanbrough*, supra. It is objected by counsel for appellant that the two instructions relative to abandonment are in conflict, but they relate to different matters, and we think that such objection is not well taken.

It is further suggested as to instruction No. 6 that the trial court "sailed its judicial craft in dangerous shoals" when it informed the jury that, if they found that certain facts existed, the relatrix was justified in remaining away from the home of appellant's mother, where he had taken up his residence. While it may be possible that said instruction was erroneous in the statement that if such facts existed the wife was justified in refusing to follow her husband to the domicile of his mother, where he had taken up his abode, yet we feel, in the absence of any statement of points, that the mild suggestion of error above mentioned does not require us to consider the sufficiency of said instruction. The presumption is that the judgment below was right, and the burden is upon appellant to show otherwise. A mild and general suggestion of error is insufficient to shift upon the court a burden of showing error that in the first instance rests upon the party assailing the judgment. *Elliott*, Appellate Procedure, § 445.

Instruction No. 7 is as follows: "Evidence has been admitted tending to show the treatment of the defendant by the relatrix during his sickness while at the home of his mother, after their return from Kansas. This evidence may be considered by you, together with the other evidence in the case, in determining the conditions and relations existing at the time between the relatrix and defendant, and, if you find that the defendant abandoned the relatrix, then in determining whether he had any just and sufficient cause for so doing." It is contended, as appellant had a right to show as a defense that the relatrix had abandoned him, rather than that he had abandoned her, that the above instruction, in effect, informed the jury that they could consider such matters of evidence for one purpose only, namely, to determine whether he had any sufficient cause to abandon her. We have carefully

considered said instruction with reference to the point mentioned, and we do not think counsel's criticism of it is just. The instruction did not limit the right of the jury to consider such evidence for all legitimate purposes. The instruction was not erroneous. If a more definite instruction was desired, it should have been tendered.

This case has been certified to us by the Second Division of the Appellate Court, with a recommendation that we overrule the case of *Stanbrough v. Stanbrough*, supra, in respect to the language therein that we have above set out. Section 1 of the act under which this proceeding was brought reads as follows: "That any male person who being at the time under or liable to a prosecution, either civil or criminal, for seduction or bastardy, fraudulently enters into a marriage with the female who has been seduced or who is the mother of the bastard child, with the intention thereby to escape or avoid such prosecution or the consequences thereof, and who within two years after such marriage, shall abandon his wife, or who shall, within such time, cruelly or inhumanly mistreat such wife, or fail and neglect to make reasonable provision for her support, shall be liable to an action for the recovery of a penalty which shall in no case be less than two hundred dollars." The above section gives to the wife, whose husband has married her under the circumstances mentioned therein, a remedy by way of penalty if the husband has within the time fixed abandoned her, or cruelly and inhumanly treated her, or failed and neglected to make reasonable provision for her support. If cruel and inhuman treatment of such a wife completes the right of action, there is no occasion for holding that such treatment amounts to abandonment, if such conduct compels the wife to abandon her husband's domicile, since, if the relatrix would recover on the ground of cruel and inhuman treatment, she may draw such matter in issue by appropriate averments. However wholesome the doctrine may be in the abstract that is announced by said division of the Appellate Court, yet we are not persuaded, for the reason stated, that the Legislature used the word "abandon" in any other than its literal sense. In our judgment, the subsequent words of the statute negative the idea that the framers of the statute intended to include within the term "abandon" a mere constructive abandonment. This is not a case where the court is called upon to construe a statute liberally in order to advance the remedy, for it would seem that the remedy under the subsequent words of the statute is quite as broad as it is contended that it ought to be under the earlier words. Having reached the conclusion that the word "abandon," in the act under consideration, was used in the sense of physical abandonment, it appears to us that any opinion we might express concerning the correctness of the *Stanbrough* Case in the particular men-

tioned would be wholly gratuitous. For this reason, we decline to pass upon such question.

The judgment of the trial court is affirmed.

(161 Ind. 371)

DEANE et al. v. INDIANA MACADAM & CONSTRUCTION CO.

(Supreme Court of Indiana. Nov. 4, 1903.)

STREET IMPROVEMENTS—SPECIAL ASSESSMENTS—COMPLAINT—SUFFICIENCY—LOCATION OF IMPROVEMENT—DESCRIPTION—OPPORTUNITY FOR HEARING—PRACTICE—JOINT PLEADINGS.

1. A complaint in an action to collect an assessment for street improvements alleged that the trustees of the town of M. adopted a resolution for the improvement of A. street between First street and B. street, etc., and that when the contract was let defendants owned certain described real estate in said M., fronting upon such street. The assessment roll was made an exhibit, and contained a description of the improvement to the effect that it consisted in the improving of A. street from First street to B. street in the town of M. *Held*, that the complaint sufficiently showed what portion of the street was to be improved, and that it was within the corporate limits of the town of M.

2. In an action to collect a special assessment for street improvements it is not necessary for the complaint to show the depth and width of the improvement and the kind of material used, where the resolutions and ordinances and the contract and specifications fixing these particulars are referred to in the complaint.

3. The complaint in an action to collect a special assessment for street improvements alleged that a final estimate of the cost was made by the city engineer, which was filed with the town clerk, and showed the amounts which should be assessed against abutting lots; that the work was accepted by the board of trustees, and statutory notice of the hearing upon said assessments given; and that the board confirmed the report, etc. *Held* to sufficiently allege that the cost of the improvement was to be borne by the abutting property.

4. In an action to collect a special assessment for street improvements, an allegation in the complaint that the board of trustees "gave two weeks' notice in said public newspaper of general circulation printed and published in said town and the place when a hearing could be had before said board * * * upon the said assessments of benefits," etc., was sufficient to show that notice of the time and place of the hearing was given.

5. The statute relative to street improvements in towns and cities is not unconstitutional for the reason that no right of appeal was given in the case of towns while such right is given in cities.

6. The statute authorizing the assessment of the cost of a street improvement by the front-foot rule is not unconstitutional as a taking of property without due process of law.

7. A paragraph of a joint cross-complaint, which fails to state a cause of action in favor of both cross-complainants, is bad on demurrer.

8. Burns' Rev. St. 1901, § 4331, provides that the inspectors shall make a certified statement of the persons elected to fill the several offices in a town and file the same with the clerk of the circuit court within 10 days from the election, and that no ordinance of any board of trustees shall be valid until the provisions of this section are substantially complied with.

In an action to collect a special assessment for street improvements defendant by cross-complaint alleged that no certificate of the election of the persons acting as town trustees was at any time filed, and that their proceedings in the matter of the street improvement were therefore void. *Held*, that such defense was in the nature of a collateral attack, and not available as a defense.

9. On appeal by the property owner in an action to collect special assessments for street improvements, appellant's claim that there was an excessive allowance for attorney's fees cannot be considered where the evidence is not on the record, and there was no motion for a new trial on the ground of such error, nor any assignment of error covering the point in question.

Appeal from Circuit Court, Tippecanoe County; R. P. De Hart, Judge.

Action by the Indiana Macadam & Construction Company against John Deane and others. From a judgment for plaintiff, defendants Deane appeal. *Affirmed*.

Isaac N. Parsons and Thompson & Storms, for appellants. Foltz, Spittler & Kurrie, for appellee.

DOWLING, J. This is an action to collect an assessment and to enforce a lien against a lot owned by the appellant John Deane in the town of Monon for work done by the appellee in the improvement of a street. The proceedings for such improvement were under the act of March 6, 1891 (Acts 1891, p. 323, c. 118; Burns' Rev. St. 1894, §§ 4288-4294). A demurrer to the complaint for want of facts was overruled, and a joint demurrer of both appellants to the third paragraph of appellee's answer to the second paragraph of appellants' cross-complaint was carried back and sustained to the second paragraph of the cross-complaint. These rulings are assigned for error.

The first, second, and fourth objections taken to the complaint are that the description of the portion of the street alleged to have been improved is not sufficiently certain, and that it does not appear that such part of the street is within the town of Monon. The averments of the complaint in this connection are that on December 22, 1898, "the board of trustees of the town of Monon, by a vote of two-thirds of the members, adopted a declaratory resolution for the improvement of so much of Arch street as lies between the north line of First street and the south line of Broadway street by grading and macadamizing the said part of said street in accordance with the profile and specifications of said work; * * * that at the time the said contract was let and the said improvement was completed John Deane and Martha Deane were the owners in fee simple of the following described real estate, to wit, lot eighteen (18), Arch street, in Wilson's Addition to the said Monon, Indiana, which had a frontage of 60 feet upon that part of said street so improved." The assessment roll, which was properly made an exhibit and filed with the complaint, contained this description of the improvement: "A first and final

¶ 6. See Constitutional Law, vol. 10, Cent. Dig. § 871; Municipal Corporations, vol. 36, Cent. Dig. § 1113.

estimate for grading and draining and macadamizing Arch street from the north line of First street to the south line of Broadway street, in said town of Monon. * * * John Deane and Martha Deane, Wilson Addition, lot No. 18, Arch street, \$54.00." The averments of the complaint, without aid from the exhibit, make it sufficiently certain that the portion of Arch street between First and Broadway streets, improved under the ordinance, was within the corporate limits of the town of Monon, and that the lot owned by the appellants abutted upon the part of the street so improved. While exhibits cannot supply the place of necessary allegations in a pleading, they may add to the certainty of averments with which they are properly connected, and thereby relieve the pleading from the defect of uncertainty. In this case the copy of the assessment roll, which is the written instrument on which the appellee's claim is founded, removes all uncertainty regarding the location of the improvement.

The third point made against the complaint is that the depth and width of the improvement and the kind of material to be used are not specifically stated. It was not necessary that they should be. The resolutions and ordinances passed by the board, and the contract and specifications fixing these particulars, are referred to in the complaint by proper averments, and no more definite statement of these items was required. *Lewis v. Alberson*, 23 Ind. App. 147, 53 N. E. 1071; *Leeds v. Defrees*, 157 Ind. 392, 61 N. E. 930; *Pittsburgh, etc., R. Co. v. Hays*, 17 Ind. App. 261, 44 N. E. 375, 45 N. E. 675, 46 N. E. 597.

It is asserted on behalf of appellants, as a fifth objection, that the complaint contains no averment that the cost of the improvement was to be assessed against the abutting property. We find, however, that there is an allegation that a final estimate of the cost of the improvement was made by the city engineer; that this estimate was filed with the town clerk; that the estimate showed the amounts which should be assessed against the lots abutting upon the part of the street so improved; that the work was accepted as completed by the board of trustees; that they gave the notice prescribed by the statute of the hearing upon the said assessments of benefits; and that on October 12, 1899, the said board accepted and confirmed the said report, and the assessment of benefits so made against the several lots reported benefited, together with the amount of the cost of such improvement each lot should bear. These allegations plainly showed that the cost of the improvement was to be borne by the abutting property.

A sixth point made against the complaint was that it did not aver notice of the time and place when and where a hearing upon the report of the assessments against the abutting property would be given. The allegation of the complaint is that the board "gave two weeks' notice in said public news-

paper, of general circulation printed and published in said town, and the place, when a hearing could be had before the said board of trustees upon the said assessments of benefits as fixed by said engineer in his said report." Awkwardly constructed as the sentence undoubtedly is, it amounts to an averment that notice of the time and place of the hearing was given.

The last objection made to the complaint is that, so far as the act for the improvement of streets, *supra*, applies to towns, it is unconstitutional, for the reason that no right of appeal is given as in the case of similar improvements in cities, and that the assessment of the cost of the improvement by the front-foot rule is a taking of property for public use without due process of law. It is not necessary to the validity of such statutes that a right of appeal should be given. Notice to the property holder and a hearing are provided for, and this is all that is required. *Lake Erie, etc., R. Co. v. Watkins*, 157 Ind. 604, 605, 62 N. E. 443; *Sullivan v. Haug*, 82 Mich. 548, 46 N. W. 795, 10 L. R. A. 263; *McEneney v. Town of Sullivan*, 125 Ind. 407, 25 N. E. 540; Acts 1891, pp. 324, 325, c. 118, § 2; *Barber, etc., Co. v. Edgerton*, 125 Ind. 455, 25 N. E. 436.

The validity of the provision for the collection of the assessments against the property abutting upon the improvement has been recognized and declared in many cases, and the question must be regarded as settled. *Adams v. Shelbyville*, 154 Ind. 467, 57 N. E. 114, 49 L. R. A. 797, 77 Am. St. Rep. 484; *Taylor v. City of Crawfordsville*, 155 Ind. 403, 58 N. E. 490; *Martin v. Wills*, 157 Ind. 153, 60 N. E. 1021; *Leeds v. Defrees*, 157 Ind. 392, 61 N. E. 930.

The second paragraph of appellants' cross-complaint charged, in substance, that no certificate in the election of the persons acting as town trustees was at any time filed with the clerk of the White circuit court, and that, consequently, their proceedings in the matter of the improvement of said Arch street were void, under the provisions of the act of March 10, 1873 (Acts 1873, p. 218, c. 100, § 2; *Burns' Rev. St.* 1901, § 4331). That section contains, among other things, the following: "And it shall be the further duty of such inspectors to make a certified statement, over their own signatures, of the persons elected to fill the several offices in said town, and to file the same with the clerk of the circuit court in the county thereof, within ten days from the day of such election. And no act or ordinance of any Board of Trustees chosen at such election shall be valid until the provisions of this section are substantially complied with." To this paragraph a demurrer was sustained, and the appellants John Deane and Martha Deane jointly assign this ruling as error. The paragraph in question does not purport to state a cause of action in favor of the appellant Martha Deane. Its conclusion is: "Wherefore cross-complainant

demands judgment * * * for the cancellation of said lien, * * * for the quieting of the title of the said John Deane to said lot, * * * for the costs of this action, and for all other just and proper relief." As the second paragraph of the cross-complaint was a joint pleading, unless it stated facts sufficient to constitute a cause of action in both the cross-complainants therein it was bad on demurrer. *Brunson v. Henry*, 140 Ind. 455, 39 N. E. 256; *McIntosh v. Zaring*, 150 Ind. 301, 49 N. E. 164; *City of New Albany v. Llines*, 21 Ind. App. 380, 51 N. E. 346. We think, too, that the matters stated in said paragraph were in the nature of a collateral attack upon the proceedings of the town board, and for that reason were not available as a defense to this action. *Redden v. Town of Covington*, 29 Ind. 118; *Mullikin v. Bloomington*, 72 Ind. 161; *Willard v. Albertson*, 23 Ind. App. 164, 53 N. E. 1077, 54 N. E. 403; *Willard v. Albertson*, 23 Ind. App. 166, 53 N. E. 1078, 54 N. E. 446; *Elliott, Roads and Streets*, § 589.

It is pointed out by counsel for appellee that, while the exceptions of the appellants to the ruling on the demurrer which was sustained to this paragraph were several, the assignment of error is joint, and therefore not good as to either. While we are inclined to the opinion that this objection is fatal to the last-named assignment, we have considered the question presented, and have given the appellants the benefit of the assignment as if it had been well made.

By an additional brief appellants refer to what is deemed an excessive allowance for attorney's fees. The evidence is not in the record. There was no motion for a new trial on the ground that there was an error in the assessment of the amount of the recovery, nor any assignment of error under which this question could be examined. For these reasons we cannot pass upon it.

There being no available error in the record, the judgment is affirmed.

(32 Ind. App. 255)

**SOUTH BEND PULLEY CO. et al. v.
FIDELITY & DEPOSIT CO.
OF MARYLAND.**

(Appellate Court of Indiana, Division No. 1.
Nov. 6, 1903.)

On petition for rehearing. Petition overruled.

For former opinion, see 67 N. E. 269.

BLACK, J. We are requested by learned counsel for the appellant to set forth in full in our opinion on their petition for a rehearing the letter of Mr. Mullen, general agent of the appellee, of June 30, 1900, and the appellant's answer thereto, mentioned in our former opinion. The letter of Mr. Mullen, dated June 30, 1900, was addressed to the appellant, at South Bend, Ind., and signed by

Mr. Mullen as general agent, and the body thereof was as follows: "I wish to acknowledge receipt of your favor of the 18th, enclosing a copy of Mr. Phelps' letter of the 16th, and trust you will pardon my delay in replying to same, but sickness and inability to catch Mr. Phelps at his office has caused the same. I to-day saw Mr. Phelps and have ascertained that on yesterday he filed suit against us. I advised Mr. Phelps that I hardly thought this was necessary, as from your letter he could see that you were willing to settle the amount, less the amount of pulleys which had been disposed of since the litigation began, and for which they received payment. Mr. Phelps thereupon advised me he would take the matter up with Mr. Caldwell and ascertain what figure he would settle for and would advise me, and on receipt of this letter I will immediately advise you." The letter of Mr. Phelps of the 16th referred to above as inclosed in the letter of the appellant, was addressed to the appellant, and in the body thereof was as follows: "As requested, I send you herewith statement which has been furnished to Mr. Mullen, showing the amount due: \$1,187.59, amount of judgment, with interest thereon at six per cent. per annum, from the date of the judgment, viz.: from the 19th day of January, 1897; cost of the Jefferson Circuit Court, \$74.45; cost of the court of appeals, \$23.05. You will understand this is not a claim we are making, but it is the amount fixed by judgment and absolutely due under the bond. I trust you will make remittance on receipt of this, as my clients are complaining at me for delaying the matter. If you have any controversy with Caldwell & Co. about the amount of the pulleys, they are perfectly responsible and you can settle with them. I hope you will settle this matter at once, as I am not in a position where it can be longer delayed." The letter of the appellant to Mr. Mullen at Louisville, Ky., of June 18, 1900, was in the body thereof as follows: "I enclose letter just received from Mr. Phelps, from which you will see that the fellow Caldwell expects us to pay the full amount of the court judgment with interest and then take our chances of getting from him the amount of \$504.67, which is the value of the pulleys he has sold since he swore to the inventory in court. I write to advise you that we will not settle on any such basis and will resist to the last point any demand to collect that amount. We have sent you the invoice showing the amount as above; this checking was made by my son and Caldwell's warehouse man, at the time my son was to see you. We enclose letter just received from Phelps, and ask you to kindly return it as soon as you note contents." The answer of the appellant to Mr. Mullen, above mentioned, was dated July 2, 1900, and was in the body thereof as follows: "Your favor just received. We note what you say about action of Mr. Phelps, and we only have to say,

it will be a long time before we will pay on the basis of his demands. It is simply absurd to ask us to pay the judgment in full, when he has sold more than a third of the pulleys scheduled to return to us. When they present a proper offer of settlement, we will settle the matter, as we are anxious as they are to get rid of the disagreeable deal. Common sense, if there was no law, would tell any one that they would have to deduct from their bill such as they have sold, as they, as we understand the case, had no right to sell any without court permission, and, doing so, make the deficiency good to us. We have press copy of Caldwell's letter to Phelps in which he says he sold the pulleys because he was afraid the case would go against him. This would show that they were sold before the judgment was rendered; consequently, they are not entitled to interest on the balance of the account since the judgment was rendered. If they want to sue, we have no way to prevent it, but we will defend to the 'long limit,' against collection of more than the amount." After long correspondence, in which the prospective suit had been mentioned and threatened, the subject-matter of the suit being fully known to the appellant, it was definitely informed by Mr. Mullen, in his letter of June 30th, that he had ascertained that on the day previous Mr. Phelps had "filed suit against us." In answer to this the appellant wrote Mr. Mullen, July 2, 1900: "We note what you say about action of Mr. Phelps." Upon further consideration, we are constrained to adhere to the conclusion stated in our former opinion.

The petition for rehearing is overruled.

(33 Ind. App. 489)

KRATZ v. COOK.¹

(Appellate Court of Indiana, Division No. 1.
Nov. 6, 1903.)

APPEAL—CONCLUSIONS OF LAW—ASSIGNMENTS OF ERROR—AFFIRMANCE.

1. The court rendered a special finding of facts and conclusions of law, the second of which was that "on the foregoing facts, which I find to be true," the petition of plaintiff to require defendant administrator to inventory certain property "should be, and is hereby, dismissed at" plaintiff's costs. The court thereafter rendered a formal judgment of dismissal, and that the administrator recover costs and charges of plaintiff. *Held*, that since, though an assignment to such conclusion that the court erred in rendering judgment on the special findings in favor of defendant be sustained, and that part of the conclusion objected to be stricken, the remainder of the conclusion would require the rendition of the same judgment, it would be affirmed.

Appeal from Circuit Court, Huntington County; J. C. Brannan, Judge.

Objections by John H. Kratz to the approval of the inventory of Samuel E. Cook as administrator of the estate of Mary A. Kratz, deceased. From a judgment dismissing the objections, objector appeals. Affirmed.

68 N.E.—44

¹ Rehearing denied. Transfer to Supreme Court denied.

Kenner & Lucas, for appellant. C. W. Watkins and H. C. Morgan, for appellee.

BLACK, J. The appellant filed his written objection to the approval of the inventory of the estate of Mary A. Kratz, deceased, filed by the appellee as administrator thereof, and asked that the appellee be required to inventory certain specified articles alleged to be property of the decedent's estate. The appellee answered by a general denial, and the court trying the matter rendered a special finding of the facts, with conclusions of law. The appellant has discussed the second conclusion of law alone, under an assignment of error as follows: "The court erred in the second conclusion of law, in rendering judgment on the special findings in favor of the appellee." The second conclusion of law, to which this assignment is directed, was as follows: "My conclusion of law, on the foregoing facts, which I find to be true, is that the petition of John H. Kratz to require said administrator to inventory said property should be, and is hereby, dismissed at his costs." Afterward, a motion for a new trial having been overruled, the court formally rendered judgment of dismissal, and that the appellee recover his costs and charges of the appellant. The court, in its second conclusion of law, declared the petition of the appellant to be thereby dismissed at the appellant's costs, yet it afterward rendered a formal judgment upon the conclusions of law, and it is manifest that the second conclusion was not regarded or treated by the court as amounting to a judgment. The assignment of error discussed by counsel, which is the appellant's pleading in this court, and which must specifically point out the error of which the appellant desires to complain, is to the effect that the court erred in rendering judgment on the special findings in favor of the appellee in its second conclusion of law. If we should hold that in this respect the court did err in that conclusion of law, and should direct the court below to restate that conclusion, and in restating it to omit the portion thereof so objected to in the assignment of error, the remainder of the conclusion thus left unchanged would require the rendition of a judgment the same in effect as that from which this appeal has been taken, for the judgment must be in accordance with the court's conclusions of law upon the facts found and stated in the special finding.

We do not find any available error. Judgment affirmed.

(31 Ind. App. 595)

MULKY v. KARSELL et al.

(Appellate Court of Indiana. Nov. 5, 1903.)
VENDOR'S LIEN—ENFORCEMENT—RIGHT TO—SUBSEQUENT PURCHASER—NOTICE—COMPLAINT—SUFFICIENCY.

1. The right to a vendor's lien on the sale of real estate does not depend on the transfer of

a perfect legal title, nor on the conveyance to the person making the purchase.

2. The execution of a note for the unpaid price of real estate presupposes a conveyance.

3. Where, in a suit to enforce a vendor's lien, it is shown that real estate is sold and conveyed, and that the purchase money, or a part thereof, remains unpaid, the vendor is entitled to a vendor's lien.

4. The remedy for a defective statement in a complaint of a material fact is by motion to make more specific, and not by demurrer.

5. In a suit to have a vendor's lien declared, it is not necessary for plaintiff, in his complaint, to negative the existence of facts amounting to a waiver of the lien.

6. In a suit to have a vendor's lien declared, instituted against a subsequent purchaser, the complaint, which alleged a conveyance of the land to defendant, the then owner thereof, who had knowledge that plaintiff held unpaid notes given for the unpaid price of the land, and that the maker of the notes was insolvent, sufficiently charged defendant with notice of plaintiff's equity.

7. A general assignment of the evidence of the debt incurred for the purchase money of real estate carries with it the lien, and the assignee may thereafter enforce the same.

Appeal from Circuit Court, Monroe County; Wm. H. Martin, Judge.

Action by James B. Mulky against James Karsell and others. From a judgment for defendants, plaintiff appeals. Reversed.

R. A. Fulk, for appellant. J. B. Wilson and J. E. Henley, for appellees.

ROBY, J. To appellant's complaint seeking to have a vendor's lien declared, a demurrer for want of facts was sustained. He refused to plead further, a judgment was rendered against him for costs, and he appeals.

The pleading is extremely inartistic. It is therein averred that on May 8, 1890, the Bloomington Olite Stone Company executed its promissory note, payable nine months after date, for the sum of \$150, to the order of Robert Marshall; "that said money was given for the unpaid purchase money for lots 16, 23, and 24 in East & Marshall's addition to the city of Bloomington." It is further averred that said payee indorsed said note to plaintiff; that it is due and unpaid. The stone company is not a party to the action. It is averred to be insolvent, and to have no property subject to execution. It is not, in terms, stated that Marshall owned the lots, or that they were conveyed to the stone company. The substance of the facts relied upon, in so far as the right to the lien is involved, is that the note sued upon was given for the unpaid purchase price of the land described, and that it is due and unpaid.

The right of the vendor's lien does not depend upon the transfer of a perfect legal title. *Johns v. Sewell*, 33 Ind. 1; *Fleece v. O'Rear*,

83 Ind. 200. Nor is its conveyance to the person making the purchase essential thereto. *Fleece v. O'Rear*, supra; *Martin v. Cauble*, 72 Ind. 67; *Humphrey v. Thorn*, 63 Ind. 296; *Scott v. Edgar* (Ind. Sup.) 63 N. E. 452.

The execution of a note for the unpaid purchase price of real estate presupposes a conveyance. "It is unpaid purchase money that creates and sustains the lien." *Nichols v. Glover*, 41 Ind. 24; *Nutter v. Fauch*, 86 Ind. 451.

"When real estate is sold and conveyed, and the purchase money, or any part thereof, remains unpaid, when these facts are stated by the vendor he shows that he is entitled to and has the lien of a vendor, in equity, on such real estate, as a security for the payment of the unpaid purchase money." *Lord v. Wilcox*, 99 Ind. 491; *Fleece v. O'Rear*, 83 Ind. 200; *Scott v. Edgar* (Ind. Sup.) 63 N. E. 452.

The remedy for a defective statement in a complaint of a material fact is by motion to make more specific, and not by demurrer. *Frain v. Burgett*, 152 Ind. 55, 50 N. E. 873, 52 N. E. 395; *Ry. Co. v. Bates*, 146 Ind. 564, 45 N. E. 108; *Connersville v. Hydraulic Co.*, 86 Ind. 235.

It was not necessary to appellant's cause of action that he negative the existence of facts amounting to a waiver of the lien. *Lord v. Wilcox*, supra.

It was necessary, the action being brought against subsequent purchasers, to charge them with notice of appellant's alleged equity. *Richards v. McPherson*, 74 Ind. 158; *Gaar v. Millikan*, 68 Ind. 208. The averments made in that respect are as follows: "That thereafter said Collins & Karsell sold and conveyed each of said lots to the defendants Henleys, who now own the same, who also had full knowledge that said plaintiff held said note, and that the same was unpaid, and that the maker was insolvent, and that the same was given for the unpaid purchase money of said lots."

The general assignment of the evidence of the debt incurred for purchase money carries the lien with it, and the assignee may thereafter enforce the same. *Smith v. Mills*, 145 Ind. 334, 43 N. E. 564, 44 N. E. 362; *Felton v. Smith*, 84 Ind. 485; *Midland Ry. Co. v. Wilcox*, 122 Ind. 84, 91, 23 N. E. 506.

The facts stated were sufficient as against the demurrer.

The judgment is reversed and the cause is remanded, with instructions to overrule the demurrer to the complaint, and for further proceedings not inconsistent herewith.

ROBINSON, C. J., and HENLEY, BLACK, and WILEY, JJ., concur. COMSTOCK, J., absent.

¶ 4. See Pleading, vol. 39, Cent. Dig. § 409.

(34 Ind. App. 523)

INDIANA NATURAL GAS & OIL CO. v.
PIERCE.*(Appellate Court of Indiana, Division No. 1.
Nov. 4, 1903.)GAS AND OIL LEASE—RELATION OF PARTIES—
LANDLORD AND TENANT—TERMI-
NATION OF LEASE.

1. Where an oil and gas lease provided that the lessee might hold the premises for five years, or so long as oil or gas should be found in paying quantities, and that the lessee should commence operations within six months, or pay in lieu thereof \$80 per annum, no well having been drilled or possession taken, the contract was ineffective after five years.

2. Such a lease does not create the relation of landlord and tenant, and at the end of any year either party could terminate any rights under the instrument, in the absence of any possession taken by the lessee.

Appeal from Circuit Court, Grant County;
H. J. Paulus, Judge.

Suit by Drew B. Pierce against the Indiana Natural Gas & Oil Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

W. O. Johnson, Foster Davis, and Blackledge, Shirley & Wolf, for appellant. Manley & Strickler, R. T. St. John, and Wm. H. Charles, for appellee.

HENLEY, J. The only questions raised by the appeal in this case relate to the sufficiency of the various pleadings filed. Appellant's demurrer was overruled to both paragraphs of appellee's complaint. Appellee's demurrer was sustained to the answer of appellant. The second paragraph of complaint was plainly to quiet title, and as such was sufficient. It is not questioned on appeal. The first paragraph of complaint is insufficient as a complaint to quiet title, and whether it is sufficient as a complaint to cancel the lease therein referred to we need not decide, because it appears from the record that the judgment rendered does not exceed the relief prayed for, and to which appellee was entitled, by the second paragraph of his complaint, the sufficiency of which, as before stated is unquestioned. The amended answer of appellant shows by proper averments that appellant has complied in every particular with the terms of its contract, as evidenced by the lease which is made a part of the answer. If appellant has any rights in the real estate described, they grow out of this lease or contract, which was in the following words:

"Memorandum of Agreement, made and entered into this 14th day of December, A. D. 1888, between D. B. Pierce, of Grant County, State of Indiana, party of the first part, and T. Spellacy of Lime, Ohio, party of the second part,

"Witnesseth: That the said party of the first part, for and in consideration of the sum of one dollar to him in hand well and truly

paid, the receipt of which is hereby acknowledged, and in further consideration of the agreements hereinafter mentioned, agrees to lease, and by these presents has leased and granted the exclusive rights unto the party of the second part, for the purpose of drilling for petroleum and gas; also, the right to lay, maintain and remove lines of pipe over and across said lands for the conveyance and transportation of oil and gas, all that certain piece or parcel of land situated in Monroe Township, Grant County, and State of Indiana, bounded and described as follows, to-wit: North east $\frac{1}{4}$ of section 14, Town 24, Range 9, containing 160 acres more or less.

"The second party to have and hold the same premises for the above purpose only, for and during the term of five years from the date hereof, or as long as oil or gas shall be found in paying quantities.

"The party of the second part agrees to give the party of the first part the full and equal $\frac{1}{2}$ part of all the petroleum obtained and saved from the said premises, free of cost to first party, the $\frac{1}{2}$ of all cash received for oil sold from premises.

"The party of the first part is to fully use and enjoy said premises for farming purposes, except such parts as are actually necessary for said drilling and producing purposes and a right of way over and across said premises to the place or places of drilling and producing. The party of the second part to have the privileges of using sufficient water from the premises for the prosecution of said operations, but must not interfere with the water wells now on the premises.

"The party of the second part may at any time remove all machinery, fixtures and property placed upon said lands by second party.

"Should gas be found on said premises in greater quantities than is required for use on the premises the second party agrees to pay the first party the sum of One Hundred dollars each year in advance for every well from which the gas is used off the premises.

"The party of the second part further agrees to commence operations within six months from the date hereof, or in lieu thereof to pay the first party eighty dollars per annum.

"First party shall be entitled to enough gas free of cost to heat three stoves in residence where he now resides. Second party shall furnish 200 feet of pipe and lay the same to dwelling and shall connect two stoves with said pipe, and shall furnish regulator for same. First party shall use said gas at his own risk. When one well is completed on above premises, it shall stop the rental as above provided on 100 acres only.

"It is hereby mutually understood that this agreement shall extend to the heirs and assigns of both parties.

"A failure to comply with the above terms shall render it null and void."

This instrument was properly signed, ac-

*1. See Mines and Minerals, vol. 34, Cent. Dig. § 200.

*Rehearing denied, 73 N. E. 194.

knowledge, and recorded. Whatever rights the lessee, Spellacy, acquired under it, became the property of the appellant by written assignment and transfer. Appellant never took possession of the land under the lease for any purpose. It was optional with appellant whether a well should be drilled, and the consideration going to the landlord for a failure to drill was fixed at so much per year. No well having been drilled, and possession not having been taken, the contract was ineffective after five years. The only way it could have been made effective for a longer time than the term therein expressed, without a new or additional contract, arises under that part of the contract which gave the appellant the right to drill gas or oil wells, and thus prolong the lease "as long as oil or gas shall be found in paying quantities." This court has held in *Diamond Plate Glass Co. v. Curless*, 22 Ind. App. 346, 52 N. E. 782, and *Diamond Plate Glass Co. v. Echelbarger*, 24 Ind. App. 124, 55 N. E. 233, that under facts such as are presented by appellant's answer, the relation of landlord and tenant never existed between appellant and appellee, and that at the end of any year either party could terminate any rights granted or received under the instrument; the one by refusal to accept, and the other by refusing to pay the stipulated sum. Under the cases cited appellant's answer is insufficient.

Judgment affirmed.

(31 Ind. App. 575)

INDIANA NATURAL GAS & OIL CO. v. SEXTON.

(Appellate Court of Indiana, Division No. 1. Nov. 5, 1903.)

OIL LEASES—CANCELLATION—QUIETING TITLE—COMPLAINT—SUFFICIENCY.

1. Where a complaint for the cancellation of an oil lease showed on its face that the lease had expired before the action was brought, and there were no facts alleged showing title in plaintiff, or that defendant was claiming an interest in the land under the lease adverse to plaintiff, or that any claim of defendant was unfounded and was a cloud on plaintiff's title, the complaint was insufficient as a complaint to quiet title.

2. A complaint for the cancellation of an oil lease on the ground that defendants had never attempted to use the property for the purposes intended, but failing to allege that plaintiff was the owner of the land affected by the lease, was demurrable.

Appeal from Circuit Court, Grant County; H. J. Paulus, Judge.

Action by Edmund G. Sexton against the Indiana Natural Gas & Oil Company. From a judgment overruling a demurrer to the complaint, defendant appeals. Reversed.

W. O. Johnson, Foster Davis, and Blackledge, Shirley & Wolf, for appellant. W. D. Lett and W. E. Haisley, for appellee.

HENLEY, J. The complaint in this case was attacked by demurrer. The trial court

held the complaint sufficient. Its averments were substantially as follows: That appellant is a corporation; that appellee, on the 21st day of May, 1889, leased to one Edmund H. Ford, by an instrument in writing, a copy of which is filed as an exhibit, certain real estate in Grant county, Ind., which lease was for the express term of five years from the date of the lease, and was for the purpose of giving the lessee the right to drill and operate for gas and oil; that this lease was recorded on the 26th day of June, 1889, in the recorder's office of Grant county, in Miscellaneous Record No. 6, on pages 221, 222; that in May, 1889, the said Ford assigned his interest in said lease to the Silurian Gas & Oil Company; that on the 29th day of September, 1890, the Silurian Gas & Oil Company assigned its interest in said lease to the appellant; that neither appellant nor any one under whom it claims title ever took possession of said premises under said lease, and have not at any time since the execution of the lease operated or attempted to operate for gas or oil or for any purpose whatever; that appellee has demanded of appellant that it enter a release of said lease of record, which appellant has refused to do, "and still claims and asserts some interest therein." The prayer of the complaint is that appellee have judgment in the sum of \$100; that the lease be declared of no force or effect, and that it be released of record, and that a commissioner be appointed to release it, and for all other proper, legal, and equitable relief.

The complaint is insufficient as a complaint to quiet title because it fails to show title in appellee. *Chapman et al. v. Jones et al.*, 149 Ind. 434, 47 N. E. 1065, and cases cited. It is insufficient as a complaint to quiet title for the further reason that it does not aver that appellant is claiming any interest adverse to the appellee's title, or that any claim of the appellant's is unfounded and is a cloud upon the appellee's title. *Conger v. Miller*, 104 Ind. 592, 4 N. E. 300, and cases cited. The complaint shows on its face that the lease was for a term of five years; that the term of the lease had expired more than six years before this action was brought. Neither by the terms of the lease nor the averments of the complaint is it shown that appellant was contending that the lease in any manner affected the real estate at the time the action was commenced, nor is it shown by averment or necessary inference that appellee was the owner of any right, title, or interest in the real estate upon which the alleged lease was executed. If the lessee was in fact claiming an interest in the land by virtue of this lease at the time the action was commenced, and such claim was a cloud on the title of the owner of the land, he could in an appropriate action have it removed; but such allegations are not made, nor such relief asked. Nor can appellee cause the cancellation of the lease without alleging

that he is the owner of the land affected by such lease. The complaint does not state a cause of action.

Judgment reversed.

(31 Ind. App. 590)

KRISE et al. v. WILSON et al.

(Appellate Court of Indiana, Division No. 1.
Nov. 5, 1903.)

QUIETING TITLE—CANCELLATION OF DEEDS—
PLEADING—CONSTRUCTION—STATU-
TORY NEW TRIAL.

1. A complaint by certain heirs at law of a grantor of land, in the first paragraph, alleged a cause of action in equity against the grantees to have the conveyance canceled because of the unsoundness of mind of the grantor; the second paragraph stated a cause of action in equity to have the deeds canceled for want of delivery; and the third paragraph averred that plaintiffs were the owners, as tenants in common, of an undivided one-fourth interest in fee of the land, and that defendants claimed some interest therein which was without right, and was a cloud on plaintiffs' title, and asked that plaintiffs' title be quieted. *Held* that, since any relief plaintiff could secure under such complaint must come through overthrowing defendants' title acquired by the deeds, the title to the land was involved in each paragraph of the complaint, entitling defendants to a statutory new trial as of right.

Appeal from Circuit Court, Tipton County; James C. Blackledge, Special Judge.

Action by Mary Krise and others against Isaac D. Wilson and others. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

Joseph C. Herron, F. J. Byers, and Coleman & Carter, for appellants. Cooper & Gerhart and Beauchamp & Proctor, for appellees.

ROBINSON, C. J. This appeal questions the action of the trial court in granting appellees a new trial as of right. Appellants' complaint is in three paragraphs. The first paragraph avers that appellant Mary Krise is a daughter, and the other appellants granddaughters, of Granville M. Wilson, who died July 29, 1901; that appellee Margaret Daily is a daughter, and the other appellees are sons, of Granville M. Wilson, and that the appellants and appellees are heirs at law of Wilson; that on the 11th day of July, 1901, Wilson, the decedent, conveyed to each of the appellees certain lands; that at the time of the execution of the deeds he was of unsound mind; that afterwards, August 22, 1901, appellants gave appellees written notice disaffirming the deeds and demanding that appellees reconvey to appellants their interest in the land as heirs at law of Wilson, which appellees refused to do. Prayer that the deeds be set aside, and for all proper relief. The second paragraph contains the same averments, except, in place of averring the unsoundness of mind of the grantor, it is averred that none of the deeds were delivered to the appellees; asking the same relief as the first paragraph. The third paragraph avers that appellants are the owners, as ten-

ants in common, of an undivided one-fourth interest in fee of the land; that appellees claim some interest adverse, which is without right, and is a cloud upon appellant's title; asking that their title be quieted. A trial resulted in appellants' favor, and, upon filing the statutory undertaking, a new trial as of right was granted appellees, resulting in a finding for appellees.

It is conceded that the third paragraph is an action to quiet title, but it is argued that neither the first nor the second paragraph is an action to quiet title or in ejectment, and that where two or more substantive causes of action proceed to judgment in the same cause, one entitling the losing party to a new trial as of right, and the other not, a new trial as of right will not be allowed. The nature of an action must be determined from the general character and scope of the pleading. *Cottrell v. Aetna, etc., Ins. Co.*, 97 Ind. 311; *First National Bank v. Root*, 107 Ind. 224, 8 N. E. 105; *Bingham v. Stage*, 123 Ind. 281, 23 N. E. 756; *City of Ft. Wayne v. Hamilton*, 132 Ind. 487, 32 N. E. 324, 32 Am. St. Rep. 263. The substantive facts pleaded, and not the prayer for relief, nor the name given to the action by the pleader, determine the nature of the cause of action; but, where the prayer for relief is consistent with the facts pleaded, it is proper to consider it with the facts averred to determine the nature and character of the action. *Physio-Medical Col. v. Wilkinson*, 89 Ind. 23; *Martin v. Martin*, 118 Ind. 227, 20 N. E. 763; *Galway v. State ex rel.*, 93 Ind. 161. It is a general rule that a pleading will be construed as proceeding upon the theory which is most apparent and most clearly outlined by the facts stated, and that it "will, if possible, be given such construction as to give full force and effect to all of its material allegations, and such as will afford the pleader full relief for all injuries stated in his pleading." *Monnett v. Turple*, 132 Ind. 424, 32 N. E. 328; *Batman v. Snoddy*, 132 Ind. 480, 32 N. E. 327; *Monnett v. Turple*, 132 Ind. 482, 32 N. E. 328. The first paragraph of complaint is a proceeding in equity to have the conveyances canceled because of the unsoundness of mind of the grantor. Appellants could pursue this remedy, or they could have treated the conveyances as having been avoided by the disaffirmance, and, if out of possession, sue in ejectment or to quiet title. *Monnett v. Turple*, 132 Ind. 424, 32 N. E. 328. The second paragraph is also a proceeding in equity to have the deeds canceled and declared ineffective because not delivered. But in each paragraph the title to the land, which is particularly described, is directly in issue. The only question the court was authorized to try, under the facts pleaded, was the title to the land. If the facts averred were found to be true, the appellees are not the owners of the land by virtue of the deeds, but under the averments the title is in both appellants and appellees as heirs at law of the grantor.

The deeds carried the legal title to the appellees, and manifestly the disposition of these deeds will determine where the title shall finally rest. If the deeds stand, the title is in appellees. If they are declared ineffective, the title is in appellants and appellees as heirs at law of the grantor. It is true, the judgment says nothing about the title, but, as said in *Physio-Medical Col. v. Wilkinson*, supra, "the case as made by the pleadings and tried between the parties must determine the nature of the action. * * * It not infrequently happens that judgments are in a measure meaningless, without reference to the pleadings." In the above case the facts averred are similar to the facts averred in the first paragraph here, and the prayer of the complaint asks, among other things, that the title be quieted. "The position of appellee's counsel," said the court in that case, "is that appellants are not entitled to a new trial as of right, for the reason that the action is neither for the possession of, nor to quiet title to, real estate; that it is simply to set aside the deed on account of the mental unsoundness of the grantor, and has no reference to the title to the land. In this we do not agree with counsel. It is a proper case in which to ask for the quieting of the title, and in which to compel the opposite party to assert his title. It is very patent, also, that, aside from the prayer, the title to the land is involved in the litigation." In *Anderson v. Anderson*, 128 Ind. 254, 27 N. E. 724, the complaint was in three paragraphs. By the first it was sought to have a deed for land set aside because of alleged fraud and undue influence exercised by the grantee over the grantor; plaintiffs alleging that they were the owners of the land as heirs at law of the grantor, who was deceased. The second paragraph was to quiet title to the same land, and the third for partition. In that case the court said: "The first paragraph, while in form an action to set aside a deed as fraudulent, is in legal effect an action to recover the land; it being averred, as above stated, that the deed was obtained by the grantee by fraud and by undue influence over the grantor, who, it is averred, was the father of the appellants, and they his children and heirs. A suit by creditors to set aside a conveyance as fraudulent, and to subject the land to the payment of a debt, is not a case where a new trial as of right is allowed by statute. * * * But where, as in this case, the parties attacking the conveyance are not creditors, but heirs, of the grantor, who is deceased, who seek by setting the deed aside to recover the land, we think a new trial may be claimed as of right by either party." Citing *Warburton v. Crouch*, 108 Ind. 83, 8 N. E. 634; *Adams v. Wilson*, 60 Ind. 560; *Physio-Medical Col. v. Wilkinson*, 89 Ind. 23. In the case of *Carpenter v. Willard Library*, 26 Ind. App. 619, 60 N. E. 365, the complaint, without specifically describing the real estate, sought to have a deed

set aside because the grantor was not of sound mind, and because of undue influence and fraud, and also required an accounting. We think that case falls within the rule that a new trial as of right cannot be allowed in an ordinary suit to set aside a fraudulent conveyance of land. See *Warburton v. Crouch*, 108 Ind. 83, 8 N. E. 634, and cases there cited. In the case at bar the suit is between heirs. Any relief appellants may secure must come through overthrowing the title of appellees acquired by the deeds. If the deeds are set aside, appellees' title through the deeds is divested. It must reveal in some one. Under the facts pleaded, it would vest in appellants and appellees. It is manifest, we think, that the title to the land is involved in the litigation, and that a new trial as of right was properly granted.

Judgment affirmed.

(31 Ind. App. 577)

WHITTERN et al. v. KRICK et al.

(Appellate Court of Indiana, Division No. 1.
Nov. 5, 1903.)

VENDOR AND PURCHASER—WARRANTY DEED—COVENANT RUNNING WITH LAND—KNOWLEDGE OF INCUMBRANCE—RECOVERY UNDER WARRANTY—LIMITATIONS—ESTATE OF DECEDENT—PLEADING—AMENDMENT.

1. The right of a vendee to recover on a covenant of warranty is not affected by knowledge of the existence of an incumbrance at the time of conveyance.

2. The mortgagee in a purchase-money mortgage accepted a reconveyance of the premises, and discharged the mortgage of record, being ignorant of the fact that there was on the land the lien of a judgment against the mortgagor, and subsequently he conveyed the land to plaintiff, with covenant of warranty against incumbrances. After the death of the mortgagee the judgment creditor levied on the land, and plaintiff sued to enjoin sale. A decree was entered reviving the mortgage lien as prior to the judgment, and providing that on payment of the mortgage by the judgment creditor he should be subrogated as holder of the mortgage lien. In determining the amount of the mortgage lien, there was deducted from the face of the mortgage the rental value of the premises during the time they had been in possession of plaintiff. The judgment creditor paid such sum, and purchased the land at judicial sale under both liens, and plaintiff paid to him the amount of the mortgage and judgment, taking an assignment of the certificate of sale to cut off other judgments. The amount of the judgment was not greater than the purchase price paid by plaintiff for the land. *Held*, that plaintiff was entitled to recover the amount of the judgment from the heirs of the mortgagee.

3. A covenant of warranty against incumbrances runs with the land.

4. Burns' Rev. St. 1901, § 2465, provides that no action shall be brought against the executor or administrator on any claim against decedent, "but the holder thereof, whether such claim be due or not," shall file a statement, etc., at least 30 days before final settlement of the estate, or the claim shall be barred. Section 2470 enacts that if one interested in a decedent's estate execute a bond to a creditor whose claim is not due, for payment when it falls due, the court shall direct that the estate be discharged from liability. Section 2597 enacts that the heirs

¶ 1. See *Covenants*, vol. 14, Cent. Dig. § 48.

of a decedent shall be liable, to the extent of the property received by them, to any creditor whose claim remains unpaid, who, six months prior to the final settlement of the estate, was insane, an infant, or out of the state. Section 3344 enacts that heirs of every person who shall have made any covenant shall be answerable thereon to the extent of property descended or devised to them. *Held*, that where, during the settlement of a decedent's estate, there were several judgment liens standing against land, which he had conveyed with warranty against incumbrances, but no steps were taken to satisfy any such judgments from the lands, the vendee, after satisfaction of an execution levied on the land under one of the judgments, was entitled to recover from the decedent's heirs at law, notwithstanding that he had not filed a claim against the estate, he not having been, prior to the levy, a creditor holding a claim either due or not due in the sense of the statutes.

5. Where, in an action by a vendee of land to recover against the heirs of the vendor on a breach of warranty against incumbrances, the action of plaintiff in procuring an assignment of a certificate of sale under a judgment against the land for the purpose of cutting off other judgment liens is erroneously spoken of as a "redemption" in the complaint, on appeal such language is to be regarded as amended.

Appeal from Circuit Court, Allen County; John H. Alken, Judge.

Suit by Henry Krick and others against Lavina N. Whittern and others. From a decree in favor of complainants, defendants appeal. Affirmed.

Robertson & O'Rourke and Thomas E. Ellison, for appellants. E. W. Meeks, W. G. Colerick, K. C. Larwill, and Guy Colerick, for appellees.

BLACK, J. The appellees Henry Krick and Joseph T. McIntosh brought their action against the appellants, as the heirs at law of Charles Whittern, deceased, to recover damages for a breach of the covenant of warranty against incumbrances in a deed of conveyance of certain real estate situated in Allen county. The complaint showed the conveyance of the real estate by the decedent and his wife, one of the appellants, by a deed set out as an exhibit, February 23, 1891, for the price of \$610, which sum the appellees then paid to the decedent; that afterward Charles Whittern died at Allen county, intestate, and that the appellants were his widow and children and grandchildren, and that all his property descended to the appellants in portions stated; that his estate was duly administered, and on June 14, 1898, was finally settled, and the administrator was then discharged; that under an order of the proper court made May 17, 1898, the administrator distributed among the appellants, heirs at law, the sum of \$5,412.40, remaining in his hands, which they received in accordance with their proportionate interests; that the appellants also received by the death of the grantor, Charles Whittern, and as his heirs at law, about 500 acres of real estate in said county, then and still of the value of \$18,000, in accordance with their proportionate interests therein; that at the time of the

execution of the deed of conveyance to the appellees a judgment existed in favor of one Thomas McMahon against John A. Corbaley, Franklin Freese, and Jonathan Hart, rendered in the superior court of Allen county December 5, 1890, for \$633.17 and costs, which was duly rendered, and which at the date of said deed of conveyance was a valid lien on the real estate thereby conveyed, which at that time was owned by said Corbaley and Freese, and which was by them sold and conveyed to the decedent January 21, 1891; that by the provisions of the deed of conveyance to the appellees the grantor and his heirs covenanted with the appellees that the title so conveyed to them was clear, free, and unincumbered, and that he was lawfully seised of the real estate as of a sure and indefeasible estate of inheritance in fee simple, and that he would warrant and defend the same against all claims whatsoever. It was alleged that after the death of the grantor one John H. Brannon, as guardian of said McMahon, caused execution to be issued on the judgment to the sheriff, who levied the same on the real estate, and thereupon the appellants, or some of them, caused an action to be brought in the court below in the name of the appellant Frick, as plaintiff, against the sheriff and Brannon, as guardian, to enjoin the sale of the real estate on the execution, and asserted in the complaint therein that the decedent had sold the real estate to Corbaley and Freese, and had taken a mortgage on the real estate to secure the payment of the purchase money; that afterward, being unable to pay the purchase money, they had reconveyed the real estate to the decedent, and he had canceled the record of the mortgage in ignorance of the existence of the judgment lien, and asking that the mortgage lien be revived as against the judgment lien, which action resulted in a decree whereby the amount of the mortgage lien was ascertained and determined at \$701.58, and declared to be prior to the judgment lien; and also that the judgment of McMahon was a lien on the real estate, but junior to the mortgage lien, and the decree fixed the amount thereof at \$587.89 and costs accrued at \$46.53, and fixed the sum of both liens at \$1,389.04 and costs; and it was further decreed that upon the payment of the amount of the mortgage lien by Brannon, guardian, he should be subrogated to the rights of the holder of the mortgage lien; that thereafter Brannon, as guardian, paid said sum, and caused a duly certified copy of the decree and the order of the court directing the sale of the real estate to pay the liens and costs to be issued by the clerk to the sheriff, who duly sold the real estate February 24, 1900, to Brannon, as guardian, for \$1,389.04, and issued to him a certificate of purchase therefor, and on April 26, 1900, the appellees "redeemed" said real estate from said sale by paying to Brannon the amount of the purchase money for which the real es-

tate had been sold to him by the sheriff, and, in order to cut off certain other judgment liens existing on said land, and which had been rendered against Corbaley and Freese in favor of different persons, caused Brannon to assign to the appellee Krick the certificate of purchase, which he still held; that in effecting "said redemption" the appellees used and applied the sum of \$701.58, which had been so paid by Brannon in payment of the mortgage lien, and the appellees were compelled in addition thereto to pay him in money the further sum of \$687.42 to satisfy the judgment lien and costs, and thereby, it was alleged, they were damaged in the last mentioned sum in consequence of the existence of the judgment lien and the breach of the covenant in said deed by which the decedent warranted the real estate against all incumbrances. After some allegations relating to expenses, there was an averment of failure and refusal of the appellants to pay; and it was alleged that the sum paid to extinguish the judgment lien was not paid by the appellees until after final settlement of the estate of the decedent, and therefore they could not present and prosecute in the court below any claim against the estate for the amount so due them; and that each of the appellants received as heir at law of the decedent in property, real and personal, an amount exceeding the sum so due the appellees.

A demurrer to the complaint for want of sufficient facts having been overruled, there was an answer in four paragraphs; the first a general denial. The court sustained a demurrer to the other paragraphs. The second paragraph of answer, by facts alleged therein, showed that when the appellees purchased the real estate they had constructive notice that the judgment of McMahon was a lien thereon; that long before the decease of their grantor they had actual notice of the judgment, and actual knowledge that it was a lien on the real estate, and had requested him in his lifetime to have the lien satisfied and removed; that the grantor died March 11, 1897, and on March 23, 1897, one of the appellants named was appointed and qualified as administrator of the decedent's estate, and gave notice of his appointment by publication and posting as required by law, and that such proceedings were thereafter had in the court below having jurisdiction of the administration that April 18, 1898—more than a year after the issuance of the letters of administration and the giving of notice thereof—he filed his final report as administrator in that court, and due publication and posting of notices thereof were made by him, and on May 17, 1898, he filed in that court proof of such publication and posting, and thereupon the court then approved his final report and ordered distribution of the balance in his hands according to the report, which distribution was made and reported to the court, and the report was by

the court approved, and the administrator was discharged, and the estate was settled and closed. It was alleged that during all this time the appellees had actual knowledge of the judgment lien and of the pendency of the administration, and filed no claim against the estate, and filed no statement of the lien, and made no demand on the administrator for a settlement or a release of the lien, but that soon after the final settlement report was filed the appellee Krick, then and now sole owner of the real estate by deed of conveyance from his co-appellee, who the appellants claim has no interest in the cause, filed in the office of the clerk of the court below a verified complaint against the estate and administrator, setting up the breach of warranty alleged in the complaint, and demanding damages therefor, and that such proceedings were had that the claim was dismissed by the court, and the appellee Krick has not taken an appeal from the judgment of dismissal, and the time for an appeal therefrom has expired; that during the pending of the claim so dismissed the claimant made no showing of fraud on the part of the administrator, or of excusable neglect on his own part for not filing the claim before the filing of the settlement report, or that the claimant was insane, an infant, or absent from the state during the pendency of the administration; and that the suit at bar was not brought within two years from such final settlement. The third paragraph contained allegations to the effect that, while the claim of the appellee Krick, so dismissed, was pending before the court below, he, in August, 1898, gave the appellants written notice to the effect that the sheriff had levied on the real estate in question by virtue of an execution on the McMahon judgment, and that the appellees intended to hold the appellants liable on the covenants of the deed for all damages the appellees might sustain; that afterward the appellee Krick, he being the sole owner of the real estate, entered into an agreement with the appellants that he, with their consent, and upon their agreement then made to pay the attorney's fees, would bring an action in the court below, and he did thereupon bring such suit, against the party claiming under the judgment and the sheriff, praying for the revival of the mortgage of Corbaley and Freese to the decedent, and for the foreclosure thereof, and the application of the proceeds thereof as a lien prior to that of the judgment, in favor of Krick, as owner by conveyance from the decedent to Krick and McIntosh and by McIntosh to Krick; that in such action the court adjudged that the mortgage be revived and declared a prior lien, and that the execution plaintiff should pay into court for Krick \$701.58, the amount due on the mortgage, after deducting rental for the premises while occupied by the appellees; that the amount found due as a prior lien to the decedent upon the mortgage lien was \$1,200, and

exceeds the sum that the appellees would be entitled to recover in this action, if any, and it was reduced solely by a set-off for rents and profits while occupied by the appellees; that therefore the claim of the appellees was paid and satisfied before the commencement of this suit. It was also alleged that the appellants, pursuant to their agreement, paid the fees of the attorneys in said suit for the revival of the mortgage. This paragraph also contained averments like those of the second concerning notice of the judgment lien and concerning the final settlement of the estate. The fourth paragraph of answer, while somewhat more specific as to some of the facts, was, in substance, like the third paragraph.

If it be true that there was a breach of the covenant of warranty against incumbrances in the deed of conveyance from the decedent to the appellees, the right of the appellees to recover for such breach could not be affected by their knowledge of the existence of the alleged incumbrance at the time of the conveyance, or by their knowledge thereof in the lifetime of their grantor, if the case at bar were a claim against the decedent's estate filed as such 30 days before the final settlement of the estate. The right of action is a legal claim upon an express covenant which covered all incumbrances, known or unknown, to the covenantees. Suit was instituted in the name of one of the appellees at the expense of the appellants, and upon their agreement to procure a decree reviving the mortgage and declaring it still a subsisting and superior lien as against the subsequently rendered judgment; and when the amount of the mortgage lien had been paid in by the holder of the judgment lien, and he had thereby acquired the right to have the real estate sold for the satisfaction of both the liens, and he had been repaid the amount which he had so paid to acquire the superior lien, there was still left the amount of his judgment, which was paid by the appellees, as was necessary for the removal of the incumbrance from the real estate; and it is for this amount only, so paid by the appellees, in addition to the amount paid and repaid on account of the mortgage lien, that they have sought and obtained relief in the case at bar.

The episode relating to the mortgage was a circumlocution which did not aid the appellants. In reviving the mortgage lien as a lien superior to the judgment lien, the amount to which the mortgage debt would have accumulated by the addition of interest was reduced by deducting therefrom the rental value of the real estate during the time it had been in the possession of the appellees, and the mortgage was treated as a lien prior and superior to the judgment lien for the amount of the balance so ascertained. Before the appellees purchased from the decedent, paying him the purchase price in full, and receiving his covenant of warranty, he

had released the purchase-money mortgage executed to him by his former grantees upon their reconveyance of the mortgaged real estate. In reviving the mortgage lien at the suit, nominally, of the appellee Krick, he was subrogated to the right of the mortgagee, the decedent, and it was in favor of the nominal plaintiff that the lien of the mortgage was declared superior to that of the judgment. Being thus, by subrogation, treated as a mortgagee who had long been in actual possession of the mortgaged real estate, it was not improper, as against the appellants, in declaring the mortgage lien in his favor to be superior to the subsequent judgment lien, to deduct from the amount of the mortgage lien the rental value of the real estate for the period of the rightful possession of the mortgagees. As the result of the enforcement of the judgment against the real estate in the manner shown by the pleadings, in accordance with the judgment in the case conducted by the appellants in the name of one of the appellees, the latter were compelled to pay the amount of the judgment lien in order to protect the real estate from an incumbrance against which the decedent covenanted, and they were entitled to a recovery for such breach of the covenant of warranty, unless precluded by other considerations urged by the appellants, which we will now examine. It is contended that, if there was any right of action in the appellees, it was a claim against the estate of the deceased warrantor, which should have been filed against the administrator of that estate before it was finally settled, and that, not having been so filed, it is barred, and may not be enforced against his heirs at law. Counsel for the appellants direct attention to certain provisions of our statute relating to the settlement of decedent's estates. By section 2465, Burns' Rev. St. 1901, it is provided that no action shall be brought by complaint or summons against the executor or administrator for the recovery of any claim against the decedent, "but the holder thereof, whether such claim be due or not, shall file a succinct and definite statement thereof in the office of the clerk of the court in which the estate is pending"; and that, if such claim be not filed at least 30 days before final settlement of the estate, it shall be barred, except as thereafter in said statute provided in case of liabilities of heirs, devisees, and legatees. By another section of the same statute, cited by the appellants (section 2470, Burns' Rev. St. 1901) it is provided that, if any person interested in such estate shall execute bond, with penalty and surety to the acceptance of a creditor whose claim is not due, for the payment thereof when it shall fall due, if it shall prove to be a legal demand, the court, on such bond being delivered and accepted, and a statement thereof subscribed by the creditor filed in the court, shall direct a minute thereof to be made in its order book, and the estate be discharged from further lia-

bility touching it. Section 2597, Burns' Rev. St. 1901, also referred to by the appellants, provides that the heirs, devisees, and distributees of a decedent shall be liable, to the extent of the property received by them from such decedent's estate, to any creditor whose claim remains unpaid, who, six months prior to the final settlement of the estate, was insane, an infant, or out of the state, but such suit must be brought within one year after the disability is removed; and that suit upon the claim of a creditor out of the state must be brought within two years after the final settlement. Then we have also a statute (section 3344, Burns' Rev. St. 1901) as follows: "Lineal and collateral warranties, with all their incidents, are abolished; but the heirs and devisees of every person who shall have made any covenant or agreement shall be answerable upon such covenant or agreement, to the extent of property descended or devised to them, and in the manner prescribed by law." In *Bundy v. Ridmour*, 63 Ind. 406, it was held that for a breach of the covenant against incumbrances in a warranty deed, in the absence of fraud, there can be no recovery except of nominal damages, where there has been no eviction, and no payment of or upon the incumbrance. The covenant of warranty ran with the land. *Dehority v. Wright*, 101 Ind. 382; *Worley v. Hineman*, 6 Ind. App. 240, 33 N. E. 260.

The claim of the appellees for reimbursement of the amount expended in the extinguishment of the judgment lien did not accrue until after the final settlement of the deceased grantor's estate. The appellees were not required, as against the appellants, to anticipate that the judgment in question, taken against Corbaley and Freese and another, while Corbaley and Freese held the title to the real estate, would not be paid by the judgment debtors, but would be enforced against the land; but the appellees had the right to wait until the active measures mentioned in the pleadings were taken for the enforcement of payment of the judgment out of the land, and they were so compelled to pay off the incumbrance, whereby, and not sooner, they suffered the damage for which they sue. They were not, before that action on their part, creditors and holders of a claim, either due or not due, in the sense of the statutes above quoted. They ought not to be without a remedy, upon so meritorious a case, merely because of failing to do that which they were under no obligation to do. Without any fault of the appellees toward the decedent or his estate or the appellants, the appellees were not in a position to assert a claim for damages for breach of the covenant against incumbrances until they had been compelled to pay off the judgment lien. Having thus suffered damage by the breach of the covenant after the settlement of the estate of the deceased grantor, we think a fair view of the statutes as taken in *Blair v. Allen*, 55 Ind. 409, *Stevens v.*

Tucker, 87 Ind. 109, and *Harmon v. Dorman*, 8 Ind. App. 461, 35 N. E. 1025, should lead to the conclusion that the failure of the appellees to file a claim for breach of the covenant against incumbrances before the settlement of the decedent's estate, when they did not have a demand for a definite sum, should not exempt the appellants, as heirs of the covenantor, from being answerable upon the covenant to the extent of the property descended to them. The reasonableness of such a view of the case is illustrated by the evidence and the references thereto of the appellants in their brief, to the effect that while Corbaley and Freese owned the real estate in question there were four judgments of record entered against them—one called the "Wilson judgment," February 11, 1890, for \$286.53; one called the "Sunshine judgment," September 2, 1890, for \$275, which was paid after the conveyance to the appellees; one called the "Wise judgment," September 22, 1890, for \$241.05, also paid, after the conveyance to the appellees; and the McMahon judgment, December 5, 1890, for \$633.17, against Corbaley, Freese, and Hart, in part paid in 1891, after the conveyance to the appellees. The real estate was conveyed to the appellees February 23, 1891, for \$610. The grantor died March 11, 1897. The decedent's estate was finally settled in 1898, while each of the judgments against Corbaley and Freese and that against them and Hart, so far as not paid, continued to be a lien on the real estate, and would so continue for 10 years after the rendition thereof. Whether the real estate in question would ever be resorted to for the satisfaction of either of the judgments, remained an uncertainty at the time of the final settlement of the estate, and, if paid by the appellees, they could recover upon the covenant of warranty only to the extent of the amount of their purchase money and interest thereon. They could hardly be required to anticipate that the McMahon judgment, and it alone, would be pressed against the real estate, and to pay all the judgment liens might require an expenditure of more than the value of the real estate and interest thereon. The certificate of sale to Brannon was assigned for the purpose of cutting out the other judgments. The liability of the appellees to be called upon for the payment of any of the judgments was so far contingent at the time of the settlement of the decedent's estate that we think they should not be held to be deprived of a remedy against the heirs at law holding property descended from the covenantor.

It is insisted that the damages were excessive, and it seems to be thought that the appellants should have the benefit of the reduction of the amount of the mortgage debt made by reason of the possession and enjoyment of the real estate by the appellees. They received a deed of conveyance with full covenants, paid the entire purchase price,

and went into possession under their conveyance. There could not arise any obligation on their part to their grantor for rents and profits. When they were subrogated to the rights of mortgagees in possession in the suit against the holder of the judgment and the sheriff, the deduction of the rental value of the premises while they had been in possession was made for the benefit of the junior judgment creditor. The amount which the appellees were required to pay of their own money to release the real estate which they recovered in this action was not greater than the purchase money and interest thereon.

It is claimed that there was a variance between the complaint and the proof, in that the complaint states that the appellees redeemed the real estate, while the proof was that they purchased the certificate of sale from Brannon. While the action of the appellees is spoken of in the complaint as a redemption, the facts stated in the same connection as to their action showed it to be the procurement of the assignment of the certificate for the purpose of cutting off the other judgment liens. The language of the complaint in this respect should be regarded as amended.

We find no available error. Judgment affirmed.

(33 Ind. App. 49)

CLARK et al. v. WORRALL et al.¹

(Appellate Court of Indiana. Nov. 5, 1903.)

WILLS—LEGACIES—FUND FOR PAYMENT—PROCEEDS OF REAL ESTATE—PERSONALTY—CONSTRUCTION.

1. Testatrix's will provided for the payment of debts, funeral expenses, etc., and then gave certain specific legacies. The executor was directed to sell all the real estate, and by the fourth clause of the will was directed to apply the proceeds of such sale, after the payment of such legacies, to certain persons. Testatrix died intestate as to a considerable amount of personalty. *Held*, that the legacies should be paid out of the proceeds of the sale of real estate, and any residue divided among those named in the fourth clause; a contention that the special legacies should be paid from the personalty, and, in case of its insufficiency, from the proceeds of the real estate, and the residue of the proceeds of the real estate distributed to the legatees named in the fourth clause, being untenable, as evidently not the intention of the testatrix.

2. A testator may exonerate his personal property from liability for the payment of legacies and debts, and make the same a charge on his real estate.

3. It is to be presumed that a testator intended that legacies should be paid from the personal estate.

Appeal from Circuit Court, Clark County; James K. Marsh, Judge.

Suit by Curtis Worrall and others against Thomas J. Clark and others. From a decree for complainants, defendants appeal. Affirmed.

O. H. Montgomery, for appellants. Jonas G. Howard and James Fortune, for appellees.

WILEY, J. Upon the determination of questions involved in this case depends the

settlement of an estate and the distribution of a large sum of money, and on petition it was advanced. The matters in issue involve the construction of a will.

Appellees were plaintiffs below, and in their complaint averred that Rozella Wright died, leaving an estate of the value of \$16,000, of which \$9,229.65 was in money, \$500 in a good note, and other personal property of the value of \$300, and real estate of the value of \$6,000; that said decedent left, as her sole heirs at law, certain persons (naming them, and the relation they bore to her); that on January 9, 1902, being five days after the death of Rozella Wright, a paper purporting to be her will was admitted to probate, in which John J. Potter was named as executor; that thereupon said Potter qualified as such executor, took possession of the estate, and entered upon the duties of his trust. It is averred that there were no debts against the estate; that the legacies, funeral expenses, and expenses of administration would not exceed \$4,500; that there are now in the hands of the executor \$12,000, and he threatens to, and will, make disposition of the same upon a construction of the will different from the construction put upon it by appellees, and against their interests, unless the court will construe it; and that said sum should be distributed between the heirs and legatees. It is further averred that some doubt exists as to whether the legacies should be paid out of the proceeds of the sale of real estate, or out of the personal property, and that appellants demand and claim that such legacies be paid out of the personal property, while appellees contend that they be paid out of the proceeds arising from the sale of real estate, and that the executor is about to pay them out of the personal property. The complaint sets out the special legacies, amounting in the aggregate to \$4,011, and designates the parties to whom the bequests are made, and avers that by the terms of the will the executor was directed to sell the real estate of which the testatrix died seised, and, after the payment of the special legacies and expenses of administration out of such proceeds, the residue was to be divided equally between certain persons (naming them), and that the value of the real estate was ample for such purpose. It is also alleged that the will failed to bequeath or otherwise dispose of the personal estate of the testatrix, except as to some household goods, and that her heirs at law are entitled to share therein "in the following proportions": (Then follows a list of the heirs, and the proportion of the estate it is alleged each is entitled to inherit.) The complaint further avers that when the will was executed the testatrix was 80 years old, and that she and the girl she raised then, and for many years previous, had lived alone upon the farm; that she concealed from the person who drafted the will the greater portion of her personal estate, and left the same unbequeathed, and that at the time of her

¹ Rehearing denied. Transfer to Supreme Court denied.

death she did not owe any debts; and that appellees are each entitled to share as heirs at law in her personal estate. A copy of the will is filed as an exhibit. As the sole question is to arrive at a proper construction of the will, it is important its leading terms and provisions be stated.

Item 1 directs the payment of the just debts and funeral expenses of the testatrix, and the erection of a suitable monument at her grave.

Item 2 makes specific bequests as follows:

"I give and devise, to be paid in cash to such legatees as follows:

To Thomas J. Clark.....	\$ 500 00
" Katherine Snyder	500 00
" Eliza J. Ashton.....	500 00
" Rosella Holman	500 00
" Hattie Grant	500 00
" Eliza Worrall	200 00
" Curtis Worrall	100 00
" Thomas J. Worrall	5 00
" John R. Shadburn.....	5 00
" David Walkup	1 00
" Sadie J. Williams.....	1,000 00
" Lucinda Walkup and her daughters, or such as may be living at my death.....	200 00"

By item 3 the executor was directed to sell all the real estate, and execute deeds, etc., without order of court.

As the decision of the case hinges largely on item 4, we set it out in *hæc verba*:

"It is my will and I so direct that the proceeds of such sale, after the payment of such legacies as mentioned in Item second, and expense of administration, shall be divided equally between the following named parties, living at time of my death, to wit: George S. Clark, Rosella C. Clark, Martha J. Walkup, Susan M. Cox, Mary E. Bergdoll, Sallie F. Grice, Luella Groub, Eliza J. Ashton, Rosella Holman, Hattie V. Grant."

By item 5 the executor was to deliver "such articles of household nature as I may leave undisposed of at my death to the following different parties as set out in the memoranda hereto attached." In the memoranda attached the testatrix expressed her desire that Katie Snider divide her "household goods and effects among the parties and in the way I have expressed to her, and as she understands my wishes."

The cause was submitted to the court upon an agreed statement of facts, and a finding made and judgment rendered in favor of appellees, by which the court construed the will in harmony with the theory of the complaint. Motions to modify the judgment and for a new trial were overruled, and such rulings are assigned as errors. The motions to modify were in harmony with the theory set up in the second paragraph of answer. Both the motions for a new trial and to modify the judgment may be considered together, for they involve substantially the same questions.

By the agreed statement of facts it is made to appear that the will in controversy was executed September 14, 1895; that the

testatrix died January 4, 1902, and the will was duly probated January 9, 1902 (copy of the will is set out in full); that on January 11, 1902, John J. Potter qualified as executor, entered upon his duties as such, and that he is still so acting; that when the will was executed the testatrix owned a farm in Clark county, Ind., of 108 acres, and of the value of \$4,700, and possessed money on deposit and other personal property of the value of \$5,000; that at the time of her death she was 85 years old; that she did not owe any debts; that she had personal property of the aggregate value of \$10,029.65, consisting of \$9,229.65 in money, one solvent note of \$500, and farming implements and other personal property of the value of \$300; that, by a mistake of the scrivener in drafting the will, the name of one of the legatees was written as Sallie F. Brice, when her correct name was Sallie F. Grice; that the monument mentioned in item 1 of the will was erected and paid for by the testatrix during her life; that the testatrix at the time of her death left as her sole heirs at law the following named persons, who are parties to this action: Lucinda Walkup, a half-sister; John B. Shadburn and Hattie V. Grant, only children of John R. Shadburn, a deceased brother; David Walkup, the only child of Mary Walkup, a deceased half-sister; Curtis Worrall, Thomas J. Worrall, Katherine Snider, Eliza J. Ashton, and Rosella Holman, the only children of Eliza J. Worrall, a deceased sister; Thomas J. Clark, George S. Clark, Rosella C. Clark, Martha J. Walkup, Susan M. Cox, Mary E. Bergdoll, Sallie F. Grice, Luella Groub, and Lizzie Toms, the only children of Katherine Clark, a deceased sister.

The appellants and appellees agree that, as to her personal estate, the testatrix died intestate, except as to her household goods. The question at issue between them is this: Under the terms of the will, are the specific legacies, expenses of administration, etc., to be paid from the proceeds of the sale of real estate, or from the personal assets of the estate? The relative positions assumed by the parties are that appellees contend that such legacies, etc., must be paid out of the proceeds of the sale of the real estate, under the express provision of the will. There are two classes or divisions of appellants here, represented by different counsel; hence there are three contending interests. The contention of appellees has already been stated, and it is in harmony with the theory of their complaint. The appellants Katherine Snider, Eliza J. Ashton, Rosella Holman, and Hattie V. Grant contend that the fund arising from the sale of real estate is a primary fund for the payment of the specific legacies, debts, and expenses of administration, but that, if such fund should be insufficient to pay the legacies, then the personal estate not bequeathed is not exonerated from the payment of such debts and legacies, but should

be applied thereto. Appellees Thomas J. Clark, George S. Clark, Rosella C. Clark, Martha J. Walkup, Susan M. Cox, Mary E. Burgdoll, Sallie F. Grice, Luella Groub, and Lizzie Toms, who are made residuary legatees under item 4 of the will, contend that the will should be so construed that the executor be required to use the unbequeathed personal property as follows: (1) In the payment of the expenses of administration; (2) in the payment of funeral expenses; (3) in the payment of expenses of last sickness; (4) in the payment of taxes; (5) in the payment of general debts; (6) in the payment of special legacies—and that the residue of the personal estate descend and be distributed according to the laws of descent to the heirs of the testatrix, and that the proceeds of the sale of real estate, in case the personal property should be insufficient therefor, be applied in the payment of the above-named items in their order, and that the residue of the proceeds of the sale of the real estate be distributed to the legatees named in item 4 of the will.

We must conclude, from the plain language of the will, that the testatrix intended to bestow her special bounty upon the legatees therein designated. No question is presented as to her capacity to make a will, nor is any reason suggested why she should not make the devises she did. If the contention of a part of the appellees be adopted as a proper construction of the will, we must conclude that the will means, and that the testatrix intended, that the specific legacies should be paid out of the fund not included in the testamentary instrument, to the exclusion of the fund which such instrument specifically designates as the sole source of such payment. The language of the will is not uncertain or ambiguous, and is in plain terms and easily understood. The intention of the testator, if it can be ascertained, should control in construing a will; and, in such construction, effect should be given to the intention of the testator, as far as the same may not interfere with the established rules of law. *Fowler v. Duhme*, 143 Ind. 248, 42 N. E. 623; *Mulvane v. Rude*, 146 Ind. 476, 45 N. E. 659; *Bray v. Miles*, 23 Ind. App. 432, 54 N. E. 446, 55 N. E. 510. From the will itself, considering all of its provisions, the intention of the testatrix is clearly manifest; and that intention is that she meant to direct, and in fact did direct, the sale of her real estate, and charged upon the fund arising therefrom the payment of the expenses of administration, legacies, etc. Such a provision in a will does not contravene an established rule of law, as will be seen later in this opinion. The testatrix connected the payment of the specific bequests with the fund arising from the sale of real estate by express reference thereto, and it seems plain from the language used that she intended that they should be paid out of that fund, for she blends item 2 of the will,

in which the specific legacies are made, with item 4, directing how they shall be paid. The personal assets of an estate primarily constitute the fund out of which debts, expenses of administration, legacies, etc., are to be paid. *Scott v. Morrison*, 5 Ind. 551; *Lindsey v. Lindsey*, 45 Ind. 552; *Duncan v. Wallace*, 114 Ind. 169, 16 N. E. 137. There are exceptions to this rule, however, and the testator may exonerate his personal property from liability for the payment of debts, legacies, etc., and may make the same a charge upon his real estate; but he will not be taken to have done so without a clear expression to that effect, to be collected from the whole will. *Scott v. Morrison*, supra; *Duncan v. Wallace*, supra; *Davidson v. Coon*, 125 Ind. 499, 25 N. E. 601, 9 L. R. A. 584. Another rule, which seems to be well settled, is that it will be presumed that the testator intended that legacies shall be paid out of the personal assets of his estate; and where there is a general bequest of money, and no express charge is made upon the land, such land is not burdened, unless it appears that the testator intended that it should be charged, and where there is personal property no such intention can be implied. *Duncan v. Wallace*, supra; *Davidson v. Coon*, supra. But here, however, the testatrix specifically directed that the legacies provided for in item 2 should be paid from the proceeds of the sale of real estate. We cannot speculate as to why she made this provision. The record does not disclose any fact or circumstance to militate against the plain language used as expressive of her intention, and no good reason is shown why she should not have directed the payment of such legacies in the manner indicated. Appellants having admitted that the testatrix died intestate as to her personal estate, except household goods, we do not understand how they can successfully assert that she intended that the specific legacies should be paid out of a fund not mentioned in her will, in view of the controlling fact that she directed their payment out of a fund to be created by the sale of real estate. We have in the will before us a direction to the executor to sell all of the real estate of the deceased, and the law seems to be well settled that the effect of such a provision is to convert the real estate into personalty, and that the same is to be treated as money by the executor. *Rumsey v. Durham*, 5 Ind. 71; *Scott v. Morrison*, 5 Ind. 551; 1 *Garman on Wills*, p. 475; 2 *Garman on Wills*, p. 522; 1 *Story on Eq. Jur.* p. 320; *Stagg v. Jackson*, 1 N. Y. 206; *High v. Worley*, 33 Ala. 196; *Indiana Executor's Manual*, par. 522, p. 182. It was not an infringement of the established rules of law for the testatrix to make the legacies for which she provides payable out of the proceeds of the real estate. Counsel for appellants concede this proposition, and the authorities support it. *Scott v. Morrison*, supra; *Duncan v. Wallace*, supra; *Davidson v. Coon*, supra. To

put the construction upon the will contended for by appellants, we would have to conclude that the testatrix did not mean what she so plainly expressed, and that she intended something in clear opposition to what she did express. This we cannot do.

Looking at the whole record, it is our conclusion that the trial court reached the correct result, and the judgment is affirmed.

ROBINSON, C. J., and BLACK, ROBY, and HENLEY, JJ., concur. COMSTOCK, J., absent.

(31 Ind. App. 556)

TOLEDO, ST. L. & W. R. CO. v. BEERY
et al.

(Appellate Court of Indiana, Division No. 1
Nov. 3, 1903.)

CARRIERS—NEGLIGENCE—PROXIMATE CAUSE
—PLEADING.

1. A demurrer "for the reason that said complaint does not state a cause of action" is sufficient in form.

2. An allegation in a complaint that it was the duty of a railway company to place a car of horses on its track in position to unload is admitted by demurrer.

3. The refusal of a railway company to perform its admitted duty to place a car of horses in position to unload promptly on arrival at their destination is negligence.

4. A complaint stating that plaintiff shipped horses over defendant's railroad; that when they arrived at their destination defendant refused to place the car in position to unload the horses, which it was its duty to do, but side-tracked it until the following day; and that while the car was so side-tracked and in defendant's charge the horses were injured—does not state a cause of action, since it fails to show that the injuries resulted from defendant's acts.

5. An averment that the injury to plaintiff's horses was caused wholly by the defendant railway company's negligence, without statement of any act or omission, or reference to acts before stated, does not remedy an otherwise insufficient complaint.

Appeal from Circuit Court, Allen County;
E. O'Rourke, Judge.

Action by Daniel W. Beery and another against the Toledo, St. Louis & Western Railroad Company. From a judgment overruling its demurrer to the complaint, defendant appeals. Reversed.

Guenther & Clark, for appellant. Shaffer Peterson and W. & E. Leonard, for appellee.

ROBINSON, C. J. Suit by appellees for damages for injury to a car load of horses. A demurrer to the complaint "for the reason that said complaint does not state a cause of action" was overruled. This ruling is the first error assigned. It is suggested by counsel for appellee that the demurrer is not in form as the statute requires. But we think it sufficient to question the complaint under the fifth statutory cause for demurrer. The form used could not reasonably be said to come within any of the other statutory causes for demurrer. Demurrers have been

held sufficient in form where a demurrer to several paragraphs of answer was on the ground that neither paragraph "states facts sufficient" (Ross v. Menefee, 125 Ind. 432, 25 N. E. 545); and to a complaint that it "does not state facts sufficient" (Petty v. Board, etc., 70 Ind. 290); and that the complaint "does not state facts enough to entitle the plaintiff to relief" (Pace v. Oppenheim, 12 Ind. 533); and that the complaint "does not contain and set forth sufficient facts to enable the plaintiffs to sustain said action" (Stanley v. Peeples, 13 Ind. 232). Demurrers on the ground that the complaint is "not good and sufficient in law" (Porter v. Wilson, 35 Ind. 348), and that the complaint "does not state facts sufficient to constitute a complaint" (Pine Civil Tp. v. Huber Mfg. Co., 83 Ind. 121), and that "the petition does not state facts sufficient to constitute a good and sufficient petition" (Grubbs v. King, 117 Ind. 243, 20 N. E. 142), were held insufficient in form to present any question. The statute requires that the complaint shall contain "a statement of the facts constituting the cause of action." The cause of action between the parties consists of a statement of the facts, and when the demurrer says that the complaint does not state a cause of action the necessary implication is, under this statutory designation of what constitutes the cause of action, that the complaint does not state sufficient facts. The complaint avers that on July 24, 1901, appellees shipped 30 horses over appellant's road, with directions to appellant to deliver to themselves at Russiaville, a town on appellant's road; that the shipment was made in time so that the horses could be delivered at such station before the morning of July 25, 1901, at which date appellees had advertised a sale of the horses; that appellant accepted the horses, which were then in good condition, the freight charges having been paid in advance, and placed the car in one of its freight trains, which reached Russiaville about 11 o'clock of the night of July 24, 1901; that at that time appellees had at the place an experienced representative who understood the business of unloading horses from cars into stockyards, at which place appellant had a stockyard with a chute made for the purpose of receiving stock from the cars and transferring them to the stockyards; that it was appellant's duty to place the car at and in connection with the chute; that a representative of appellees at the arrival of the train requested appellant's employes in charge of the train to properly set the car at the chute so that the same might be unloaded; that this the employes refused to do, but set off the car among a large number of other freight cars on a side track away from the stock yards and away from the chute, and in such condition that it was impossible for appellees to unload, leaving the car and horses so situated until about the hour of 10 o'clock of the following day, July

¶ 1. See Pleading, vol. 39, Cent. Dig. § 477.

25, 1901, at which time appellant sent another engine, and placed the car at the chute, and unloaded them from the car; that "during the time the said car load of horses were in the defendant's charge, and while standing on her side track at Russiaville, they became and were injured to such an extent that when they were unloaded from said car by the defendant two shortly thereafter died, others were crippled, maimed, and bruised to such an extent that they were worthless, so much so that the entire car load were rendered useless and worthless to plaintiffs, and when they were requested by defendant's agents and employés to receive said horses they refused them, and left them in the possession of the defendant company; that at the time this defendant received said car load of horses for shipment they were reasonably worth forty dollars per head, making a total value of twelve hundred dollars; that plaintiffs requested the defendant company to adjust said loss, which they refused to do; that said request was made of defendant before plaintiffs refused to receive said horses from the defendant. The injury to plaintiffs' horses was caused wholly on account of the negligence of the defendant, and without any fault or negligence on the part of the plaintiffs. By reason of the fault of the defendant, plaintiffs were damaged twelve hundred dollars, for which they demand judgment in the sum of twelve hundred dollars, and all other proper relief."

This is an action in tort. It is predicated upon appellant's negligence. It is argued against the sufficiency of the complaint that it fails to charge negligence, and that, if it does charge negligence, it fails to connect such negligence with the injuries complained of. It is averred that it was appellant's duty to place the car at the chute at the stockyards upon arrival at its destination, so that the stock might be unloaded. It is also averred that appellant not only failed to so place the car, but refused to do so when requested, and that, disregarding its duty and appellees' request, the car was placed by appellant among other cars away from the chute and in a position where it was impossible to unload the horses. That such a duty rested upon appellant is admitted for the purpose of the demurrer. If it was in fact charged with such a duty, its failure to perform it would be no less negligent than its failure to perform a statutory duty. The only difference in the two instances is that in the former the duty must be proven, while in the latter it is fixed by statute. The omission to perform the duty charged was negligence.

But the complaint fails to show this imputed negligence was the proximate cause of the injury. It is simply charged that during the time the car load of horses was in appellant's charge, and while standing on the side track, they became and were injured. Whether they were injured because of hav-

ing been left on the side track, or whether they were injured from some cause with which appellant had nothing to do, is left to conjecture. No facts are averred to show whether injury would necessarily and naturally result to horses left as these were, and that appellant knew such to be the fact. No facts are averred which to a certainty raise the presumption that the injury was the result of the negligence charged. It is not charged that the horses were injured by reason of having been left as they were. So far as informed by the complaint, the injury might have occurred just as it did occur had there been no omission of duty on appellant's part. The pleading shows no connection between the negligence charged and the injury in the way of cause and effect. The injury is averred, but the complaint does not aver what caused it, nor does it aver facts from which it can be said that the injury complained of must necessarily have occurred from the negligent act charged. *Pennsylvania Co. v. Gallentine*, 77 Ind. 322; *Pittsburgh, etc., Co. v. Conn*, 104 Ind. 64, 3 N. E. 636; *Pennsylvania Co. v. Marion*, 104 Ind. 239, 3 N. E. 874; *Harris v. The Board*, 121 Ind. 299, 23 N. E. 92; *Evansville, etc., R. Co. v. Krapf*, 143 Ind. 467, 36 N. E. 901; *Baltimore, etc., R. Co. v. Young*, 146 Ind. 374, 45 N. E. 479; *Chicago, etc., R. Co. v. Thomas*, 147 Ind. 35, 46 N. E. 73; *Lake Erie, etc., R. Co. v. Mikesell*, 23 Ind. App. 395, 55 N. E. 488; *South Chicago, etc., R. Co. v. Moltrum*, 26 Ind. App. 550, 60 N. E. 361; *Peerless Stone Co. v. Wray*, 10 Ind. App. 324, 37 N. E. 1058; *Ohio, etc., R. Co. v. Engler*, 4 Ind. App. 261, 30 N. E. 924. See, also, *City of Greencastle v. Martin*, 74 Ind. 449, 39 Am. Rep. 93; *Pennsylvania Co. v. Hensil*, 70 Ind. 569, 36 Am. Rep. 188; *Corporation, etc., v. Mathews*, 92 Ind. 213. The averment at the close of the pleading that "the injury to plaintiffs' horses was caused wholly on account of the negligence of the defendant, and without any fault or negligence on the part of the plaintiffs," does not make the complaint sufficient, as no act or omission is mentioned, and no reference is made to any act or omission or negligence before mentioned. *South Chicago, etc., R. Co. v. Moltrum*, supra; *Ohio, etc., R. Co. v. Engler*, supra.

Judgment reversed, with instructions to sustain the demurrer to the complaint.

(69 Ohio St. 123)

PITTSBURG, C., C. & ST. L. RY. CO. v. LYNCH.

(Supreme Court of Ohio. Oct. 27, 1903.)

RAILROAD EMPLOYE—PERSONAL INJURIES—ATTEMPT TO SAVE LIFE OF ANOTHER.

1. In an action to recover on account of injuries sustained in an effort to save human life, the conditions upon which there may be a recovery are "that the person whose rescue is attempted must be in a position of peril from the negligence of the defendant, and the rescue

must not be attempted under such circumstances or in such a manner as to constitute recklessness." Those conditions appearing, a recovery will not be prevented by the fact that negligence of the person whose rescue is attempted contributed to his peril, nor by the fact that the plaintiff is an employé of the defendant.

(Syllabus by the Court.)

Error to Circuit Court, Tuscarawas County.

Action by one Lynch against the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

The railway company, for purposes of operating its road, maintains 10 tracks over the grade crossing of Third street, in Dennison; that street being the principal thoroughfare of the village; about one-third of its population of 4,000 residing upon one side of the tracks, and two-thirds on the other. On the 25th of April, 1900, while Lynch was acting as the company's only watchman at the crossing, one of the tracks being occupied by a passing train, and he engaged in looking after the safety of a number of school children who were about to cross the tracks, a caboose was, without warning, kicked over the crossing on another track at the rate of about eight miles an hour, without any one on its forward end to warn persons of its approach. Lynch observed a woman apparently unconscious of the approach of the caboose on the track on which it was approaching, and, as he believed, in danger of being run down by it. He attempted to give her a warning signal with his flag, but she did not observe the warning. He then hastened to her rescue, and pushed her from the track, but was himself caught by the caboose and seriously injured. He had been at the crossing about three weeks, his duty being to see that teams and footmen crossed the tracks in safety. The degree of care which he exercised could only be inferred from the circumstance of the accident. There was evidence tending to show that the caboose was sent over the street in the manner stated, and that the woman rescued was not exercising due care. Lynch brought suit in the court of common pleas to recover for his injury, alleging negligence of the company in the manner of operating the caboose and in other respects; such negligence being alleged to be the cause of his injury. The company denied that it was negligent, and pleaded that, if Lynch was injured, it was the result of his own carelessness. The material question presented for decision is raised by the following portion of the charge: "The plaintiff claims that he was struck by a car and injured while he was in the act of rescuing a woman from danger, and saving her life. To hold the railroad company responsible in damages for this injury, it must be shown that the woman was in danger of being run over and injured by the approaching car, and that such danger was caused or created by the negligence of the railroad

company, and that in making an effort to rescue the woman the plaintiff was not guilty of contributory negligence. These are questions of fact which it will be your duty to determine from the evidence. If you find that the peril to which the woman was exposed was caused by such negligence of the company, you will then inquire whether the plaintiff, Lynch, in passing onto the track and attempting to rescue the woman, was guilty of contributory negligence. The law will not impute negligence to an effort to preserve human life unless made under such circumstances as to constitute rashness in the judgment of prudent persons. If the plaintiff believed, and had good reason to believe, that he could save the life of the woman without serious injury to himself, the law will not impute to him blame for making the effort. The attending circumstances, as shown by the evidence, must be regarded; the alarm, the excitement and confusion, if you find any to have existed on said occasion; the uncertainty, if any, as to the proper move to be made; the promptness, if any, required, and what liability to mistake as to the best course to pursue. All these circumstances, as shown by the evidence, may be considered by you in determining whether, under the peculiar circumstances of this case, the plaintiff was in the exercise of ordinary care at the time he received his injuries." There was a verdict in favor of the plaintiff, which was followed by a judgment, and that judgment was affirmed by the circuit court.

Dunbar & Sweeney and T. D. Healea, for plaintiff in error. T. H. Loller and D. A. Hollingsworth, for defendant in error.

SHAUCK, J. (after stating the facts). With respect to the general instructions given to the jury upon the subjects of negligence and the measure of recovery, it is sufficient to say that they were in substantial accordance with the familiar cases. But regarding the peculiar circumstances of the case, counsel for the company insist that the rescuer could not recover for the injury to him if the person rescued was in peril because of such contributory negligence on her part as would have prevented a recovery by her if she had been injured. The trial judge was not requested to give to the jury an instruction embracing that view of the law, but the verdict for the plaintiff appears to have been returned without regarding the evidence tending to show negligence on her part; and it is assumed that this was in accordance with the instruction given that the law will not impute negligence to one attempting to save human life unless the attempt is made under such circumstances or in such a manner as to constitute rashness or recklessness. The jury had been told in another portion of the charge that there is no presumption of negligence against either party, and they per-

haps understood the word "impute" to be used in its theological sense, and the instruction to signify that his right of action was not affected by her negligence. This portion of the charge was given in the language of this court in *Railroad Co. v. Langendorf*, 48 Ohio St. 316, 28 N. E. 172, 13 L. R. A. 190, 29 Am. St. Rep. 553, but it is insisted that the case cited and the present case are distinguishable by the two facts that the person whose rescue was there attempted was an infant incapable of negligence, while here she was chargeable with the consequences of her conduct, and *Langendorf* was a stranger to the company, while the plaintiff in the present case was its employé. Obviously the cases present the suggested differences of fact. Are those differences of legal significance? Apparent support is given to the view presented by counsel for the company by commentators whose conclusions have been affected by misconceptions of the three cases which they cite: *Railroad Co. v. Hiatt*, 17 Ind. 102; *Donahoe v. Railway Co.*, 83 Mo. 560, 53 Am. Rep. 594; *Sann, Adm'r, v. The H. W. Johns Manufacturing Co.*, 16 App. Div. 252, 44 N. Y. Supp. 641. In none of these cases was the judgment placed upon the ground that the person whose rescue was attempted had been guilty of negligence which was contributory merely, but that his was the only negligence which the case presented—that the defendant had not been negligent. The cases were determined upon the self-evident proposition that an action of negligence cannot be prosecuted successfully against one who has not been negligent. In the present case the jury were distinctly instructed that their verdict must be for the company unless the evidence showed that it had been negligent as charged in the petition. The view of the law which was given to the jury in the present case was expressed by *Grover, J.*, in *Eckert v. Railroad Co.*, 43 N. Y. 502, 3 Am. Rep. 721. It has been adopted in *Railroad Co. v. Langendorf*, and in many other cases. It is worthy of notice that while some of them were cases of the rescue, or attempted rescue, of infants, that fact has not been regarded as having legal significance, and the judgments have been placed upon grounds which are found in the present case. If the view now urged by counsel is considered as unaffected by the decided cases, it must be rejected because of the impracticability of applying it. It invokes the principle of subrogation as the test of the plaintiff's right to recover. If that principle should be adopted to determine his right to recover, for equal reason it should determine the amount of his recovery. By what process could it be ascertained what the extent of her injury would have been if the attempted rescue had failed? The view presented would lead to the conclusion that if the attempted rescue had failed, and she had been injured without her fault, no right of action

would have accrued to him, because such right would have accrued to her. The insurmountable difficulties which would be met in an attempt to apply the suggested doctrine in an action under the statute for the benefit of the next of kin when the injuries of the rescuer prove fatal need not be stated. It seems clear that the law will not admit of the suggested refinement.

Lynch's right of action is not unfavorably affected by the fact that he was an employé of the company. Approbation of his conduct should not lead to a recovery in his favor contrary to the doctrines of the law upon the subject, but a brief consideration of those doctrines will show that his recovery was proper. The evidence tended to show, and the charge required that it should establish, the negligence of the company. One is liable for the consequences of his negligence unless there appears to be a contributing cause arising from conduct of the plaintiff, which, in the eye of the law, is reprehensible, such as unlawfulness or negligence. Can it be said that the generous and heroic performance of duty is reprehensible? It is according to settled and salutary rules that a recovery is denied one who voluntarily goes into a place of danger, omitting to use present opportunities for circumspection and care, and failing to discharge his primary duty to regard his own safety. But if the reason of the law is its life, can it be said that the same judgment awaits one who is required to act under circumstances which leave no opportunity for circumspection, and in the discharge of the primary duty to regard the safety of others? Would it be considerably said that the duty imposed upon a railway company to keep a watchman at a crossing such as this would be discharged by keeping a watchman under instructions to care for those only who, if injured, might maintain actions against it? The duty is to the public. The present case showed that the woman rescued was in great peril. Though called as a witness for the company, she testified to her utter confusion at the time of the accident, and that she did not know whether she was swept from the track by the hand of the watchman or the end of the caboose. There was therefore a situation which called upon the watchman to act with the utmost promptness, and for that situation he was not responsible. No fact of legal significance distinguishes the present case from *Railroad Co. v. Langendorf*, and the conditions to the plaintiff's recovery were properly stated to the jury. To the authorities cited in that case may be added *Gibney v. State of New York*, 137 N. Y. 1, 33 N. E. 142, 19 L. R. A. 365, 33 Am. St. Rep. 690, and *Eckert v. Railroad Co.*, 57 Barb. 555.

Judgment affirmed.

BURKET, C. J., and SPEAR, DAVIS, CREW, and PRICE, JJ., concur.

(69 Ohio St. 126)

GERMANIA FIRE INS. CO. v. SCHILD.

(Supreme Court of Ohio. Oct. 27, 1903.)

INSURANCE POLICY—STIPULATION—SEVERABLE RISK.

1. An insurance policy which contains a stipulation that "this entire policy shall be void" on certain named conditions is not a severable risk, although the amount of insurance is distributed among different classes or articles of property. *Coleman & Co. v. Insurance Co.*, 31 N. E. 279, 49 Ohio St. 310, 16 L. R. A. 174, 84 Am. St. Rep. 565, distinguished.

(Syllabus by the Court.)

Error to Circuit Court, Huron County.

Action by one Schild against the Germania Fire Insurance Company. Judgment for plaintiff. Defendant brings error. Reversed.

The defendant in error sued upon a policy of insurance which contained the following clause: "This entire policy shall be void if the insured has concealed or misrepresented, in writing, or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss." The policy was for the sum of \$625, and was distributed as follows: \$200 on office furniture and fixtures of every description, useful and ornamental, including carpets, rugs, desks, chairs, tables, library case, medicine cases; \$250 on surgical instruments and medicines of all kinds used in the business of the insured; \$75 on surgical operating chair; and \$100 on medical library—all while contained in the 2½-story, shingle-roof, frame building situate on No. 71 Brownell street, Cleveland, Ohio. On the trial it appeared that the surgical operating chair had been bought by the plaintiff on a conditional purchase, the title remaining in the vendor until the chair was fully paid for, and it further appeared that the chair had not been fully paid for when the policy was issued, and therefore that the interest of the plaintiff in the property insured was not truly stated in the policy.

The court charged the jury as follows: "The first and second of these defenses relate to the ownership of the property insured. It is said that it is one of the conditions of the policy that, if the interest of the plaintiff was not truly stated, or if he was not the sole and unconditional owner of the property insured, or if the property was incumbered by chattel mortgage, then the policy is void. I say to you that in such case the policy would be rendered void in part, but not necessarily in its entirety; that is to say, it would be void, and plaintiff would have no right of action upon it, as to any item or items of the

property insured to which either of these misstatements or defective statements applied; but the policy in other respects, and as to the other property insured, would remain in force. This defense is particularly applicable to the so-called surgical chair mentioned in the policy. Under the undisputed evidence in the case the plaintiff is not entitled to a verdict for any loss sustained by the destruction of said chair or damage to it." And the court refused to instruct the jury to the effect that, if they should find from the evidence that at the time of securing the policy of insurance the plaintiff was not the sole and unconditional owner of the surgical chair, and that he fraudulently concealed this fact from the insurance company, then this was such a concealment and misrepresentation as would avoid the whole policy, and the plaintiff could not recover. Verdict was rendered for the plaintiff in the sum of \$430. A motion for a new trial was overruled, and a bill of exceptions taken, and petition in error filed in the circuit court, which court affirmed the judgment of the court of common pleas.

C. W. Fuller and Andrews Bros., for plaintiff in error. A. M. Beattie, for defendant in error.

DAVIS, J. (after stating the facts). It has been twice adjudged by this court that policies of insurance, like other contracts, should be reasonably construed, so as to give effect to the express words of the parties, and not to defeat their intention. *West et al. v. Insurance Co.*, 27 Ohio St. 1, 9, 10, 22 Am. Rep. 294; *Insurance Co. v. Myers*, 62 Ohio St. 529, 57 N. E. 458, 49 L. R. A. 760. See, also, *Joyce on Insurance*, §§ 208, 216. And this rule of construction should be observed notwithstanding the rule that when a policy is open to two interpretations, which are equally fair, that one should be preferred which would give to the insured the greater indemnity. There is no ambiguity in this policy, and it is not contended that it is ambiguous. Counsel for the defendant in error insists that the words, "This entire policy shall be void," etc., have no more force than if the word "entire" were omitted, and that, therefore, this case is controlled by *Coleman & Co. v. Insurance Co.*, 49 Ohio St. 310, 31 N. E. 279, 16 L. R. A. 174, 84 Am. St. Rep. 565. There is much force in the argument that the clauses, "This policy shall become void" and "This entire policy shall become void," mean the same thing; but by no legitimate construction can the latter clause be restricted to less than the whole policy, and whatever is included in it, and therefore the strength of the argument, if it has any, goes to the soundness of the decision in *Coleman & Co. v. Insurance Co.* The two cases, however, are plainly distinguishable. In the former case the language used in the

policy, whether ambiguous in itself or not, had frequently been the subject of construction and ingenious debate, resulting in diametrically opposite conclusions in the courts. In this case the parties, no doubt with knowledge of previous controversies, seem to have endeavored to put the indivisible character of their contract beyond controversy by inserting the word "entire," and, in our judgment, they succeeded in their purpose. Unless we reject this controlling word, and thus make a new contract for the parties, the policy means precisely what it says, and cannot be valid in part and void in part. The parties have agreed that it should not be a severable risk, and they have clearly expressed that intention.

In one case the policy provided that: "This entire policy, unless otherwise provided by agreement indorsed thereon or added hereto, shall be void," etc. It was held that "the stipulation in regard to the forfeiture is applicable to the policy as an entirety." *Insurance Co. v. Hamilton*, 82 Md. 88, 33 Atl. 429, 30 L. R. A. 633, 51 Am. St. Rep. 457. In another case the policy contained these words: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void, if the subject of insurance be a building on ground not owned by the insured in fee simple." The insured owned the building which was insured, but did not own the land on which it stood. The court said: "We have looked to see whether the suit might not go on as to the chattels contained in the building. The words of the written contract are: 'This entire policy,' etc., 'shall be void if the subject of insurance is a building,' etc. This language is plain, and must control;" and the court directed the lower court to enter judgment for the defendant. *Martin v. Insurance Co.*, 57 N. J. Law, 623, 31 Atl. 213.

In *New York the Court of Appeals* has distinguished a policy providing that "this entire policy and every part thereof shall be void" from cases which are cited, and which are like *Coleman & Co. v. Insurance Co.*, supra; the court saying: "This policy is quite different in its legal effect from those considered in the cases cited, it not being expressly provided in those policies, as in this, that a misrepresentation of the situation of one of the subjects insured should invalidate the insurance on all other property covered by the policy." *Smith v. Insurance Co.*, 118 N. Y. 518, 526, 23 N. E. 883. "Every part thereof" includes the whole, the same as "this entire policy," and we therefore do not regard this New York policy as materially differing in its provisions from the one in the case at bar.

The judgments of the circuit court and the court of common pleas are reversed.

BURKET, C. J., and SHAUCK, PRICE, and CREW, JJ., concur.

(305 Ill. 321)

MORAVA et al. v. BONNER et al.*

(Supreme Court of Illinois, Oct. 26, 1903.)

MORTGAGES—REDEMPTION—MASTER'S FAILURE TO RECORD CERTIFICATE OF REDEMPTION—EFFECT—RECORD—PRESUMPTION.

1. Where the foreclosure decree under which a creditor redeems from the sale of land under a first mortgage does not provide for the issuing of an execution except in case of deficiency after sale, no execution or levy as required by 2 Starr & C. Ann. St. 1896 (2d Ed.) p. 2358, c. 77, § 20, is necessary.

2. A redemption from the sale of land under foreclosure decree of a first mortgage by one of several decree creditors inures to his own benefit, and not to the benefit of all claimants whose claims were directed to be paid by the decree.

3. The failure of the master to record the certificate of redemption as required by the statute did not defeat the right of redemption by one who had done all that the law required of him.

4. Where the record shows that the master accepted the redemption money and interest, issued a certificate of redemption, proceeded to readvertise and resell the property, reported the sale, which was approved by the court, and the issuance of a deed ordered, it will be presumed that the party redeeming paid all costs and fees to the master at the time he sought to redeem, and a third person cannot, by raising the question of nonpayment of fees, defeat the redemption, especially when the question is for the first time raised in the Supreme Court.

Appeal from Superior Court, Cook County; Jesse Holdom, Judge.

Action by Charles Bonner against the Englewood Sash & Door Company, in which Wensel Morava and John Vanderpoel were made parties defendant. From a decree for plaintiff, defendants Morava and Vanderpoel appeal. Affirmed.

This was a bill in chancery, filed by Charles Bonner against the Englewood Sash & Door Company, in the superior court of Cook County, for the partition of certain real estate described therein, it being alleged that each of said parties was the owner of the undivided one-half part thereof in fee simple. Wensel Morava and John Vanderpoel were made parties defendant, and a sheriff's deed held by them upon said real estate was sought to be canceled as a cloud upon the title of Bonner and the Englewood Sash & Door Company. An answer and replication were filed, and a trial had, and a decree was entered in accordance with the prayer of the bill, from which decree Morava and Vanderpoel have prosecuted an appeal to this court.

The real estate in question formerly belonged to the Olivet Baptist Church. On April 26, 1901, a decree of foreclosure was entered in the circuit court of Cook county in favor of George W. Norton against the Olivet Baptist Church for the foreclosure and sale of said real estate to satisfy a first mortgage thereon for the sum of \$4,269.05, to which foreclosure suit all the parties to this suit were made parties defendant. On July

*Rehearing denied December 2, 1903.

9, 1901, the premises were sold by a master in chancery to satisfy said decree, and the personal representatives of Norton were the purchasers at said sale. The claims of Bonner, the Englewood Sash & Door Company, and Morava and Vanderpoel against the Olivet Baptist Church were secured by a second mortgage upon said real estate. On July 16, 1902, a decree was entered in said circuit court foreclosing said second mortgage, in which suit the parties to this suit were parties, wherein it was decreed there was due Bonner \$1,116.72, the Englewood Sash & Door Company \$2,321.72, and Morava and Vanderpoel \$2,799.40, and the premises were ordered to be sold by said master within five days from the date of said decree if said several sums were not paid prior to the expiration of that time, and an execution was authorized to issue in case of a deficiency. On the day upon which said decree was entered Bonner and the Englewood Sash & Door Company, for the purpose of effecting a redemption from the sale under the first mortgage, deposited with the master who made that sale the amount of the sale, with interest, and the master on that day issued a certificate of redemption from said sale, which was filed for record by him on August 15, 1902. The premises were readvertised for sale, and on August 26, 1902, were sold to Bonner and the Englewood Sash & Door Company for the amount of said redemption money, interest, and costs, and a deed was made to them, as such purchasers, by the master, and filed for record, and is the title under which they now claim to own the said premises. On May 2, 1902, Morava and Vanderpoel, in an action of assumpsit, recovered a judgment for the amount of their claim against the Olivet Baptist Church in the superior court of Cook county. On July 22, 1902, they sued out an execution thereon, and delivered the same to the sheriff of Cook county, on which day they paid to said sheriff the amount required to redeem from the sale upon the decree foreclosing the Norton mortgage, a levy was indorsed, and the sheriff issued a certificate of redemption from said sale, which was filed for record on the 31st day of July, 1902, and said premises were advertised by the sheriff, and on the 13th day of August, 1902, sold to Morava and Vanderpoel for the amount of said redemption money, interest, and costs, and a sheriff's deed was executed to them therefor, which was duly recorded. Morava and Vanderpoel shortly thereafter obtained possession of said premises from the Olivet Baptist Church by a suit in forcible detainer. The sheriff's deed thus obtained is the sheriff's deed sought to be canceled as a cloud upon the title of Bonner and the Englewood Sash & Door Company.

James Harvey Hooper, for appellants. Israel Cowen, for appellee Charles Bonner. Dunn & Hayes, for petitioner.

HAND, C. J. (after stating the facts). This is a controversy between the parties to this suit, as creditors of the Olivet Baptist Church over the title to certain real estate which formerly belonged to said church, and a correct determination thereof depends upon the validity of the redemption of the premises in controversy by appellees, through the master, from the sale under the Norton foreclosure decree and the resale to them of said premises by the master. If the redemption from said sale by appellees and the resale to them by the master are valid, the title of appellees must prevail over that of appellants, and the decree be affirmed; otherwise it should be reversed.

It is first contended that the redemption by appellees is invalid, because they did not sue out an execution upon their decree and deliver the same to the sheriff or other proper officer, and have him indorse on the back thereof a levy on the premises desired to be redeemed, in accordance with the terms of paragraph 20 of chapter 77 of our statutes (2 Starr & C. Ann. St. 1896 [2d Ed.] p. 2358). The decree under which the redemption was made did not provide for the issuing of an execution except in case of a deficiency after sale, and under the authority of *Whitehead v. Hall*, 148 Ill. 253, 35 N. E. 871, and *Beadle v. Cole*, 173 Ill. 136, 50 N. E. 809, no execution or levy was necessary or proper, as the decree was all the process that was required to authorize a redemption.

It is next contended that the appellees should be held to have redeemed for the benefit of all the claimants whose claims were decreed to be paid by the decree under which they sought to redeem. The decree was several, and not joint, and the appellees had the right to redeem from the sale under the foreclosure decree of the Norton mortgage as decree creditors; and such redemption inured to their benefit, and not to the benefit of the other creditors of the Olivet Baptist Church, whose claims were covered by said decree. Under the repeated decisions of this court (*Davis v. Upham & Stone*, 191 Ill. 372, 61 N. E. 76; *Pugh Co. v. Wallace*, 198 Ill. 422, 60 N. E. 1005) each of said decree creditors could have prosecuted a separate appeal from said decree, and we see no reason, if a decree of the character here referred to is severable for the purpose of an appeal, why it is not severable for the purpose of a redemption.

It is further contended that the failure of the master to record the certificate of redemption until after the appellants had deposited with the sheriff the amount necessary to redeem from the sale under the decree foreclosing the Norton mortgage defeated the redemption by the appellees from said sale. The section of the statute above referred to made it the duty of the master to make and file in the office of the recorder of the county in which the premises are situated a certificate of redemption, and his

failure to fully comply with the statute did not deprive the appellees, who had complied with the statute by depositing in his hands the amount necessary to redeem from said sale, of the right to redeem therefrom. The appellees did all that the law required of them, and their right of redemption was not defeated by the failure of the master to record the certificate of purchase. *Pease v. Fish Furniture Co.*, 176 Ill. 220, 52 N. E. 932.

It is, however, said that, although it be conceded that it was the duty of the master to file for record the certificate of redemption, and that his failure in that regard would not destroy the redemption of the appellees, he was not bound to file the certificate of redemption until the appellees advanced to him the recording fee, and that the record does not show such fee was advanced by the appellees to the master. The record does not show in express terms that the fee for recording the certificate of redemption was paid to the master. It does show, however, that the master accepted the redemption money and interest, issued a certificate of redemption, proceeded to re-advertise, and resold the property, reported the sale, which was approved by the court, and a deed was ordered to issue to the appellees, which was executed by the master. We think, in view of these facts, the presumption obtains that the appellees paid to the master whatever sum was due him from them as costs at the time they sought to redeem, and, as the master made no complaint that his fees were not paid, the appellants cannot defeat the redemption by appellees by now raising the question of the payment of the master's fees, especially as that question is raised in this court for the first time, and was not raised when the master's report of the redemption and resale was presented to the court and approved, although the appellants were present objecting to its approval on other grounds.

The redemption by appellees being valid, and antedating that of appellants, as there could be but one valid redemption from the sale under the decree foreclosing the Norton mortgage, it must be held that the only valid redemption from said sale is that of appellees, and that their title to said premises is superior to and must prevail over that of appellants.

The decree of the superior court will therefore be affirmed. Decree affirmed.

(205 Ill. 170)

EGGLESTON et al. v. ROYAL TRUST CO.*

(Supreme Court of Illinois. Oct. 26, 1903.)

JUDGMENTS — DEFAULT — VACATION — DILIGENCE — AFFIDAVIT OF MERITS — TRIAL — CALENDARS — STIPULATIONS — CONSTRUCTION.

1. On appeal from an order denying a motion to set aside a default judgment in an ac-

tion at law, it will be presumed, in the absence of a bill of exceptions, that the evidence was sufficient to support the judgment.

2. A stipulation by which attorneys agreed that an order dismissing a cause and entering judgment for defendants should be vacated, and the cause reinstated on the general calendar, did not preclude the plaintiff, after an order reinstating the cause "on the several dockets of the court" had been entered, from placing the cause on the short-cause calendar on filing the affidavit and giving the notice to defendants required by 3 Starr & C. Ann. St. 1896 (2d Ed.) pp. 3165, 3166, par. 97.

3. After a cause had been reinstated, plaintiff's attorney filed an affidavit and gave notice to defendants' attorney of the placing of the cause on the short-cause calendar for trial. Service of the notice was accepted by defendants' attorney, and thereafter the judge of the court on whose calendar the cause was placed was assigned to another court; and on August 31, 1899, an order was made striking all the causes undisposed of on such short-cause calendar therefrom, without prejudice to have them reset thereon by serving new notices on and after September 1, 1899. On September 2d, plaintiff's attorney filed another affidavit and served another notice on defendants' attorney, and thereafter the cause was again placed on the short-cause calendar, the call of which did not begin until October 30, 1899, on which day judgment was entered by default. Defendants made no motion to strike the cause from the calendar, and did not appear and object to the trial, though notice of the call of the case was given in a legal publication of which both parties were required to take notice. *Held*, that the facts showed such want of diligence on the part of defendants' attorney as required denial of a motion to set aside the default.

4. It is not error for the court to deny a motion to set aside a default judgment in the absence of a showing of merits.

Appeal from Appellate Court, First District.

Action by the Royal Trust Company against Charles B. Eggleston and others. From a judgment in favor of plaintiff, affirmed by the Appellate Court, defendants appeal. Affirmed.

This case has been before us before, and is reported as *Eggleston v. Royal Trust Co.*, 192 Ill. 101, 61 N. E. 423. It appears from the opinion filed in the case of *Eggleston v. Royal Trust Co.*, *supra*, that on October 30, 1899, the circuit court of Cook county entered a judgment in favor of defendant in error against plaintiffs in error for \$17,587.50; that, at the same term, plaintiffs in error entered their motion in said court to set aside said judgment, which motion was continued to the next term, when it was heard and denied; that plaintiffs in error excepted to the ruling and order of the court, and prayed an appeal to the Appellate Court for the First District, which was allowed upon filing their appeal bond in the sum of \$19,000 to be approved by the court, within 20 days, and their bill of exceptions within 60 days; that their appeal was allowed on November 11, 1899, and the appeal bond was approved by the court and filed on November 27, 1899, in pursuance of the order allowing the appeal; that the bill of exceptions was filed

*Rehearing denied December 2, 1903.

¶ 4. See Judgment, vol. 30, Cent. Dig. § 333.

on December 7, 1899, within the time allowed by the order of the court; that afterwards the Appellate Court dismissed the appeal, of its own motion, for want of jurisdiction, on the ground that the appeal bond recited the recovery of the original judgment and an appeal therefrom, instead of an appeal from the order denying the motion to set aside the judgment; that the writ of error in that case was sued out to review the judgment of the Appellate Court dismissing the appeal. We there held that the judgment of the Appellate Court dismissing the appeal was wrong, and reversed the judgment of the Appellate Court dismissing the appeal, and remanded the cause to that court, with directions to consider and determine the cause upon the error assigned upon the record. In pursuance of the decision so made, the Appellate Court has considered the cause, and affirmed the judgment of the circuit court. The present appeal is from such judgment of affirmance.

N. M. Jones, for appellants. Geo. I. Hicks (Hamline, Scott & Lord, of counsel), for appellee.

MAGRUDER, J. (after stating the facts). This case was tried on October 30, 1899, upon the short-cause calendar, before a judge sitting in the circuit court of Cook county, and a jury. The action is upon a promissory note, and the plea was the general issue, with affidavit of merits thereto attached, of a defense upon the merits as to \$3,569.79 of the amount sued for. When the trial took place, neither of the appellants was present, nor was their attorney present. There is no bill of exceptions in the record, showing what took place at said trial, or showing the evidence upon which the verdict and judgment were rendered.

As the proceeding was one at law, it will be presumed, in the absence of a bill of exceptions, that the evidence heard was ample to support the judgment. *Clark v. Burke*, 172 Ill. 109, 49 N. E. 551. Where a court of superior general jurisdiction has proceeded to adjudicate and render judgment in a matter before it, all reasonable intendments will be indulged in favor of its jurisdiction. *Hansen v. Schlesinger*, 125 Ill. 230, 17 N. E. 718; *Osgood v. Blackmore*, 59 Ill. 261. Where there is no bill of exceptions in the case, the presumption arises that the necessary proof was introduced in the court below to sustain the findings of the judgment, and the allegations of the pleadings. *Boyles v. Chytraus*, 175 Ill. 370, 51 N. E. 563.

But on November 3, 1899, the defendants below (the present appellants) moved to set aside the judgment, and in support of such motion read certain affidavits. The bill of exceptions in the record shows what took place upon the motion subsequently made to set aside the judgment rendered on October 30, 1899, and not what took place at the trial which resulted in the judgment. The gen-

eral ground upon which the motion to set aside the judgment was based is that the case, when called for trial, was improperly upon the short-cause calendar. The facts upon this subject set up in the affidavits are substantially as follows: In March, 1899, appellee caused the case to be put on the short-cause calendar before one of the judges of the circuit court. On April 3, 1899, the cause was called for trial, and, upon motion of attorney for the defendants (the present appellants), was dismissed for want of prosecution, at the plaintiff's costs, and execution ordered to issue therefor. On April 7, 1899, the order of dismissal and judgment entered on April 3, 1899, were set aside and vacated upon the stipulation of the parties, and the cause was reinstated.

It is claimed by the appellants and their attorney that they consented to a setting aside of the order of dismissal, and to a reinstatement of the cause, upon the agreement of counsel for appellee that the cause should not be put upon the short-cause calendar; and the motion to set aside the judgment rendered on October 30, 1899, was based upon the contention on the part of appellants and their counsel that the cause was placed upon the short-cause calendar, and reached and disposed of while on that calendar, in violation of such stipulation or agreement claimed to have been made by counsel for appellee.

There was a written stipulation entered into between the attorneys for appellee and appellants, and signed by both of them. This written stipulation is as follows: "It is hereby stipulated and agreed between the parties hereto, by their respective attorneys, that the order entered in said cause on the 3d day of April, 1899, dismissing said cause and entering judgment for defendants herein, be vacated, and said cause be reinstated on the general calendar." So far as the record shows, this was the only stipulation in writing entered into between the parties, and, while the stipulation provides for the reinstatement of the cause on the general calendar, and not on the short-cause calendar, it contains no agreement that the cause might not thereafter be put upon the short-cause calendar in accordance with the terms of the statute. The order reinstating the cause, as entered by the court, is as follows: "On the stipulation of the parties to this suit filed herein, it is ordered that the order of dismissal and judgment heretofore, on April 3, 1899, entered herein, be, and the same is hereby, set aside and vacated, and this cause reinstated on the several dockets of this court." There is nothing in this order, which refers to the stipulation of the parties, stating or implying that the appellee (the plaintiff below) was not at any time to put the cause upon the short-cause calendar. Therefore, if there was a stipulation that the case, when reinstated, should remain on the general calendar, and not again be put for trial

upon the short-cause calendar, it must have been a verbal, and not a written, stipulation.

Appellants were informed by the steps taken by the attorney for appellee that it was the intention of the latter again to put the cause upon the short-cause calendar. The statute in regard to short-cause calendars provides as follows: "That it shall be the duty of the clerk of each court of record, in this state, to prepare a trial calendar, in addition to the regular trial calendar of each court, to be known as the 'short-cause calendar.' Upon the plaintiff, his agent or attorney, in any suit at law pending in any court of record, filing an affidavit that he verily believes the trial of said suit will not occupy more than one hour's time, and upon ten days' previous notice to the defendant, his agent or attorney, said suit shall be placed by the clerk upon said short cause calendar." 3 Starr & C. Ann. St. 1896 (2d Ed.) pp. 3165, 3166, par. 97. On June 20, 1899, after the cause had been reinstated, the attorney for appellee filed an affidavit in accordance with the statute, and gave notice to the attorney for the appellants of the filing of said affidavit on June 20, 1899, and that the clerk of the circuit court would place said suit on the short-cause calendar for trial, as provided by statute. Service of a copy of this notice was accepted on June 20, 1899, by the attorney for appellants. On August 9, 1899, the judge of the circuit court, on whose calendar the cause was placed, was assigned to the criminal court for the ensuing year; and on August 31, 1899, a judge of the circuit court, then holding court, entered an order that all cases which had been noticed for the short-cause calendar previous to vacation, and were still pending on said calendar and undisposed of, should be, and the same were thereby, stricken from the said short-cause calendar, without prejudice, and that new notices should be given, as provided by statute, to replace said causes upon the short-cause calendar, and that said notices might be filed on and after September 1, 1899.

What was thus done by attorney for the appellee on June 20, 1899, was notice to the attorney of the appellants that the appellee intended to put the cause upon the short-cause calendar. It does not appear, however, that the attorney for the appellants took any steps to have the cause stricken from the short-cause calendar between June 30, 1899, when the 10 days mentioned in the statute expired, and August 31, 1899, when said last-mentioned order was entered.

In pursuance of the order so entered by the circuit court on August 31, 1899, the attorney for the appellee on September 2d filed another affidavit under the statute, and in accordance therewith, for the purpose of putting the cause upon the short-cause calendar; and on the same day, to wit, September 2, 1899, a copy of a notice that attorney for the appellee had filed the requisite affidavit on September 2, 1899, and that the clerk

would place said suit on the short-cause calendar for trial as provided by statute, was received by the attorney of appellants, and service of such notice was acknowledged by the latter.

Two things are required by the statute in order to justify the placing of a cause on the short-cause calendar: First, the filing with the clerk of an affidavit such as is prescribed by the statute; and, second, the giving of 10 days' notice to the defendant, or his agent or attorney. The presumption, in the absence of evidence to the contrary, is that the clerk did his duty in this particular. There is no evidence here that the clerk did not so perform his duty. The tenth day after the service of the notice of September 2, 1899, was September 12, 1899. The call of the short-cause calendar did not begin until October 30, 1899, and consequently the case at bar was not reached for trial on that calendar until October 30, 1899, when the judgment here under consideration was entered. If appellants regarded the cause as improperly upon the short-cause calendar, because of the violation of an oral stipulation between the attorneys in the case by putting the cause upon that calendar, appellants should have made a motion between September 12, 1899, and the time when the cause was reached for trial on the short-cause calendar, to strike the same from the short-cause calendar. No such motion, however, was made. It is true that the judge, upon whose docket the cause was originally placed for trial upon the short-cause calendar, had been assigned to duty in the criminal court of Cook county, and another judge outside of that county had been assigned to call the short-cause calendar. But inasmuch as the attorney for the appellants had been served with notice on September 2, 1899, of the filing of the necessary affidavit required by the statute, a resort to the files and records of the court would have enabled him to discover before what judge the short-cause calendar, upon which, according to the notice, the cause was put, was to be called. It appears that not only did the attorney for the appellants fail to make a motion to strike the cause from the short-cause calendar during the period of nearly two months which elapsed before it was replaced upon such calendar and before it was reached for trial thereon, but it also appears that when the cause was called for trial on October 30, 1899, the attorney for the appellants was not present, and made no objection to the trial of the case upon the short-cause calendar on October 30, 1899. *Anderson v. McCormick*, 129 Ill. 308, 21 N. E. 803; *Belford v. Beatty*, 145 Ill. 414, 34 N. E. 254; *Winterburn v. Parlow*, 102 Ill. App. 368; *Highley v. Metzger*, 186 Ill. 253, 57 N. E. 811.

It seems to be conceded by counsel on both sides, although no rule of court in relation to such matter was introduced in evidence, that both parties, or their attorneys,

were bound to take notice of notices published in the Chicago Law Bulletin. It appears from the evidence that the Chicago Daily Law Bulletin, containing the announcements and calls of the several courts of Cook county, announced on Friday, October 27th, and on Saturday, October 28th, that the short-cause calendar would be called on the following Monday, and that the first case on that call would be 15,622, Royal Trust Co. v. Eggleston. There is an affidavit by a clerk in the office of the attorney of appellants that it was a part of his duties, as such clerk, to look over the Chicago Law Bulletin from day to day, and to keep track of cases and memoranda thereon; that he looked over the bulletins which were published on Saturday and Monday, October 28th and October 30th and did not observe that the above cause was on the short-cause calendar on either of said days, and did not know that the same had been placed upon said calendar, or that any judgment had been entered in said case, until November 2, 1899. It is thus clear from the affidavits filed upon the motion to set aside this judgment that the appellants not only failed to make any motion to strike the cause from the short-cause calendar before it was reached for trial, but that they did not use such due diligence as they ought to have used in discovering when it was to be called for trial, as announced upon the bulletin. Whatever want of diligence there is on the part of the attorneys binds the clients. *Staunton Coal Co. v. Menk*, 197 Ill. 369, 64 N. E. 278.

But there is a fatal defect in the affidavits filed by the appellants in support of their motion to set aside the judgment in this case, which justified the trial court in refusing to sustain the motion. That defect is that the affidavits fail to show that the defendants below had any meritorious defense to the claim, or any part of the claim, against them, which was the subject-matter of the suit. It has always been a well-settled rule in this state that a motion to set aside a default is addressed to the sound legal discretion of the court, and, unless it appears that such discretion has been wrongfully and oppressively exercised, this court, on appeal, will not interfere. *Culver v. Brinkerhoff*, 180 Ill. 548, 54 N. E. 585, and cases there cited. It does not appear here that there was any abuse of the discretion of the court. In *Constantine v. Wells*, 83 Ill. 192, we said: "But if appellant had been free from negligence, the court was not bound to set aside the default, unless it appeared that he had a meritorious defense to the action." In *Roberts v. Corby*, 86 Ill. 182, where a suit was tried in the absence of the defendant and his counsel, and an affidavit was made to set aside the finding, and for a new trial, we said: "It is sufficient to say of appellant's affidavit that he does not state any facts from which the court can see he had any substantial defense to appellee's claim. He

says he has a good and valid defense. * * * But this is a conclusion of law to be drawn from facts, and not the statement of a fact. He should have stated the facts as he can prove them, so that the court would have been enabled to draw its own conclusions of law." The doctrine thus announced in *Roberts v. Corby*, supra, was reaffirmed by this court in *Culver v. Brinkerhoff*, supra. In the case at bar, one of the affidavits states that the appellants claim a good defense to a part of the judgment, but does not state what that defense is, and fails to set up the facts constituting such defense. In this respect the affidavit was wholly insufficient.

For the reasons above stated, we are of the opinion that no error was committed by the lower courts, and accordingly the judgment of the Appellate Court affirming the judgment of the circuit court is affirmed. Judgment affirmed.

(205 Ill. 70)

WOOD v. CITY OF CHICAGO et al.*

(Supreme Court of Illinois. Oct. 26, 1903.)

APPEAL—SUPREME COURT—ORIGINAL JURISDICTION.

1. Where a suit to restrain the commissioner of public buildings of a city from revoking a building permit involved no question of freehold, but only whether the city had authority under a statute to pass a certain ordinance, and whether the ordinance was void for unreasonableness, the Supreme Court had no jurisdiction of a direct appeal from a decree of the circuit court denying an injunction.

Appeal from Circuit Court, Cook County; Elbridge Haney, Judge.

Bill by Olive H. Wood against the city of Chicago and others. From a judgment in favor of defendants, complainant appeals. Dismissed.

Edmund H. Smalley, for appellant. Charles M. Walker, Corp. Counsel, and William D. Barge, Asst. Corp. Counsel, for appellees.

CARTWRIGHT, J. This is a suit in equity, begun by appellant, Olive Henline Wood, in the circuit court of Cook county, by filing her bill to enjoin the appellees, the city of Chicago and Peter Kiolbassa, commissioner of buildings of the said city, from interfering with the alteration of appellant's building and the construction of an addition thereto in accordance with a building permit issued to her on July 11, 1902, and revoked by said building commissioner on July 15, 1902. The court sustained a demurrer to the bill, and, appellant electing to stand by her bill, it was dismissed for want of equity at her cost, and she prosecuted an appeal directly to this court.

Upon an examination of the record we find no ground upon which we are authorized to assume jurisdiction of this appeal. The bill

*Rehearing denied December 2, 1903.

alleges that complainant owns a lot, with a building thereon, in the city of Chicago; that, being desirous of adding to the building and making certain changes therein, she submitted the plans of her architect to the health department of the city and the building commissioner, who approved the same; that a permit was issued authorizing her to make such addition and changes; that the commissioner of buildings attempted to revoke said permit for the reason that the building was to be used as a hospital, and it would be necessary for the complainant to get the consent of property owners in the block and on the opposite side of the street, as required by an ordinance of said city; and that the defendants threatened to interfere with and prevent the building of the addition and altering the building in accordance with the permit. It alleges that no authority has been granted to the city of Chicago by the act under which it is organized to pass an ordinance requiring frontage consents for the establishment of hospitals, and that the ordinance is unreasonable, arbitrary, and oppressive, and therefore void. The controversy relates only to the validity of the ordinance, and the questions involved are whether power to pass any ordinance on the subject has been conferred by statute, and whether the ordinance requiring frontage consents is an unreasonable interference with complainant's right of property.

It is not claimed that any franchise or freehold is involved in the appeal. We are authorized to take jurisdiction of an appeal from the circuit court where the validity of a statute is involved; but an ordinance is not a statute, and we have no jurisdiction of this appeal under that provision. While an ordinance is a law of the municipality which ordains and enforces it, it is purely local, for the regulation of affairs within such municipality, and is distinguished from general laws and statutes. It is true that the enforcement of an ordinance may involve a construction of the Constitution, and we may be authorized to assume jurisdiction of an appeal upon that ground. An ordinance may be an attempted interference with a constitutional right which is in dispute, and the construction of the Constitution may be necessary to determine the validity of the ordinance. *City of Chicago v. Trotter*, 136 Ill. 430, 26 N. E. 359. In such a case it is immaterial whether the denial of a constitutional right is in a statute or an ordinance passed by virtue of a statute. *City of Chicago v. Netcher*, 183 Ill. 104, 55 N. E. 707, 48 L. R. A. 261, 75 Am. St. Rep. 93. In this case there is no controversy as to the construction of any provision of the Constitution, and a decision as to the validity of the ordinance does not involve a construction of the Constitution. In *Cicero Lumber Co. v. Town of Cicero*, 176 Ill. 9, 51 N. E. 758, 42 L. R. A. 696, 68 Am. St. Rep. 155, an ordinance was involved, but it was contended that the stat-

ute authorizing municipalities to provide for pleasure driveways was unconstitutional and void. The validity of the statute was involved in that case. In *City of Chicago v. Collins*, 175 Ill. 445, 51 N. E. 907, 49 L. R. A. 408, 67 Am. St. Rep. 224. The validity of a wheel tax ordinance of the city of Chicago was involved, but the ordinance was regarded as levying a tax to raise a fund for the improvement of streets, which amounted to a double tax on the same property. The ordinance was held to levy a tax upon specific articles of personal property which were also assessed at their value for general taxation, and the case therefore related to revenue. This case does not come within any provision of the statute authorizing a direct appeal to this court.

The appeal is dismissed. Appeal dismissed.

(205 Ill. 147)

LEIGH v. AMERICAN BRAKE BEAM CO.*

(Supreme Court of Illinois. Oct. 26, 1903.)

CORPORATIONS—AGREEMENTS—VALIDITY—
ULTRA VIRES—ASSUMPSIT—EVIDENCE.

1. A corporation is not bound by an agreement made by its president and general manager with his co-partners for the application of corporate funds to the private enterprise of the partners, in which the corporation has no interest, in the absence of proof showing express authority on the part of the president and general manager to make the agreement.

2. A corporation organized to manufacture and sell or otherwise dispose of brake beams and other railroad appliances has no power to loan its money as capital, and an agreement for the application of its funds to the private enterprise of its president and others as partners is ultra vires and void.

3. Assumpsit for money had and received will lie against a person to whom money belonging to a corporation has been paid over pursuant to an ultra vires contract, and which in equity belongs to the corporation.

4. In an action by a corporation for money had and received, a copy of an unadjusted account between the president and principal stockholder of the corporation and the corporation, kept by the president, was inadmissible in evidence in favor of defendant.

Appeal from Appellate Court, First District.

Action by the American Brake Beam Company against Edward B. Leigh. From a judgment of the Appellate Court (107 Ill. App. 444) affirming a judgment for plaintiff, defendant appeals. Affirmed.

John P. Ahrens and David S. Geer, for appellant. Defrees, Brace & Ritter, for appellee.

CARTWRIGHT, J. Appellee, the American Brake Beam Company, a corporation organized under the laws of this state to manufacture and sell or otherwise dispose of brake beams and other railroad appliances, brought this suit in assumpsit in the circuit court of Cook county against the appellant,

*Rehearing denied December 2, 1903.

Edward B. Leigh. The declaration, as originally filed, contained two special counts for the recovery of alleged loans of money by the plaintiff to the defendant. The first alleged that on June 26, 1899, plaintiff loaned defendant \$1,000 by means of its check of that date, payable to the order of defendant, drawn on the American Trust & Savings Bank of Chicago for \$1,000, which check was delivered to defendant and indorsed by him and paid to him by said bank. The second set forth a like transaction on August 2, 1899, by which \$2,500 was loaned by plaintiff to defendant by means of a similar check on said bank, payable to the order of defendant, indorsed by him and paid. The court sustained a demurrer to these counts, and they were eliminated from the case. The declaration also contained the common counts, including a count for money had and received by the defendant for the use of the plaintiff. To the common counts the defendant pleaded the general issue. Upon a trial the court denied a motion of defendant to instruct the jury to find the issues in his favor, but gave an instruction to find the issues for the plaintiff, and assess its damages at the amount of the checks, with interest at the statutory rate of 5 per cent. The jury accordingly found the issues for plaintiff, and assessed its damages at \$3,916. The court, after overruling motions for a new trial and in arrest of judgment, entered judgment for said amount and costs, and the Branch Appellate Court for the First District affirmed the judgment.

At the trial plaintiff offered in evidence two checks drawn by it on the American Trust & Savings Bank of Chicago, signed by W. A. Tichenor, treasurer, and countersigned by Henry D. Laughlin, general manager, payable to the order of defendant, one dated June 26, 1899, for \$1,000, indorsed by the defendant, and paid June 28, 1899, and the other dated August 2, 1899, for \$2,500, indorsed by the defendant, and paid August 4, 1899, and also the testimony of a witness that he requested payment from the defendant of the amount of the checks and interest. The defendant offered evidence that he was interested with George Atkins, George Milliken, and Henry D. Laughlin, the president and general manager of the plaintiff, in the Noonday mining property, and that Laughlin advanced the money represented by the checks to put into the mining property for the benefit of those four, by giving the checks of the corporation to the defendant. The court ruled that the evidence was not admissible, in the absence of proof that Laughlin had some other authority than that implied from his position as president and general manager of the corporation to loan the money of the corporation or pay it to men who knew it was corporate money that was being paid or invested for the individual benefit of the officer, and that unless such action was au-

thorized by the board of directors or stockholders of the corporation it would not be bound by the act. The defendant then stated what he offered to prove, substantially as follows: That he and Laughlin, with Atkins and Milliken, were jointly interested in mining enterprises; that Laughlin offered to furnish Atkins and Milliken money, up to \$10,000, to carry on the work of those enterprises; that Laughlin said he could obtain money from his corporations, one of which was the plaintiff, and would furnish such money to Atkins and Milliken; that the checks were given to defendant for the purpose of using the money in that way for the joint benefit of Laughlin, Atkins, Milliken, and defendant in their private enterprise, to which the plaintiff was not a party, and in which it was not interested in any way; that the moneys were transferred by defendant to Atkins and Milliken for said purpose and applied to that object; and that Laughlin was the president of the plaintiff, and the owner of fifteen-seventeenths of its stock. There was no evidence tending to show that Laughlin had any authority from the stockholders or board of directors to take the money of the corporation and deliver it to the defendant or any one else for any such purpose. The court refused to admit the proffered evidence.

The ruling was right. It need scarcely be said that the president and general manager of a corporation has no authority, by virtue of his office, to appropriate the money of the corporation to the use of himself and his partners in his private business. The defendant had full notice, both by the checks and the agreement which he offered to prove, that the money of the plaintiff was being taken by its president, acting in the interest of himself and his associates, to be used for their joint benefit, and not for any purpose or business of the corporation. The checks were the checks of the corporation, drawn against its funds in the bank, and they did not purport to be checks of Laughlin. They were signed by the treasurer of the corporation, and were merely countersigned by Laughlin as general manager. Although a corporation must act by agents, the general power of an agent does not extend to a case where he is the person interested on the other side. Generally, an officer or agent of a corporation cannot act for the corporation and himself at the same time, and the position of Laughlin in the transaction was utterly inconsistent with the idea that he represented the corporation. Every person dealing with an officer of a corporation who assumes to act for it in matters in which the interests of the corporation and officer are adverse is put upon inquiry as to the authority and good faith of the officer. *Moores v. Citizens' Nat. Bank*, 111 U. S. 156, 4 Sup. Ct. 345, 28 L. Ed. 385; *Innerarity v. Merchants' Nat. Bank*, 139 Mass. 332, 1 N. E. 282, 52 Am. Rep. 710. The plaintiff was not bound

by any agreement of Laughlin to take its moneys and advance them to the defendant to be used in their private enterprise in which the corporation had no interest, and defendant admitted that he had full knowledge that the checks were not given for any corporate purpose, and therefore knew the want of power of Laughlin to bind the corporation. In the absence of proof of express authority from the plaintiff, the evidence was not admissible.

Furthermore, the alleged contract, by which Laughlin was to take the moneys of the plaintiff and loan them for use in the private enterprise, was beyond the power of the corporation, which was organized to manufacture and sell or otherwise dispose of brake beams and other appliances. The business of loaning money was not included in the powers granted to the corporation, and no action would lie upon the contract made in violation of the law. A corporation cannot make loans of money unless the exercise of its chartered powers ordinarily includes such loans. The business of this corporation was to invest and use its capital in making and selling brake beams and other railroad appliances and to distribute its profits as dividends, and it had no power to loan its money or capital. *Cook on Stock & Stockholders*, § 690. Any contract to loan the moneys of the corporation would be illegal and void, and the courts can afford no legal remedy upon an illegal and void contract. *McNulta v. Corn Belt Bank*, 164 Ill. 427, 45 N. E. 954, 56 Am. St. Rep. 203; *National Home Building & Loan Ass'n v. Home Savings Bank*, 181 Ill. 35, 54 N. E. 619, 72 Am. St. Rep. 245; *Best Brewing Co. v. Klassen*, 185 Ill. 37, 57 N. E. 20, 50 L. R. A. 765, 76 Am. St. Rep. 26; *Fritze v. Equitable Building & Loan Society*, 186 Ill. 183, 57 N. E. 873. No action could be brought on the alleged contract even if the corporation had attempted to authorize it, and neither could it be made the ground of a defense.

That rule of law, however, does not prevent a recovery from the defendant of the moneys of the plaintiff received by him. Although a party is not liable to pay according to a contract which is ultra vires, that fact is not permitted to work injustice where the law can afford a remedy without enforcing the illegal contract, and the courts will give relief where it can be given independently of the contract. It would be unjust to hold that one who has received money or property under a contract which is ultra vires need not account for it because the contract was illegal, but the law implies a contract to return what has been received. Where a contract is not *malum in se* or *malum prohibitum*, and it has been executed or benefits have been received, the party benefited, whether the corporation or individual, will not be permitted to retain the fruits of the transaction without compensation. It has sometimes been said that, where the

contract has been in good faith fully performed by one party, the other party, who has had the benefit of the performance of the contract, will be estopped to plead its invalidity. *Bradley v. Ballard*, 55 Ill. 413, 7 Am. Rep. 656; *Darst v. Gale*, 83 Ill. 136; *Kadish v. Garden City Building Ass'n*, 151 Ill. 531, 33 N. E. 236, 42 Am. St. Rep. 256. Although this has been said in cases where the contract was not ultra vires in the proper sense, and the language was not, perhaps, strictly accurate, it was intended to declare the sound and wholesome doctrine that a party cannot retain the benefits, money, or property received under a contract which is void merely for want of power to enter into it, without making compensation therefor. Where a contract is ultra vires, and a corporation has received money under it which in equity and good conscience belongs to another and which it ought to pay over, it is liable for it in an action for money had and received, with interest after demand. *Brennan v. Gallagher*, 199 Ill. 207, 65 N. E. 227. The converse of the proposition is equally true, and an action for the recovery of the money would not enforce or affirm the original contract, but would disaffirm it. 27 Am. & Eng. Ency. of Law, 376. As said by the Supreme Court of the United States in *Central Transportation Co. v. Pullman Palace Car Co.*, 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55: "The action is not maintained upon the unlawful contract nor according to its terms, but on an implied contract of the defendant to return, or, failing to do that, to make compensation for property or money which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm, the unlawful contract." The recovery in this case was for moneys had and received by the defendant for the use of the plaintiff, and this action will lie whenever one person has received money which in justice and right belongs to another, and which should be returned. It is an equitable action to recover back money which the defendant ought to refund. *Allen v. Stenger*, 74 Ill. 119; *Wilson v. Turner*, 164 Ill. 398, 45 N. E. 820. In any view of the case, the evidence offered by the defendant was not admissible.

It is further contended that the court erred in rejecting evidence tendered by the defendant which would have shown that Laughlin had paid to it the amount of the second check, \$2,500. The evidence consisted of a copy of an account between Laughlin and the plaintiff, kept by him, or under his direction, in the books of the plaintiff. On this account the last check was charged to him, and it contained credits to him of large sums of money. On the same day that the check was given there was a credit of \$25,000, with no indication what it was, and there were large credits at other times. There was nothing save the copy of an account to show that Laughlin was enti-

tied, as against the plaintiff, to the credits in his favor, or that the corporation knew anything about them or ever assented to them. There was no evidence tending to prove that any other representative, officer, or stockholder had ever seen or approved the account, or tending to show that the account had ever been settled or adjusted. Laughlin was not a party to this suit, and would not be bound, and the court could not go into collateral questions involving the adjustment of unsettled accounts between him and the corporation and their equities or respective rights. Although Laughlin was the principal stockholder, he and the corporation must be regarded as entirely distinct in the action at law. The offer was simply to show that the president of the corporation had made an account between himself and it, crediting himself with large sums and charging himself with this check. To have permitted defendant to have introduced the check would have been to let in collateral issues which could not have been tried in the case. The court did not err in excluding the document from the jury. Defendant admitted that he received the checks from Laughlin; that he collected the money and paid it out in the personal ventures of himself, Laughlin, Atkins, and Milliken, in which the plaintiff was in no wise concerned. The evidence did not tend to show that Laughlin had returned the money to the plaintiff, or that it accepted payment from him or his obligation to pay it. There being nothing to show a defense, the court did not err in directing the jury to find the issues for plaintiff.

The judgment of the Appellate Court is affirmed. Judgment affirmed.

(205 Ill. 77)

**SEYMOUR et al. v. O. S. RICHARDSON
FUELING CO.***

(Supreme Court of Illinois. Oct. 26, 1903.)

ENTIRE JUDGMENT—REVERSAL IN PART—ACTION—PROCEEDING AGAINST SEVERAL—VALID DEFENSE BY ONE—TAKING ENTIRE JUDGMENT.

1. A judgment that plaintiff have and recover from defendants, naming them, its said damages, etc., is an entire judgment, and a unit against all the defendants.

2. An entire judgment against several defendants cannot be affirmed as to one and reversed as to the others.

3. Where a plaintiff sues a number on a contract, and one or more interpose valid personal defenses, he may not have judgment against all, but only against those not interposing such defenses.

4. Where in an action against several on a contract one of the defendants set up a discharge in bankruptcy, the court could not of its own motion discontinue as to such defendant nor require the plaintiff to discontinue as to him.

5. The court was not bound to instruct plaintiff to discontinue as to a defendant pleading his discharge in bankruptcy.

6. Where in a suit against several on a contract a defendant interposed a valid personal defense, but judgment was erroneously entered against all, and the Appellate Court made no findings of fact, but reversed the judgment, it would be presumed on appeal to the Supreme Court that the reversal was because of error in rendering judgment against the defendant making the personal defense.

7. Where the Appellate Court reverses for an error of law, it should remand the cause.

8. Where a hearing of a cause has been regularly had, and judgment is delayed by the court taking the case under advisement, and one of the parties dies before the announcement of judgment, the court may direct the same to be entered as of the preceding term, at which the cause was taken under advisement.

Appeal from Appellate Court, First District.

Action by the O. S. Richardson Fueling Company against John Seymour and others. From a judgment of the Appellate Court (103 Ill. App. 625) modifying and in part reversing a judgment in favor of plaintiff, certain defendants appeal. Reversed.

This is an action in assumpsit, brought by attachment on the ground of the nonresidence of a part of the defendants, and begun on or about April 18, 1898, by the O. S. Richardson Fueling Company, for use of Levi Windmuller, against John Seymour, Richard A. Seymour, Elwyn W. Seymour, and Antoine E. Cartier, copartners as Seymour Transportation Company, for the price of coal alleged to have been furnished at divers times between the 1st day of August, 1895, and the 28th day of September, 1895, to the steamer Puritan, owned by the defendants. The original special count of the declaration alleged that between August 1, 1895, and September 28, 1895, the defendants, pretending and assuming to be officers and directors of a pretended stock corporation by name of Seymour Transportation Company, having its principal office and place of business in Cook county, assumed to exercise corporate powers, granted under and by virtue of the laws of the state of Illinois, and to use said corporate name, without having complied with chapter 32, Hurd's Rev. St. Ill. 1893, to wit, did not file or cause to be filed prior to September 28, 1895, in the recorder's office of Cook county a certificate of complete organization, "and did purchase from said plaintiff on the alleged behalf of said pretended corporation goods," etc., of the value of \$1,071.03, and delivered said goods to defendants, "to them as and so pretended to be directors, officers, and agents of said pretended corporation." The common counts consolidated were also embodied in the declaration. A plea of general issue with affidavit of merits was filed by all the defendants. They also filed additional pleas, setting up section 18 of chapter 121, Rev. St. U. S. (Act June 26, 1884, c. 121, 23 Stat. 57 [U. S. Comp. St. 1901, p. 2945]), and alleging total destruction of steamer on December 31, 1895, and that she is of no value, and that there is no freight pending. Replication was filed to the additional pleas to the effect that said

*Rehearing denied December 2, 1903.

steamer was not lost on the trip immediately succeeding the furnishing of the coal, but that the vessel made several trips thereafter prior to her loss; and also to the effect that defendants filed petition to limit liability in the United States District Court as to this same indebtedness, which petition since the last continuance has been denied. Demurrers were filed to the replications, which appear to have been overruled, and rejoinders were filed to the first and second replications.

The defendant Elwyn W. Seymour filed, by leave of court, a plea of bankruptcy, alleging that, after the making of the supposed promises in the declaration, on, to wit, the 12th day of November, 1900, the District Court of the United States of America for the Northern District of Illinois granted to the said Elwyn W. Seymour a discharge in bankruptcy; and that the said supposed claim of the plaintiff was scheduled by the said defendant in his petition for adjudication as a bankrupt in said court. No replication was ever filed to the plea setting up a discharge in bankruptcy. Subsequently the plaintiff below filed an amended count to the declaration, declaring against the defendants as members the Seymour Transportation Company, doing business without having filed its certificate of complete organization with the re- and stockholders of the pretended corporation corder of deeds of Cook county, and that the plaintiff, at the special instance and request of said defendants, delivered to them, as and so pretending to be members and stockholders of the pretended corporation as aforesaid, certain coal, etc. Other pleas and replications were filed. The cause went to trial before the court and a jury, and the trial resulted in a verdict finding the issues for the plaintiff below, the present appellee, and assessing the damages at \$1,367.33. Motion for new trial was overruled, and judgment was entered for \$1,367.33, and costs against all the defendants, and it was ordered that execution issue. The judgment entered by the circuit court was as follows: "This cause coming on to be heard upon the defendant's motion heretofore entered herein for a new trial in said cause, after arguments of counsel and due deliberation by the court said motion is overruled, and a new trial denied. Therefore it is considered by the court that the plaintiffs do have and recover of and from the defendants John Seymour, Richard A. Seymour, Elwyn W. Seymour, and Antoine E. Cartier, as Seymour Transportation Company, its said damages of \$1,367.33, in form as aforesaid by the jury assessed, together with its costs and charges in this behalf expended, and have execution therefor."

It was proven upon the trial that Elwyn W. Seymour, being unable to pay any of his debts and obligations, had gone through bankruptcy; and there was introduced in evidence a duly certified copy of an order of

discharge, entered by the District Court of the United States of America for the Northern District of Illinois on November 12, A. D. 1900, reciting that Elwyn W. Seymour of Chicago, in said district, had been duly adjudged a bankrupt under the acts of Congress relating to bankruptcy, and appeared to have conformed to all the requirements of law in that behalf, and ordering that he be discharged from all debts and claims made provable by said acts against his estate, and which existed on the 12th day of September, A. D. 1900, on which day the petition for adjudication was filed by him, except such debts as were by law excepted from the operation of the discharge in bankruptcy. Accompanying said order of discharge was a duly certified copy of the schedule in bankruptcy, attached to the petition of the bankrupt, in which schedule was named the claim here sued upon in the sum of \$1,200 for coal furnished to the steamer Puritan. An appeal was taken from the judgment of the circuit court to the Branch Appellate Court. After a hearing of the cause in the Branch Appellate Court, the following judgment was entered by that court: "On this day came again the said parties, and the court having diligently examined and inspected as well the record and proceedings aforesaid as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, are of the opinion that in the record and proceedings aforesaid and in the rendition of the judgment aforesaid there is manifest error as to Elwyn W. Seymour, one of the appellants herein. Therefore it is considered by the court that for that error and others in the record and proceedings aforesaid the judgment of the circuit court of Cook county in this behalf rendered be reversed, annulled, and set aside, and wholly for nothing esteemed, as to Elwyn W. Seymour, one of the appellants herein; and it appearing to the court now here that neither in the record and proceedings aforesaid nor in the rendition of the judgment aforesaid is there anything erroneous, vicious, or defective as to John Seymour, Richard A. Seymour, and Antoine E. Cartier, and in that record there is no error as to them, therefore it is considered by the court that the judgment aforesaid be affirmed as to the said John Seymour, Richard A. Seymour, and Antoine E. Cartier, and stand in full force and effect as to them, notwithstanding the matters and things therein assigned for error; and it is further considered by the court that the said Elwyn W. Seymour, one of the appellants herein, recover of and from the said O. S. Richardson Fueling Company, for use of Levi Windmuller, appellee, his costs by him in this behalf expended to be taxed; and that the said appellee, O. S. Richardson Fueling Company, for use of Levi Windmuller, recover of and from the said John Seymour, Richard A. Seymour, and Antoine E. Cartier its costs by it in this behalf ex-

pending, to be taxed, and that executions issue in favor of the respective parties in accordance with the foregoing order."

C. E. Kremer, for appellants. Hubert E. Page, for appellee.

MAGRUDER, J. (after stating the facts). We pass no opinion upon the merits of the controversy presented by this record, inasmuch as the judgment of the Appellate Court must be reversed on account of the character of the judgment itself. The judgment rendered by the circuit court was a money judgment in behalf of appellee, the O. S. Richardson Fueling Company, against the four defendants below, appellants here, to wit, John Seymour, Richard A. Seymour, Elwyn W. Seymour, and Antoine E. Cartier. The money judgment thus rendered was a unit as to all the defendants, and upon appeal the judgment must be reversed as to all the defendants if reversed as to any one of them. The judgment of the Appellate Court reversed the judgment as to Elwyn W. Seymour and affirmed it as to the three other defendants below, the appellants here, John Seymour, Richard A. Seymour, and Antoine E. Cartier. An entire judgment against several defendants cannot be affirmed as to one and reversed as to the others. *Hays v. Thomas*, Breese, 180. Where the judgment is entire, there must be a total affirmance or reversal. *Richards v. Walton*, 12 Johns. 434. In *Arnold v. Sandford*, 14 Johns. 417, it was said: "Where the judgments are distinct, we may reverse in part and affirm in part, as in cases of damages and costs; but when the judgment is entire there must be a total affirmance or reversal." In *Earp v. Lee*, 71 Ill. 193, we said (page 197): "It is also urged that, although the judgment may be erroneous as to a part of the defendants, still it is correct as to Atkins, and that it should not be reversed as to him. In the first place, a judgment at law is a unit, and is erroneous in whole or is valid as to all the defendants." See, also, *Tompkins v. Wiltberger*, 56 Ill. 385; *Mack v. Brown*, 73 Ill. 295. In *Jansen v. Varnum*, 89 Ill. 100, we said: "At law a judgment must be a unit as to all the defendants. It cannot be reversed as to a part of them and affirmed as to the others." See, also, *Glos v. O'Toole*, 184 Ill. 585, 56 N. E. 827. In *West Chicago Street Railroad Co. v. Morrison*, 160 Ill. 288, 43 N. E. 393, this court, speaking through the late Justice Baker, said (page 295, 160 Ill., and page 395, 43 N. E.): "It is also a rule applicable to trespass, as well as to all other actions at law, either for torts or upon contracts, that the judgment is a unit as to all the defendants against whom it has been rendered, and cannot be reversed as to one or more of them and affirmed as to the others, but, if erroneous as to one, is erroneous as to all." 1 Chitty's Pl. 86; *McDonald v. Wilkie*, 13 Ill. 22 [54 Am. Dec. 423]; *Jansen v. Varnum*, 89 Ill. 100; *Ragor v. Kendall*, 70 Ill.

95; *Clafin v. Dunne*, 129 Ill. 241 [21 N. E. 834, 16 Am. St. Rep. 263]. In *Clafin v. Dunne*, supra, we said (page 248, 129 Ill., page 836, 21 N. E., 16 Am. St. Rep. 263): "It is claimed that, although the judgment may be vacated against Horace B. Clafin, it should be sustained as to the other defendants. We do not concur in this view. The judgment is a unit as to all the defendants, and, if erroneous as to one, it is erroneous as to all." The same rule is laid down in the text-books. For instance, Black, in his work on Judgments (volume 1 [2d Ed.] § 211), says: "When we inquire as to the proper disposition to be made of a joint judgment against several defendants, which is void as to one of them, when it is brought before a court of review by writ of error or appeal, we find the authorities more nearly harmonious. In general, they agree that it cannot be affirmed as to one defendant and reversed as to another, but must be reversed as an entirety. And, conversely, if in favor of defendants, invalidity as to one will vitiate it as to all." In *Wait's Law and Practice* (vol. 3 [7th Ed.] p. 664) it is said: "The rule is well settled that an entire judgment against several defendants, whether rendered in an action for tort or upon contract, cannot be reversed as to one defendant and affirmed as to the others. *Farrell v. Calkins*, 10 Barb. 348."

It follows that, under these authorities, the judgment of the Branch Appellate Court, which reversed the judgment of the circuit court as against Elwyn W. Seymour and affirmed the same as to the three other defendants below, is erroneous. It is true that where a plaintiff sues a number on a contract he may take judgment against a part of them only where a personal defense is interposed by any one of the defendants. In other words, the rule that, where a money judgment is a unit as to all the defendants, the judgment must be against all or none, does not apply where a personal defense is established as to one or more of the defendants. For instance, where one of the joint defendants proves a discharge in bankruptcy, the judgment may be rendered against the other defendants without joining the bankrupt. In *Felsenthal v. Durand*, 86 Ill. 230, we said: "In actions on contract against several, when all are served with process, the judgment must be against all or none, unless some of the defendants make a personal defense—as infancy, lunacy, bankruptcy, and the like." In *Byers v. First Nat. Bank of Vincennes*, 85 Ill. 423, we said (page 425): "We are aware of no case that holds that a plaintiff may sue a number on a contract, and take judgment against only a part of them, where no personal defense is interposed by any one of the defendants. It has been repeatedly and uniformly held by this court that the judgment must be against all or none, unless a personal defense is established as to one or more of the defendants."

See, also, *Faulk v. Kellums*, 54 Ill. 188; *Robinson v. Brown*, 82 Ill. 279; *Stevens v. Catlin*, 152 Ill. 56, 37 N. E. 1023. In 15 *Encyclopedia of Pleading and Practice* (page 549) it is said: "The rule that joint contractors must be sued jointly is subject to several well-defined exceptions. Thus, where a joint contractor has become bankrupt, an action may be brought against the other joint contractors without joining the bankrupt."

In the case at bar, the judgment of the Branch Appellate Court does not show the ground upon which the judgment was reversed as to Elwyn W. Seymour and affirmed as to the other appellants. But on looking into the record we find what is recited in the statement preceding this opinion—that a plea of discharge in bankruptcy was filed by Elwyn W. Seymour, and that the fact of discharge, as set up in said plea, was established by proof. It was therefore error for the trial court to render judgment against all of the four defendants. Appellee, plaintiff below, could have dismissed or discontinued the case as to Elwyn W. Seymour, and taken a judgment against the three other defendants, John and Richard A. Seymour and Antoine E. Cartier. But appellee did not pursue this course. On the contrary, it took judgment against the four defendants below without reference to the personal defense of bankruptcy or discharge in bankruptcy made by Elwyn W. Seymour.

In speaking of the rule here announced, Black, in his work on *Judgments* (volume 1 [2d Ed.] § 206), says: "The rule, however, is subject to one important exception. Though the obligation in suit is joint or joint and several, yet if one defendant pleads matter which goes to his personal discharge (such as bankruptcy), or to his personal disability to contract (such as infancy), or any other matter which does not go to the nature of the writ, or pleads or gives in evidence matter which is a bar to the action as against himself only, and of which the others could not take advantage, judgment may be rendered for such defendant against the rest. * * * The reason of the distinction is obvious, and it is this: That such a special personal defense does not falsify the averment of an original joint promise, but, admitting it, avoids it by the averment of matter subsequent." In some of the states it is held that in an action upon a joint and several contract "the plaintiff may enter a nol. pros. against one of the defendants and proceed to judgment against the others." 1 *Black on Judgments* (2d Ed.) § 206. Appellee, upon the trial below, might have discontinued the suit as to Elwyn W. Seymour, but the court could not do that for it, nor require it to do that; nor was the court bound to instruct appellee that it ought to do that. *Da-*

vis v. Johnson, 41 Ill. App. 22. In the present case the Appellate Court made no findings of facts in its judgment. It is to be presumed, therefore, that its reversal of the judgment as against Elwyn W. Seymour was for error of law on the part of the trial court in not rendering judgment in favor of Elwyn W. Seymour because of his discharge in bankruptcy, as pleaded and proven. Where the Appellate Court thus reverses the trial court for an error of law, it should reverse the judgment and remand the cause. *Siddall v. Jansen*, 143 Ill. 537, 32 N. E. 384; *Hogan v. City of Chicago*, 168 Ill. 561, 48 N. E. 210. The cases of *Iroquois Furnace Co. v. Elphicke & Co.*, 200 Ill. 411, 56 N. E. 784, and *Manistee Lumber Co. v. Union Nat. Bank*, 143 Ill. 490, 32 N. E. 449, have no application here, because those cases were tried before the court without a jury, while the case at bar was tried before the court and a jury.

The case at bar was submitted to this court and taken under advisement by the court at the February term, 1903; but no final judgment or order has yet been entered in the case by this court since the hearing thereof, and since the same was taken under advisement. At the April term, 1903, of this court, it was suggested to the court that, since this cause was taken under advisement, to wit, on March 11, 1903, Richard Seymour, one of the appellants herein, departed this life. Thereupon, at the April term, 1903, of this court, a motion was made by the appellee that the judgment or final order entered by this court should be so entered nunc pro tunc as of a date prior to the 1st day of March, A. D. 1903, or prior to the day of the death of said appellant, Richard Seymour. In *Danforth v. Danforth*, 111 Ill. 236, this court held that, where a hearing of a cause has been regularly had, and judgment is delayed by the court taking the case under advisement, and one of the parties dies before the announcement of judgment, the court may direct the same to be entered as of the preceding term, at which the cause was taken under advisement. Accordingly the motion made by the appellee will be allowed, and the judgment hereinafter ordered to be entered will be entered nunc pro tunc as of the February term, 1903, when the present cause was taken.

For the reasons hereinbefore set forth, the judgment of the Branch Appellate Court reversing the judgment of the circuit court as to Elwyn W. Seymour and affirming the same as to the three other appellants is reversed, and the judgment of the circuit court is also reversed, and the cause is remanded to the circuit court for further proceedings in accordance with the views herein expressed.

Reversed and remanded.

(206 Ill. 9)

ILLINOIS CENT. R. CO. v. BYRNE.*

(Supreme Court of Illinois. Oct. 26, 1903.)

RAILROADS—CONTRACT TO HAUL CAR—BREACH OF CONTRACT—DAMAGES—STATUTES—RUNNING MIXED TRAINS—INSTRUCTIONS.

1. Act March 31, 1874, § 21 (3 Starr & C. Ann. St. 1896 [2d Ed.] p. 3277), provides that no freight car shall be run in the rear of passenger cars. In an action for damages because of a railroad's failure to haul a car as agreed, one of the defenses was that the contract was to haul the car, which had a broken drawbar, on a certain passenger train, which contract was illegal, and the court instructed that, if the agent agreed with plaintiff to haul the car at the end of the train, such agreement was wholly void. *Held*, that defendant had no reason to complain.

2. Where a railroad agreed to haul a car, one of the drawbars of which was broken by attaching the good end of it to a locomotive or train, it waived any objection that the car was not in proper condition for transportation.

3. The judgment of the Appellate Court affirming a judgment of the trial court is binding on the Supreme Court so far as it concerns questions of fact.

4. Act March 31, 1874, § 21 (3 Starr & C. Ann. St. 1896 [2d Ed.] p. 3277), provides that no freight car shall be run in the rear of passenger cars. In an action against a railroad for damages for failure to haul a car as agreed, one of the drawbars being broken, defendant contended that the contract was to haul the car by a certain passenger train, and plaintiff contended that the contract was merely to haul the car. The court instructed that if the contract was made without reference to any particular train, and the railroad could have hauled the car attached either to a locomotive or the rear end of a train other than a passenger train, plaintiff could recover; but that, if the contract was that the car should be hauled by a certain passenger train, the railroad was not required to haul it by any other train; and, if it could not be safely carried save at the rear thereof, plaintiff could not recover. *Held*, that defendant could not complain of the instructions.

5. Instructions are not erroneous because not reciting all the facts relied on by defendant, where the facts omitted are merely circumstances which are a part of the testimony tending to disprove plaintiff's cause of action, and are not controlling circumstances.

6. A party cannot complain of an error in an instruction when a similar error appears in an instruction given at his own request.

7. In an action against a railroad for damages suffered by a theatrical company by reason of defendant's failure to haul a car of scenery to a certain city within the time agreed, the evidence showed that the show could not get to the city so as to fill an engagement there; that the advance sale of tickets had been refunded to the purchasers; that there was a contract between plaintiff and the opera house whereby plaintiff was to receive a certain per cent. of the sales; and there was evidence that the railroad was informed that the object of hauling the car was to give the theatrical performance in question. *Held*, that it was proper to instruct that plaintiff was entitled to recover all additional expense incurred by him and all profits which he would have received, after deducting the expense of advertising his show, if the car had been hauled in time to enable him to give the performance.

8. It was proper for the jury to take into consideration the nature of plaintiff's business and his profits for a reasonable period next preceding the time when the contract was violated.

*Rehearing denied December 2, 1903.

Appeal from Appellate Court, Third District.

Action by John F. Byrne against the Illinois Central Railroad Company. From a judgment of the Appellate Court (105 Ill. App. 96) affirming a judgment for plaintiff, defendant appeals. Affirmed.

This is a suit in assumpsit brought by the appellee against the appellant company in the circuit court of McLean county to recover damages for a breach of contract alleged to have been made by the appellant company with the appellee to haul a car, loaded with scenery and theatrical property belonging to the appellee, from Decatur to Bloomington. Appellee was the owner and manager of a traveling theatrical troupe known as the "Eight Bells Company." This company gave a performance in Decatur on Saturday night, February 2, 1895, and was to give another in Bloomington on the following Monday night, February 4th. It is claimed by appellee that, by reason of the failure of the appellant to haul said car as agreed, appellee missed his engagement to give a performance in Bloomington as previously advertised, and to which appellee had sold a large number of tickets, and to which he could have sold more tickets had he been able to keep his engagement. Bloomington is distant 42 miles from Decatur, and it is claimed by appellee that, on account of appellant's refusal to perform its contract to haul this car filled with theatrical scenery and properties from Decatur to Bloomington in time to enable appellee to give his performance in Bloomington, appellee suffered damages. Appellee's claim is that he had a contract with the manager of an opera house in Bloomington to give his performance on the evening of Monday, February 4th, and had advertised the performance, so to be given, by newspaper and billboard.

About 10 days or more before the car was to be hauled from Decatur, appellee's advance agent went to an agent of appellant in Decatur to make the contract. The car arrived in Decatur over the Vandalia Line from Terre Haute at 11 o'clock on Saturday morning, February 2, 1895. On the way from Terre Haute to Decatur one of the drawbars of the car was pulled out, but was recoupled in the train by means of a chain, and in that manner the car was hauled safely to Decatur. It is claimed on the part of the appellee that the Vandalia Line delivered the car to appellant, and that it was accepted by appellant between 4 and 6 o'clock on the afternoon of Saturday. There is, however, a dispute in the evidence as to its acceptance. The evidence tends to show, however, that, under the order of one of appellant's agents, appellant's switch crew took the car from the place where it had been placed by the Vandalia Line, turned it around, and hauled it to a place where appellee could unload it, and then, after the

performance in Decatur on Saturday night, the car was reloaded and returned to a proper place in the yards of the company, where it remained all day the following Sunday, February 3d, ready to be attached to a train to be hauled to Bloomington.

As soon as the car and company arrived in Decatur, appellee's agent went to the office of appellant's ticket agent, and told him that the drawbar was out of order. The ticket agent claims that he told appellee's agent that the car would have to pass appellant's inspection, and appellant also claims that appellee's agent replied that the Vandalla people were going to fix the car. Appellee's agent then paid to appellant's agent \$15, the price asked for hauling the car from Decatur to Bloomington. Appellee's agent also paid the fare of the members of the troupe, being about 20 in number, from Decatur to Bloomington, each fare being about \$1.31; and passenger tickets were given to appellee's agent by appellant's agent. A receipt was also given appellee for the \$15. This receipt, though written and issued on Saturday, February 2d, was dated Monday, February 4th, the day when the car was to be hauled from Decatur to Bloomington. The receipt is as follows:

"Illinois Central Railroad Company,

"Decatur, Ill. City Station, Feb. 4, 1895.

"Received of W. E. Flack, manager Eight Bells Company, \$15.00 for hauling car Decatur to Bloomington.

"E. Pennywell, C. T. A., M. E.

"Illinois Central R. R., February 4, 1895.

"City Office, Decatur, Ill."

A plea of general issue was filed by appellant, and by agreement all evidence, including tender, was to be admitted under the plea of general issue, and all other pleas were withdrawn. The passenger tickets were tendered to appellant at the trial. Appellant tendered the sum paid for tickets and the hauling of the car, and this sum was taken and receipted for by appellee.

It is claimed by appellee that he was prevented by promises of the appellant's agent from making other arrangements to take this car, with its stage scenery and apparatus, from Decatur to Bloomington, until it was too late to reach Bloomington in time for the performance on Monday night. It is claimed that on Monday morning the trainmaster refused to allow the car to go. As it was useless to go without the scenery and baggage, the company was compelled to remain in Decatur, it not being possible to reach Bloomington over any other railroad in time to give the performance on the evening in question. The contention of appellee is that, as the result of appellant's refusal to haul the car, appellee was compelled to, and did, abandon his Bloomington engagement, and instead went to Springfield.

The damage claimed by appellee is the cost for extra board for his company, extra

transportation to Springfield, loss of his share of advance sales in Bloomington, and loss of box-office sales that would have been made, based upon previous sales in the same city for the same performance by the same company.

The case was first tried at the April term in the circuit court of McLean county in 1898, and the trial resulted in a verdict and judgment for appellee for \$400, including the sum of approximately \$45 for cash paid by appellee to appellant, being the contract price for hauling the car and the company of players from Decatur to Bloomington—which service, however, was never performed. Before the first judgment was rendered, appellant paid that sum to the clerk for appellee, as a tender back of the cash received by it, with interest to the date of the tender. An appeal was taken to the Appellate Court for the Third District, and the judgment was there reversed because of errors in four of appellee's instructions, and error in refusing appellant's eighth refused instruction, as will be seen by reference to the case of Illinois Central Railroad Co. v. Byrne, 78 Ill. App. 204. After the reversal the cause was reinstated on the docket, and subsequently, on June 19, 1900, all the pleadings and depositions in the case were destroyed by a fire which consumed the McLean county courthouse. By agreement, upon the second trial, the transcript of the record was withdrawn from the office of the clerk of the Appellate Court, and the testimony of appellee's witnesses, in the shape of depositions, was read from the transcript, and such of the appellant's testimony as it desired was also read. By agreement, also, it was provided that either party might supplement such testimony by oral testimony of witnesses, if desired.

Upon the second trial of the case, the jury returned a verdict in favor of appellee for \$300; motion for new trial was overruled, and judgment entered upon the verdict. An appeal was taken to the Appellate Court, and the Appellate Court has affirmed the second judgment of the circuit court for \$300, at the same time granting a certificate of importance. The present appeal is prosecuted from such judgment of affirmance.

Charles L. Capen (John G. Drennan, of counsel), for appellant. A. E. De Mange, for appellee.

MAGRUDER, J. (after stating the facts). The main contentions of the appellant company in this case are, first, that the contract between appellee and appellant was that the car, containing appellee's theatrical scenery and apparatus, should be hauled from Decatur to Bloomington by a passenger train, which was to leave Decatur on Monday morning about 9 o'clock, and that appellant did not agree to haul the car in any other train or in any other way; and, second,

that appellant was not obliged to haul the car until it had passed the inspection of its car inspector, and that, by reason of the broken condition of the drawbar on one end of the car, it did not pass such inspection.

In connection with the first contention of the appellant, it claims that it was not bound to perform the contract as made, because such contract was illegal, and in violation of the statute, and also of its own charter. Section 21 of the "Act in relation to fencing and operating railroads," approved March 31, 1874, provides as follows: "In no train shall freight, merchandise or lumber cars be run in the rear of passenger cars, and if such cars, or any of them, shall be so run, the officer or agent who so directed, or knowingly suffered such arrangement to be made, shall each be deemed guilty of a misdemeanor, and punished accordingly." 3 Starr & O. Ann. St. 1896 (2d Ed.) p. 3277. Appellant's contention is that, inasmuch as, by the terms of this statute, it was forbidden to haul the car in question in the rear of the passenger train to start from Decatur on Monday morning, the contract made by it was a void contract, and could not be enforced. It is said, in relation to such a contract, that, the parties being in *pari delicto*, the law leaves them where it finds them, and that no question of estoppel or ratification can possibly arise.

The trial court held the law upon this subject to be as contended for by the appellant, because it gave to the jury for the appellant the following instruction numbered 5, to wit: "Even if you believe from the evidence Hovey [the appellant's freight agent] agreed with plaintiff's manager the defendant should haul the car in controversy at the rear end of the passenger train on Monday morning, such agreement, if any such is shown by the evidence, was one prohibited by the laws of this state, and is wholly invalid and illegal. You are instructed, therefore, such agreement, if any, did not bind the defendant, and as to it you will find the defendant not guilty."

In view of this instruction so given at the request of the appellant, the latter has no reason to complain of the action of the court in that regard. But it was a question in dispute between the parties whether or not the contract was to haul the car by this particular passenger train which was to leave Decatur on the morning of Monday, February 4th, about 9 o'clock. Both parties submitted the question to the jury whether the contract was to haul the car by this particular train, or whether the appellant agreed to haul the car from Decatur to Bloomington in time for the theatrical performance to be given at Bloomington on the evening of Monday, February 4th, without reference to any special or particular train. If the contract was a general agreement to take the car from Decatur to Bloomington in time for the performance, the appellant could have hauled

it by attaching it to a locomotive, or a freight train, and thus a violation of the statute by attaching it to a passenger train would have been avoided.

It is true that the drawbar at one end of the car in question was broken, but there is testimony tending to show that the drawbar at the other end of the car was in good condition, and that, by turning the car around and attaching the end where the drawbar was not broken, the car could have been hauled from Decatur to Bloomington within the time specified; and there is also evidence tending to show that the appellant, through its agent or agents, agreed thus to haul it, or allowed appellee to believe that they would so haul it. If the appellant agreed to haul the car by thus attaching the end of it which was in good condition to some locomotive or train, it waived its objection that the car was not in good condition for transportation. These questions were all questions of fact, and were submitted to the jury by proper instructions, and the jury have found them against the appellant. The judgment of the Appellate Court, affirming the judgment of the circuit court, is binding upon us, so far as these questions are concerned.

For instance, the second instruction given for the appellee by the trial court was as follows: "If you believe from the evidence plaintiff made a contract with the Illinois Central Railroad Company to haul his car from Decatur to Bloomington, without reference to any particular train it should be connected with, or to the condition of the car, in time to enable him to give his show there, and that he paid for such hauling; and if you further believe from the evidence said railroad company could have hauled said car, coupled by its good end either to a locomotive or to the rear end of a train, other than a passenger train, without danger in excess of the ordinary danger incident to the hauling of other cars; and if you further believe from the evidence plaintiff informed said railroad company's agents at Decatur of his engagement or contract to give a show in Bloomington on the evening of February 4, 1895, and that, after said agents became so informed, the said railroad company failed or refused to haul said car to Bloomington in time to enable plaintiff to give his show in Bloomington—then the plaintiff is entitled to recover all additional expense, if any has been shown by the evidence, necessarily incurred by him, and all profits which he would have received for giving the said performance in Bloomington, after deducting the expense of advertising his show in Bloomington, if said car had in fact been hauled to Bloomington in time to enable him to give said show in Bloomington, if you believe from the evidence he would have received any such profits."

This instruction submitted to the jury the question whether or not the contract was

that appellant should haul the car to Bloomington without reference to any particular train it should be connected with, and without reference to the condition of the car. It also left to the jury to find whether the car could have been hauled, even if the draw-bar at one end of it was broken, by coupling its good end to a locomotive, or to the rear end of a train other than a passenger train.

The court gave a number of instructions for appellant, and among others, the following numbered 2, to wit: "In the absence of a contract or agreement to the contrary, the defendant was not required or bound in law to haul the car in controversy in any other train or in any other way than contemplated or provided in such contract or agreement. And if, therefore, you believe from the evidence the contract or agreement in this case was the car in controversy should be hauled in or by the Monday morning passenger train, then the defendant was not required to haul it in any other train, or in a special train, or by a special engine. And if you believe from the evidence that plaintiff's car, when said passenger train reached Decatur, was in such condition it could not be safely hauled from Decatur to Bloomington except at the rear of the train, and as the rear car of the train, your verdict should be for the defendant." By this instruction the appellant submitted the question to the jury whether or not the contract was such a contract as the appellant claimed it to be, and it also embodied the theories of the appellant as to the contract and as to the condition of the car. We are unable to see, therefore, that the appellant was in any way injured, or its rights prejudiced, by the action of the court in the giving of instructions.

Again, the court gave to the jury, in behalf of the appellant, an instruction numbered 6, which was as follows: "The court instructs you that, if the plaintiff contracted for the transportation of the car in controversy from Decatur to Bloomington by the passenger train that left on Monday morning, and that no contract was made to haul it by any other train, and if you further believe from the evidence that the condition of said car on Monday morning was such that it could not safely be carried in any other place in the train than at the rear, and as the rear car, your verdict in such case must be for the defendant."

Several of the instructions, given by the trial court for the appellee, are complained of by the appellant upon the ground that they do not recite all the facts relied upon by the appellant in its defense to the action, but only recite such facts as are necessary to warrant the jury in finding for the appellee. The instructions are not objectionable for the reason thus insisted upon. These instructions are based upon the hypothesis or theory contended for by the appellee, and they summarize the elements necessary to a recovery upon that theory, without omitting

any essential matter. In *Chicago & Alton Railroad Co. v. Harrington*, 192 Ill. 9, 61 N. E. 622, we said (page 24, 192 Ill., and page 627, 61 N. E.): "The rule that an instruction is erroneous which sums up all or a part of the facts which the evidence tends to prove on one side, and omits the facts on the other side, does not apply to an instruction which merely fails to embody evidence tending to establish a distinct antagonistic theory. * * * All the law requires is that an instruction, based upon some particular hypothesis warranted by the evidence, which undertakes to summarize the elements in the cause essential to a recovery upon that theory, must not omit any essential matter. * * * It is not necessary to incorporate all the evidence in an instruction, but only matters which constitute a material issue in the case." In the case at bar the facts which are alleged to have been omitted in the instructions for the appellee are merely circumstances which are a part of the testimony tending to disprove the appellee's cause of action, and are not controlling circumstances. The appellant asked, and the court gave in its behalf, an instruction similar to those complained of as having been given for the appellee, which embodied facts establishing the particular hypothesis or theory for which appellant contended. Several instructions were thus given for appellant which presented appellant's grounds of defense, but did not include all the facts tending to establish appellee's right of recovery. "A party has no right to complain of an error in an instruction when a like error appears in an instruction given at his own request." *Chicago & Alton Railroad Co. v. Harrington*, supra, and cases there referred to.

Some of the instructions given for the appellee are also criticised by appellant's counsel upon the alleged ground that they lay down an improper rule as to the damages to be recovered, but we do not regard them as erroneous in this respect. The evidence tends to show that appellee and his troupe could not go from Decatur to Bloomington, and were detained in Decatur, and that they had to be transported by another route to Springfield. The evidence tends to show, also, that the advance sale of tickets to the show, which had been made in Bloomington, amounted to \$100; that this amount had to be refunded to the ticket purchasers; and that the advance and box-office sales together would have amounted to about \$500, estimated by the amount of sales at previous exhibitions of the performance. The evidence also tended to show that there was a contract between appellee and the owner of the opera house in Bloomington, where the show was to take place, by the terms of which appellee was to receive 70 per cent. of the sales. There was evidence also tending to show that the appellant or its agents were informed that the object of going from De-

catur to Bloomington was to give this show on the night of February 4th. The instructions left it to the jury to determine whether or not the proper notice and information were communicated by appellee or his agents to appellant or its agents as to the purpose of hauling the car to Bloomington, and as to appellee's contract in relation to the same. In estimating the losses sustained by reason of the failure to perform a contract of this character, it is proper for the jury to take into consideration the nature of the plaintiff's business and his profits for a reasonable period next preceding the time when the contract was violated. *Chapman v. Kirby*, 49 Ill. 211.

We find no error in the record which would justify us in reversing the judgment of the Appellate Court. Accordingly that judgment is affirmed. Judgment affirmed.

(205 Ill. 42)

GARDEN CITY SAND CO. v. AMERICAN REFUSE CREMATORY CO. et al.*

(Supreme Court of Illinois. Oct. 26, 1903.)

CORPORATIONS—STOCKHOLDERS' LIABILITY—REVIEW OF DECREE—JURISDICTIONAL AMOUNT—PERSON FROM WHOM STOCK WAS PURCHASED—SUFFICIENCY OF EVIDENCE—RECITAL OF FULL PAYMENT—NOTICE TO ASSIGNEE.

1. Hurd's Rev. St. 1899, p. 436, c. 32, § 8, provides that each stockholder shall be liable for corporate debts to the amount of unpaid stock held by him, and his assignee shall be similarly liable, and, if any stockholder proves insolvent, his portion of the debts is to be apportioned between the others. *Held*, that the liability was several, so that a decree on a creditors' bill in favor of stockholders each liable for less than \$1,000 of debts, which the Appellate Court had affirmed, could not be reviewed by the Supreme Court.

2. In determining the jurisdiction of the Supreme Court to review a decree adverse to a complainant, the amount involved is to be determined from the evidence.

3. Evidence in a suit to enforce stockholders' liability *held* to show that defendants purchased their stock from an original subscriber, and had not bought "treasury stock" from the corporation itself.

4. The fact that stock certificates recite that the stock is "fully paid up and nonassessable" furnishes no protection to assignees, as against corporate creditors.

5. Where the assignees of an original subscriber buy under circumstances such that a person of average intelligence would know the facts in relation to the stock being paid up, they must be held chargeable with such knowledge, as against a corporate creditor seeking to enforce their liability as stockholders.

6. Evidence in a suit to enforce stockholders' liability *held* to show that defendants, when purchasing their stock from an original subscriber, had notice that it was not paid up, but that the subscription had been satisfied by a transfer of fraudulently overvalued property.

Appeal from Appellate Court, First District.

Suit by the Garden City Sand Company against the American Refuse Crematory

Company and others. From a judgment of the Appellate Court, First District (105 Ill. App. 342), affirming a decree dismissing the appeal except as to one defendant, complainant appeals. Reversed.

Edwin C. Crawford, for appellant. Goodrich, Vincent & Bradley and Max Pam, for appellees.

CARTWRIGHT, J. The American Refuse Crematory Company was incorporated under the laws of this state on January 29, 1894, for the purpose of making, operating, and dealing in crematory furnaces, with a capital stock of \$1,000,000, divided into 10,000 shares, of \$100 each. Bertrand Walker and Clyde R. Bates each subscribed for 1 share of the capital stock, and Frank C. Rutan subscribed for the remainder, 9,998 shares, of the par value of \$999,800. As an ostensible payment for the stock issued to him, Rutan, who had subscribed for all the stock except 2 shares, and who was practically dealing with himself, assigned to the corporation his interest in letters patent issued by the United States to William M. Johnson for an invention in garbage crematories, which gave to the corporation the right to manufacture and sell crematories in the United States, except the state of Illinois, subject to the conditions of the transfer of the same interest from Johnson to Rutan. The stock was issued as "fully paid and nonassessable." The corporation became indebted to the appellant, the Garden City Sand Company, a corporation of this state, for materials sold to be used in the construction of a crematory plant. On October 23, 1895, the crematory company, being insolvent, made an assignment for the benefit of its creditors and ceased to do business. All its property was sold under an order of court for \$250, which was less than enough to pay the expenses of administration under the assignment, and the amount realized was ordered by the court disbursed for such expenses. Appellant recovered a judgment in the superior court of Cook county on January 9, 1896, against the crematory company for said indebtedness, amounting to \$1,598.68 and costs, upon which judgment an execution was issued. The crematory company allowed the execution to remain unsatisfied for more than 10 days after a demand by the sheriff, whereupon the bill in this case was filed by appellant on February 20, 1896, in said superior court, alleging that the stock had never been fully paid for by any person, and seeking to enforce the statutory liability of appellees as stockholders, who own stock originally issued to Rutan. The bill alleged that the crematory company had become indebted in divers sums to other creditors mentioned therein, and it prayed for an ascertainment of the amount due from said stockholders, and that they be ordered to pay the judgment of appellant, and the claims of other

*Rehearing denied December 2, 1903.

¶ 4. See Corporations, vol. 12, Cent. Dig. § 973.

creditors who should come in and prove their claims. The corporation and appellees answered the bill, admitting the assignment, the sale of all the property of the corporation for less than enough to pay the expenses of administration, and that the corporation had ceased doing business, but denying any knowledge that the stock was not fully paid for. The cause was referred to a master in chancery, who took the evidence, and reported the same, with his conclusions that at the time Rutan assigned his interest in the patent to the corporation he was the owner of all the stock except 2 shares, and was practically the corporation; that the value of the patent at the time of its assignment to the corporation did not exceed \$50,500, and the excess above that sum was a fraudulent overvaluation of the same; that Rutan should not be allowed credit on his stock subscription above the sum of \$50,500, and there was still due from him \$949,300; and that, with the exception of Rutan, there was no proof that any of the appellees had knowledge of the transaction and of the issuance of stock to the amount of \$999,800 in payment for the interest in the patent. The master therefore recommended that the bill be dismissed as to the stockholders, except Rutan, and that a decree be entered against him for the amount of appellant's judgment and the claims of other creditors who had proved their claims in the cause, together with interest thereon. Appellant excepted to the report of the master, but the court approved the report, and entered a decree accordingly. The bill was dismissed at the appellant's costs, except as to Rutan, and there was a decree against him, as recommended by the master. The Appellate Court for the First District affirmed the decree.

Appellees have entered their motion to dismiss the appeal on the ground that the liability of each of them is several, that less than \$1,000 is involved as to them severally, and that the judgment of the Appellate Court is therefore final. The liability sought to be enforced is declared in section 8 of chapter 32 of our statutes, which provides that each stockholder shall be liable for the debts of the corporation to the extent of the amount that may be unpaid upon the stock held by him, and that every assignee of stock shall be liable to the company for the amount unpaid thereon, to the extent and in the same manner as if he had been the original subscriber. Hurd's Rev. St. 1899, p. 436. The liability of each stockholder is separate and distinct, and the amount involved as to each is the amount unpaid upon the stock held by him. If any stockholder shall prove to be insolvent, his portion of the debts is to be divided among the solvent stockholders, but the limit of liability is the amount remaining unpaid upon the stock held by him. The decree of the superior court being against appellant, the amount involved is to be determined from the evidence. There was

some value in the patent, and the amount involved as to any of the appellees holding stock not amounting to more than \$1,000 would be less than that sum after crediting a proportionate share of such value. There is therefore less than \$1,000 involved as to three of the appellees: Wilbur H. Fitch, whose stock amounts to \$1,000; J. Erika Anderson, who holds the same amount; and Dora Johnson, whose stock amounts to \$500. The appeal is dismissed as to them. More than \$1,000 is involved as to each of the other appellees, and as to them the motion is overruled. *Farwell v. Becker*, 129 Ill. 261, 21 N. E. 792, 6 L. R. A. 400, 16 Am. St. Rep. 267. Some of them made small advances of money to the corporation, but they insist that they did not buy their stock from it or subscribe for the stock, but received it from Rutan, supposing it had been fully paid for, and these advances must be taken to be something else than payment on the stock.

There is no evidence from which it can be said that the interest in the patent assigned to the corporation was worth \$50,500, or which would lead to the conclusion that the appellees, or any of them, would have given money or money's worth to that amount for it. On the contrary, the evidence tends to prove that the patent was practically worthless, since the whole property of the corporation was sold for \$250. The question here, however, is whether there was a fraudulent overvaluation of the patent at the time it was transferred to the corporation, and on that question reasonable allowance is to be made for all expectations of success, although they may not be realized. The conclusion of the master that the interest in the patent could not have been, in good faith, regarded as worth more than \$50,500, was liberal to the appellees, after making all possible allowances for errors in judgment. No fault is found with the conclusion of the master on that question, but appellees say that there was no proof that any of them knew of the actual consideration paid to Rutan for the interest in the patent, and that, although there may have been a fraudulent overvaluation as between the corporation and Rutan, there was no evidence that any of the appellees knew that the interest in the patent was not worth in cash the full par value of the stock exchanged for it. The stock was issued to Rutan in a single certificate, and it is claimed by appellant that the certificate was returned and canceled, and the stock was reissued in some form to the appellees as treasury stock, and that they did not pay for it. The records of the corporation show some proceedings for raising money with reference to treasury stock, but appellees insist that they did not buy any treasury stock from the corporation, but received their stock from Rutan, and that whatever they paid for it they paid to him. The stubs in the stockbook show that appellees received their

stock by assignment from Rutan, and there was no other source from which they could have received it. Practically the whole stock of the corporation was issued to him for the patent, and the corporation did not purchase any of the stock, and had no money to buy any with. The stock of appellees was in some way transferred from Rutan to them, and the master and court so found. The position of appellees on that question is undoubtedly correct, and the question in dispute between the parties is whether the appellees had notice that the stock was issued in exchange for the interest in the patent, and that there was a fraudulent overvaluation.

The stock was issued as fully paid and non-assessable, but that fact furnishes to appellees no exemption from liability. Judge Thompson characterizes that statement in stock certificates as the most shallow and ineffective, although perhaps the most common, of the many devices resorted to by stockholders to escape the liability assumed by their contract of subscription. Thompson on Liability of Stockholders, § 129. The practice of issuing stock in that way upon payment of a small percentage of its par value is now so common that it is questionable whether it ought to raise any presumption of full payment. The report of the master and the decree were based entirely on the evidence introduced by appellant, none being offered by any of the appellees; and there is no claim that appellees bought their stock in any open market where stocks were dealt in, so that none of the presumptions arising in case of such a purchase can be indulged in. They bought their stock from Rutan, and, if the circumstances were such that a person of average intelligence would know the facts in relation to it, they must be held chargeable with such knowledge.

Undoubtedly, stock may be issued in payment of the purchase price of property sold to the corporation, if the property is such as the corporation may lawfully purchase. Where a corporation desires property for corporate uses, and the owner of the property desires to purchase stock, an exchange is equivalent to paying money for the property, and the vendor paying it back for shares of stock. In such a case the corporation may agree with the stockholder as to the value of the property to be taken in payment for the stock, but the transaction must constitute a valid contract of bargain and sale in good faith, in the exercise of fair and honest judgment. *Sprague v. National Bank of America*, 172 Ill. 149, 50 N. E. 19, 42 L. R. A. 606, 64 Am. St. Rep. 17. It is also true that where there is nothing to apprise an innocent purchaser that the property was worth less than the face value of the stock, and that there was a fraudulent

overvaluation, he will be protected. Thompson on Liability of Stockholders, § 135. He is not to be charged with liability to the creditors of the corporation where he acts in good faith, and there are no circumstances to put him upon inquiry. It is, of course, unnecessary, as well as impracticable, for a creditor to prove that each purchaser of stock was told that there had been a fraudulent overvaluation of a patent taken in exchange for it, but, if he establishes such facts as properly lead to the inference of knowledge, it will be sufficient. In this case the corporation had a capital stock of \$1,000,000, all of which, except two shares, was issued to Rutan, and purported to have been fully paid. It therefore appeared to have a paid-up capital of \$1,000,000 in money or property, and was possessed of nothing but the interest in the patent. It is not conceivable that a person of ordinary intelligence and prudence, buying shares of stock in such a corporation, would not become advised as to what property the corporation had. In fact, some of the appellees made advances of money to meet expenses and pressing necessities. The directors were soliciting bids for a contract to build a furnace, and endeavoring to provide a small amount of money, as compared with the capital stock, for that purpose. It is clear that appellees knew that the corporation had no money and no property aside from the patent, and it would not be creditable to them to say that they believed the patent to be worth \$999,800. The interest in the patent was assigned to the corporation by Rutan, and the stock was issued to him; and we do not see how it can be contended that appellees did not know, when the corporation had no money or property aside from the patent, that the stock was either issued in exchange for it, or not paid for at all. We regard the proof as establishing the fact of notice to appellees of the transaction and overvaluation. They knew that the corporation did not have a paid-up capital of \$1,000,000, and that Rutan had not paid for the stock unless it was given for the patent.

The judgment of the Appellate Court and the decree of the superior court are reversed, and the cause is remanded to the superior court, with directions to allow to the appellees (except those as to whom the appeal has been dismissed) their proportionate share of the value of the patent at \$50,500, and any cash payment made to the corporation as a payment on the stock held by them, if any, and to then ascertain the amount due and unpaid on the stock held by each of them, and to enter a decree assessing them such amounts as will produce enough to pay the judgment of appellant and the other claims proved against the corporation, in accordance with the prayer of the bill. Reversed and remanded.

(205 Ill. 155)

RUSSELL v. CHICAGO & M. ELECTRIC RY. CO. et al.*

(Supreme Court of Illinois. Oct. 26, 1903.)

STREETS — DEDICATION — ACCEPTANCE — STREET RAILWAYS—USE OF PRIVATE PROPERTY—INJUNCTION.

1. Where land is platted as an addition to a city, and certain portions thereof designated as streets, and the property is sold with reference to such plat, the designation of a street upon the plat does not constitute the land so designated a street until the dedication is accepted by the city.

2. Where land is platted as an addition to a city, certain portions thereof being designated as public highways, the mere acceptance of the plat by the municipal authorities, and inclusion of the territory covered thereby within the city limits, is not an acceptance of the dedication of the streets.

3. Under Hurd's Rev. St. 1899, c. 131a, § 1, providing that street railway companies shall occupy streets in such manner as not to unnecessarily obstruct the public use thereof, a municipal corporation cannot grant such company the right to the exclusive use of a street.

4. Pending a suit to enjoin the construction of a street railway on private property, which defendant street railway company claimed constituted a street, the railway company filed a bond conditioned to pay all damages that might be awarded complainant, and proceeded with the construction of the road. *Held*, that nevertheless, on a finding that the property was in fact private property and not a street, complainant was entitled to an injunction compelling the railroad company to remove its structure.

Appeal from Appellate Court, Second District.

Suit by Anna May Russell against the Chicago & Milwaukee Electric Railway Company and others. From a judgment of the Appellate Court (98 Ill. App. 347) modifying a judgment for defendants, complainant appeals. Reversed in part, and remanded, with directions.

Bowen W. Schumacher (Louis Zimmerman, of counsel), for appellant. Wood & Oakley, for appellees.

RICHARDS, J. This was a bill in chancery filed in the circuit court of Lake county on May 19, 1899, by Anna May Russell against the Chicago & Milwaukee Electric Railway Company and the North American Railway Construction Company, praying for a temporary injunction restraining the defendants from constructing an electric street railway and certain trestlework and from cutting trees and erecting telegraph poles in front of complainant's premises, upon what was known as Railroad avenue. The bill also asked that upon a final hearing said Chicago & Milwaukee Electric Railway Company be perpetually enjoined from the further construction of said proposed work, and from operating and maintaining a system of electric railways over said so-called Railroad avenue in front of complainant's premises, which alleged street in front of her premises com-

plainant claimed to own, and that the defendants be required to remove the obstructions theretofore placed by them in said alleged street, and to restore the latter to its former condition. A temporary injunction was granted in accordance with the prayer of the bill. Afterwards, on June 7, 1899, the injunction, which had extended over the full width of the strip of land known as Railroad avenue, which was 66 feet, was dissolved as to the west 33 feet thereof, upon the defendants' giving bond in the sum of \$5,000, conditioned for the payment of the amount of any judgment or decree or the award of any arbitrators that might be entered against them in favor of complainant for damages caused by the use of the west 33 feet of the said Railroad avenue opposite complainant's premises. Defendants having afterwards filed an answer to the bill, and complainant her replication thereto, a hearing was had, and on March 6, 1900, a decree was entered, from which an appeal was taken to the Appellate Court, and from the judgment affirming and reversing the decree in part this appeal has been perfected.

The evidence upon which the decree in this case is based is not incorporated in the record by means of a certificate of evidence, and consequently the facts recited in the decree must be taken as true. If the findings of the decree are sufficient, it must be sustained; if not, it must fall. The decree in this case was a very lengthy one, and contained findings on many different questions. The case turns largely upon the question whether said Railroad avenue is a street or highway, or whether the appellant is the owner of the title to the same. We will refer only to such of the findings as are necessary to make clear the grounds upon which we act in disposing of the case.

It appears from the recitals of the decree that on the 7th day of June, 1873, Jacobs & Gurnell executed a plat subdividing into lots, blocks, streets, and avenues a portion of section 36, town 43, range 12, and of fractional section 13, town 43, range 13, in the county of Lake. The lands so subdivided adjoined the city of Highland Park on the south, and the plat was entitled as "South Highland Addition to Highland Park." The plat was acknowledged before a proper officer, and certified by the county surveyor of Lake county, and recorded in the office of the county recorder. The streets and avenues were shown on the plat to be 66 feet in width, and the length and width of the lots, as stated on the plat, extended to the middle of the streets and avenues, but the plat showed distinct boundary lines of the streets and avenues and of the lots. The plat showed the names of the different streets and avenues, and the numbers of the respective lots. The appellant on the 21st day of May, 1892, became the owner of lots 151, 152, and 153, which, as shown by the plat, abutted on a strip of land designated "Rail-

*Rehearing denied December 2, 1903.

¶ 1. See Dedication, vol. 15, Cent. Dig. §§ 34, 35, 64.

road Avenue" on the plat. The former owner of the lots had erected thereon a two-story frame dwelling and a barn, both of which faced upon the said Railroad avenue, and are now occupied by a tenant of the appellant. Said Railroad avenue furnished the only means of ingress or egress to or from the lots, there being no alleys marked on the plat. The land adjoining Railroad avenue on the west is the right of way of the Chicago & Northwestern Railway, and is not included in the platted ground. The city of Highland Park extended its limits southward over a portion of the platted ground, so that the city limits passed along the north line of appellant's northernmost lot, being lot No. 151, but did not bring any part of either of said lots, or the street in front of them, within the corporate limits. The strip marked on the plat as Railroad avenue is a continuation of a street of the same name in the city of Highland Park, and said city improved a portion of said strip in that portion of the plat over which the city limits were extended, by grading the roadbed and laying a sidewalk. A sidewalk 4 feet in width had been constructed in 1892 by public contributions,—that is, by voluntary subscription by the property holders,—and has since been maintained on the east line of Railroad avenue, adjoining the west line of appellant's three lots; and also a bridge for foot passengers, in connection with said sidewalk, had been constructed across a ravine, by funds raised in the same manner as those provided for the walk. The town of Deerfield (the county of Lake being under township organization) built a culvert on said Railroad avenue about 110 rods south of appellant's lots. The ravine rendered Railroad avenue impassable for teams in the block on which appellant's lots abutted. The passenger depot of the Chicago & Northwestern Railway Company was on Railroad avenue, about 500 feet south of appellant's lots. Access to her lots was obtained from the south by means of Railroad avenue. In front of her lots, and up to the ravine at the north end thereof, there was a natural growth of trees on said Railroad avenue. On the 27th day of June, 1891, the commissioners of highways of the town of Deerfield, by a resolution, accepted the following streets marked on said plat: A portion of Roger Williams avenue, which opens upon Railroad avenue 176 feet south of appellant's lots, and Judson avenue from the city limits of the city of Highland Park southward. The city of Highland Park, some time prior to 1899 (not more clearly fixed by the decree), accepted the territory within the plat to the north line of appellant's lots, including the strip of ground marked "Railroad Avenue."

The court further found that up to the 9th day of May, 1899, said subdivision, as hereinbefore set forth, was a portion of the town of Deerfield, and that on said date said subdivision was annexed to the city of High-

land Park, pursuant to the statutes of the state of Illinois in that behalf, and that on said 9th day of May, 1899, the city council of the city of Highland Park passed the ordinance of annexation, in and by which the city clerk was directed to prepare and file with the recorder of Lake county, Ill., a copy of the ordinance of annexation, together with an accurate map of said annexed territory, and that pursuant to said ordinance the clerk of said city did thereafter, on the 17th day of May, 1899, file with the recorder of Lake county, Ill., a copy of said annexation ordinance, and a map or plat of said premises, which said plat was prior to the filing thereof duly acknowledged by the mayor of said city, and that on said plat appear the streets, avenues, and lots in precisely the same form as in plat of South Highland addition to Highland Park, and two ordinances of the city of Highland Park, passed and approved July 14, 1899, and August 1, 1899, respectively accepting, by name, certain streets in the annexed territory of Ravinia, but not including in either of said ordinances said so-called Railroad or Railway avenue. The court further found that the appellee railway company was incorporated under the laws of the state, and had authority to build, operate, and maintain a street railway; that on the 1st day of March, 1899, it petitioned the board of supervisors of the county of Lake to grant it the right of way over the strip of ground marked on the plat as Railroad avenue, from the south line of the corporate limits of the city of Highland Park (which at that time was at the north line of appellant's lots) to the southern terminus of said avenue; that the petition was accompanied by a petition of the requisite number of property owners, and was granted by said board; that under color of this grant said railway company, through the appellee construction company, entered upon said Railroad avenue, and began the construction of its road there, including an embankment and a bridge in the avenue across the ravine at the north end of appellant's property.

The block in which appellant's property is situated is bounded on the north by Marsham street, on the east by Judson avenue, on the south by Roger Williams avenue, and on the west by Railroad avenue. There is no alley through the block, and there are lots belonging to other persons to the north and south of her, so that there is no access to her property, other than over Railroad avenue. As to the contour and the lay of the street in front of appellant's property, the decree finds that said lots and street gradually decline from Roger Williams avenue north to a point 100 feet north of the south line of lot 151, which is appellant's northernmost lot, at an average grade of from 2 to 2½ feet to the 100 feet, at which point the surface of said lots on said avenue declines sharply into the ravine, said ravine being about

20 feet deep and 180 feet across, and that the said Railroad avenue and the lots of appellant have the same general characteristics as to grade and ravine. Appellant's lots count from north to south; lot 151 having a frontage of 255½ feet, and lots 152 and 153 each having a frontage of 100 feet, making her total frontage 455½ feet. As to the character of the grade and trestle built by appellees in front of appellant's property on the west 30 feet of said Railroad avenue, the decree finds, substantially, that appellees constructed, on a level and without regard to the natural grade of the said Railroad avenue, and beginning at the south of appellant's premises, a 3-foot embankment, to a point 41 feet north of the south line of lot 153, and from that point north, the full length of appellant's premises, appellees constructed a trestle, consisting of four piles driven in the ground crosswise, 12 inches in diameter, thus forming piers, which were built every 20 feet apart in front of said lots and along said depression and across said ravine, and the trestlework, as thus constructed, varied in height from about 3 feet at the point of beginning to 25 feet at the ravine, and that in front of the dwelling house upon the appellant's premises the said trestle extended 6 feet above the natural grade. The roadbed and trestle were designed for a double-track electric railway. The injunction prayed in the case was to restrain the further prosecution of this work by the appellee companies. After the dissolution of the temporary injunction that was granted, and the filing of a bond by appellees in the sum of \$5,000, conditioned for the payment of any damages appellant might, by suit or arbitration, establish, appellees proceeded to build and put in operation said electric railway, and the same was in full operation at final hearing of this cause.

The appellant was one of the signers of the petition upon which the board of supervisors acted in granting the appellee company the right of way on said avenue. The decree finds she was not thereby estopped to ask the court to restrain the construction of the railway in Railroad avenue, for the reason that a representative of the appellee company, who presented the petition to her for her signature, induced her to sign it by representing to her, to quote from the decree, "that in front of her said premises, as aforesaid, down to the edge of the ravine, said Chicago & Milwaukee Electric Railway Company would place its tracks on the natural grade of said land, and build a broad bridge over the ravine, thereby saving her a large amount of special assessments. Thereupon, on said representations, complainant signed said petition"—and that though the engineer of the company, on her complaint that the embankment was higher than had been promised her, reduced it two or three feet, and to the lowest possible grade consistent with the safe operation of the road, along

its track and on and over the bridge across the ravine, and turned the grade several feet farther from appellant's lots to the westward, yet "that the height of the grade was higher than the grade promised by the company." The court further found that the appellee company had not compensated or offered to compensate the appellant for the right of way along said avenue, or for the damages occasioned to her lots by reason of the construction and operation of the road.

On the theory, to quote from the decree, "said so-called Railroad avenue, though it had been dedicated, by reason of said plat, for public use, had never been accepted by the proper public authorities or by user of the public, and until accepted by the proper public authorities or user of the public is and was not subject to the jurisdiction of the county board of the county of Lake as a public highway, or for any other purpose," and that the complainant, therefore (to quote again), "owned the fee to the whole of said Railroad avenue in front of her said lots, subject, however, to the rights of the public to accept said so-called Railroad avenue as a street, should they wish to do so," and for the reason it appeared to the court that the damages sustained by the complainant by reason of the wrongful acts complained of in her said bill of complaint are relatively small in comparison with damages that would accrue to the defendant company should the operation of said road as now located be enjoined, or should the defendant railway company be directed by the mandatory injunction of this court to remove its said tracks and trestle in front of complainant's premises, and that said premises are not occupied by complainant as her homestead, but are rented, when tenants therefor can be had, as a source of income to complainant, and that the damage to complainant's said lands by reason of the occupation of the west 25 feet of Railroad avenue in the manner hereinbefore described in this decree could be made good to her by a money judgment, it was ordered, adjudged, and decreed that an issue be made up in this cause, to be tried by a jury or by the court, as the parties shall elect, in which issue shall be tried the following questions, and a single money judgment therefor shall be entered herein in accordance with the verdict of the jury or the finding of the court: First, the value of the west 25 feet of said Railroad avenue in front of appellant's lots; second, the damages to said lots 151, 152, and 153, which they have sustained or may sustain by reason of the construction of said trestle and structure and roadbed and the operation of the railway upon the west 25 feet of said Railroad avenue as aforesaid. And it was ordered that the defendant railway company shall pay all costs of this proceeding, to be taxed by the clerk, including a reasonable solicitor's fee for the complainant's solicitors, and that the value of the lands

taken, and of the damages to the residue of complainant's lots, be ascertained as hereinbefore provided; "that the appellant should proceed to have her damages ascertained within the period of six months, and should the defendant company fail to pay the money judgment so to be rendered against it within the period of thirty days after the rendition thereof in the trial court, but should make default, that said railway company be and are hereby perpetually enjoined from operating and maintaining its system of street railway upon the embankment and trestlework erected in front of appellant's lots, and from operating and maintaining a system of electric railways over, across, and upon said so-called Railroad avenue in front of said lots, as aforesaid, and should remove said embankment and trestlework in front of complainant's said lots, and to restore the said strip of land known and described as Railroad avenue, as near as may be, to the condition it was before the defendants, or either of them, committed the said injuries and trespass," etc.

Appellant, being dissatisfied with the relief granted by the decree of the circuit court, prosecuted an appeal to the Appellate Court for the Second District. The appellate Court affirmed the decree, except as to the provision ordering appellant to institute proceedings to have her damages ascertained, and the provision requiring the parties to have the issue tried by a jury or by the court, as the parties might elect, and remanded the cause, with directions to the circuit court "to modify the decree so as to provide that the proceedings to condemn be instituted by the railway company, and that the issue to be made up be tried by a jury, unless the parties waive a jury and elect to try it by the court." The appellant has perfected this appeal to this court to secure a reversal of the judgment of the Appellate Court.

From our examination of the decree and record before us, we concur in the conclusions reached by the chancellor that Railroad avenue, along the block in which appellant's property is located, is not a public highway, and that the action of the board of supervisors of Lake county, purporting to grant to the appellee the Chicago & Milwaukee Electric Railway Company the license or authority to construct its road over said portion of said Railroad avenue, was void, for the reason that although said Railroad avenue was shown upon the plat of the addition in which appellant's premises are situated, and although the plat was in compliance with the statute, the making and recording of such plat amounted to no more than the offer to dedicate the streets and avenues shown thereon, and, until accepted by the proper authorities in some of the modes known to the law, there was no highway; and the decree finds, and we think upon sufficient facts, that there was no such acceptance by the county or township au-

thorities upon which to predicate any action by the board of supervisors extending or granting to said electric railway company authority to use or occupy the same as a public highway. To constitute a public highway by dedication, whether statutory or otherwise, two things are necessary: There must be a dedication or offer to dedicate, and there must be an acceptance of such dedication by the proper public authorities. *Fisk v. Town of Havana*, 88 Ill. 208; *Littler v. City of Lincoln*, 106 Ill. 353; *Jordan v. City of Chicago*, 166 Ill. 530, 47 N. E. 191; *Village of Augusta v. Tyner*, 197 Ill. 242, 64 N. E. 1127; *Willey v. People*, 36 Ill. App. 609. And in such case, where the highway is claimed by dedication, the acts of both the donor and the public authority should be certain—of the design to dedicate on the one part, and to accept and appropriate to public use on the other. *Grube v. Nichols*, 36 Ill. 92. The owners of the lands included in South Highland addition to Highland Park having platted the same, and having shown on the plat a number of the streets—among them the street in question—and having sold property with reference to such plat along said Railroad avenue, they and their privies and successors in title are estopped, as against purchasers and holders of property in such addition, and bought with reference to such plat, to deny the existence of such streets and passageways, as held in *Earl v. City of Chicago*, 136 Ill. 277, 26 N. E. 370; *Clark v. McCormick*, 174 Ill. 164, 51 N. E. 215; and other cases that have been before this court. But these cases only go to the extent of establishing the private right of the property holder, as contradistinguished from the right of the public to have such designated streets remain open for their access, and the access of those who may have occasion to travel such streets in connection with the property thus conveyed. They do not go to the extent of declaring streets and passageways thus established as public highways, because, after all, until some affirmative act which makes certain the purpose of the municipal authorities to accept such offer of the streets as public highways, they still stand as mere offers of dedication. It does not lie within the power of the individual who may elect to plat and sell his property with reference to such plat to impose upon the public authorities, merely by his own act, the burden of the care and responsibility of such dedicated streets and passageways as public highways, until those authorities representing the public have seen fit, by some unequivocal declaration or act, to accept and assume such burden and liability. *Littler v. City of Lincoln*, supra; *Jordan v. City of Chicago*, supra; *City of Chicago v. Gosselin*, 4 Ill. App. 570. And until the proper municipal authorities do accept the streets thus dedicated, and public highways, the fee of the streets does not vest in the municipality. *Hewes v. Village of Crete*, 175 Ill. 348, 51

N. E. 696; *Hamilton v. Chicago, Burlington & Quincy Railroad Co.*, 124 Ill. 235, 15 N. E. 854; *Jordan v. City of Chenoa*, supra.

It is said, however, by appellees, that, prior to the filing of the bill in this case, Highland Park, on the 9th of May, 1899—10 days before the filing of the bill—extended its city limits by taking in the whole addition in which the avenue in question is located. The mere acceptance of the plat by the municipal authorities, and the inclusion of the territory covered by the plat within the limits of the municipality, was not an acceptance of the dedication of the streets and passageways shown upon the plat. The municipality still had the right to elect what streets shown upon the plat should become public highways, and public charges upon the municipality with reference to their maintenance; and, although certain streets had been accepted, the street in question was not one of them. *Littler v. City of Lincoln*, supra; *Jordan v. City of Chenoa*, supra.

It is apparent from this record that the appellee electric company is what is known as a "street railway company," acting under the horse and dummy act, or street railroad act; and, even if it could be held that the locus in quo was a street or public highway, appellant should still have her injunction. While the county or municipal authorities may grant to such companies the use of the highways, it is only the use in common and in connection with the public that they may grant. Such companies cannot appropriate the whole or any portion of such streets and highways to their exclusive use and control. The statute conferring the right to occupy the streets and highways contains the express limitation that such occupancy and use shall be "in such manner as not to unnecessarily obstruct the public use of such street, alley, road or highway." *Hurd's Rev. St. 1899, c. 131a, § 1*. Where it is established by proof, or admitted, that the locus in quo is a public highway, the property owner, ordinarily, is presumed, in law, not to suffer damages from the proper construction thereon of such railroads, upon the theory that such use is compatible with the use in common with the public, and does not impose upon such street or highway an additional servitude. But this is upon the theory that such street railways shall follow the natural contour of the surface of the streets. In the case at bar, however, for the full length of appellant's property, the electric company has appropriated exclusively to its own use at least 25 feet of the highway; has erected an obstruction in the street ranging from 2 to 3 feet high at the south end to about 25 feet at the north end, gradually and constantly increasing from where it begins at the south until the extreme is reached at the north. The decree finds that appellant was the owner of the entire street, subject to the offer of dedication, and subject to its acceptance by the public authori-

ties. If it were not a public highway, the public authorities had no power to confer license upon the electric company to enter upon it for any purpose. If it were not a public highway, and the electric company was a street railway, or operating under the street railway law, it did not have and could not acquire any right to enter upon the same, except for special reasons and under peculiar circumstances, not shown by this record to exist. *Harvey v. Aurora & Geneva Railway Co.*, 174 Ill. 295, 51 N. E. 163; *Id.*, 186 Ill. 283, 57 N. E. 857. The locus in quo not being a public highway and the fee being in appellant, it was the duty of the electric company to bring itself within the exception to the rule by which it might occupy other territory than a public highway, and to compensate appellant for her damages before constructing its road. It may be that appellees and appellant were both mistaken as to the law, but that fact cannot alter the law, or deprive the appellant of her remedy. When this bill was filed, appellees were merely in the act of constructing the roadbed and trestle, and pending the litigation they have gone on and completed and put in operation the electric railroad. This they did at their own hazard, and, whatever burden attaches, they must bear it.

The circuit court of Lake county erred in decreeing a bond to be taken from appellees, and requiring appellant to institute proceedings for her damages, and in not granting the injunction. The Appellate Court erred in modifying that decree, and directing that the appellee electric railway company should proceed to condemn the right of way, and in requiring appellant to pay any portion of the costs. The decree should have been for a mandatory injunction. The decree of the circuit court of Lake county, finding that there was no public highway, and that appellant was the owner of the locus in quo (and in all other matters except that portion of the decree finding that the appellee the Chicago & Milwaukee Electric Railway Company might maintain its track upon said street or avenue, and that appellant should bring proceedings to establish her damages and denying a mandatory injunction), is approved. The judgment of the Appellate Court affirming the decree of the circuit court is affirmed, except in so far as it sustains the circuit court in denying the mandatory injunction and remanding the cause with direction, and modifies the decree so that the electric company should be required to proceed to condemnation of the right of way, and taxes costs against appellant, in which latter respects the judgment of the Appellate Court is reversed. The cause is remanded to the circuit court of Lake county, with direction to that court to amend its decree by granting a mandatory injunction requiring the Chicago & Milwaukee Electric Railway Com-

pany to remove said trestlework and embankment and its said tracks and railroads from said so-called Railroad avenue in front of appellant's premises. The appellees will be required to pay the costs of this proceeding in all of said courts.

The injunction here directed shall not be held to be conclusive of the right of appellee the Chicago & Milwaukee Electric Railway Company to prosecute condemnation proceedings, as this court, on the record before it, is unable to say whether such conditions existed as authorized said electric company to deviate from the public highways.

Reversed in part and remanded, with directions.

(205 Ill. 132)

SOUTH CHICAGO BREWING CO. v. TAYLOR.*

(Supreme Court of Illinois. Oct. 26, 1903.)

CLOUD ON TITLE—CONVEYANCES—BURNT RECORDS—CHARACTER OF TITLE—SUFFICIENCY—TAX TITLE—VACATION—TENDER—PERSONS ENTITLED TO SUE—ADVERSE POSSESSION—CONTINUOUSNESS—PAYMENT OF TAXES—EQUITY—COURTS—JURISDICTION—BILL—AMENDMENT TO CONFORM TO PROOF—REHEARING—NEWLY DISCOVERED EVIDENCE—DILIGENCE—COSTS.

1. Where, in a suit to remove a cloud on title, defendant did not claim under a title in existence before the Chicago fire, or that any conveyance in its chain had been destroyed to entitle it to file a cross-petition as authorized by Burnt Records Act, § 13 (Hurd's Rev. St. 1899, c. 116), and a cross-petition filed alleged nothing not contained in defendant's answer and did not ask to have any conveyance removed as a cloud on its title, it was not error for the court to strike such cross-petition from the files.

2. Where a court acquired jurisdiction to establish and declare the title to real estate by reason of the destruction of the records of complainant's chain of title in the Chicago fire, it had jurisdiction to remove a cloud on such title in the same suit.

3. In a suit to remove a cloud on title, complainant is not bound to show a perfect title from the government or as against the world, but is only required to show a title good as against the holder of the alleged cloud.

4. A person having such a title to real estate as gives him a right to redeem from a tax sale is entitled to file a bill to set aside such sale, or a deed issued in pursuance thereof, as a cloud on its title, on offering to pay the taxes and penalties, with interest.

5. Evidence that a quitclaim deed executed during the pendency of a suit to remove a cloud on title was similar to a deed in possession of witness, which had been lost, was not sufficient to prove such fact.

6. In a suit to remove a cloud on title, evidence held insufficient to show that defendant had been continuously and uninterruptedly in possession of the land for seven years, so as to confer title by adverse possession.

7. Defendant paid the taxes on certain land to the collector before they were due or the collector was authorized to receive them as payment, and when the collector received his book and warrant, and was authorized to receive payment, he collected the first payment of the tax from plaintiff's husband, and on the same day marked a payment by defendant as the second payment of the same taxes. Held, not a payment of the taxes by defendant, within the seven-years statute of limitations.

8. In a suit to set aside a cloud on title it was proper for the court to allow plaintiff to amend her bill, after the proof had been taken, to conform the allegations of the bill to such proof.

9. Where a bill is amended, after the proofs have been taken, to conform thereto, such amendment operates to set aside previous defaults for failure to answer.

10. Where, in a suit to set aside a cloud on title, an amendment to the petition to conform to the proof was filed July 14, 1902, and the decree was not rendered until February 25, 1903, during which period no attempt was made by the defendant to take any new testimony, an application to set aside the decree and for a rehearing in order to allow defendant to introduce further evidence, the character of which was not disclosed, was properly refused.

11. Where, in a suit to set aside a tax deed as a cloud on title, plaintiff did not tender the amount of taxes and interest due defendant before beginning the suit, defendant was not liable for costs.

Appeal from Superior Court, Cook County; Theo. Brentano, Judge.

Suit by Esther E. Taylor against the South Chicago Brewing Company. From a decree in favor of plaintiff, defendant appeals. Affirmed in part.

Story, Russell & Story and Gage & Deming, for appellant. H. S. McCartney, for appellee.

CARTWRIGHT, J. On August 1, 1896, Hugh L. Mason and the appellee, Esther E. Taylor, filed their petition in the superior court of Cook county against a large number of defendants, among whom was the appellant, asking the court to restore burnt and destroyed records of deeds, plats, and proceedings in the title to that portion lying north of the center line of 100th street, of block 19, in Bowen's addition to South Chicago, being a subdivision of the north quarter of section 7 south of the Indian boundary line, in township 37, range 15, in said county, and to establish and confirm the title of petitioners to the same. During the pendency of the suit appellee purchased the interest of Hugh L. Mason in the premises, and that fact was set forth by supplemental petition filed December 15, 1898. The other defendants, to whom the premises had been conveyed at various times, were defaulted. The averments of the petition respecting the title claimed by appellant were that it claimed to be in possession of the premises by means of a wire fence along the easterly side thereof, and a fence along the northerly side of 100th street, and a small oil house or outbuilding at the southeasterly side of said premises; that its claim of title and possession was based on a tax deed to J. A. Brophy, dated April 23, 1887, and a quitclaim deed from him to appellant, dated July 21, 1887, and that said tax deed was void.

Appellant answered the petition, denying the ownership of petitioner, and set up its title by virtue of its tax deed to Brophy mentioned in the petition, but denied that

*Rehearing denied December 2, 1903.

¶ 8. See Quieting Title, vol. 41, Cent. Dig. § 83.

said deed was its only title. It alleged that Rudolph Brand conveyed the premises about October 17, 1884, to Charles Brand and Ernest Hummel, partners, who then took possession of the premises, and the title passed to appellant; that Brand & Hummel and appellant paid all the taxes legally assessed thereon up to the commencement of the suit; that the deed from Rudolph Brand was claim and color of title in Brand & Hummel made in good faith, and that the deed from Brophy to appellant was also claim and color of title made in good faith. It was therefore alleged that by virtue of said deeds and claim and color of title, with possession for seven years and payment of taxes for that period, appellant became the owner of the property to the extent and according to the purport of its paper title, under section 6 of the limitation act (Hurd's Rev. St. 1899, c. 83, § 6). Appellant afterward filed what was called a cross-petition, alleging that it had derived title to the property in the mode and manner mentioned in its answer, and asking the court to declare the claim of title of appellee to be void, and to remove said claim as a cloud upon its title, and to enjoin her from asserting any title to the land. On motion, the court struck this cross-petition from the files.

The issues formed by replication to appellant's answer were as to the title of the petitioner, the title of appellant under the tax deed to Brophy, and the quitclaim to it and the alleged deed from Brand, with possession and payment of taxes for seven successive years, and the right of the petitioner to have said tax deed and quitclaim deed removed as a cloud upon her title. The cause was referred to a master in chancery, who took the evidence and reported the same, with his conclusion that appellee was the owner in fee simple of the premises by a connected chain of title from the government of the United States through a patent to Ash Kum, an Indian chief of the Pottawatamie Indian Nation, in pursuance of a treaty made and concluded by the United States and the Pottawatamie Indians on October 27, 1832, and subsequent conveyances from persons holding said title by conveyance or by descent. The master also found that, for several years previous to the Chicago fire of 1871, James H. Bowen was in possession of the premises under claim of title thereto, and while in such possession received a deed of conveyance from Edward Sorin on April 25, 1871, which deed was executed and delivered in good faith; that Bowen and his grantees continued in possession until the fall of 1888; that the deed from Sorin to Bowen was recorded before said fire; that Bowen made the plat of the addition; and that the appellee had proved a full and perfect chain of title by regular conveyances from Bowen to herself, independently of the title from the government. Respecting the alleged title of the appellant by virtue of

deeds, possession, and payment of taxes, the master found that Rudolph Brand was never in possession of the premises, that he was a stranger to the title, and that there was no evidence that the alleged deed from him to Brand and Hummel was ever executed, and, if it was, there was no evidence of any privity between the partnership of Brand and Hummel and appellant. The master found the tax deed to Brophy to be void, but the quitclaim deed from him to appellant to be sufficient proof of claim and color of title made in good faith, but found that appellant did not continue in actual possession for any period of seven successive years under claim and color of title based on the quitclaim deed from Brophy or any other color of title, and that appellant did not pay the taxes for seven successive years. The master recommended that the tax deed of Brophy and the quitclaim deed from him to appellant be set aside upon payment of the taxes, with interest thereon, and as to the costs found that not more than one-fifth of the cost of the proceeding had been incurred on the issue respecting the setting aside of the tax deed as a cloud upon the title of appellee, and recommended that she be decreed to pay one-fifth of the costs as a condition to relief, and that appellant be decreed to pay the other four-fifths of the costs.

After the evidence was taken, the appellee obtained leave of court to amend her petition without prejudice to the defaults, proceedings, and proofs in the case, and amended the petition on July 14, 1902, by setting up the possession of James H. Bowen before the Chicago fire, and claiming ownership by virtue of his possession and the complete chain of title to her, independently of her chain of title from the government under the patent to Ash Kum. To the petition as amended appellant filed an answer, not confined to the amendment or defenses to it, but again covering the whole case, and again setting forth its alleged title by the deed from Rudolph Brand and the tax title, with possession and payment of taxes. Appellee moved to strike this amended answer from the files, but the court permitted it to stand, and the replication previously filed was allowed to stand to such amended answer.

The court overruled exceptions of appellant to the report of the master, and on February 25, 1903, entered a final decree, with findings substantially the same as those of the master. The court found that the taxes, with interest thereon, paid by Brophy and appellant, amounted to \$900; that the costs, including a master's fee of \$1,945, had been paid by appellee, except \$3 paid by appellant; that appellant should pay four-fifths of the costs and the appellee one-fifth, but the money due the appellant should be satisfied by setting off the \$900 against four-fifths of the costs; that four-fifths of the costs amounted to \$1,556, and one-fifth to \$389; that the appellant having paid \$3, the

balance due from it was \$1,553, and after setting off the \$900 due it, it should pay the balance of costs, \$653. The decree established and confirmed the title in appellee, restored the burnt and destroyed records, ordered appellant to surrender possession to appellee, and decreed that appellee recover said balance of \$653 costs from appellant and have execution therefor.

It is contended that the court erred in striking from the files the cross-petition of appellant. Section 13 of the burnt records act (Hurd's Rev. St. 1899, c. 116, § 18) gives a defendant a right to file a cross-petition if he desires to do so, but in this case appellant claimed no ante-fire title, or that any conveyance in its chain of title had been destroyed. Its title was a new and independent one, originating in the tax proceedings, and not dependent upon any previous title. The cross-petition set up nothing that was not contained in the answer, and did not ask to have any conveyance removed as a cloud upon appellant's title. It was in no proper sense a cross-petition seeking affirmative relief, but simply prayed that upon the final hearing the court should declare the claim of title of appellee to be void and to exist only as a cloud upon appellant's title, and should enjoin her from claiming or asserting any title. The petition set out the alleged claim of title of appellant, and if, upon a hearing, such title had been found good and the petition had been dismissed for want of equity, the decree would have accomplished all that appellant could have had under its cross-petition. There was nothing new or different in the cross-petition from the issue formed by the petition and the answer, and it was not error to strike the cross-petition from the files.

Ash Kum, the Indian chief, conveyed the premises on October 24, 1835, to Louis De Saille, who died in 1837, and appellant makes many objections to the proof of heirship and conveyances from his heirs in the chain of title to appellee. The issue between appellant and appellee related only to the title claimed by appellant under section 6 of the limitation act, by virtue of possession under claim and color of title, with payment of taxes for seven successive years, and the question whether appellee had such a title as would enable her to have the alleged cloud removed. Appellant had no title except a quitclaim deed from the holder of an invalid tax deed. The destruction of the records in the chain of title gave the court jurisdiction to inquire into the condition of the title and to establish the same and declare in whom the title was vested, and, having acquired such jurisdiction, it could remove a cloud from the title in the same suit, but so far as appellant is concerned the proceeding was one to remove a cloud. If appellee showed a good title as against appellant, it was not concerned with the question whether she showed a perfect or connected chain of title

from the government. Even in ejectment it is not necessary for a plaintiff to prove title back of the common source. In a proceeding to remove a cloud from title the complainant or petitioner must have some title, legal or equitable, and must recover upon the strength of his own title, but it is sufficient if he makes out a title good against the holder of a mere cloud upon it. A complainant in a bill to remove a cloud is not bound to show a perfect title as against all the world, or with the same strictness as in an action of ejectment. It is not necessary that he show title from the government, but he must show title in himself superior to the alleged cloud. *Rucker v. Dooley*, 49 Ill. 377, 99 Am. Dec. 614; *Wing v. Sherrer*, 77 Ill. 200; *Glos v. Randolph*, 138 Ill. 268, 27 N. E. 941. In the case of a sale for taxes, all the estates, legal and equitable, in the land are sold, and the title is a new one in the purchaser, derived from the state. Generally speaking, any person who has such title as gives him a right to redeem may file a bill to set aside a tax sale or deed upon offering to pay the taxes and penalties, with interest. *Miller v. Cook*, 135 Ill. 190, 25 N. E. 756, 10 L. R. A. 292; *Burton v. Perry*, 146 Ill. 71, 34 N. E. 60. If the title of appellee was good as against appellant, she had a right to have a cloud held by appellant removed, and if she showed title by a connected chain of conveyances from Bowen, who was in possession in 1871 under a deed purporting to convey title, her title would be superior to that derived under a subsequent invalid tax deed. It was proved that Bowen was in the actual occupancy, by tenants and buildings, of a part of a tract of land, including the premises in question, and under a conveyance of the whole, and his possession would be co-extensive with his paper title. So far as these premises were concerned, they were submerged by the waters from the Calumet river up to the year 1890. Boats passed over, but no person was on the land in any other way, except on the ice in the winter. In the year 1890 the Calumet river at that point was moved by the United States government between 100 and 200 feet west, and material dredged from the river was deposited upon the land, so that in the fall of 1890 it was raised above the flooding from the river. The appellant claimed that Brand & Hummel had a board fence built in the water around the premises about 1884—the date of the alleged deed from Rudolph Brand—and that the fence being destroyed, and the boards carried off or destroyed, appellant built the wire fence in the same place.

It will be unnecessary to inquire whether there was any fence on the premises before July 21, 1887, when appellant received its quitclaim deed from Brophy, for the reason that there was no proof of the alleged deed from Rudolph Brand, in 1884, to Brand & Hummel. An unrecorded quitclaim deed executed after the commencement of this suit

was offered in evidence, together with testimony that it was similar to a deed alleged to be lost. Rudolph Brand was a stranger to the title, and never in possession, and no deed from him to Brand & Hummel was of record. There was no evidence of the execution of any deed by Rudolph Brand in 1884, by signing, sealing, or delivery, or by proof of an acknowledgment by him of such a deed. Evidence that a quitclaim deed executed during the pendency of the suit was similar to a deed in the possession of the witness which had been lost was not sufficient to prove that fact. As it was not proved that any deed was executed in 1884, appellant could not prove its title from such source, even if it connected itself with such deed. There was no evidence of any connection between Brand & Hummel and the corporation. In 1887 a corporation was formed under that name, and the name was subsequently changed to that of appellant, but there is no evidence that appellant acquired anything from the partnership.

When appellant received the quitclaim deed of July 21, 1887, the land was under water and useless for any purpose except harvesting ice, and the ice was filled with weeds, pond lilies, and rushes. On November 2, 1885, Douglas S. Taylor, the husband of appellee, from whom she derived title, executed a lease, in which she joined, for certain land, with the privilege of harvesting and cutting ice on these premises until October 31, 1890. The lessees put up slides for ice on the land, but did not cut much at that time on account of the condition being unsatisfactory. The slides were removed and put up again in the winters of 1886-87 and 1887-88. In the winter of 1888-89 there was no ice to be cut, and in erecting the ice slides in the winter of 1889-90 a post and wire fence was found on the premises. It had been built after November, 1888, and before February, 1890, and appellant then claimed possession and prohibited putting up the ice slides. Appellant had possession at that time, but in 1890 Mason and Douglas S. Taylor entered into a contract with the contractors dredging the Calumet river for the United States government, for filling in the land, and it was filled at their expense, amounting to \$700, paid in September, 1890. Appellant knew of the contract and saw the land being filled under it by Mason and Taylor, and whatever possession it previously had by virtue of its wire fence or any previous board fence was then abandoned. The possession of Mason and Taylor, who claimed to own the land and were filling it at their expense above the danger of flooding from the river, was utterly inconsistent with any claim of possession by appellant. Appellant had possession afterwards, but had not been in possession seven successive years when the suit was commenced on August 1, 1896.

Appellant also failed to prove payment of

taxes for seven successive years. It is conceded that as to an undivided $\frac{2}{21}$ of the land, on which the tax was paid by Mason January 10, 1891, there was such a failure, and that the statute of limitations is applicable to only $\frac{12}{21}$. There was also a failure as to the latter share. The taxes of 1894 on the premises became payable January 16, 1895, and were paid by Taylor. Appellant had previously, on December 22, 1894, given to John J. Hanberg, the collector, \$170 to pay the taxes when they became due. He had not received the book or warrant, and when he received them, on January 16th, and was authorized to collect the tax, he received payment from Taylor and marked it as the first payment, giving a receipt therefor. Appellant made Hanberg its agent to make the payment, and there was no evidence that the taxes were actually applied or accounted for by Hanberg, in his capacity as collector, before the payment by Taylor. On the same day he marked a payment by appellant as a second payment of the same taxes. The evidence shows that the first payment was actually made by Taylor. Appellant did not show good title under the statute of limitations, and appellee proved a superior title and that she was entitled to redeem.

After the decree was entered, appellant moved the court to set it aside and for a rehearing, to enable it to introduce further evidence material to the issues in the case. There was no showing what the evidence was, whom it was expected to prove it by, or that there had been any diligence in obtaining and producing it. The motion was a general request to open the case, based on the fact that there had been an amendment to the petition, and an answer thereto, after the testimony was taken before the master. The amendment to the petition was filed July 14, 1902, and the decree was on February 25, 1903. During the intervening period there was no attempt to take any new testimony. The amendment was proper, since a complainant must recover on the case made by his bill, and appellant had a right to answer and contest the case on which appellee claimed relief. *Adams v. Gill*, 158 Ill. 190, 41 N. E. 738. It was also proper to allow the amendment after the proofs were taken, so that the allegations and proofs might correspond. The regular and proper course upon an amendment is for the court to set aside the defaults, but, whether there is such an order or not, an amendment to a bill virtually sets the default aside. *Gibson v. Rees*, 50 Ill. 383; *Lyndon v. Lyndon*, 69 Ill. 43. Appellant is not interested in any question as to the effect of the amendment or the setting aside of defaults as to other parties. It was entitled to answer the new claim stated in the amended petition. The amended answer was proper so far as it answered the amendment to the bill and alleged any matter of defense thereto. So far as appellee was con-

cerned, the amendment made her petition conform to proofs already taken. On the reference before the master several witnesses were produced and examined by appellee as to the possession of Bowen, and they were cross-examined by the appellant. When the amendment was made setting up the facts proved by such witnesses, if the appellant had any evidence that Bowen was not in possession it should have moved with reasonable diligence in procuring and offering such evidence. It not only did not do so, but did not show that it had any evidence of that character. The court was not called upon to reopen the case and continue it under those circumstances.

The court found the amount due appellant, which appellee was bound to pay as a condition to the relief asked for, to be \$900, but adjudged four-fifths of the costs against appellant, and satisfied the \$900 by way of set-off against such costs. There was no tender to the appellant of the amount due before the suit was begun, and in such a case it could not be required to pay the costs. The rule is that on a bill to set aside a tax deed the complainant must pay all the costs, unless a tender is made and refused before incurring costs. *Gage v. Busse*, 102 Ill. 592; *Gage v. Arndt*, 121 Ill. 491, 13 N. E. 138; *Glos v. Beckman*, 168 Ill. 74, 48 N. E. 69. Where the owner does not pay the taxes due the state, but permits his premises to be sold, it is clearly inequitable to compel the holder of the deed to pay the costs where there has been no tender of the amount; and this is so notwithstanding the petition contains an offer to pay whatever may be found to be due. Counsel for appellee says that appellant should pay the costs because it contested the suit and asserted title under its tax deed. Appellee had a right to make a tender of the amount due, and thereby prevent a judgment for costs against her, if appellant elected to refuse it. She did not choose to do so, but brought the defendant into court, where she was bound to prove the invalidity of the tax deed, and could then only have relief by paying the amount due for taxes and interest. We do not see any ground for changing the rule in the fact that appellant denied the averments of the petition and required appellee to prove them. The master reported that not more than one-fifth of the costs was made upon the issue in which appellant was interested, and the decree required it to pay four-fifths of all the costs, but under the well-established rule it could not be required to pay any costs.

The decree of the superior court is affirmed, except so far as it requires appellant to pay costs and sets off moneys due it against such costs, and the cause is remanded to that court with directions to amend the decree so as to require the payment of all costs by appellee and the payment to appellant of the amount due for taxes and interest.

Affirmed in part, and remanded.

(205 Ill. 231)

STOTT v. CITY OF CHICAGO et al.*

(Supreme Court of Illinois. Oct. 26, 1903.)

MANDAMUS—POLICE PATROLMAN—PETITION—SUFFICIENCY—ELECTION BY DUE APPOINTMENT.

1. A de facto officer cannot recover compensation for his services, but to be entitled to compensation an officer must be such de jure.

2. An allegation, in a petition for mandamus, to compel petitioner's restoration to the office of police patrolman, that petitioner was duly appointed to the office, was insufficient as an allegation as to the manner of petitioner's appointment, the allegation being of a legal conclusion.

3. *Starr & C. Ann. St. 1896, c. 24, art. 6, § 2*, provides that a city council may by ordinance provide for the election or appointment of certain named officers, and such other officers as may by the council be deemed necessary or expedient. A petition for mandamus to compel the restoration of petitioner to the pay rolls as a police patrolman alleged that petitioner was appointed to the office of police patrolman, and alleged that a department of police was created by ordinance, consisting of superintendent of police and certain other offices, and such patrolmen as might be prescribed by ordinance, but there was no allegation of the passage of any ordinance fixing the number of patrolmen or providing for their appointment or election. *Held* that, as a state court cannot take judicial notice of a city ordinance, the petition did not sufficiently allege that petitioner had been legally appointed.

4. *Hurd's Rev. St. 1901, p. 365, § 3*, regulating the civil service of cities, provides that civil service commissioners shall classify all the offices and places of employment in such city with reference to examinations, and that the offices and places so classified shall constitute the civil service of such city, and that no appointments to any of such offices or places shall be made except according to the rules hereinafter mentioned. Section 11 provides that officers elected by the people or whose appointment is subject to confirmation by the city council shall not be included in such classified service. A petition for mandamus to compel relator's reinstatement as a police patrolman alleged that petitioner took the civil service examination as to his qualification as police patrolman, was passed as qualified, and thereby was entitled to stand at the head of eligibles for appointment on the police force. It was then alleged that petitioner had actually been appointed as a police patrolman, and had been discharged without authority of law. *Held*, that the petition did not show that petitioner was appointed under the civil service act, there being no allegation that patrolmen had been classified by the civil service commission as required by section 3, or that petitioner was not an officer whose appointment was subject to confirmation by the city council so as not to be entitled to the benefit of section 12 of the act forbidding discharges except for cause upon written charges, and after an opportunity to be heard in defense.

5. A demurrer to a plea will be carried back to a defect in the petition.

Appeal from Appellate Court, First District.

Petition by J. A. Stott against the city of Chicago and others for a writ of mandamus requiring defendants to place petitioner's name upon the police pay rolls. From a judgment of the Appellate Court (98 Ill. App.

*Rehearing denied December 2, 1903.

¶ 1. See *Officers*, vol. 37, Cent. Dig. § 124.

105) affirming a judgment dismissing the petition, petitioner appeals. Affirmed.

This is an appeal from a judgment of the Appellate Court affirming a judgment of the superior court of Cook county dismissing the petition of appellant praying for a writ of mandamus to the city of Chicago, the mayor and superintendent of police thereof, respectively, commanding them to place petitioner's name upon the police pay rolls of said city of Chicago, to the end that petitioner might draw the pay of a police patrolman.

On the 20th day of June, 1900, appellant filed his petition in the superior court of Cook county, in which it is alleged that the city of Chicago is organized under the general law relating to cities and villages; that Carter H. Harrison is, and ever since the month of April has been, the mayor of said city; that from the 18th day of April, 1881, there has been, and still is, "an executive department" of the municipal government of said city of Chicago, "known as the department of police, which department was created by an ordinance of said city of Chicago, and by which ordinance said executive department was made to, and does, embrace the superintendent of police and secretary to said superintendent, one captain of police for each police district, and such number of lieutenants, detectives, sergeants, and police patrolmen as has been or may be prescribed by ordinance"; that by the ordinance creating said department there was created the office of superintendent of police, which by the provisions of said ordinance was to be filled by appointment by the mayor of said city, by and with the advice and consent of the city council of said city, on the first Monday of May, 1881, and biannually thereafter; that Joseph Kipley was on the first Monday of May, 1897, duly appointed by the mayor of said city as such superintendent, and by reappointment has continued to be, and still is, such superintendent; that, on the 1st day of December, 1890, petitioner was a citizen of the United States above the age of twenty-one years, and for more than two years had been a continuous resident of the city of Chicago, and was then a qualified elector of said city; that he had never been a defaulter to the said city; that in the month of December, 1890, said petitioner was duly appointed to the office of police patrolman in the said department of police in said city, and thereupon took the oath of office prescribed for such policemen to take, and at once entered upon his official duties as such police officer, and has held said office of police patrolman from thence hitherto; that petitioner still is a police patrolman of the city of Chicago, duly appointed and qualified, and entitled to all the rights and privileges of said office: that petitioner took the prescribed civil service examination, which he passed as duly qualified for said office; that by reason of such examination and prior

military service petitioner was entitled "to stand at the head of eligibles for appointment upon the police force of said city"; that on March 14, 1898, the superintendent of police of said city "arbitrarily, wrongfully, and without legal excuse" caused petitioner's name to be dropped from the police pay roll, and that by reason thereof petitioner has since been unable to obtain payment of his salary as a police patrolman; that defendants, or some of them, claim that said action of the police superintendent was tantamount to a discharge of petitioner as a police patrolman, which the petitioner denies; that no charges were ever preferred against petitioner, no trial had, no report to the city council of such discharge by the mayor, nor were any reasons presented therefor by said mayor or other person; that for nearly three years prior to March 14, 1898, petitioner was, from month to month, duly certified by the civil service commission upon the police pay rolls of said city as a patrolman entitled to pay, and payment was made from month to month; that various appropriations had been made for the payment of police patrolmen, including petitioner.

Pleas were filed, to which demurrers were sustained as to all except the third. Demurrer to the third plea was overruled, and petitioner elected to stand by his demurrer, on which judgment was rendered dismissing the petition. The sufficiency of both the petition and the plea are, under the pleadings, presented for consideration.

The principal averments of said plea were that the petitioner had not been a police patrolman of the city of Chicago since March 14, 1898; that on that date petitioner was "discharged by Joseph Kipley, superintendent of police of said city of Chicago, by and with the concurrence and assent of the said Carter H. Harrison, mayor of said city of Chicago, and the civil service commission of said city of Chicago"; that he was discharged for the good of the service, and in the judgment of his superior officers he was an inefficient officer, and because of the insufficiency of appropriations for the payment of the salaries of police patrolmen the discharge of some of them was necessary. The order under which it is claimed petitioner was discharged is as follows: "City of Chicago, Department of Police. Joseph Kipley, Chief of Police. General order No. 10. All patrolmen of the 21st, 22d, 23d, 24th, 27th, 28th, 29th and 30th precincts of the third division, not certified for appointment by the civil service commission, are hereby discharged from the force, to take effect at 5 p. m. this date. All patrolmen affected by the above order will report at the office of the civil service commission for certification, in the following order: 21st, 22d, 23d, 24th, 25th precincts at 5 p. m.; 27th, 28th, 29th and 30th precincts at 6 p. m. Joseph Kipley, General Superintendent." It is further averred that sections 1481 and 1482 of the Revised Code

of Chicago, passed April 8, 1897, were in force March 14, 1898, and were as follows:

"Sec. 1481. The superintendent shall have the management and control of all matters relating to the department, its officers and members.

"Sec. 1482. Said superintendent shall have power to remove from the police force any police patrolman, and with the concurrence of the mayor he may remove or reduce in rank any officer or member of said department."

It is further averred that by the word "superintendent," contained in said sections, is meant the superintendent of police of the city of Chicago; that an act of the Legislature entitled "An act to regulate the civil service of cities" was adopted by the city of Chicago in the prescribed method, and became in force in said city in August, 1895; that all the police patrolmen of the police department of said city are civil service employés; that if petitioner is granted a writ of mandamus restoring him to the position of police patrolman he will crowd out and displace a civil service employé duly examined, certified, and appointed.

W. B. Black and A. B. Chilcoat, for appellant. Charles M. Walker, Corp. Counsel, and Roswell B. Mason, Asst. Corp. Counsel, for appellees.

RICKS, J. (after stating the facts). The position assumed by appellant in this case, as we understand it from the brief and argument, is that this application or petition is for the purpose of restoring him to the pay rolls, his contention being that he is still a police patrolman of the city of Chicago, and that his pay is illegally withheld. He alleges in his petition that in 1890 he was appointed to the office of police patrolman, and served in that capacity and received his compensation thence to the 14th day of March, 1898, when, as he contends, without lawful authority, his name was dropped from the pay roll. He alleges further that the defendants claim that he was removed from office, but this he denies, and asserts that at that time the civil service act was in operation in the city of Chicago, and that he could not be removed from office except in compliance with that act, and that the plea interposed does not sufficiently show that he was removed in the manner pointed out by that act, and that, if that act be held not applicable to his case, then he could only be removed from office by the mayor, who was required by the statute to report his removal to the city council for its action, and if the city council should, by a two-thirds vote of all its members authorized by law to be elected, by yeas and nays disapprove of such removal, he would thereby become restored to his office; that the plea fails to aver sufficiently that he was removed by the mayor, or that the mayor ever reported his removal

to the city council; and that, therefore, in any event, his removal became ineffectual.

The writ of mandamus, though no longer a prerogative writ, only becomes a writ of right when it shows upon its face that the petitioner has a clear right to the relief he seeks. *Swift v. Klein*, 163 Ill. 269, 45 N. E. 219. According to appellant's own contention, the main purpose of his application for the writ is to entitle him to receive or enforce the payment of his compensation. Although, as between himself and the public, he may be a de facto officer, and his official acts be given the force and virtue of the acts of an officer de jure, yet when the case is the assertion of his individual right, based upon his official character, he is required to show that he is an officer de jure. *Home Ins. Co. v. Tierney*, 47 Ill. App. 600; *People ex rel. v. Weber*, 86 Ill. 283; *Same v. Same*, 89 Ill. 347; *People v. Tierman*, 30 Barb. 193; *People v. Hopson*, 1 Denio, 574. In *People ex rel. v. Weber*, 86 Ill. 283, it is said: "But it is said he was de facto such officer. We believe the rule to be, when one claims rights as an officer by virtue of his office he must show that he is legally entitled to act; that he is an officer de jure as well as de facto. The acts of the former are valid and effectual everywhere, for he is clothed with all the power and authority appertaining to the office, and his acts, within the limits of his authority, cannot be questioned anywhere. The acts of a de facto officer are valid only so far as the rights of the public, or of third persons having an interest in such acts, are involved. But such officer can claim nothing for himself." And in *People v. Tierman*, supra, it is said: "Possession under color of title may well serve as a shield for defense, but cannot, as against the public, be converted into a weapon of attack to secure the fruits of usurpation and the incidents of the office." In *People v. Hopson*, supra, it is said: "Clearly he cannot recover fees or set up any right of property on the ground that he is an officer de facto unless he be also an officer de jure." "An officer de jure is one who is clothed with the full legal right and title to the office; in other words, one who has been legally elected or appointed to an office, and who has qualified himself to exercise the duties thereof according to the mode prescribed by law." 23 Am. & Eng. Ency. of Law (2d Ed.) 327.

In his petition appellant does not state how he was appointed to office or by whom; but it is said that although he took the civil service examination, and passed with a grade of 100 upon a scale of 100, and was entitled to be certified for admission to the classified service under the civil service act, he was denied such certification, and was not in fact appointed under the civil service act. His contention is that he was appointed in compliance with the provisions of the statute as found in the act "for the incorporation of cities and villages." The office of policeman

or police patrolman was unknown to the common law, and wherever such office exists it is the creation of statute law or the creation of municipal ordinances. The officers expressly provided for municipalities by statute are "a mayor, a city council, a city clerk, a city attorney, and a city treasurer." Starr & C. Ann. St. 1896, c. 24, art. 6, § 1. Also by section 2 of article 6 of said act it is provided: "The city council may, in its discretion, from time to time, by ordinance passed by a vote of two-thirds of all the aldermen elected, provide for the election by the legal voters of the city, or the appointment by the mayor, with the approval of the city council, of a city collector, a city marshal, a city superintendent of streets, a corporation counsel, a city comptroller, or any or either of them, and such other officers as may by said council be deemed necessary or expedient." Policemen and police patrolmen, not being specifically mentioned in the act, must come within the designation of "such other officers as may by said council be deemed necessary or expedient," and until the city council, in the exercise of its discretion, passes an ordinance, by a two-thirds vote of all the aldermen elected, providing for such office of policeman or police patrolman, and providing the manner in which it shall be filled, whether by election or appointment, it cannot be said any such office exists. If the city council does by ordinance provide for such an office, and also provides that the office shall be filled by appointment, then the appointment is controlled by section 3 of article 6, supra, which provides: "All officers of any city, except where herein otherwise provided, shall be appointed by the mayor, * * * by and with the advice and consent of the city council." By section 4 of the same article all officers, whether elected or appointed, are required to take the oath therein prescribed, and all officers, except aldermen and trustees, are required, before entering upon the duties of their respective offices, to execute an official bond; and by section 5 of the same article all officers elected or appointed, except the clerk, aldermen, mayor, and trustees, are to be commissioned by warrant under the corporate seal, signed by the clerk and the mayor or presiding officer of the city.

The petition in this case avers that in April, 1881, an executive department of the municipal government of the city of Chicago, known as the department of police, was created by ordinance of said city, and that said department embraces the "superintendent of police and secretary to said superintendent, one captain of police for each police district, and such number of lieutenants, detectives, sergeants, and police patrolmen as have been or may be prescribed by ordinance." The petition also alleges that the ordinances creating the said office of superintendent of police provided that the same should be filled by appointment by the

mayor of said city, by and with the advice and consent of the city council, and that Joseph Kipley, superintendent of police, was duly appointed to that office on the first Monday of May, 1897, and by reappointment continued to be, and still is, such superintendent. The petition then alleges "that on the 1st day of December, 1890, petitioner was a citizen of the United States above the age of twenty-one years, and for more than two years has been a continuous resident of the city of Chicago, and was then a qualified elector of said city; that he had never been a defaulter to the said city; that in the month of December, 1890, said petitioner was duly appointed to the office of police patrolman of the said department of police in said city, and thereupon took the oath of office prescribed for said policeman to take, and at once entered upon his official duties as such police officer, and has held such office of police patrolman from thence hitherto; that petitioner still is a police patrolman of said city of Chicago, duly appointed and qualified, and entitled to all the rights and privileges of said office." It is further averred that the pay roll upon which petitioner's name appeared was certified for payment, and payment made up to March, 1898. Petitioner alleges no facts concerning his appointment to office. It is nowhere alleged in the petition that the city council, either after or before creating the department of police, did, by ordinance passed by a "two-thirds vote of all the aldermen elected" or "by ordinance duly passed," prescribe the number of police patrolmen, or for the election or appointment of any policeman or police patrolman, that should be elected or appointed, or whether the said office should be filled by election or appointment. In the seeming immaterial matter of the appointment of the superintendent of police, appellant expressly alleges that his appointment was provided for by ordinance; but as to the appointment of appellant, so far as shown by any allegation in the petition, there appears no authority whatever. As we have said, if the appellant was appointed police patrolman it must have been under authority of some ordinance authorizing his appointment. Whatever may be the rule obtaining in municipal courts, there can be no question but that the rule as applied to the general state courts is that they will not take judicial notice of municipal ordinances, but such ordinances must be specially pleaded, where the action or the right to the relief sought is predicated upon such ordinances. "The general rule is that state courts of general jurisdiction will not take judicial notice of municipal ordinances. A municipal ordinance is not regarded in the light of a public law, of which the courts should take judicial notice, but the party relying thereon must allege and prove it as a matter of fact." 17 Am. & Eng. Ency. of Law (2d Ed.) 937; 15 Ency. of Pl. & Pr. 425; Illinois

Central Railroad Co. v. Godfrey, 71 Ill. 500, 22 Am. Rep. 112; Blanchard v. Lake Shore & Michigan Southern Railway Co., 126 Ill. 416, 18 N. E. 799, 9 Am. St. Rep. 630.

Appellant contends, however, that the allegation in his petition that he "was duly appointed to the office of police patrolman in the said department of police in said city, and thereupon took the oath of office prescribed for such policeman to take, and at once entered upon his official duties, as such police officer, and has held such office of police patrolman from thence hitherto," is a sufficient allegation, and is the usual allegation adopted and approved in such forms of procedure, and that by the use of the word "duly" there is implied in the allegation a sufficient averment of the existence or passage of whatever ordinance is necessary. To this contention we cannot accede. If the office of police patrolman had been one provided by statute or some general law of which it was the duty of the court to take judicial notice, then there is authority for holding that the word "duly" means in a regular and legal manner, or, as said in some of the cases, "in the proper way; regularly; according to law;" but, as we have said, the courts of general jurisdiction of the state do not judicially know of any law except those laws of a general character and applicable generally to the municipality and the citizens of the state, and to hold that by merely alleging that he was duly appointed appellant has made such an allegation as authorizes him to offer any class of evidence that will tend to support his office would simply be placing it within the power of appellant to determine for himself what was the legal manner of his appointment, and to also plead the legal conclusion, without setting out the facts showing that he was legally appointed. It may be, if appellant were an officer of the city or of the county, whose election or appointment is expressly provided for by statute, that the allegation that he was duly appointed might be regarded as sufficient by the courts. We do not wish to be understood as laying down the rule that in such cases such an allegation would be sufficient where the *de jure* right of the officer was the essential basis of the action. The general rule, as we understand it, is that where the question is one of office the burden is upon the pleader to show his right to the office. He must plead the facts from which the legal conclusion of that right may be drawn by the court, and not alone by the pleader. *Lavalle v. Soucy*, 96 Ill. 467; *People ex rel. v. Town of Mt. Morris*, 145 Ill. 427, 34 N. E. 144; 2 *Spelling on Extraordinary Relief*, § 1643. "The word 'duly,' when used in a complaint, is generally a conclusion of law. Denying that an act was duly done raises no issue." 1 *Ency. of Pl. & Pr.* 807.

In the case at bar, if appellees had traversed the allegation of the petition, and had

denied that appellant was legally and duly appointed, we do not think such an allegation and denial would have formed an issue of fact to be tried by the court, but would have been a mere conclusion of the pleader. "Averments that certain transactions 'were unlawful, illegal, or wrongful' have been held to be mere conclusions of law, unless from the facts stated the unlawfulness, illegality, etc., appear. And so an allegation that a certain thing has been 'duly' given, executed, or performed is generally held to be only a legal conclusion." 12 *Ency. of Pl. & Pr.* 1033.

The case of *Beach v. King*, 17 Wend. 197, would seem to be directly in point. In that case the plaintiff declared on the common counts. The defendant pleaded that the plaintiff's right to the money mentioned in the declaration, if any, is as one of the next of kin of Nicholas Beach, deceased; that he, the defendant, was duly appointed administrator of the goods, etc., of the said Nicholas Beach; and that the plaintiff had not, before the commencement of the suit, executed a bond with sufficient sureties to indemnify the defendant, and to refund, etc. Upon demurrer to the plea the court said: "The exceptions taken to the plea are: (1) It is not alleged that letters of administration were granted to the defendant nor any letters of administration brought into court; and (2) it does not appear by whom the defendant was appointed administrator nor whether he was appointed under the laws of this state. The defendant cannot be administrator unless letters of administration of the goods, chattels, and credits of the intestate had been granted to him by one of the surrogates of this state. * * * The proper mode of pleading the fact is by a direct allegation that such letters were granted. The defendant has not pursued that course, but pleads that he was duly appointed administrator. This allegation consists partly of matter of fact and partly of matter of law, and is not capable of trial. That the defendant was appointed administrator by somebody or in some form is a question of fact, but whether he was duly appointed or not is a question of law. The defendant should have stated how he was appointed, and then the court could determine its sufficiency upon demurrer, or, if an issue to the country were joined upon the fact of having obtained letters, the question could be tried by jury."

Nor are the allegations of the petition sufficient to bring appellant within the protection of the civil service act. The only allegation concerning that act is "that on December 18, 1897, by order of the superintendent, petitioner took the civil service examination as to his qualifications as a police patrolman, which examination was taken under the civil service commission of the city of Chicago, which city had theretofore adopted the civil service act, so-called, and was then under said civil service act, and govern-

ed thereby, upon which examination petitioner was passed as qualified, standing 100 upon a scale of 100; that petitioner was a soldier in the United States volunteers during the war of 1861-65, and held at the time of such examination an honorable discharge; that by reason of said military service and discharge, and having passed said examination 100, petitioner was entitled, on report thereof, to stand at the head of eligibles for appointment on the police force of said city." There is also an allegation that the pay roll was certified by the civil service commission from 1895 to 1898. These are all the allegations relative to the civil service act, and it may well be doubted if there was a sufficient allegation that the act was even adopted by the city. But, should it be conceded that the allegation is sufficient to show the adoption of the act, much more is required to show that appellant is brought within the provisions of that act. By section 3 of the act (Hurd's Rev. St. 1901, p. 365) to regulate the civil service of cities it is provided: "Said commissioners shall classify all the offices and places of employment in such city with reference to the examinations hereinafter provided for, except those offices and places mentioned in section 11 of this act. The offices and places so classified by the commission shall constitute the classified civil service of such city; and no appointments to any of such offices or places shall be made except under and according to the rules hereinafter mentioned." Conceding that appellant was appointed to the office of police patrolman, it would still be necessary for him to show that the civil service commission had classified the offices, and that the office held by him was placed in the classified service, and was not an office or place mentioned in section 11 of the act. Section 11 of the act provides: "Officers who are elected by the people, or who are elected by the city council pursuant to the city charter or whose appointment is subject to confirmation by the city council, * * * shall not be included in such classified service." If, then, appellant was appointed by the mayor and confirmed by the city council, his office is one that is especially excepted from the operation of the civil service act; and if appellant's office was one not within the exception made by section 11, but was one to which the general provisions of the civil service act applied, then the allegations of his petition failed to bring him within section 12 of the act, which relates to removals, and provides: "No officer or employee in the classified civil service of any city, who shall have been appointed under said rules and after said examination, shall be removed or discharged except for cause, upon written charges and after an opportunity to be heard in his own defense." In his petition he fails to allege that the civil service commission had classified the office, or had made rules to carry out the purposes of the act, and for

examinations, appointments, and removals, as required by section 4 of the act, and wholly fails to show by his petition that he was in the classified service, or that he had been appointed under any rules relative to that service "after an examination," but, on the contrary, he shows that he was not appointed after an examination, but was removed after the examination and before the certification. We regard the petition in this case so lacking in substance that it was obnoxious to general demurrer.

Upon such a petition can it be said that appellant has shown a clear right to have the thing sought by him done, and by the person or body sought to be coerced? Appellant demurred generally and for substance to appellees' plea, and by such demurrer brought before the court not only the sufficiency of the plea, but of the petition also. "It is an established rule that upon the argument of a demurrer the court will, notwithstanding the defect of the pleading demurred to, give judgment against the party whose pleading was first defective in substance." *Cleveland v. Skinner*, 56 Ill. 500. In *Illinois Fire Ins. Co. v. Stanton*, 57 Ill. 354, it is said (page 359): "By the well-settled principles of pleading, the demurrer would reach back to the first error in the pleadings, and the consequences of a defective pleading will rest upon the party committing the first error, and the applicant cannot complain that a defective replication was allowed to stand to a defective plea. If the replication was bad the plea is also bad, and both would fall together." See, also, *Barrow v. Window*, 71 Ill. 214.

Entertaining the views above expressed as to the petition in this case, and under the state of the pleadings, it would seem unnecessary to extend this opinion to a discussion of the merits of appellees' plea.

We are urged by appellant to decide this case upon its merits, and the reason assigned is that the questions presented are important as affecting not only the rights and duties of the city, but other persons who claim rights under the civil service act. It may be that the questions presented are of importance, and should be settled by the courts. That matter can only be determined when the questions are properly raised, upon sufficient allegations in the petitions or pleas, that this court may have before it all the law and ordinances relative to the appointment and removal of officers, which must be considered together with the civil service act. In the present case we are left to surmise the manner of appointment of the appellant. Whether he was appointed by the superintendent of police or by the mayor is left as a mere matter of argument, and we are unwilling to assume the material facts that should be contained in the pleadings in order to express our opinion upon the questions that may arise under the civil service act.

The superior court of Cook county render-

ed a judgment against appellant upon the pleadings. This judgment was affirmed by the Appellate Court, and we think properly; hence the judgment of the Appellate Court is affirmed. Judgment affirmed.

(205 Ill. 87)

MORRIS v. JAMIESON et al.*

(Supreme Court of Illinois. Oct. 26, 1903.)

BROKERS—STOCKS—SHORT SALES—BORROWING CONTRACT—MARGINS—BROKERS' DUTIES—ASSUMPSIT—MONEY HAD AND RECEIVED—BREACH OF DUTY—NATURE—TORTS—WAIVER—EVIDENCE—ADMISSION—ENTIRE CONVERSATION.

1. Where, in an action on the common counts against brokers to recover an alleged profit on a short sale of stocks, plaintiff introduced certain statements of account rendered by defendants, showing a credit for the sale, as an admission of the amount received, defendants were entitled to introduce a letter, accompanying such statements, notifying plaintiff of the amount advanced by defendants for the purpose of borrowing stock with which to cover the sale, showing an advancement exceeding the amount received for the stock sold.

2. Where brokers, at the request of a customer, borrowed stocks to cover a short sale, and were compelled to pay therefor more than the amount received on the sale, they were not bound, in the absence of proof of a rule or usage, to require the lender to put up margins to secure the seller against the decline of the stock so loaned.

3. Evidence of a witness that it was the duty of brokers, after delivery of stock, to guaranty the transaction and protect the customer from loss, and that the witness had transactions in stock running into thousands of shares, and had never known of a case where the broker did not call margins from a lender of stock borrowed to cover a short sale, was insufficient to establish a usage or custom imposing such duty on a broker.

4. Where it was claimed that plaintiff's brokers were indebted to him by reason of a breach of their duty to require margins from a lender of stocks borrowed to cover a short sale made by them for plaintiff, the amount due could not be recovered in an action based on common counts for money had and received.

5. Where plaintiff claimed the right to recover from his brokers by reason of their failure to require margins of a lender of stock borrowed by defendants to cover a short sale for plaintiff, defendants' breach of duty, if any, was a breach of contract, and not a tort, which plaintiff could waive and sue on the common counts in assumpsit.

Appeal from Appellate Court, First District.

Action by Nelson Morris against M. M. Jamieson and others. From a judgment in favor of defendants, affirmed by the Appellate Court (99 Ill. App. 32), plaintiff appeals. Affirmed.

May 30, 1896, appellant sued Malcolm M. Jamieson and others, constituting the firm of Jamieson & Co., in the circuit court of Cook county, in assumpsit. The declaration consists of the common counts only, and includes counts on an account stated, a count for interest, and a count for money had and received. Defendants pleaded the general issue. At the conclusion of the evidence for

the plaintiff, the court, on motion of the defendants, excluded the plaintiff's evidence, and directed the jury to find the issues for the defendants. An appeal was prosecuted to the Appellate Court for the First District, where the judgment of the circuit court was affirmed, and this appeal is prosecuted. The suit was for an alleged balance due from defendants to plaintiff. The only evidence produced on the trial was certain documents and letters, and the testimony of Charles E. Davis, secretary of appellant. Appellant assigns error of the Appellate Court in affirming the judgment of the circuit court and rendering judgment against appellant, and in not reversing the judgment of the circuit court and remanding the cause. But two propositions are argued: First, that the circuit court erred in directing the verdict for appellees; and, second, that the action would lie upon the common counts for money had and received. These are the only matters material to be considered in this case.

Dupee, Judah, Willard & Wolf, for appellant. Francis A. Riddle and James E. Munroe, for appellees.

RICKS, J. (after stating the facts). The position taken by the appellees, and evidently entertained by the trial and Appellate Courts, is that the action in question could not be maintained under the common counts, and, there being no evidence that would warrant a verdict and judgment under such counts, the instruction asked was given. If the action could not be had under the common counts, then it is conceded that the instruction should have been given, and to properly determine whether it was necessary that the declaration should contain special counts upon the case, or whether the common counts were sufficient, it will be necessary to review the evidence.

The appellees were brokers in Chicago, and as such brokers or agents dealt in stocks, and appellant was a trader in stocks for profit. About December 1, 1892, appellant directed appellees to sell 1,000 shares of Street's Stable Car Line stocks (hereafter called "Street stock") for the sum of \$29,000, deliverable to the purchaser within 60 days. This stock appellant did not own, and the sale is what is called a "short sale." Before the time for the delivery of this stock, Jamieson & Co., at the request of appellant, did what is termed "borrowing the stock" for appellant for delivery on his contract of sale, and paid to the lender of the stock \$30 per share, or in all \$30,000, for the loan of the stock, and delivered the stock to the purchaser about January 31, 1893, and on the latter date sent to appellant a written report of the transaction. Davis, the only witness, testified that the business relations between appellant and appellees, which began some time in 1892 and were terminated in June or July, 1893, involved the purchase and sale of about 10,000 shares of stock, but that

*Rehearing denied December 2, 1903.

These are fair samples of all the accounts, and the particular item in controversy is referred to in all the various counts in substantially the same manner, and in every such account so rendered it is shown that the 1,000 shares of Street stock was short. Davis testified that appellees had paid to appellant all balances appearing in any of these accounts, except that relating to the sale of the 1,000 shares of Street stock of December 1st, and that on the 29th day of August, 1893, he tendered to appellees 1,000 shares of Street stock; that the market value of the 1,000 shares so tendered was on that day \$18,000, and that on making such tender he demanded from appellees the sum of \$11,872.68, the same being the difference between \$29,872.68, which appellant claimed as a credit to him, and \$18,000, the market value of the stock tendered; that appellee Jamieson took the stock, requested witness to remain a few moments in his office while he went on change, and that Jamieson went away, and returned in about 15 minutes, and handed the stock back to witness, saying that the person from whom the stock had been borrowed had refused to receive it; that witness took the stock away with him; that he did not know how many times appellees had borrowed stock on account of the sale in question; that they reported having borrowed it on two occasions. The lender of the stock, as appears from the evidence, was a Mr. Koch.

Before appellant took the 1,000 shares of Street stock to appellees, and tendered it, as the witness Davis testifies, to make good their short sale, appellant had received two letters relating to this borrowed stock, as follows:

"Chicago, June 3, 1893.

"Nelson Morris, Esq., City—Dear Sir: We have borrowed one thousand shares Street's Stable Car Co. at ninety days from May 31, the lender paying us interest at the rate of two per cent per annum.

"Yours truly, Jamieson & Co."

"Chicago, August 22, 1893.

"Nelson Morris, Esq., U. S. Yards, Chicago—Dear Sir: We notified Mr. Ed. Koch yesterday, from whom we borrowed the thousand shares stock for your account, that you desired to deliver the same at the expiration of contract, if agreeable to him. He notifies us to-day that he is not in financial condition to accept the stock now or at the expiration of contract.

"Yours truly, Jamieson & Co."

Appellant replied to these letters by the following:

"Chicago, Ill., Aug. 24, 1893.

"Messrs. Jamieson & Co., 187 Dearborn St., City—Gentlemen: Yours of the 22d was duly received. Our Mr. Davis called to see your Mr. Jamieson twice yesterday in regard to it, but, not finding him in, called again to-day, and now informs me that you tell him that Mr. Koch never put up any

margins on this deal, although you called upon him to do so some time ago, and that you did not thereupon order the stock sold under the rules of the exchange, because there was no market for it. In view of these facts, and the fact that you never heretofore advised me of them, I do not see how I can do other than look to you to make good the amount which I should have received, had you properly looked after the trade and not neglected my interests. You will therefore kindly oblige me by sending me your check for the amount due me, based on the present market price for the stock. Kindly give this matter your immediate attention.

"Yours truly, Nelson Morris."

Under the evidence, as is shown by the testimony of Davis, appellant's secretary, appellees had borrowed the stock and advanced their money for it to fill the sale made by them at appellant's request, the sum advanced being \$30,000, and, leaving out the question of dividends and commissions, was at least \$1,000 more than the money appellees had received in the transaction to be placed to the credit of appellant. The witness Davis also testified that he knew the practice with reference to borrowing stock, and that when it was borrowed for such transactions it was upon the market price at the time of the borrowing. It will be observed that the sale was made December 1, 1892, and the delivery January 31, 1893, which was just at the expiration of the 60 days. Appellant had notice, then, of the borrowing and of the rate per share that was advanced by appellees to borrow this stock; the fact of the borrowing and the price being expressly stated in the letter of January 31, 1893. Appellant also knew that he had paid nothing for the stock that had been borrowed, and that the lender of the stock was unable to receive the same back and refund the money advanced by appellees to borrow the same. With all these facts before appellant, his letter of August 24th was written, in which he insists that, because appellees did not require Koch, the lender of the stock, to put up margins on the deal, and thus protect the stock, appellees should receive the 1,000 shares of such stock from appellant, and pay him the difference in cash; and, on their failure to do so, appellant brought his suit, laying his damages at \$17,000. Under such state of facts, could appellant recover for money had and received?

Appellant's position now is that as appellees sold 1,000 shares of stock on account of appellant, and received the proceeds of such sale, and so reported to appellant, and at continuous monthly periods rendered him statements of account showing such proceeds to his credit, and appellant having afterwards in due time tendered the stock, appellees therefore became liable to appellant for money had and received to his use. Appellant cites sections 117 and 118 of 2 Greenleaf on Evidence, wherein it is said (section

117): "The count for money had and received, which in its spirit and objects has been likened to a bill in equity, may in general be proved by any legal evidence showing that the defendant has received or obtained possession of the money of the plaintiff, which in equity and good conscience he ought to pay over to the plaintiff." And in section 118: "What is money had and received? * * * If the defendant was the agent of the plaintiff, and the evidence of his receipt of the money is in his own account rendered to his principal, this will generally be conclusive against him, unless he can clearly show that it was unintentionally erroneous."

Appellant cites authorities to the effect that, if one renders an account from time to time which contains the statement that money is received to the credit of another, he is bound by that action, unless he can show the statement was made unintentionally and by mistake. We cannot see that the rule of law thus invoked has any application to the case at bar. The argument proceeds upon the theory that appellant is now insisting upon and brought his suit for the \$28,165, which he says appears from the statement of January 31, 1893, made by appellees to him, as being to his credit. This contention is not supported by the record. To begin with, his suit is only for \$17,000, and was begun after a tender of certain stock and a demand of a balance. Nor do we agree with the position taken by appellant that the evidence in this case shows, or tends to show, that appellees reported on January 31, 1893, or at any other time, the bare fact that they had \$28,165 on their books to his credit on account of the transaction in question. Appellant's contention is that he only offered the statement of the account, and did not offer the letter in which that statement was enclosed, which letter apprised appellant of the fact that the 1,000 shares which had been delivered under that sale had been borrowed by appellees for appellant's benefit to carry out the trade, and for which they had paid \$30,000, and that appellees, by bringing out the contents of the letter on cross-examination, could not have the benefit of it in determining whether the instruction should have been given. In other words, his position, as we understand it, is that the statement of the account was an admission, complete, separate, and distinct in itself; that the letter inclosing the statement containing the reference to the stock borrowed upon which to realize the money so reported was not so connected with it that appellees can have the benefit of it; and that it was error in the court to admit it, and it should not have been considered.

The memorandum evidenced the delivery of the stock on short sale to the seller and the amount of the purchase price received by appellees for it. The letter showed where,

how, at what price, and on what terms appellees acquired the stock which they so delivered for appellant, and we think would be admissible under the rule as stated by appellant, viz.: "The rule regarding admissions is that only those parts of the whole conversation or writing which cover the same subject-matter as that of the adverse party's examination are made admissible by the introduction of such conversation or writing, or parts thereof, even though other parts may relate to the general subject matter in issue in the suit." The statement of account as offered by appellant was for the purpose of showing an admission on the part of appellees that they had in their hands moneys of appellant to the amount named in the statement; and, as we view the statement and the letter, the former advised appellant that appellees had received \$29,000 upon a sale of stock directed by appellant to be made, and the letter accompanying that statement also informed appellant that appellees, in order to realize the \$29,000 thus reported, paid \$30,000 to borrow stock to enable them to carry out the instruction of appellant.

Mumford v. Whitney, 15 Wend. 380, 30 Am. Dec. 60, one of the cases cited by appellant, seems to us to be quite conclusive against his contention. In that case the question was as to a license to build a dam. One Cleveland wanted to build a dam. The plaintiff had examined a witness as to declarations made by the defendant, at or about the time of the erection of the dam, and concerning such erection. The defendant's counsel, on cross-examination of the same witness, asked him whether, in the same conversation, the defendant had said that the plaintiff had given his consent to the erection of the dam. This evidence was objected to, and the objection overruled. A witness in the same case had given an account of an unsigned, written agreement, and then testified that Cleveland at the time agreed to construct a stone wall along the east line of the island to protect it from injury; and after giving such testimony the plaintiff's counsel inquired of the witness whether it was understood between plaintiff and Cleveland that Cleveland should not build the dam unless he built a wall to secure the island. The court sustained the objection to this last question. In discussing the question the court held: "The rule must certainly have some such limitation. It could not be tolerated that a party could thus draw out his own declarations upon a subject on which the opposite party had not examined the witness. But in this case the subject-matter of the inquiry by the plaintiff was what the defendant had said concerning the erection of the dam, and his answer probably was that he had built it, and he then assigned the reason by his cross-examination, viz., because the plaintiff had assented to it. Without such assent he would have had no right

to do the act. It seems to me that the cross-examination was proper."

We think the true rule is stated in the Queen's Case, 2 Brod. & Bing. 297, where it is said: "The conversations of a party to the suit relative to the subject-matter of the suit are in themselves evidence against him in the suit, and, if a counsel chooses to ask a witness as to anything which may have been said by an adverse party, the counsel for that party has a right to lay before the court the whole which was said by his client in the same conversation—not only so much as may explain or qualify the matter introduced by the previous examination, but even matter not properly connected with the part introduced upon the previous examination, provided, only, that it relate to the subject-matter of the suit, because it would not be just to take part of a conversation as evidence against a party, without giving the party, at the same time, the benefit of the entire residue of what he said on the same occasion."

The following cases further illustrate the rule:

Plaintiff demanded statement of a claim, and defendant made out an itemized statement of the amount due plaintiff for goods sold to defendant, and delivered it to defendant's agent, with instructions to demand a counterclaim for demurrage, which counterclaim the agent wrote on the statement of the account and went to plaintiff to settle. Being unable to settle, he left the paper with plaintiff. Plaintiff in the suit offered the paper, together with the circumstances of its receipt, and judgment was given for the amount, less the demurrage. Plaintiff appealed, insisting that the statement of plaintiff's account by defendant was conclusive upon him. The court said: "The defendant never admitted this account as distinct from the demurrage. His statement was made all in one breath, and I cannot distinguish what he admitted to be due for the timber from what he claimed for the demurrage. The verdict, therefore, was only for the balance, and was perfectly right. *Sinclair* was to go to the plaintiffs to settle the account—to receive what was due from them and allow what was due to them. It would be doing monstrous injustice if we were not to hold that the whole of the declaration must be taken together. I always have thought that, if a man gave an account of a transaction, the whole of it must be taken together." By Lord Mansfield in *Randle v. Blackburn*, 5 Taunt. 247.

Suit for one dollar had and received. Judgment for the plaintiff upon the ground that the defendant had said he had received a dollar of the plaintiff, but it was his due. The court said: "The justice was manifestly wrong. The whole conversation of the defendant must be taken together. The plaintiff could not take one part and reject the other. What was said by the defendant,

taken together, was a denial of the demand of the plaintiff, who was bound to prove it." *Carver v. Tracy*, 3 Johns. 427.

Action for medicine and attendance. Judgment for plaintiff, upon the admission of the defendant that the medicine and attendance had been furnished her, but at the same time she denied her responsibility for the amount, because she had not employed the plaintiff, and because she was a minor. The court said: "For anything that appears—and, indeed, such is the reasonable intention—she was living with her father, and the medicine and attendance furnished at his request. An infant, who lives with and is maintained by her father, cannot bind herself for necessities. The confession of the defendant, when all taken together, showed that she was not responsible, admitting that the medicine and attendance had been furnished, without something more being proved by the plaintiff." *Wailing v. Toll*, 9 Johns. 141.

Judgment against defendant for killing a dog. "There was no proof by which to charge the defendant, except his own confession, which the jury ought to have taken altogether, and not to have charged him with killing the dog without giving due weight to what the defendant said at the same time in justification. He killed the dog, but he did so because the dog assaulted him in the night, in the highway. It was therefore a justifiable act, and the verdict of the jury was against law and evidence." *Credit v. Brown*, 10 Johns. 365.

"Where a party introduces in evidence a writing as an admission of the adverse party, the whole becomes evidence in the cause, as well those parts which are in favor of the party making the admission as those which are against him; and this evidence the jury are to consider, giving to every part and the whole such weight and effect as they think it entitled to." *Bristol v. Warner*, 19 Conn. 7. Also, in same case, it is further said: "Therefore, where the defendant, to establish his defense and show that nothing was due to the plaintiff, introduced in evidence a letter from the plaintiff, and to repel this evidence the plaintiff referred to the same letter, claiming that in this respect it furnished evidence in his favor; this the defendant denied, and objected to its being considered by the jury for that purpose, but the court instructed the jury that the defendant, having himself introduced the letter, had thus made it substantive evidence in the cause, and it was held that this instruction was unexceptionable."

"The rule is that the whole of an admission is to be taken together, and that, when part of a conversation or statement is put in evidence by one party, the other is entitled to put in the whole, so far as it is relevant; and it makes no difference whether the whole statement comes out upon the direct examination, or part of it is drawn out on

cross-examination. 1 Greenleaf on Evidence, § 201; 2 Wharton on Evidence, §§ 1108, 1109; Hatch v. Potter, 2 Gilman, 725 [43 Am. Dec. 88]; Phares v. Barber, 61 Ill. 271." McIntyre v. Thompson, 14 Ill. App. 554.

The case of Phares v. Barber, supra, was an action against sureties on a note. The defense was a release by the giving of a mortgage by the maker. Ford, a witness, was called by plaintiff to show that the sureties, in a conversation with plaintiff, stated that they intended to make Huffman, the principal, secure the debt in some other manner. Upon cross-examination Ford was asked, "Was anything said in that conversation about releasing Phares and Croka [sureties] from the note?" Objection was sustained to the question. Mr. Justice Thornton, speaking for this court, said (page 275): "It is a well-settled rule that, where a witness details a conversation, the party against whom the evidence is offered is entitled to the whole conversation, and any action of the court which prevents its obtainment violates this rule of law. The question was proper, and the objection to it should have been overruled."

Plaintiffs, to prove the delivery of goods by them to defendants, put in evidence letters by defendants to them, which letters admitted the receipt by defendants of the goods, but stated that defendants had given to the plaintiffs' agent, Holmes, a check in payment of the goods. "The only proof of the delivery of the check to Holmes consisted of statements in letters of defendants which plaintiffs introduced in evidence as admissions of other facts. By the ruling of the court the letters were treated as conclusive evidence of the fact of delivery of the check. The statements were not in themselves unreasonable or improbable, nor was there anything in the nature of the transaction or in the evidence tending to impeach them. The doctrine in such cases is that the admission, with the accompanying declaration, which serves as an answer to the admission, is to be received in evidence, and the answer is conclusive. Howell v. Moores, 127 Ill. 67 [19 N. E. 863]; 1 Roscoe on Crim. Evidence (8th Ed.) 54, 55; Roberts v. Gee, 15 Barb. 449; Corbett v. State, 31 Ala. 329; Arnold v. Johnson, 1 Scam. 196." Bailey v. Pardridge, 35 Ill. App. 121.

In Moore v. Wright, 90 Ill. 470, plaintiff proved by a witness that defendant had said a paper presented was a copy of the original note, and on cross-examination defendant brought out that defendant at the same time stated that he had paid a sum of money which was not indorsed on the note. The court below excluded the latter evidence, and its exclusion was held to be error.

We do not think the cases cited by appellant are in conflict with the above holdings, nor do we think they support the contention of appellant.

Appellant further urges that, though the court may take the view that the letter of January 31, 1893, and the account rendered and inclosed therein, should be read together, still the instruction should not be given, because appellees could not charge up to appellant any money lost with the lender of the stock, because such loss was, from the evidence, the fault of appellees. In support of this contention appellant cites authorities that it was the duty of an agent to give his principal timely notice of every fact coming to his knowledge which it may be material for the principal to know for the protection or preservation of his interest, and that the agent is bound to observe all the precautions ordinarily observed in the particular business and according to the usages of the place and the circumstances of the times within which the business is to be transacted. These propositions as to the duty of the agent are not controverted, and will be accepted generally as correct statements of the duty of the agent, and the argument would be applicable if the facts existed upon which to predicate it. The evidence shows that the borrowing of the stock, for which appellees put up \$30,000, was at the request of appellant, and that he was notified of the transaction, and that he was also notified of the length of time within which the stock should be returned, and that the time was 4 months, or on or before the 31st day of May, 1893, and was also further notified that the stock had been again borrowed for 90 days to hold the deal, and yet the evidence wholly fails to show that appellant took a single step or did anything until the 24th day of August, 1893, two days after he had received notice from appellees that the lender of the stock was unable to take up the stock and refund the money for the same, when appellant wrote appellees that he was informed that Mr. Koch had never put up any margins on the deal, although called upon to do so, and that the stock was not sold on the market under the rules of the exchange, because there was no market for it, and that, in view of such facts, it was the duty of the appellees to make good the amount which appellant should have received. This letter was introduced by appellant; but it was not evidence of any rule or usage, nor was there any competent evidence in the record of any rule or usage requiring appellees to call for or secure appellant with margins from the lender of the stock. In fact, the evidence wholly fails to show where this stock transaction was had—whether in Chicago or New York. Davis states that he was unable to say where it was, as the purchases and sales aggregated 18,600 shares on the New York and Chicago Stock Exchanges. There is no rule of the common law, or any law that we are required to take notice of, that made it the duty of appellees to call for margins, or to require the lender of stock to keep up mar-

gins, to protect the value of the stock thus loaned. The proof in this case is, not that the borrowing of this stock was in the mere line of the duty of an agent, but that the borrowing was by direction and at the request of appellant, and we know of no rule of agency existing at common law which required appellees, when directed by appellant to borrow stock and advance the money for the same, to see that the lender of the stock put up margins to protect the value of such stock. If there was any such rule, it was either a local usage or custom or rule of the Stock Exchange, or some rule or usage appertaining to this line of business, of which there is no proof at all, except the declaration of appellant as to the duty of appellees in the letter above mentioned, and others of like tenor subsequently written, and the statement of Davis, appellant's witness, wherein he says: "It is now, and always has been, the duty of brokers, after delivery of stock is made, to guaranty the transaction absolutely and protect the customer from loss." And the further statement: "I had had transactions in stocks running up into thousands of shares, and I never had known of a case where the broker did not call margins to protect a trade of that kind." The letters above mentioned were introduced by appellant, as was the witness Davis, and the most they or his evidence shows is that it is the opinion of the writer of the letters, or Mr. Davis, that such duty existed, but whether by custom, usage, or rule of the Stock Exchange is not shown. This evidence falls far short of establishing a usage or custom in regard to this business, and wholly fails to show any rule of either of the Stock Exchanges where such deals were being conducted with reference thereto. Particular trade usages or customs, however extensive they may be, must be proven, and cannot be noticed by the courts unless so established, and this evidence falls short of the rule as recognized by any of the authorities for the establishing of such a usage. 27 Am. & Eng. Ency. of Law, 719; Lyon v. Culbertson, 83 Ill. 33, 25 Am. Rep. 349; Bissell v. Ryan, 23 Ill. 566; Sweet v. Leach, 6 Ill. App. 212; Wood v. Hickok, 2 Wend. 501; Coffman v. Campbell, 87 Ill. 93.

Appellant could not, without showing the duty above contended for rested on appellees, tender appellees depreciated stock and demand the difference in money, and thereby so adjust the account that appellees would be indebted to him in any sum; and if it had been the duty of appellees to call for margins, and the loss to appellant had resulted from their failure to do so, still the instruction requested should have been given. The action was on the common counts for money had and received, and was not for a breach of their duty as agents or brokers, in which latter case a special count in the declaration

would have been necessary, averring the duty and the breach of it. Rollins v. Duffy, 14 Ill. App. 69; Russell v. Gillmore, 54 Ill. 147; 1 Chitty's Pl. 340; Brand v. Henderson, 107 Ill. 141; Throop v. Sherwood, 4 Gilman, 92; Royalton v. Turnpike Co., 14 Vt. 311; Meyers v. Schemp, 67 Ill. 469; Morrison v. Rogers, 2 Scam. 317; Stahl v. Ausley, 2 Gilman, 32; Trumbull v. Campbell, 3 Gilman, 502; De Clercq v. Mungin, 46 Ill. 112; Cushman v. Hayes, Id. 145.

Appellant takes the position that the cause of action here grows out of a tort, and that, under a well-recognized rule and certain authorities cited by him, the tort may be waived and a suit had on the common counts. From the declaration, of course, it cannot be determined what the exact nature of the action was; but, looking to the evidence, or the case the evidence tends to make, it shows an action for a breach of contract. There are authorities which, in a broad discussion of torts, or in a general definition of them, say that "the violation of a legal right" or "breach of legal duty" is a tort, and to this effect is the definition quoted from Bouvier's Law Dictionary, tit. "Torts," p. 1125; and, while this definition may be technically true in a certain sense, it is not accepted as a correct definition as applied to pleading and forms of action. To hold the rule as here insisted upon would be to abolish special pleading—that is, special counts in a declaration in any case for violation of contract or violation of legal duty growing out of contract; and practically, under such views, all actions ex contractu and sounding in damages would be brought under the common counts. No standard writer on the subject of torts lays down the rule, or discusses the breaches of contracts, or the breach of legal duty arising from contracts, under such head. "A tort is an act or omission giving rise, in virtue of the common-law jurisdiction of the court, to a civil remedy which is not an action of contract." Pollock on Torts, 4. "A tort may be distinguished from a contract, in that a contract involves the agreement of at least two parties, whereas a tort, as such, involves no agreement." 26 Am. & Eng. Ency. of Law (1st Ed.) 72. To the same effect are Cooley on Torts (2d Ed.) 2, and 1 Hill on Torts, 1.

We think the position of appellant upon this question unsound, and that to sustain it would be a great departure from the general rules of pleading as recognized by the courts of this country. The evidence in this case not only did not tend to establish a cause of action for the plaintiff, but shows that under the declaration filed he had no cause of action, and the instruction for a verdict for appellees was properly given. The judgment of the Appellate Court is affirmed.

Judgment affirmed.

(305 Ill. 233)

**BROCKWAY v. TRINITY M. E. CHURCH
OF CHICAGO.***(Supreme Court of Illinois. Oct. 26, 1903.)
JUSTICES OF THE PEACE—JUDGMENTS—TRANSCRIPTS—LIEN.

1. Hurd's Rev. St. 1901, p. 1126, makes a judgment of a justice of the peace a lien on the personal property of the defendant, and provides that his real property shall be bound from the date of the filing of a transcript of the judgment in the clerk's office after a return of the execution nulla bona, and that the transcript, when filed, shall have all the effect of a judgment of the circuit court. Chapter 77, § 1, after declaring a judgment in a court of record a lien on real estate for seven years from the date the judgment was rendered, declares that, when execution is not issued on a judgment within one year from the time the same becomes a lien, it shall thereafter cease to be a lien. *Held*, that where a transcript of a judgment rendered by a justice of the peace was filed in the office of the clerk of the circuit court it ceased to be a lien on the real property of the debtor unless execution was issued within one year after the filing of the transcript.

Appeal from Superior Court, Cook County;
Axel Chytraus, Judge.

Bill by the Trinity Methodist Episcopal Church of Chicago against Guy Brockway. From decree for plaintiff, defendant appeals. *Affirmed*.

This is an appeal from that portion of a decree of the superior court of Cook county, entered in a proceeding commenced by appellee under the burnt records act, to which appellant was made a party, which canceled and removed as a cloud upon its title a sheriff's deed executed to appellant, purporting to convey to him a portion of the premises in controversy. It appears that appellant recovered a judgment in a justice court in Cook county against appellee's grantor, sued out an execution thereon, which was returned by the constable "No property found," and then caused a transcript of said judgment to be filed in the office of the clerk of the circuit court of Cook county. About eight months thereafter the judgment debtor sold the real estate in controversy to appellee. Appellant, one year and fourteen days after the date of the filing of the transcript in the office of the circuit clerk, sued out an execution, placed it in the hands of the sheriff, who levied upon and sold the said real estate, and in due time made a deed thereto to appellant, who was the purchaser at said sale. Afterwards appellee commenced this proceeding, and upon the trial the superior court held appellant took no interest in said premises through said sale, as his lien, by virtue of the transcript, had expired before the date when said execution issued. It is admitted by appellant that, if the lien created by the transcript had expired before said execution issued, he took no title through the sheriff's sale; but it is insisted said lien was in full force and effect at the time the execution issued.

Oscar A. Kropf, for appellant. Pence & Carpenter, for appellee.

HAND, C. J. (after stating the facts). The sole question before us is, was it necessary for appellant to sue out an execution within one year from the date of filing the transcript in the office of the circuit clerk, in order to keep alive the lien of said judgment after one year from the date of filing said transcript? The contention of appellant is that the provision of the statute requiring an execution to issue within one year from the date of a judgment of a court of record, in order to preserve a lien for more than one year, was satisfied by the execution issued by the justice of the peace upon said judgment, while appellee insists that the statute requires that an execution issue from the office of the circuit clerk within one year from the filing of the transcript therein, as in case of judgments in courts of record.

Section 7 of article 11 of the justice and constable act (Hurd's Rev. St. 1901, p. 1126) provides that a judgment before a justice shall become a lien upon the personal property of the defendant from the delivery of an execution to the constable, "and the real property of such defendant, not exempt from execution, shall be bound as aforesaid, from the date of the filing of a transcript of the judgment in the clerk's office, as provided in this act." Section 1 of article 12 of said act provides, when it appears from the return of an execution issued from a justice court that the defendant has no personal property sufficient to satisfy said judgment and costs within the county in which the judgment was rendered, if the plaintiff so desire the justice may certify a transcript of said judgment to the clerk of the circuit court of the county in which the judgment was rendered, and which, when filed by the clerk, "shall thenceforward have all the effect of a judgment of the said court, and execution shall issue thereon, out of that court, as in other cases." Section 1 of chapter 77, after providing that a judgment in a court of record shall be a lien on real estate of the person against whom it is obtained for a period of seven years from the date rendered, contains the following provision: "When execution is not issued on a judgment within one year from the time the same becomes a lien it shall thereafter cease to be a lien." The issuing of the execution from the justice court cannot be held to be a compliance with the provision of section 1 of chapter 77, requiring an execution to be issued within one year from date of judgment. The purpose of the issuing of the execution from the justice court is to create a lien upon the personal estate of the defendant, and its return "No property found" is a condition precedent to the right of plaintiff to file a transcript. *Wooters v. Joseph*, 137 Ill. 113, 27 N. E. 80, 31 Am. St. Rep. 355. Upon the return of the execution "No property found" it becomes the privilege

*Rehearing denied December 4, 1903.

of the judgment creditor to have a transcript, which transcript, when filed in the circuit clerk's office, has all the effect of a judgment of the circuit court. It is the filing of the transcript in said office which creates a lien on real estate, not the recovery of judgment in the justice court; and upon the filing of the transcript the judgment creditor acquires the rights of judgment creditors in courts of record, but no greater, and, in order to preserve a lien for more than one year, an execution must issue as in case of judgments obtained in courts of record.

We are of the opinion that the superior court of Cook county properly found in its decree that the filing of the transcript in the office of the clerk of the circuit court was not sufficient to create a lien upon real estate for more than one year from the filing of said transcript, and that, more than one year having elapsed between the date of filing the transcript and the date of the issuing of this execution, and the premises in question in the meantime having been conveyed to appellee, it took the same freed of said judgment lien, and that the sale thereof under said execution was void, and properly canceled and set aside as a cloud upon appellee's title.

The decree of the superior court will therefore be affirmed. Decree affirmed.

(205 Ill. 73)

MERRICK et al. v. CARTER.*

(Supreme Court of Illinois. Oct. 26, 1903.)

JUSTICES OF THE PEACE—JUDGMENTS—EXECUTION—TRANSCRIPT—FILING IN CIRCUIT COURT—SALE OF REAL ESTATE—VALIDITY.

1. The justices' act (2 Starr & C. Ann. St. [2d Ed.] p. 2454, c. 79, par. 135) provides that when it shall appear by the return of an execution that the defendant has not personal property sufficient to satisfy the judgment and costs, and it is desired to have the same levied on real property, it shall be lawful for the justice to certify to the clerk of the circuit court a transcript which shall have the effect of a judgment in said court, and execution shall thereupon issue out of that court. *Held* that, where an execution on a justice's judgment was returned unsatisfied, indorsed, "Demand made August 7, 1894," it did not show that defendant had no personal property sufficient to satisfy the judgment and costs within the county, so as to authorize the filing of a transcript of the judgment in the circuit court.

2. Where a transcript of a justice's judgment was improperly filed with the clerk of the circuit court, a sale of real estate under an execution issued out of the circuit court on such transcript was void.

Appeal from Circuit Court, Cook County; M. F. Tuley, Judge.

Bill by Lizzie J. Carter against Austin L. Merrick and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

F. A. Bingham and Edward Marshall, for appellants. John C. Wilson, for appellee.

HAND, C. J. This was a bill in chancery, filed in the circuit court of Cook county, to set aside and remove as clouds upon the title of appellee to the premises described in the bill a sheriff's deed made to appellant Austin L. Merrick by the sheriff of Cook county, bearing date March 23, 1897, and recorded in said county on the same day; a trust deed executed by Austin L. Merrick to Edward Marshall on the premises, dated September 25, 1898, and recorded in said county; also a decree of the circuit court of Cook county foreclosing said trust deed, entered on September 11, 1901; and a certificate of sale thereunder bearing date October 10, 1901. Answers and replications were filed, a hearing was had in open court, and a decree was entered in accordance with the prayer of the bill, and an appeal has been prosecuted to this court.

The appellee became the owner of the premises in controversy on October 27, 1887, when she paid therefor \$2,500, and it is now admitted the same are worth from \$3,500 to \$3,600, and occupied the same, with her mother, as a homestead, until the time of her mother's death in the year 1893, since which time she has continued to reside thereon. On the 14th day of February, 1894, Lewis & Carnahan obtained a judgment before George H. Harlow, one of the justices of the peace of Cook county, against the appellee, for \$100. On June 20, 1894, an execution was issued on said judgment, and delivered to Walter W. Ford, a constable of said county, to serve, which execution was thereafter returned indorsed: "Demand made August 7, 1894; return execution; no part satisfied; August —, 1894." On November 3, 1894, a transcript of said judgment was filed in the office of the clerk of the circuit court of said county. On October 8, 1895, an execution issued upon said transcript to the sheriff of Cook county, which was levied upon said premises on the next day. On November 12, 1895, said premises were sold to John F. Stewart for the sum of \$129.95, and on the 23d day of March, 1897, a deed was made to the appellant Austin L. Merrick, as assignee of said certificate. Afterwards Austin L. Merrick executed to Edward Marshall, as trustee, a trust deed to secure the payment of \$1,500, which has been released, and on the 25th day of September, 1898, he executed another trust deed to Edward Marshall, as trustee, to secure the payment of \$1,000, which was filed for record in said county on October 31, 1898. On June 7, 1901, the appellant Henry W. Drath, the holder of the notes secured by said trust deed, upon which it was claimed there was due \$800, filed his bill in the circuit court of Cook county against Austin L. Merrick and Edward Marshall to foreclose said trust deed, and upon September 11, 1901, obtained a decree of foreclosure, and on the 10th day of October, 1901, said premises were sold to satisfy said decree, Henry W. Drath being

*Rehearing denied December 4, 1903.

¶ 2. See Execution, vol. 21, Cent. Dig. § 27.

the purchaser at said sale. The appellee was not made a party to said foreclosure proceeding, and she testified upon the trial that she did not know a judgment had been obtained against her before said justice, that no demand was ever made upon her to pay the same by the constable or sheriff, and that she did not have any knowledge thereof until an attempt was made to get possession of the premises in the foreclosure suit through a receiver.

The basis of the title of the appellants is the sheriff's sale upon the execution issued upon the transcript of the judgment of the justice in favor of Lewis & Carnahan against the appellee. If that sale was void, the appellants have no interest in the premises, and the court properly set aside and canceled their titles as clouds upon the title of appellee. The justice act in force at the time the transcript was filed in the office of the clerk of the circuit court, as now, provided: "When it shall appear by the return of the execution * * * that the defendant has not personal property sufficient to satisfy the judgment and costs within the county [district] in which judgment was rendered, and it is desired by the plaintiff to have the same levied on real property in that or any other county, [district,] it shall be lawful for the justice to certify to the clerk of the circuit court of the county in which such judgment was rendered, a transcript, which shall be filed by the said clerk, and the judgment shall thenceforward have all the effect of a judgment of the said court, and execution shall issue thereon, out of that court, as in other cases." 2 Starr & C. Ann. St. (2d Ed.) p. 2454, c. 79, par. 135. In *Wooters v. Joseph*, 137 Ill. 113, 27 N. E. 80, 31 Am. St. Rep. 355, on page 116, 137 Ill., page 81, 27 N. E., 31 Am. St. Rep. 355, it was said: "The issuing of an execution to the constable, and his return thereon that the defendant has not personal property sufficient to satisfy the judgment and costs within the county in which the judgment was rendered, are conditions precedent to the right to have a transcript filed with the circuit clerk." And in *Hobson v. McCambridge*, 130 Ill. 367, 22 N. E. 823, it was held that, unless the transcript shows upon its face the issue of an execution by the justice, and its return *nulla bona* by the proper officer, the transcript and all proceedings thereunder are absolutely void and of no effect. The method of enforcing the judgment of a justice against real estate is purely statutory, and such statutory proceeding must be strictly pursued, or no title will be obtained by virtue of a sale thereunder. *Illinois Central Railroad Co. v. Weaver*, 54 Ill. 319; *Webster v. Steele*, 75 Ill. 544. The return of the constable may have been absolutely true, and yet the defendant had ample personal property in her possession in said county to satisfy the execution, and the return of that officer falls far short of a return "that the defendant has

not personal property sufficient to satisfy the judgment and costs within the county in which judgment was rendered." In *McDowell v. Clark*, 68 N. C. 118, it was held that the return of an execution "wholly unsatisfied" is not a sufficient return, as it does not conclusively appear therefrom that no goods of the execution debtor were to be found; and in *Langford v. Few*, 146 Mo. 152, 47 S. W. 930, 69 Am. St. Rep. 606, that the words "Not satisfied" were not synonymous with *nulla bona*. We are of the opinion that the return of the constable was insufficient, that the transcript was not properly filed, and that the sheriff's sale was void.

The decree of the circuit court will be affirmed. Decree affirmed.

(205 Ill. 206)

ILLINOIS STEEL CO. v. COFFEY.*

(Supreme Court of Illinois. Oct. 26, 1903.)

MASTER AND SERVANT—FELLOW SERVANTS—QUESTIONS OF LAW—NEGLIGENCE.

1. Where all the facts on which the existence of the relation of fellow servants depends are undisputed, and are so conclusive that all reasonable men must reach the same conclusion, it is a question of law.

2. In an action by an employé for personal injuries, evidence held sufficient to show that plaintiff and the member performing similar services on the day crew were fellow servants, precluding recovery for injuries arising from his negligence.

Appeal from Appellate Court, First District.

Action by Timothy Coffey against the Illinois Steel Company. From a judgment of the Appellate Court (107 Ill. App. 582) affirming a judgment for plaintiff, defendant appeals. Reversed.

Kemper K. Knapp, for appellant. David Sullivan, for appellee.

BOGGS, J. In the circuit court of Cook county, in an action on the case, the appellee recovered a judgment against the appellant company in the sum of \$3,000 for damages because of personal injuries alleged to have been received through the negligence of a servant of the company. This is an appeal to bring into review that judgment and the judgment of affirmance thereof entered in the Appellate Court for the First District on an appeal.

In one of its departments appellant company melts together pig iron and steel in open-hearth furnaces. At each of said furnaces is a channel with an opening at the bottom, being called a "tapping hole," through which the molten metal is drawn or let out of the furnace. In order to prevent the metal from coming out through the tapping hole during the process of melting it, this channel or tapping hole is filled with loam, dolomite, and magnesite to the depth of about three feet or more before the pig iron

*Rehearing denied December 4, 1903.

¶ 1. See *Master and Servant*, vol. 34, Cent. Dig. § 1062.

and steel are placed in the furnace. When the melted metal or liquid is to be drawn from the furnace, this loam, dolomite and magnesite must be dug out of the channel or tapping hole in order to open a passage through which the molten metal may escape. This process is called "digging out the tapping hole," and is attended with danger if negligently performed, or if the furnace or tapping hole has not been carefully and properly filled and tamped with the loam, dolomite, and magnesite. These substances, to the depth of at least three feet, should occupy the space in the furnace between the bottom of the molten mass and the outlet of the tapping hole. The danger which attends the tapping of the furnace is that the molten liquid will suddenly pour fourth upon and burn the workman who is opening the hole. It is not safe to be nearer than 18 feet to the tapping hole when the liquid mass is allowed to escape from the furnace. The workman charged with the duty of tapping the furnace digs away the loam, dolomite, and magnesite until he can see the gases which issue from the molten steel, and which are visible through about six inches of the packing substances. The presence of this gas apprises the workman that it is no longer safe for him to remove any more of the packing, and he withdraws to a place of safety. Other workmen from a sheltered point beneath the furnace insert an iron bar, about 20 feet in length, into the tapping hole, and up into the furnace to the point where the gas is issuing, and thrust it forward into the molten mass in the furnace. The bar is then withdrawn, and the melted iron and steel bursts out with great violence. The heat, flame, and gas would seriously endanger any one who stood at or near the tapping hole. The appellee, an employé of the appellant company, charged with the duty of digging the packing out of the tapping hole of one of the furnaces, on the 29th day of December, 1899, while engaged in the discharge of that duty, was seriously burned by a sudden and unexpected outflow of the liquid metal, accompanied by flame and gases from the tapping hole. He had removed but about three inches of packing from the channel or tapping hole when the melted iron and steel broke through and burst out of the tapping hole, and the flames, gas, and melted steel and iron flowed upon and burned him.

It was clear appellee's injury was the result of the careless and improper manner in which the loam, dolomite, and magnesite had been packed in the tapping hole. This work had been performed by one George Swick, also an employé of the appellant company, and the ground of the appellee's right of recovery was that the appellant company, as master, was legally liable to respond for the negligence of the said Swick. The appellant company insisted that upon the undisputed facts of the case it should be declared, as matter of law, that said Swick and the

appellee were fellow servants, and hence that the doctrine of respondeat superior did not apply. The trial court was asked, by a motion entered by the appellant company at the close of all the testimony, to declare, as matter of law, that the relation of fellow servant existed between these employés, and to instruct the jury to return a peremptory verdict for the appellant company. This motion the court denied, and the correctness of that ruling is assigned as for error in this court.

The work of melting the iron and steel together was continued both night and day in these furnaces, and was performed by two forces of men. One of the forces went on duty at 6 o'clock p. m., and labored until 6 o'clock a. m., and the other force then returned and relieved them, and remained on duty until 6 o'clock that evening, when they in turn were relieved by the other force of men returning to the work. One man on each force was called "second helper." The appellee was second helper of the force that went on duty at 6 o'clock in the evening, and said George Swick was second helper of the other force. It was the duty of the second helper to open the tapping hole and let off the molten metal, and after that had been done to assist in cleaning the furnace, and then to repack the tapping hole with the loam and dolomite in order the furnace might be again filled with iron and steel to be melted. The first helper would put in the magnesite, and after the second helper had packed the loam and dolomite the iron and steel would be placed in the furnace, and the work of melting it would begin. It required about 12 hours to pack the tapping hole thoroughly and melt the iron and steel, but the work was so arranged that the melted iron and steel was ready to be let out of the furnace at about the hour of 3 o'clock in the afternoon of each day, and at the same hour of each night. Each second helper was therefore called upon, while opening the tapping hole, to remove the loam and dolomite which had been packed in by the second helper of the other force. Each second helper would therefore be placed in imminent danger by the negligence of the other in filling the tapping hole. Each force remained at the work about the furnace until the other force came to relieve them. These servants of the appellant company met regularly at the end of each 12 hours. The appellee testified: "I knew every man that was changed in the night or other turn during the six months I worked there. I will tell you the reason why: They had to remain on the floor until I came in there to change with them." These second helpers, the safety of each of whom depended so greatly upon the care and diligence of the other, had therefore ample opportunity to exercise each upon the other an influence promotive of care and prudence in the matter of performing the work of packing the tapping hole of the furnace, upon the

proper performance of which work depended the safety of each of them. The duties of the appellee and the said Swick were therefore such as brought them into habitual association, and enabled each of them to exercise a mutual influence upon the other promotive of proper caution, to the end that neither might suffer injury by reason of the failure of the other to perform his work in a faithful and careful manner. The third count of the declaration alleged that Swick, the second helper of the day force, was incompetent and unfit to discharge the duties of that position, and that the appellant company had not used reasonable care in selecting him for such duty. But that position was abandoned because there was no proof produced in its support. Counsel for appellee in his brief says: "But the court took that question from the jury. * * * The jury knew that the charge of incompetency was withdrawn. The court told them so, counsel for appellant told them so, and appellee's counsel told them it was withdrawn or was out of the case."

The testimony touching the relation which existed between the appellee and Swick was without conflict, and all the facts from which that relation should be determined appeared without controversy. While it is generally a question of fact, to be determined by the jury under proper instructions, whether the relation of fellow servant exists, yet when all the facts upon which the existence of such relation depends are made known without dispute or controversy, and are so conclusive that all reasonable men must reach the same conclusion therefrom, it becomes a question of law. *Wabash Railway Co. v. Brown*, 152 Ill. 484, 39 N. E. 273; *Chicago & Eastern Illinois Railroad Co. v. Driscoll*, 176 Ill. 330, 52 N. E. 921; *Meyer v. Illinois Central Railroad Co.*, 177 Ill. 591, 52 N. E. 848. In *Joliet Steel Co. v. Shields*, 134 Ill. 209, 25 N. E. 569, we said: "The rule in this state is where one servant is injured by the negligence of his fellow servant, their duties being such as to bring them into habitual association, so that they may exercise a mutual influence upon each other promotive of proper caution, and the master is guilty of no negligence in employing the servant causing the injury, the master is not liable"—and cited many decisions in support thereof. The case came again before this court and the doctrine of the decision was reaffirmed. *Joliet Steel Co. v. Shields*, 146 Ill. 603, 34 N. E. 1108. The same principle was afterwards announced in *Chicago & Eastern Illinois Railroad Co. v. Kneirim*, 152 Ill. 458, 39 N. E. 324, 43 Am. St. Rep. 259, and also in other cases.

The appellee and said Swick were servants of the same master. The master was not guilty of any lack of ordinary care in selecting and employing Swick. In doing the work each of them was liable to be placed in great peril by the negligence of the other.

68 N.E.—48

Their duties brought them together at regular intervals twice in each 24 hours, at which times they each had opportunity to impress upon the other the necessity of care, and to exercise a mutual influence, each upon the other, promotive of proper caution and faithfulness in the performance of the work. The relation between them was that of fellow servants, and the common master was not liable to respond to either of them in damages for an injury arising because of the negligence of the other.

It was error to overrule the motion to direct the jury to peremptorily return a verdict for the appellant company. Because of that error the judgment of the circuit court and that of the Appellate Court are each reversed. The cause will be remanded to the circuit court for such further proceedings as to law and justice shall appertain.

Reversed and remanded.

(205 Ill. 144)

SPRINGER v. SCHULTZ.

(Supreme Court of Illinois. Oct. 26, 1903.)

CARRIERS—ELEVATORS—INJURY TO PASSENGER—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DILIGENCE—INSTRUCTIONS.

1. Where the fall of an elevator which injured plaintiff was caused by a defective shackle bolt, newly discovered evidence that the elevator operator, in conjunction with plaintiff, were experimenting with the elevator by testing the safety device, which was in no way connected with the defective shackle bolt, is not of such material character as to require a new trial.

2. Affidavits presented in support of a motion for new trial founded on newly discovered evidence, which fails to show reasonable diligence to produce the newly discovered evidence on the trial, are insufficient.

3. Error cannot be predicated on the court's considering counter affidavits on motion for new trial, when the record shows the court refused to permit them to be filed.

4. Where a declaration in an action for injuries alleges that plaintiff sustained a permanent injury, in that he will suffer great pain for life, instructions on the theory that the injury was permanent are proper.

5. Where a declaration merely describes the injury generally, without pointing out its permanency, the recovery may be to the whole extent of the injury.

Appeal from Appellate Court, First District.

Action by Fred Schultz against Warren Springer. From a judgment of the Appellate Court (105 Ill. App. 544) affirming a judgment for plaintiff, defendant appeals. Affirmed.

O. W. Dynes, for appellant. Francis J. Woolley, for appellee.

WILKIN, J. This action was begun by Fred Schultz, who is appellee here, against Warren Springer, appellant, in the superior court of Cook county, to recover for an injury received by the fall of a passenger

*Rehearing denied December 4, 1903.

† 2. See New Trial, vol. 37, Cent. Dig. § 210.

elevator in a six-story building owned by appellant, in the city of Chicago. The declaration consists of a single count, the material allegation charging, in substance, that the defendant negligently and knowingly suffered the machinery connected with the elevator to be and remain in bad repair, and by his servant so negligently operated the same that it fell, by means of which the plaintiff was greatly injured and "suffered great pain, and will hereafter suffer great pain for the term of his life," etc.

From the evidence it appeared that appellee, on the 24th day of October, 1899, was working for one of the tenants in that building, and while he was riding down on the elevator as a passenger, the car became disconnected from the cable supporting it and dropped six stories, to the basement. The appellee was seriously bruised on the head and back, and the evidence showed that the spine, brain, and eyes had suffered material and more or less permanent injury.

The jury found the defendant guilty as charged in the declaration, and rendered a verdict for the plaintiff for \$25,000 damages. Upon appeal to the Appellate Court by the defendant the judgment below was affirmed, but upon condition that the amount be reduced, by remittitur, to \$15,000, which remittitur was duly entered by the plaintiff.

Upon this further appeal to reverse the judgment of the Appellate Court, it is insisted, first, that the trial court erred in refusing to grant a new trial upon the ground of newly discovered evidence. In support of the motion for new trial three affidavits were filed by appellant, setting up facts which counsel claim would upon a new trial produce a different verdict. It is clear from all the evidence the defect in the machinery which was the primary cause of the accident was immediately above the car. At the top of the elevator, passing through a heavy cross-beam, was a shackle bolt, the upper end or head of which was fan-shaped, containing four holes, through which the cables passed to support the elevator. On the lower end of this shackle bolt was screwed a large nut, which held it in place. The nut had become unscrewed until it held by the last thread. At the time of the accident the weight of the elevator and the passengers therein was too heavy to be supported by the bottom thread on the shackle bolt, and the nut pulled off, letting the elevator drop. The newly discovered evidence, as set forth in the motion for a new trial, was to the effect that one Ellis, the elevator operator, in conjunction with appellee, were experimenting with the elevator by way of testing the safety device at the time it fell. The safety device was in no way connected with the defective shackle bolt which caused the accident. The alleged newly discovered evidence could not affect the issue. Certainly, it is not of so material and conclusive a character as to lead us to conclude that it

would, if introduced on another trial, change the result. Furthermore, we think appellant failed to show reasonable diligence to discover and produce the so-called newly discovered evidence upon the trial. The affidavits presented in support of the motion were wholly insufficient, for both of the foregoing reasons, to entitle the defendant to a new trial on the ground of newly discovered evidence. *Plumb v. Campbell*, 129 Ill. 101, 18 N. E. 790; *Conlan v. Mead*, 172 Ill. 13, 49 N. E. 720.

Counter affidavits to the motion for a new trial were offered by appellee, and it is strenuously urged that the court erred in considering these in denying the motion. This contention assumes that the counter affidavits were received by the court, but the record shows that instead of receiving them the court expressly refused to permit them to be filed.

Objections are made to the introduction of evidence and the giving of certain instructions for plaintiff upon the theory that the injury sustained by appellee was permanent, it being contended that the declaration makes no claim that the injuries were permanent. The declaration clearly alleges that the plaintiff sustained a permanent injury, in that he will "hereafter suffer great pain for the term of his life." But even if the declaration merely described the injury generally, without pointing out its seriousness or permanency, "the recovery may be to the whole extent of the injury." *City of Chicago v. Sheehan*, 113 Ill. 658; *Chicago City Railway Co. v. Hastings*, 136 Ill. 251, 26 N. E. 594.

The objections that the trial court erred in its rulings in the examination of certain of the jurors and in showing a prejudice against appellant throughout the trial; that there is a variance between the declaration and the proof; that improper evidence was heard and instructions improperly refused—have been carefully considered, but we find no substantial merit in either of them, and no good purpose would be served in discussing them in detail.

The judgment of the Appellate Court will be affirmed. Judgment affirmed.

(205 Ill. 105)

HARDING v. HARDING.*

(Supreme Court of Illinois. Oct. 26, 1903.)

HUSBAND AND WIFE—SEPARATE MAINTENANCE—WIFE'S SOLICITOR'S FEES—JURISDICTION OF THE COURT TO AWARD.

1. A circuit court decree in a separate maintenance suit instituted by the wife fixed her solicitor's fees. The husband appealed from the decree, and also from the judgment adjudging him guilty of contempt for disregarding the terms of the decree. Pending the appeal the wife petitioned the circuit court for solicitor's fees for services in defending the appeals. The circuit court, on remand to that court of the original suit, by its decree expressly reserved for future adjudication the matter of such so-

*Rehearing denied December 4, 1903.

Solicitor's fees. *Held*, that the circuit court had jurisdiction to allow the wife solicitor's fees for services rendered subsequent to the original decree.

Appeal from Appellate Court, First District.

Bill by Adelaide Harding against George F. Harding. From a decree of the Appellate Court (105 Ill. App. 363) affirming a decree of the circuit court awarding plaintiff a specified sum for her solicitor's fees, plaintiff appeals. Affirmed.

Wm. J. Ammen (Barnum & Barnum, of counsel), for appellant. Peck, Miller & Starr, for appellee.

WILKIN, J. This is an appeal from the Appellate Court for the First District, seeking to reverse a judgment there rendered affirming the decree of the circuit court of Cook county allowing appellee, as and for her solicitor's fees in certain chancery causes in the circuit court of Cook county, the sum of \$5,000. On July 26, 1897, appellee recovered a decree in a separate maintenance proceeding on a bill filed by her; the court fixing her solicitor's fees and temporary alimony, and also permanent alimony at the sum of \$6,400 per annum. Appellant appealed first to the Appellate Court (79 Ill. App. 590), and by further appeal brought the cause to this court (180 Ill. 481, 54 N. E. 587), upon which latter appeal we affirmed the decree of the circuit court in all respects, except as to the allowance of permanent alimony, which was reduced from the sum of \$6,400 per annum to \$3,600 until the further order of the court, and remanded the cause to the circuit court, with directions to proceed in conformity with the views expressed in our opinion. The circuit court, in a contempt proceeding instituted by appellee, found appellant to be in contempt of the court in disregarding the terms of the decree awarding temporary alimony to her, and adjudged that he be committed to the county jail of Cook county until the temporary alimony be paid. Appellant appealed from that judgment, also, to the Appellate Court (79 Ill. App. 621), and from a judgment of affirmance there rendered further appealed the cause here (180 Ill. 592, 54 N. E. 604). The petition in the present case was filed in the circuit court while these two appeals to this court were pending, and prayed for the allowance of solicitor's fees for services rendered in prosecuting them.

It is first contended that the circuit court, in this proceeding, was without jurisdiction to entertain the petition. But that contention is without merit. The services for which the allowance is made in this case are such as were rendered since July 26, 1897, the date of the first decree, and they appear to have been necessary in order that appellee might enforce her rights as adjudicated under that decree. The circuit court, December 8, 1899, upon a remandment to that court

of the original cause, by its decree expressly reserved for future adjudication the matter here involved, namely, the fixing of appellee's solicitor's fees. The fees of her counsel for the services here claimed have not been adjusted in any former proceeding, nor has she by any act waived her legal right to have them allowed.

The main contention on the part of appellant is that the allowance of \$5,000 as solicitor's fees is excessive. No good purpose would be served in setting forth or reviewing the testimony heard by the chancellor as to the services rendered by appellee's counsel, and the value thereof, for which the allowance was made. From a careful consideration of the whole cause, and the arguments of counsel, we are of the opinion that the allowance of \$5,000 was not unreasonable—certainly not to the extent of justifying this court to substitute its judgment for that of the circuit court as to the reasonableness of the fees charged for the services rendered.

The judgment of the Appellate Court will be affirmed. Judgment affirmed.

(205 Ill. 326)

FARSON et al. v. FOGG et al.*

(Supreme Court of Illinois. Oct. 26, 1903.)

SPECIFIC PERFORMANCE — STREET PAVING — CONTRACTS WITH STREET RAILWAYS — ULTRA VIRES — PARTIES — DAMAGES — ASSESSMENT.

1. Under 1 Starr & C. Ann. St. 1896 (2d Ed.) c. 24, par. 63, conferring on the city council power to grade, pave, and improve streets, a contract by abutting owners with a street railway company for the pavement of a street in accordance with specifications furnished by parties having no control of the streets, and containing no provision that the company was to obtain an ordinance from the city permitting it to pave the street, cannot be specifically enforced.

2. A contract with a street railway company to pave a street for a consideration inuring to the benefit of abutting owners is ultra vires, since a street railway company organized under the Illinois law has no power to engage in the business of paving streets.

3. Where abutting property owners have entered into a contract with a street railway company to pave a street, knowing that it could not be enforced without the city's consent, specific performance of it cannot be enforced in a suit to which the city is not a party.

4. Where an agreement to pave a public street is made with a street railway company having no power to control the street or improve it without the city's consent, a bill for specific performance by parties knowing such facts cannot be retained for the assessment of damages.

Appeal from Appellate Court, First District.

Bill by Simon F. Fogg and others against John Farson and others. From a judgment of the Appellate Court (105 Ill. App. 572) affirming a decree for complainants, defendants appeal. Reversed.

This is a bill, filed in the circuit court of Cook county on July 21, 1897, against the Calumet Electric Street Railway Company, John Farson, Arthur B. Leach, Levi H. Ful-

*Rehearing denied December 4, 1903.

ler, John C. McKeon, and Idea L. Hammond, administratrix of William A. Hammond, deceased, for the purpose of enforcing the specific performance of the following agreement, to wit:

"This memorandum of agreement, made and entered into by the undersigned this 17th day of September, A. D. 1895, witnesseth:

"That whereas, the Calumet Electric Street Railway, a corporation, has made application for a franchise or a license to build a one or two-track electric railway on Cheltenham Place from the easterly line of Bond avenue to a point four hundred and eighty feet easterly therefrom, in Chicago, Illinois; and whereas, the said corporation has agreed with the undersigned, Simon F. Fogg and William C. Kinney, who are the owners of lots 172, 173, 174 and 175 in Westfall's subdivision, etc., * * * and the eighty feet in width east of and adjoining said lots 172 and 174, to cut, grade, curb, macadam and build the cross-walks in said Cheltenham Place from curb to curb from said Bond avenue to said point, the work to be of uniform width throughout, according to the specifications hereto attached and hereby made a part hereof, in consideration for, and in full payment of, the damages which said Fogg and Kinney will incur in connection with, and by reason of, the construction of said railway on said Cheltenham Place, if the said corporation shall secure said ordinance; and whereas, the undersigned, Farson, Leach & Co., being interested in said corporation and in the securing of said franchise and the construction of said road, to secure the faithful performance of said agreement by said corporation on or before September 1, 1896, if it shall secure said franchise in the meantime, have placed their certified check for \$1,000.00, drawn upon the National Bank of Illinois, and made payable to William A. Hammond, vice-president, as trustee, to secure the faithful performance of said agreement;

"Now therefore, in consideration of the premises, it is mutually agreed between the undersigned that, if said corporation shall complete said cutting, grading, curbing, macadamizing and cross-walks according to the specifications hereto attached as aforesaid, on or before September 1, 1896, the said William A. Hammond shall, when said work is fully completed according to said specifications, return said check to said Farson, Leach & Co. If said corporation shall not secure the said franchise or license and shall have withdrawn its application therefor, and returned to said Fogg and Kinney their petition to the city council to grant said franchise or license to said corporation, then said check shall be returned to said Farson, Leach & Co. If said corporation has acquired on or before September 1, 1896, said franchise or license, and neither it, nor the said Farson, Leach & Co. has completed said work according to said specifications, said check shall

thereupon be endorsed by said Hammond, or his successor as vice-president of said bank, and delivered to said Fogg and Kinney by said Hammond or his successor, and said bank shall pay the same to said Fogg and Kinney upon said endorsement when made by said Hammond or his said successor, and said Fogg and Kinney shall have and hold said sum of \$1,000.00 as and for liquidated damages for the failure of said corporation or said Farson, Leach & Co. to do said work. The said work shall be done in accordance with said specifications to the satisfaction of said Fogg and Kinney. In case said company be restrained by any court from proceeding as above specified, then the time to complete said work shall be correspondingly extended, but not in all longer than ninety days from September 1, 1896.

"This agreement shall be binding upon the heirs, representatives and assigns of the undersigned.

"In witness whereof, the undersigned have hereunto set their hands and seals the day and year first above written.

"Simon F. Fogg, [Seal.]

"William C. Kinney, [Seal.]

"Per Simon F. Fogg. [Seal.]

"The Calumet Electric Street Railway Company for value received hereby acknowledge that it has agreed to do said work according to said specifications, as in the foregoing memorandum is stated, and upon the conditions therein recited.

"Calumet Electric Street Railway Co.

"John Farson, Gen. Manager."

The specifications, attached to the contract, provide that, whenever cutting occurs, the earth must be excavated to such depth as the engineer may direct, and the surface graded to stakes to be given by him; that, before paving, the street should be graded to conform to stakes or profiles to be given by the engineer in charge, and thoroughly flooded, rammed, and rolled, to give it a solid bed; that on the roadbed thus formed and completed will be spread a layer of clean, broken stone entirely free from dust and dirt, not less than — in depth in the center, and not less than — at the sides after being thoroughly rolled; that the stones shall be practically uniform in quality, etc.; that on the above layer shall be spread limestone screenings or bank gravel, as designated by the commissioner of public works, in sufficient quantities to fill up all interstices, and then flooded and rolled, etc.; that the above to be covered with medium limestone, etc.; the interstices to be filled with limestone screenings, or bank gravel, and flooded; that this layer shall not be less than — in depth at the sides and not less than — at the center, after being thoroughly rolled; that the cubes shall be of best quality of oak plank, 3 inches in thickness by 14 inches in width, etc.; that there shall be four cross-walks at each street intersection, three at each half intersection, and one at each

and every alley, to be constructed of Ottawa or Grape Creek paving brick, or brick of equal quality and shape; that the brick shall be equal in quality to standard samples in the office of the commissioner of public works, the cross-walks to be formed under the direction of the engineer in charge of the street, and to be six feet in width; that the brick must be laid in uniform courses, etc.; that when laid the pavement shall immediately be covered with clean, dry, sharp sand in proper quantities, and swept until all joints become filled therewith, etc.; that no broken or cracked brick will be allowed to remain in cross-walks; that all cross-walks and their appurtenances shall be constructed by the contractor without any extra charge for the same over and above the price bid per lineal foot for macadam.

A joint and several answer was filed to the bill by the Calumet Electric Street Railway Company, John Farson, A. B. Leach, Levi H. Fuller, and John C. McKeon. The answer sets up that the National Bank of Illinois was in the hands of a receiver, and that John McNulta was such receiver. Accordingly, on May 7, 1898, the appellees, complainants below, filed a supplemental bill making John McNulta, receiver of the National Bank of Illinois, a party defendant. John McNulta, receiver of the National Bank of Illinois, filed an answer.

It also appeared from the answers that the Calumet Electric Street Railway Company was in the hands of a receiver, but such receiver was not made a party to either the original or supplemental bill.

The cause, after being at issue, was referred to a master in chancery, who made findings substantially in accordance with the prayer of the bill. The master's report, after objections and exceptions thereto, was confirmed by the court, and the final decree entered on March 22, 1901. An appeal was taken from this decree to the Appellate Court, and the decree of the circuit court was affirmed. The present appeal is prosecuted from such judgment of affirmance.

The material facts, as gathered from the pleadings and proofs, and from the master's report, and the decree of the court, are substantially as follows: The premises in question were owned by appellees, Fogg and Kinney, but the legal title was in Fogg, Kinney owning the equitable title to an undivided half of the premises. The premises owned by appellees were on the south side of Cheltenham Place, and fronted toward the north thereon 480 feet. That is to say, the whole frontage of the block on the south side of Cheltenham Place between Bond avenue and Lake avenue was the property of appellees. The Calumet Electric Street Railway Company (hereafter called the Calumet) had applied to the common council of the city of Chicago for a license or ordinance to lay tracks on Cheltenham Place in front of the property of appellees. The evidence tends to

show that the South Chicago City Railway Company (hereafter called the South Chicago) was also seeking a right of way on Cheltenham Place between Bond and Lake avenues, which was one block. No franchise could be obtained from the city to construct and operate a railway on said street without the consent of the appellees. Farson and Leach were copartners under the name of Farson, Leach & Co., and interested in the Calumet. About September 18, 1896, Fogg, representing the appellees, and Leach, representing the corporation, and Farson, Leach & Co., placed a duplicate of said agreement and a check or order for \$1,000 in the hands of said Hammond in said National Bank in trust, and told Hammond that the check was delivered to him in trust for the carrying out of the said agreement between the parties, and Hammond received the papers in trust for such purpose. The bill alleges that the check for \$1,000 was signed by Levi H. Fuller, by the name of L. H. Fuller, and addressed to Farson, Leach & Co., dated September 18, 1896, requesting Farson, Leach & Co. to pay to the order of W. A. Hammond \$1,000, and duly certified and accepted by Farson, Leach & Co. The check thus described in the bill differs from the check described in the agreement. The bill alleges that the Calumet secured the ordinance for laying down its tracks on September 1, 1896, and was not restrained from doing so by any court. Appellees, on December 11, 1896, notified Hammond that the paving had not been done, and requested him to indorse and deliver the certified check to them, the appellees. On December 21, 1896, the National Bank of Illinois became insolvent, and one John C. McKeon was appointed receiver under the laws of the United States, and as such receiver was succeeded by John McNulta. On December 31, 1896, appellees again notified Hammond in writing that the work had not been done, and claimed the check, and requested him to indorse and deliver it to them. Hammond stated that he had delivered the check to the bank. The National Bank of Illinois had no interest in the check, and the proof shows that it was in the hands of one Frost, who acted as clerk for McNulta, the receiver. Hammond died on January 2, 1897. The check was produced upon the trial from the hands of Frost. Neither Farson, Leach & Co. nor the Calumet railway company have done anything towards the paving of said street or the payment of the \$1,000. The Calumet Company has placed wires and tracks in Cheltenham Place, and is operating electric cars thereon.

The bill alleges that appellees claimed that they would incur damages to their property by reason of the construction of the railway on Cheltenham Place, and that the street was to be paved, or the \$1,000 to be paid in consideration for and in full discharge of said damages.

The answers deny that the contract was executed for the purpose of compensating appellees for the damages expected to be incurred to their property. The answers charge that the appellees combined with the South Chicago Company and with others to extort money from the Calumet Company, and prevent the latter from obtaining from the common council of the city an ordinance for building and operating an electric railway in Cheltenham Place; that appellees claimed that the South Chicago Company had offered them pecuniary inducements not to sign for the frontage of the property owned by them in favor of the Calumet Company, but to give to the South Chicago Company their signature of frontage to a petition to the city of Chicago for the right to build a railway on Cheltenham Place; that appellees declared that, unless the Calumet Company would do better by them than the South Chicago Company, appellees would not sign their frontage to a petition for the Calumet Company; that thereupon appellees presented to the officers of the Calumet Company a draft of the contract, substantially such as that which is set out in the bill of complaint, stating that the terms of said contract were the only terms on which they would sign a petition, for the frontage which they claimed to own on Cheltenham Place, in favor of the Calumet Company for an ordinance granting them the right to lay tracks and operate a railway thereon; that they stated that they insisted upon the contract in that form, because it was illegal, and contrary to public policy, and against good morals, for them to contract for a sale of their signatures and consents to the frontage of the property which they claimed to own; that the officers of the company declined to sign said contract, but that Farson, its general manager, made the indorsement thereon as above set forth. The answer charges that the consideration for the signing of the contract by the company was the signing by appellees of the petition addressed to the city council to give the Calumet Company the right to lay its tracks on Cheltenham Place in front of the property of appellees. The answers charged that the firm of Farson, Leach & Co. are not made parties defendant to the bill, and that the receiver is not made a party.

The answer admits that the Calumet Company has received its right to the use of Cheltenham Place for its electric road from the city of Chicago under an ordinance passed by the common council. The answer denies that there is any need of a pavement upon Cheltenham Place, which is near the lake, and full of sand, and called in the answer a street de soc.

The answer also sets up that the engineer mentioned in the specifications never gave or furnished to appellants, or the Calumet Company, any grade stakes or profiles as therein specified, and that the engineer of public works never had any samples of brick

in his office, and never gave any directions for the laying of the cross-walks as stated in the specifications, and that, therefore, appellants were never able to comply with the conditions of the contract; that the layer of clean, broken stone was not specified to be of any particular depth, either in the center or at the sides, and that the contract was so indefinite and uncertain in its terms that it was impossible for appellants to carry the same out, so that a specific performance thereof could not be decreed by the court.

The answer also sets up that the contract is contrary to public policy, in that by its terms the appellees assume jurisdiction over the public domain, and to take from the city of Chicago, having jurisdiction over the street in question, the power of controlling and maintaining the thoroughfare called Cheltenham Place; that the contract is in violation of the city ordinance, which provides that no individual or corporation shall, without the consent of the city, improve in any way or change the condition of its public thoroughfares; and that there never has been any ordinance or license passed by the city, to the appellees or any other persons, to make the improvement contemplated by the contract, and that, therefore, the contract is void; that, when it was made, the appellees well knew that there was no ordinance authorizing the paving of Cheltenham Place in the manner therein specified, and that, until such ordinance was passed by the city, the improvement could not be made. The answer also charges that the appellant cannot compel the specific performance of the contract, and that there is no ordinance by which it can be lawfully carried out, and that to carry out the same would be a violation of law and a breach of the peace.

The final decree rendered by the lower court found that the contract had not been performed by the Calumet Company, but that they had failed and refused to perform it, and that appellees were entitled to have from Farson and Leach \$1,000, with interest at the rate of 5 per cent. per annum from September 1, 1896, amounting to \$1,227; that the check or draft for \$1,000 was intended to be held in escrow by Hammond, to be delivered to appellees in case they became entitled to have the same from Farson, Leach & Co.; that Hammond died before this bill was filed, and that appellees had never received the draft, although they had demanded it from Hammond in his lifetime, and after his death from the person into whose hands it came. The decree holds that, upon payment by Farson and Leach of the \$1,000 to appellees, the check should be canceled and vacated, and Farson, Leach & Co. entitled to receive possession of it. The decree then orders that Farson and Leach pay appellees within five days \$1,227, with interest from the date of the decree, and that Farson, Leach, and the Calumet Company pay the costs of the suit, etc.

Judson F. Going (Daniel V. Gallery, of counsel), for appellants. Alexander S. Bradley, for appellees.

MAGRUDER, J. (after stating the facts). The appellees claim that the contract of September 17, 1895, here in controversy, was executed for the purpose of compensating them for the damages which they expected that their land fronting on Cheltenham Place would suffer from the laying down of the tracks of the Calumet Electric Street Railway Company upon said place. The testimony introduced by appellees tends to sustain this contention, and the contract itself recites that the Calumet Company agreed to pave the street in payment of the damages which appellees would incur, by reason of the construction of the railway upon the street in front of their property, in case the company should secure an ordinance permitting them to lay down their tracks there. On the contrary, the appellants claim that the real consideration of the contract was the signing by appellees of the petition of the Calumet Company to the common council for permission to lay down the tracks. In other words, the appellants contend that they were to pay \$1,000 to appellees for signing their consent to have the tracks laid in the street, and that the written contract, specifying that the consideration was the damage expected to arise, was so expressed for the purpose of covering up the fact that appellees were selling their consent. The testimony of the appellants strongly tends to sustain this contention. There is much upon the face of the contract itself to suggest the theory contended for by the appellants. The contract states that application had been made by the Calumet Company to the city for a license to build a track on Cheltenham Place. Both parties must have known, and did know, that under the law the city council had no power to grant the right to the Calumet Company to lay the tracks down in Cheltenham Place, except upon the petition of the owners of the land, representing more than one-half of the frontage of the street, or so much thereof as was sought to be used for railroad purposes. The appellees owned all the frontage, amounting to 480 feet, on the south side of the street. As we understand the evidence, the part of the street where the tracks were to be laid was only the length of one block, so that half of the frontage was owned by the appellees. The contract provides that, "if said corporation shall not secure the said franchise or license, and shall have withdrawn its application therefor, and returned to said Fogg and Kinney their petition to the city council to grant said franchise or license to said corporation, then said check shall be returned to said Farson, Leach & Co." It thus appears that Fogg and Kinney did give to the Calumet Company, or to Farson and Leach for it, their consent to the laying of the tracks.

But while there are many circumstances disclosed by the evidence, and much that appears upon the face of the contract itself, tending to create the suspicion that the parties were trying to avoid the effect of the decision of this court in the case of *Doane v. Chicago City Railway Co.*, 160 Ill. 22, 45 N. E. 507, 35 L. R. A. 588, yet we are not prepared to say that the evidence is clear and convincing as to the contention of either party upon this question. We therefore pass no opinion upon it.

There is another ground, however, pleaded in the answers and pressed upon our attention in the argument filed in behalf of appellants, upon which, in our opinion, the relief prayed for in the bill in this case ought to have been denied.

The Calumet Electric Street Railway Company agreed with the appellees to pave Cheltenham Place, a public street in the city of Chicago, for some consideration, which was supposed to operate for the benefit of appellees. The Calumet Company is shown by the proofs to be in the hands of a receiver, and that receiver is not a party to the suit. Waiving, however, the question whether it was necessary to make the receiver a party or not, we are of the opinion that the Calumet Electric Street Railway Company had no power to make any such agreement. Nor has a court of chancery the power to decree the specific performance of any such agreement. It is a well-settled doctrine in this state that a city holds the title to its streets in trust for the public, and cannot turn over such streets to private parties to be improved. The power to control and improve the streets in the city of Chicago is vested in the city itself, or in its common council.

The seventh paragraph of section 63 of article 5 of the city and village act, which was in force in 1895, when the contract here under consideration was made, provides that "the city council in cities, and the president and board of trustees in villages, shall have the following powers: * * * Seventh—To lay out, to establish, open, alter, widen, extend, grade, pave or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks, and public grounds, and vacate the same." By the ninth paragraph of the same section, the city council has power to regulate the use of the streets, by the sixteenth paragraph of the same section to provide for and regulate cross-walks, curbs, and gutters, and, by the twenty-fifth paragraph of the same section, to provide for and change the location, grade, and crossings of any railroad. 1 Starr & C. Ann. St. 1896 (2d Ed.) pp. 689, 692, 694, 696, 697, c. 24, par. 63. The power thus conferred upon the city council to pave, grade, curb, improve, and regulate the streets and cross-walks is vested exclusively in the city council, and cannot be shared by it with any other body or person. It is obvious, from the various provisions above referred to of the city and

village act, that the control of the streets and the power to improve them, which are placed in the hands of the city council, are left to a large extent to the discretion of that body. The exercise of these powers is so far discretionary that the mode of their exercise depends upon the will of the city council. *Town of Ottawa v. Walker*, 21 Ill. 605, 71 Am. Dec. 121; *Murphy v. City of Peoria*, 119 Ill. 509, 9 N. E. 895; *Gridley v. City of Bloomington*, 88 Ill. 554, 30 Am. Rep. 566; *City of Chicago v. O'Brien*, 111 Ill. 532, 53 Am. Rep. 640.

"In a bill for specific performance the contract must be of such a character that the court is able to make an efficient decree and enforce it when made." 3 *Pomeroy's Eq. Jur.* § 1405; *Sellers v. Greer*, 172 Ill. 549, 50 N. E. 246, 40 L. R. A. 589. It is difficult to see how a court of equity could enforce the contract involved in the case at bar. If it should require the Calumet Electric Street Railway Company to pave Cheltenham Place, it would require it to take possession of a public street which belongs to the city and is held in trust by the city for the use of the people. To order the Calumet Company to take possession of this street would be to order it to create an obstruction in a public street, and clothe an outside corporation with the power which the law vests in the municipality. It is well settled that the specific performance of a contract will not be decreed as a matter of course, even though a legal contract is shown to exist. But such specific performance rests entirely in the discretion of the court upon a view of all the circumstances. *Chicago & Alton Railroad Co. v. Schoeneman*, 90 Ill. 258. In *Gray v. Chicago, Milwaukee & St. Paul Railway Co.*, 189 Ill. 400, 59 N. E. 950, it was said: "The specific enforcement of a contract is not a matter of absolute right, but of sound discretion in the court."

It is true that the common council, in granting leave to a street railway company to lay its tracks in the street, sometimes imposes, as a condition, that the street railway company shall keep the street between its tracks paved, and perhaps the common council might make it a condition that the street railway company should keep more of the street than lies between its tracks paved and in repair. But a street railway company has no power, by virtue of its own charter, to pave the streets of the city outside and independently of the consent of the city itself. There is no provision in the present contract that the company was to procure or obtain an ordinance from the city permitting it to pave the street. On the contrary, the contract provides as follows: "The said work shall be done in accordance with said specifications to the satisfaction of said Fogg and Kinney." The paving was not to be done, under the provisions of the contract, to the satisfaction of the city or its officers, but it was to be done to the satisfaction of

these appellees, private parties having no control over the street itself. Even if the contract was a valid one, the specifications, as charged in the answer, are indefinite and uncertain in many of their provisions. The engineer who, by the terms of the specifications, is to give directions as to the paving, is not necessarily the city engineer, nor does it appear whether he is to be an engineer employed by the Calumet Company or by the appellees.

An offer was made, upon the hearing of the cause below, to produce in evidence the charter of the Calumet Electric Street Railway Company for the purpose of showing that it had no power, by the terms of its charter, to engage in the paving of public streets. The charter might well have been admitted, but, independently of any provisions of the charter, it must be true that a street railway corporation organized under the laws of Illinois, as the Calumet Company is shown to be, has no power from the very nature of its organization to engage in the business of paving streets. This contract, therefore, was ultra vires the Calumet Electric Street Railway Company. In *National Home Building Ass'n v. Home Savings Bank*, 181 Ill. 35, 54 N. E. 619, 72 Am. St. Rep. 245, it was said: "A contract of a corporation which is ultra vires in the proper sense—that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the Legislature—is not voidable only, but wholly void and of no legal effect." It was held, in the case last cited, that the rule that a corporation is estopped to make the defense of ultra vires where it has received the benefit of the contract applies only to cases where the contract is within its power but there has been a failure to comply with some regulation or there has been an improper exercise of the power. It was there said: "If there is no power to make the contract, there can be no power to ratify it, and it would seem clear that the opposite party could not take away the incapacity and give the contract vitality by doing something under it. It would be contradictory to say that a contract is void for an absolute want of power to make it, and yet it may become legal and valid as a contract by way of estoppel through some other act of the party under such incapacity, or some act of the other party chargeable by law with notice of the want of power." See, also, *Best Brewing Co. v. Klassen*, 185 Ill. 37, 57 N. E. 20, 50 L. R. A. 765, 76 Am. St. Rep. 26.

Where a contract is thus void, a court of equity will not enforce a specific performance of it.

A notable illustration of this principle may be found in the case of *Sellers v. Greer*, supra, where the contract under consideration by the court was a contract by stockholders to sell or dispose of the corporate property without authority or ratification by the cor-

poration, and such contract was held to have no binding effect; and the court there refused to sanction a decree granting a specific performance of it.

In *Hurlbut v. Kantzler*, 112 Ill. 482, a bill was filed for specific performance against Kantzler, Crilly & Blair, and also the board of education, to compel the assignment of a lease. There, Kantzler held a lease from the board of education, which was not assignable without the written consent of the board. Kantzler, however, gave to Hurlbut a written agreement to assign the lease, but it was held the agreement could not be enforced against the board, as it had not assented to the agreement. In disposing of the case it is there said (page 488): "There is no allegation in the bill, or proof, that the consent of the board of education will be given, or ever was given. * * * Hurlbut, at the time he took the contract from Kantzler, knew that the latter could not transfer his leasehold interest without the express consent of a third party, against whom he could claim no rights, legal or equitable, and consequently took his contract under such circumstances as to make its validity and effectiveness depend upon the exercise of the will of another under no obligation to do any act for him or for his benefit."

So, in the case at bar, appellees knew, at the time the present contract was executed, that the Calumet Electric Street Railway Company could not pave the street without the consent of the city, even if they could do it with such consent. The appellees took their contract from the Calumet Company, knowing that its validity depended upon the exercise of the will of the city, a third party. The city of Chicago is not a party to the present bill, and a contract to pave a public street could not be enforced without making the city of Chicago a party, if it could be enforced at all. Inasmuch, therefore, as the appellees accepted the contract with full knowledge that it could not be enforced without the consent of a third party, and that its validity depended upon the exercise of the will of a third party, they cannot enforce the specific performance of such contract by the present bill. The street had not been paved when the present bill was filed on July 21, 1897, although by the terms of the contract it was to be paved not later than December 1, 1896. The city did not make it a condition to the grant to the Calumet Company of the right to lay down its tracks in the street that the company should pave the street, nor did the city in any way take any steps towards the paving of the street, or authorize any other person or corporation to do so. The fair inference, therefore, is that the city did not regard the paving of the street as a necessity, or as an act to be done for the benefit of the public. Knowing all this when they filed the present bill, appellees were not entitled to a specific performance of the contract.

This being so, there can be no decree in the present case for damages, that is to say, for the amount of the check for \$1,000 and interest thereon. Where, in a bill for specific performance, a court of equity grants a decree for damages, the decree for damages is merely ancillary to the relief of specific performance, and is the result of granting that relief. But where the bill makes no case for a specific performance and shows no ground for such relief, a court of equity will not decree damages, because a court of equity does not sit for the purpose of entertaining bills whose only object is to secure damages. The remedy in such case is at law, and not in equity.

It has been held in a number of cases that a bill for specific performance will not be retained to assess damages for a failure to perform a contract where the complainant, when he filed the bill, knew that the vendor had parted with the title to the property, or where the agreement is to convey property which has no existence, or to which the defendant has no title, and if the want of title was known to the complainant at the time of beginning suit. In all such cases, the bill will not be retained for the assessment of damages. *Doan, King & Co. v. Maunzey*, 33 Ill. 227; *Stickney v. Goudy*, 132 Ill. 213, 23 N. E. 1034; *Kennedy v. Hazelton*, 128 U. S. 667, 9 Sup. Ct. 202, 32 L. Ed. 576; *Hurlbut v. Kantzler*, supra; *Sellers v. Greer*, supra; *Mack v. McIntosh*, 181 Ill. 633, 54 N. E. 1019. The principle of these cases is applicable here. The appellants, who made an agreement to pave a public street of the city of Chicago, had no right to control the street, and no power, without the consent of the city, to make any improvement of the street; and, this fact being well known to the appellees at the time of the beginning of this suit, the present bill, under the authorities referred to, will not be retained for the assessment of damages.

For the reasons above stated, the judgment of the Appellate Court and the decree of the circuit court are reversed, and the cause is remanded to the circuit court with directions to dismiss the bill.

Reversed and remanded.

(206 Ill. 179)

FISH v. McGANN.*

(Supreme Court of Illinois. Oct. 26, 1903.)

CIVIL SERVICE—DISCHARGE—REINSTATEMENT
—MANDAMUS—PLEADING—DEMURRER.

1. A demurrer to a pleading admits the truth of the facts well pleaded, though it does not admit the conclusions sought to be drawn from them by the pleader.

2. Where defendant elects to abide by the demurrer, the judgment thereupon entered is conclusive of the facts confessed by the demurrer; and no proof of such facts is necessary, other than that appearing upon the record.

*Rehearing denied December 4, 1903.

¶ 1. See Pleading, vol. 39, Cent. Dig. §§ 5261, 527.

3. Where a clerk employed under civil service rules was laid off and waived reinstatement, and he afterwards took examination and secured another appointment, he could not claim any advantage from his prior employment, and he might be discharged under the rules relating to probationers.

4. Under Civil Service Act, § 10 (1 Starr & O. Ann. St. 1896 [2d Ed.] c. 24, par. 328), enacting that appointments shall be on probation, for a period to be fixed by the rules, Rule 6, § 1, providing that appointments shall be on probation for a period of six months and at the end of this time, if the conduct and capacity of the appointee have been satisfactory, the appointment shall be completed, but the appointing officer may complete the appointment at any time after two months, is not invalid, as failing to fix a period, and as delegating that power.

5. In mandamus proceedings by a clerk to compel reinstatement in the civil service, the answer, averring a discharge as a probationer, under Civil Service Act, § 10 (1 Starr & O. Ann. St. 1896 [2d Ed.] c. 24, par. 328), requiring the head of the department to have the consent of the commission before he could discharge a clerk, was obscure in its averments of dates as to such consent and discharge, but it further averred that petitioner was discharged "in accordance with the civil service law and rules"; that defendant had assigned in writing his reasons to the commission for discharging petitioner; that petitioner had a fair trial in the duties of the office, and was incompetent. *Held*, on demurrer, that the answer was not insufficient, as not showing that the consent was obtained before the discharge.

Appeal from Appellate Court, First District.

Petition for mandamus by Clarence E. Fish against Lawrence E. McGann. From a judgment of the Appellate Court (107 Ill. App. 538) affirming a judgment refusing the writ, petitioner appeals. *Affirmed*.

This is a petition for mandamus, filed by appellant in the circuit court of Cook county on April 3, 1902, against appellee, as comptroller of the city of Chicago, to compel the latter to reinstate petitioner in the position of chief clerk in the comptroller's office of the city. The petition sets up the adoption by the city of Chicago of the civil service act of 1895 in that year, and the appointment of civil service commissioners under and by virtue thereof; that in November, 1899, petitioner, after having passed an examination as required by law under the rules of said commissioners, was appointed as clerk in the city collector's office, and was afterwards transferred to the special assessment bureau, where he remained until November 8, 1900; that on or about February 20, 1901, he was appointed as a clerk in the city collector's office, which position he held until April 1, 1901; that on July 10, 1901, he took an examination for the position of chief clerk in the comptroller's office, and was on or about February 13, 1902, appointed to that position, which he held until March 31, 1902; that on March 31, 1902, without the consent of the commission, without the filing of written charges against him, without any opportunity to defend, and without any investigation before said commission, or before any board appointed by it to conduct any such investi-

gation, he was discharged by the comptroller. The answer of appellee, respondent below, among other things, alleges that on February 20, 1901, said petitioner was appointed to the position of clerk in the city collector's office; that he was employed in said position until April, 1901; that he was laid off on or about April 1, 1901, and was tendered reinstatement on or about June 28, 1901; that he declined and refused to be reinstated, and waived his right to reinstatement, on or about June 28, 1901; that his waiver of his right to reinstatement in said position was duly accepted on or about the day last mentioned; that on July 10, 1901, an examination was held for chief clerk in the comptroller's office of the city of Chicago; that said examination was an open examination, and was not a promotional one; that petitioner took said examination, and passed the same, and was certified to the position of chief clerk in the comptroller's office of the city on January 28, 1902, and was appointed to said position on February 13, 1902. The answer further alleges as follows: "This respondent further says that said petitioner was appointed as a probational appointee in accordance with section 1 of rule 6 of the civil service rules, which is as follows: 'The appointment shall be on probation for a period of six months. At the end of this period, if the conduct and capacity of the person appointed have been satisfactory, the appointment shall be deemed complete, but the appointing officer may complete the appointment at any time after the expiration of two months by certifying such completion to the commission.' This respondent, further answering, says that the following rule was also duly adopted by the civil service commission, and is now in full force and effect, and was in full force and effect at the time of the last-mentioned appointment of said petitioner: 'If any probationer shall, upon fair trial, be found incompetent or disqualified for the performance of the duties of the position he is filling, the appointing officer shall certify the same in writing to the commission. Upon the approval of the commission such probationer shall be dropped from the service.' This respondent further says that on March 31, 1902, in accordance with the civil service law and rules, and prior to the expiration of the period of probation of the said petitioner, he discharged the said petitioner, upon assigning in writing his reason therefor to the said civil service commission; that said petitioner had a fair trial in the duties of chief clerk of the comptroller's office; that he was found incompetent and disqualified for the performance of the duties of the position; that this respondent so certified in writing to the commission, and assigned in writing his reason for the discharge of said petitioner to said commission; and that said discharge was consented to and approved of by said commission on April 4, 1902, and said petitioner was duly notified of his

discharge April 5, 1902, by said commission." To this answer the petitioner filed a demurrer, both general and special, and upon hearing the circuit court overruled the demurrer. The petitioner elected to stand by his demurrer, and thereupon the court rendered a judgment against him for costs. From that judgment appellant appealed to the Appellate Court for the First District, which court affirmed the judgment of the circuit court. From the judgment of affirmance so entered by the Appellate Court this appeal is prosecuted by appellant.

Clarence E. Fish, pro se. Charles M. Walker, Corp. Counsel, and William H. Sexton, Asst. Corp. Counsel, for appellee.

MAGRUDER, J. (after stating the facts).

1. The petitioner claims that he was improperly discharged from the position of chief clerk in the comptroller's office of the city, upon the alleged ground that he could not be removed or discharged except for cause upon written charges, and after an opportunity to be heard in self-defense, and after an investigation of such charges by or before the civil service commission. In other words, appellant claims that section 12 of an "act to regulate the civil service of cities" (1 Starr & C. Ann. St. 1896 [2d Ed.] par. 330, c. 24, p. 829) applies to his case. Section 12 is in part as follows: "No officer or employé in the classified civil service of any city, who shall have been appointed under said rules and after said examination, shall be removed or discharged except for cause, upon written charges and after an opportunity to be heard in his own defense. Such charges shall be investigated by or before said civil service commission, or by or before some officer or board appointed by said commission, to conduct such investigation." Section 10 of the civil service act provides as follows: "The appointing officer shall notify said commission of each position to be filled separately, and shall fill such place by the appointment of the person certified to him by said commission therefor, which appointment shall be on probation for a period to be fixed by said rules. * * * At or before the expiration of the period of probation, the head of the department or office, in which a candidate is employed, may, by and with the consent of said commission, discharge him, upon assigning in writing his reason therefor to said commission. If he is not then discharged, his appointment shall be deemed complete." Id. par. 328, pp. 828, 829. By the terms of sections 12 and 10, as above quoted, two cases of discharge are provided for. One applies to persons in the classified civil service, and the other applies to persons whose appointment is on probation, or persons known as "probationers." As section 12 appears to apply to persons in the classified civil service, it does not apply to appellant, under the facts of the present

case. The appointee, to whom section 12 applies, is not "in" the classified service until the probation period has expired by the running of the six months, or until the certification of the appointing officer prior to that time, as provided for by section 1 of rule 6 enacted by the commission. Section 4 (Id. par. 322) of the act provides that the commission shall make rules to carry out the purposes of the act, and for examinations, appointments, and removals in accordance with its provisions. Section 1 of rule 6 is set forth in the statement preceding this opinion. Section 2 of rule 6, providing that "if any probationer shall, upon fair trial, be found incompetent," etc., is also set forth in the statement preceding this opinion. The facts, fairly interpreted, show that appellant, when discharged, was a mere probationer, and not entitled to the hearing and investigation specified in section 12. This is so for the following reasons: The case was heard in the court below upon demurrer to respondent's answer. The object of such hearing was to determine whether the well-pleaded facts of the answer constituted grounds of defense to the petition. *Johnson v. Roberts*, 102 Ill. 655. A demurrer to a pleading admits the truth of the facts well pleaded, though it does not admit the conclusions sought to be drawn from them by the pleader. *Compher v. People*, 12 Ill. 290; *Greig v. Russell*, 115 Ill. 488, 4 N. E. 780; *County of Christian v. Merrigan*, 191 Ill. 484, 61 N. E. 479. Where, as is the case here, a demurrer is interposed to a pleading, which the court overrules, and the defendant elects to abide by the demurrer, the judgment thereupon entered is conclusive of the facts confessed by the demurrer; and no proof of such facts is necessary, other than that appearing upon the record. The facts alleged in the pleading are in such case admitted of record by the judgment of the court upon the demurrer. *Nispel v. Laparle*, 74 Ill. 306. The answer of respondent, the present appellee, alleged that after petitioner, the present appellant, was laid off, on or about April 1, 1901, as a clerk in the city collector's office, he was tendered reinstatement on or about June 26, 1901, which he declined and refused to accept, and that his waiver was duly accepted on or about June 26, 1901. Appellant, by his demurrer, admitted the truth of this allegation in the answer. Having thus declined and refused to accept reinstatement, he was thereby separated from the civil service, and could not claim any advantage from his prior employment by the city as clerk under civil service rules. The answer further alleges that on July 10, 1901, appellant entered into an open—not a promotional—examination for the position of chief clerk in the comptroller's office, passed the examination, was certified to the position January 28, 1902, and was appointed February 13, 1902, and that he was appointed, as a probational appointee, in accordance with section 1 of rule 6 above

referred to. By his demurrer to the answer, the appellant also admits the truth of this allegation. Upon the face of the record, therefore, he admits that he entered into an open, and not a promotional, examination, and that he was appointed as a probational appointee in accordance with section 1 of rule 6. Consequently his discharge is to be regarded as having occurred in pursuance of the provisions of section 10 of the civil service act, as already quoted, and of section 1 of rule 6, passed in pursuance of section 10. For the reasons thus stated, we are of the opinion that the first point made by the appellant, to the effect that he could only be discharged in pursuance of the terms of section 12, is not well taken.

2. Appellant, however, contends further that, even if the provisions of the statute and of the rules in regard to appointees serving on probation apply to his case, yet that section 1 of rule 6 is invalid and void. It is insisted, as a conclusion from the contention that section 1 of rule 6 is invalid, that no probational period has been fixed in accordance with the statute, and that for this reason no appointee can be discharged, except under and in pursuance of section 12 of the act. Section 10 of the act provides that the "appointing officer shall notify said commission of each position to be filled separately, and shall fill such place by the appointment of the person certified to him by said commission therefor, which appointment shall be on probation for a period to be fixed by said rules." It is said that, under this provision of the statute, the period of probation is to be fixed by the civil service commission in their rules; that they have no right to delegate the power thus to fix the period of probation; that, by the terms of section 1 of rule 6, such power is delegated to the appointing officer, or the head of the department or office in which a candidate is employed; and that for this reason the rule is invalid. We do not think that there is any delegation of the power conferred upon the commission to fix the period of probation. Section 1 of rule 6 fixes six months as the period of probation, and provides that at the end of this period the appointment shall be deemed complete if the conduct and capacity of the person appointed have been satisfactory. While six months is fixed as the maximum period of probation, two months is fixed by section 1 of the rule as the minimum period of probation. Although the period of probation is fixed at six months, yet section 1 of rule 6 provides that the appointing officer may complete the appointment at any time after the expiration of two months by certifying such completion to the commission. The object of having a period of probation is to determine whether the conduct and capacity of the person appointed are satisfactory, notwithstanding the fact that he has passed the required examination, and his appointment has been certified by the com-

mission to the appointing officer. If, after a period of two months, the appointee has demonstrated conclusively that his conduct and capacity are satisfactory, it would seem to be unnecessary to wait the full period of six months before completing the appointment. It would be impossible for the commission itself to test the capacity of the person appointed by observing his conduct and supervising his work. The duty of observing his conduct and testing his capacity, in order to determine whether both are satisfactory, properly devolves upon the officer under whom the appointee serves. The commission, in requiring the appointing officer to determine whether the appointee is capable of filling the position to which he is appointed, does not delegate to the appointing officer the power to fix the period of probation, but merely requires him to aid the commission by determining whether the conduct and capacity of the appointee are satisfactory, and certifying the same to them. The appointing officer is required by section 1 of rule 6 to certify "such completion" to the commission. That is, to certify to them whether, after having tested the capacity of the appointee for more than two months, he regards him as capable of filling the position. The commission may employ agents to do certain work without delegating its authority to fix a period of probation to such agents.

It is a well-settled doctrine that a legislative body cannot delegate its legislative authority, but it has often been decided that the Legislature may authorize many things to be done by others which it might properly do itself. *People v. Hoffman*, 116 Ill. 587, 5 N. E. 596, 8 N. E. 788, 56 Am. Rep. 793. In *Chicago, Burlington & Quincy Railroad Co. v. Jones*, 149 Ill. 361, 37 N. E. 247, 24 L. R. A. 141, 41 Am. St. Rep. 278, it was said that the Legislature might authorize others to do things which it might properly, but could not conveniently or advantageously, do itself. In *City of Chicago v. Stratton*, 162 Ill. 494, 44 N. E. 853, 35 L. R. A. 84, 53 Am. St. Rep. 325, it was said: "The Legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend." Section 6 of the civil service act (Starr & C. Ann. St. 1896, c. 24, par. 324) gives the civil service commission the control of all examinations of applicants for positions, but at the same time authorizes the commission to designate a suitable number of persons to act as examiners. So here the rule fixes the period of probation, both as to its maximum and its minimum length, but provides that that period may be abbreviated, in case the applicant demonstrates his capacity for the office within a time less than the maximum period fixed by the rule, and authorizes the appointing officer, to whom the name of the applicant has been certified, to determine the fact upon which

the final action of the commission is to depend. The completion of the appointment is not left to be effected by the appointing officer alone, but he must certify such completion (that is to say, the fact of the capacity of the person appointed) to the civil service commission.

We are of the opinion that there is no such delegation, by section 1 of rule 6, by the civil service commission, of its power to fix the period of probation, to the appointing officer, as is condemned by the cases referred to by appellant's counsel. The rule is not void as being the redelegation of discretionary power.

3. It is furthermore claimed on the part of the appellant that, before he was discharged, the consent of the civil service commission should have been granted thereto, but that, after he was discharged by the city comptroller, the consent of the commission was obtained. There is much force in the position thus taken by the appellant. Section 10 of the civil service act provides that, "at or before the expiration of the period of probation the head of the department or office, in which a candidate is employed, may, by and with the consent of said commission, discharge him upon assigning in writing his reason therefor to said commission." Clearly, under the terms of this statute, the head of the department or office must assign in writing his reasons for discharging an appointee, to the commission, and must have the consent of the commission to such discharge before he actually makes the discharge. The allegation of the answer in regard to this matter is somewhat obscure. Looked at from one point of view, it would appear that the appellant was discharged on March 31, 1902, and that such discharge was consented to and approved of by the commission thereafter on April 4, 1902. But looked at from another point of view, the allegation may be regarded as so far sufficient as to justify the court in overruling the demurrer thereto. The allegations of the answer show that the petitioner was notified of his discharge on April 5, 1902, by the civil service commission. If the discharge was not perfected until he received such notification, then the consent of the commission to his discharge preceded the actual taking effect of the discharge. Moreover, the answer avers that the appellee, the city comptroller, complied with all the requirements of the statute, and of the rules made in pursuance of the statute, in making the discharge. The answer avers that the appellee discharged the petitioner "in accordance with the civil service law and rules." The civil service law required that the consent of the commission should precede the discharge, and, if the discharge was made in accordance with the civil service law, it was made in accordance with these requirements thereof. Section 2 of rule 6 provides that "if any probationer

shall, upon fair trial, be found incompetent or disqualified for the performance of the duties of the position he is filling, the appointing officer shall certify the same in writing to the commission. Upon the approval of the commission such probationer shall be dropped from the service." The answer avers that the appellee assigned in writing his reason for the discharge to the civil service commission. It also alleges that appellant had a fair trial in the duties of chief clerk of the comptroller's office, and was found incompetent and disqualified for the performance of the duties of the position, and that appellee so certified in writing to the commission, and assigned in writing his reasons for the discharge of appellant to the commission. All these allegations of the answer are admitted to be true by the demurrer filed thereto by the appellant. If they were true, appellee complied with the statute, and with the rules of the commission, in making the discharge. By the terms of section 2 of rule 6, the discharge could not be fully completed until the commission approved of it, because the rule says that, "upon the approval of the commission, such probationer shall be dropped from the service." He is not properly dropped from the service until the commission approves of the act of dropping him or discharging him. It is fairly inferable from the allegations of the answer that this approval by the commission, which took place on April 4, 1902, preceded the actual dropping of the appellant from the service. If his discharge was complete on March 31, 1902, it would seem to be unnecessary that he should have been notified of the same by the commission as late as April 5, 1902.

Appellant makes severe criticism upon the effects, which will follow from permitting the appointing officer or the head of the department or office in which a candidate is employed to discharge a candidate in the manner specified in the statute and rules, although the discharge here under consideration is merely that of a probationer, or an appointee serving for a period of probation before the final completion of his appointment. Whether the provision of the statute is wise or not, the Legislature, in section 10, has certainly conferred upon the head of the department or office, by and with the consent of the commission, the right to discharge such a probationer upon assigning in writing the reason therefor to the commission. If this provision of the statute is not wise, it is for the Legislature to change it, and not for the courts to put upon it a different interpretation from that which the plain meaning of the words employed justifies.

For the reasons above stated, we are of the opinion that the circuit court properly overruled the demurrer to the answer. Accordingly the judgment of the Appellate Court affirming the judgment of the circuit court is affirmed. Judgment affirmed.

(205 Ill. 38)

EHLEN v. O'DONNELL.*

(Supreme Court of Illinois. Oct. 28, 1903.)

MASTER AND SERVANT—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—DEFECTIVE APPLIANCES—INSPECTION—RELIANCE ON MASTER'S DUTY—PLEADING—VARIANCE.

1. In an action for the death of a servant owing to the breaking of a ladder forming part of a scaffolding, that the declaration alleged that defendant "was possessed of and owned a certain ladder," and the proof showed that defendant had been possessed of the ladder, but the ownership was in doubt, constituted no variance, the ownership being immaterial.

2. An objection on the ground of variance cannot be first made on appeal.

3. Where a servant employed as a painter is directed by the master to use a certain scaffolding, it is not incumbent on the servant to inspect the scaffolding.

4. Where a master directed a servant employed as a painter to use a certain scaffolding, and the scaffolding broke, whereby the servant was killed, and in an action for the death the evidence showed the appliance defective, and that the servant had no knowledge thereof, it was proper to refuse to take the case from the jury.

5. A master directed a servant employed as a painter to use certain scaffolding. The servant deemed the scaffolding too short, and fastened some boards to it, so that they projected out about six feet. The scaffolding was supported by ropes attached to the ends of the original scaffold, and which broke, causing the servant's death. *Held*, that a contention that the use of the boards so changed the construction of the appliance that it was necessarily weakened was of no merit.

6. There is no error in refusing instructions fully covered by those given.

Appeal from Appellate Court, First District.

Action by Patrick H. O'Donnell, as administrator of the estate of John Schanne, against John C. Ehlen. From a judgment of the Appellate Court (102 Ill. App. 141), affirming a judgment for plaintiff, defendant appeals. Affirmed.

Rogers & Mahoney and Chilton P. Wilson, for appellant. Darrow, Thompson & Cross, for appellee.

RICKS, J. This is an appeal from a judgment of the Appellate Court for the First District affirming a judgment for the sum of \$2,500, entered in the superior court of Cook county in an action on the case brought by appellee against appellant. The errors assigned relate to the refusal of the trial court to give a peremptory instruction to find for the defendant at the close of all the evidence, and also to the giving and refusal of certain other instructions.

The evidence tends to show that appellant was a contracting painter. He had in his employ the deceased, John Schanne, who had been working for him several months prior to the accident which formed the basis of the suit. Some five days prior to the time of the accident complained of, the appellant di-

rected Schanne and another employé to go to the basement of his building and get a scaffolding used for painting, place such scaffolding in position upon a certain building, and proceed to paint said building. Schanne did as directed, but on reaching the building concluded the scaffolding was too short by about 6 feet, and thereupon procured some boards some 12 or 15 feet long, fastened them to the end of the scaffolding so that they projected out about 6 feet, and with the scaffolding in this condition proceeded in the performance of his duties. This was on the 9th of June, 1898. From then until the 14th of the month there was a continual rain, and work was interrupted, and during all this time the scaffolding was left hanging to the building some 30 or 35 feet above the sidewalk. On the morning of the 14th Schanne and another workman went to the building, climbed down from the top on to the scaffolding, and it almost immediately gave way, the men falling to the sidewalk, and both were killed. Immediately after the accident the scaffolding was examined, and found to be broken in two places about eight feet from the end. At the point where it broke there was an old crack in one stringer, and an iron band had been placed underneath the crack to strengthen the stringer. The evidence tends to show that the crack was covered with paint, so that it could not be seen without examination, and that the ends of the bolts securing this iron band had become so rusted that the nuts had been previously broken off, and thus permitted the bolts to pull through and the ladder to break. The evidence also tends very strongly to show that the stringers of the ladder at the place where the same broke had become decayed on the inside, which could have been told by an inspection, but not by casual observation.

Appellant contends that the peremptory instruction should have been given, because the allegation in the declaration is that the defendant "was possessed of and owned a certain painter's ladder," while the proof shows no more than that appellant had been possessed of this ladder for several weeks, and that the ownership thereof was in doubt. The duty of the master was to use reasonable care to provide his servant a reasonably safe scaffolding upon which to work. The evidence shows that this scaffolding had been in his possession six weeks or more, and had been used by him on various other jobs, and, so far as appellee was concerned, it was entirely immaterial who owned the ladder. This was not a question that was involved in the case. Aside from this, no objection was made upon the trial below that there was a variance between the evidence and the declaration which would have enabled appellee to have stricken out the words "and owned," and thereby been enabled to defeat the variance. Appellant therefore is not in a position to urge this objection here.

We think the court properly refused to

*Rehearing denied December 8, 1903.

¶ 3. See Master and Servant, vol. 34, Cent. Dig. § 714.

take the case from the jury, as the evidence tends to show that the appliance was defective, and that Schanne had no knowledge whatever of the defect. It was not incumbent upon the servant to inspect the implement which the master provided him upon and with which to perform his work, but he had a right to rest upon the assurance that the master would perform the obligations and duties which the law cast upon him to exercise reasonable care to provide him a reasonably safe scaffold upon which to work. The evidence tends to show that, had the master inspected this scaffold, he would have discovered the defective condition of the same.

Appellant further contends that Schanne, by placing the boards upon the end of the scaffold, so changed its construction that it was necessarily weakened. The only reasonable inference to be drawn from the evidence is that the scaffolding was supported by ropes attached to the ends of the original scaffold, and we are at a loss to perceive how this addition could in any way affect the strength thereof, or that it contributed to the accident.

We have examined the evidence submitted, and think that there is sufficient evidence that tended to support the declaration, and there was therefore no error in the court's refusal of the peremptory instruction asked.

The instructions to the jury given on behalf of appellee and complained of by appellant were proper instructions under the evidence, and we are unable to find any error of law stated therein. The refused instructions requested to be given by the court on behalf of appellant were fully covered by instructions given.

We are satisfied that there was no error in the Appellate Court sustaining the judgment of the trial court, and the judgment of the Appellate Court will therefore be affirmed. Judgment affirmed.

(205 Ill. 257)

STRAYER v. DICKERSON.*

(Supreme Court of Illinois. Oct. 26, 1903.)

EQUITY—REFORMATION OF DESCRIPTION—ABSENCE OF CONSIDERATION—MORAL OBLIGATION—LOVE AND AFFECTION—ANTECEDENT LEGAL LIABILITY—HOMESTEAD—ABANDONMENT.

1. Where a deed which is intended to convey one tract of land in fact conveys another, it cannot be regarded, in a suit to correct the description, as an executed conveyance of the tract intended to be conveyed, so as to give the grantee, who did not give valuable consideration, an enforceable equity.

2. A moral obligation arising from an antecedent legal obligation, the enforcement of which has been suspended by law, is a sufficient consideration to support a deed.

3. Where a man and woman were married in 1849, moneys received by him from her between such date to 1861 having been the absolute property of the husband, and that which he received from her between 1861 and 1874 not having been the subject of contract between

them, as until that time their power to contract with each other was not recognized by statute, the receipt of such money created no legal obligation to repay, suspended by law, out of which a moral obligation sufficient to support a deed to the wife could arise.

4. A widow sued to correct the description in a deed from her husband to her, claiming that he had intended to convey another tract; and though she testified she did not state that money advanced by her to him had been discussed relative to the giving of the deed, or regarded as consideration, but stated that the land was a gift, and the consideration recited in the deed was \$1 and love and affection, *held*, that the evidence failed to show that a moral obligation to repay the wife was regarded by the grantor as consideration.

5. Where the consideration for a deed from a husband to the wife is called in question, the presumption is that it was a gift or advancement, and the burden is on the grantee to show the contrary.

6. In a suit by a wife to correct the description in a deed from the husband on the ground that he intended to convey another tract, equity will not give relief in the absence of a showing of any valuable consideration.

7. Hurd's Rev. St. 1899, p. 868, c. 52, § 4, provides that no conveyance of a homestead thereof shall be valid unless subscribed by the wife or husband of the householder. *Held*, that a deed to property embracing the homestead in which the wife has not joined leaves the homestead in the grantor as though the deed had not been executed, and such estate may be transferred by sufficient conveyance or may descend to the heirs.

8. Hurd's Rev. St. 1899, p. 867, c. 52, § 4, relative to homesteads, provides that no conveyance of the estate shall be valid, unless duly executed, or possession is abandoned pursuant to the conveyance. *Held*, that if the grantee in a deed claims the benefit of the deed under the statute, upon the ground that the grantor had abandoned possession pursuant to the deed, it must appear that such abandonment was for the express purpose of giving effect to the deed, and not simply because another homestead had been secured.

9. Hurd's Rev. St. 1899, p. 867, c. 52, § 4, provides that the estate of homestead to the value of \$1,000 is excepted from the laws of conveyance, etc., and that no conveyance thereof shall be valid unless subscribed by the wife or husband of the householder. *Held* that, where a widow claims land which constituted the homestead under a deed from her husband in which she did not join, the burden is on her to show the value of the property in order to bring herself within the provision of the statute.

10. Hurd's Rev. St. 1899, p. 867, c. 52, provides that no conveyance of the homestead shall be valid unless duly executed or possession is abandoned pursuant to the conveyance in a suit by a widow claiming land under a deed from her husband in which she did not join, her bill referred to the land as the homestead, all witnesses so spoke of it, and there was no testimony showing that the grantor ever changed his residence from the premises. A will made subsequent to the conveyance spoke of testator's residence property in a certain city, "on which I now live," and a codicil spoke of the urban property as "my present home." *Held*, that there was no sufficient evidence to show such abandonment of the land as to give effect to the conveyance under the statute.

Appeal from Circuit Court, McLean County; Colostin D. Myers, Judge.

Suit by Leodicy Dickerson against Ade-

*Rehearing denied December 3, 1903.

¶ 6. See Reformation of Instruments, vol. 42, Cent. Dig. §§ 21, 22.

laide Strayer and others. From a decree for complainant, defendant Adelaide Strayer appeals. Reversed.

This bill was filed by Leodicy Dickerson to correct the description of the following described real estate, to wit: The west half of the north-east quarter of section 29, township 22, range 4 east of the third principal meridian, McLean county, Ill. The bill made Georgia Belle and Rosaline Dickerson, Cordella Patterson, Elizabeth Hobart, and the appellant, Adelaide Strayer, defendants, and was afterwards amended, making Fannie Dickerson defendant instead of Rosaline, her mother, who died during the pendency of the suit. The bill alleges that the complainant is the widow of the late Henry C. Dickerson, who during his lifetime owned and possessed several tracts of land; that on the 20th day of July, 1892, he, for a valuable consideration, intended to deed complainant the west half of the north-west quarter of section 29, township 22 north, range 4 east; that on that day he executed a deed to the complainant intending to convey the said tract of land, being the homestead, but by mistake made by the conveyancer the land was wrongfully described as being the west half of the south-east quarter of section 20. The bill then alleges that she and her husband, not knowing of the error made in the deed of September 2, 1898, conveyed by warranty deed the property described in said deed, with other lands, to their daughters, Georgia Belle and Rosaline. The bill also sets up the fact that Henry C. Dickerson died testate; that the will disposes of all of his property, both real and personal, but that the land in question was not mentioned in the said will; that from the time of the execution of the deed appellee has had control of the land, but is unable to convey or dispose of the same by reason of the said mistake.

Adelaide Strayer filed her answer, admitting that on the 20th day of July, 1892, as shown by the record, Henry C. Dickerson made a deed for the west half of the south-east quarter of section 20, township 22, range 4, and at the time of the execution of said deed he was the owner of the land, and that he had the right to convey it to complainant, but whether he intended to do so or not, or whether there was a mistake, she knows nothing, but presumes that he intended to convey the tract actually conveyed to complainant, and that she knows nothing of the deed to Rosaline and Georgia Belle Dickerson except what is shown by the record; denies that the deed of July 20th was executed for a valuable consideration, and avers that the same was a voluntary conveyance, and that if Henry C. Dickerson ever had an intention to make a deed for the lands in section 29 it was simply an intention to make a gift to complainant, which was never executed and which was without consideration, and therefore cannot be enforced in a court of equity; avers that the land in question is

vested in the heirs of Henry C. Dickerson, subject to the life estate of complainant.

The case was referred to the master in chancery to take testimony and report both conclusions of law and fact.

The will and deed having been offered in evidence, Wesley M. Dickerson testified that he lived in Maroa; that Henry C. Dickerson died May 20, 1899, leaving his widow and children, as set forth in the bill; that Henry C. Dickerson told him, before he died, that he had deeded the 80 acres of homestead in section 29 to his wife; that his wife had some money when they were married, and he just deeded her the 80 acres.

Leodicy Dickerson, the complainant, testified, without objection to her competency, that she knew about the making of the deed in 1892, and was present when it was made; that it was made at lawyer Packard's office, in Bloomington, Ill.; that her husband spoke of making it, and asked her to accompany him, and that they drove to Bloomington for that purpose; that the deed was made and acknowledged, and handed to her by her husband; that she then gave it to him to have recorded, which he did, and when the deed was returned it was again delivered to her by her husband, and kept by her from that time on; that she had about \$500 in money and land when they were married, in 1849; that the land was sold within five years of the marriage; that she afterwards received other money from her father's and mother's estates, which money had been on interest for 12 or 15 years, and amounted in all to about \$2,000; that the money so received from the estates was not received all at once, but was received in amounts along from time to time, and that her husband got this money and the benefit of the sale of the land; that after the conveyance of the 80 acres of land in question her husband rented it to renters, together with his land, except the last year before his death, when it was leased in her name. She was asked, "Now, at the time this deed was made, in 1892, did you pay Mr. Dickerson any money?" and answered, "Not on that occasion I did not; I did not pay it to him." She was further asked, "The intention was, Mr. Dickerson was going to give you this eighty acres of land?" and answered, "Yes, sir; of his own free will."

The deed sought to be reformed is as follows:

"This indenture witnesseth, that the grantor, Henry C. Dickerson, of the town of Leroy, county of McLean and state of Illinois, for the consideration of love and affection and one dollar in hand paid, convey and warrant to my wife, Leodicy Dickerson, of the town of Leroy, county of McLean and state of Illinois, the following described real estate, to-wit: The west half of the south-east quarter of section number twenty (20), in township twenty-two (22), north of range four (4), east of the third principal meridian, situated in

the county of McLean, in the state of Illinois, hereby releasing and waiving all rights under and by virtue of the homestead exemption laws of this state.

"Dated this twentieth day of July, A. D. 1892.

H. C. Dickerson. [Seal.]

"Witness: M. W. Packard."

"State of Illinois, County of McLean—ss.: I, Nathan T. Pusey, a notary public in and for the said county, in the state aforesaid, do hereby certify that Henry C. Dickerson, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person, and acknowledged that he signed, sealed and delivered said instrument as his free and voluntary act, for the uses and purposes therein set forth, including the release and waiver of the right of homestead.

"Given under my hand and notarial seal this twentieth day of July, A. D. 1892.

"[Seal.] Nathan T. Pusey,

"Notary Public.

"Filed July 20, A. D. 1892, at 10:35 o'clock a. m."

Belle Dickerson testified that the complainant was her mother; that she knows all about the transaction; that she is one of the defendants, and one of the parties to whom the 120 acres were deeded; that she heard her father say that he made a deed to the south 80 acres of the farm to her mother; that it was her right, and he wanted her to have it; that he referred to it as her land, and had the insurance changed in her name; that her mother had control of the 80 acres of land before her father died, and that since he has died she has had the full control; that she did not know about the mistake until about six weeks before the taking of the testimony, and that she was anxious that the correction should be made.

Fannie Dickerson testified that she lived in Maroa, and had heard her grandfather say many times that the 80 acres belonged to her grandmother, and that she ought to have a deed, and wanted the correction made. The evidence further shows that she was 16 years old at this time.

John Stapleton testified that he was attorney for Henry C. Dickerson for a number of years; that he was sick for some time before he died, and was not able to come to town; that he would send for him to come down and consult with him three or four years before, and told him about deeding 80 acres of his home place to his wife, and gave his reasons; that he was talking about making a will; that he wanted his land divided, and repeatedly after that spoke about this land of his wife's; that he concluded that while he had a will made to deed the balance of the farm to his two daughters, who were at home. "I made the will myself, and also the codicil to his will; it was his intention—was also so considered that his wife owned the south eighty."

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The second clause of the will of Henry C. Dickerson is as follows: "I will and bequeath to my wife, Leodicy Dickerson, all the residue of my property, both personal and real, for and during the term of her natural life, the proceeds thereof to be used by her for her benefit and living and for benefit and living of my daughters, Rose and Belle Dickerson, and my grandchild, Fannie, so long as they or either of them shall remain single and need assistance."

The third clause of the will is as follows: "It is my further will and desire that after the decease of my wife, Leodicy Dickerson, that my daughters, Rose and Belle Dickerson, shall have use of the residence property in Leroy, Illinois, on which I now live, for a home for them and Fannie, including all household furniture," etc., "contained therein, providing they remain as now and need same for a home."

This will was made February 17, 1893. In September, 1893, a codicil to this will was made, in the second clause of which the testator uses the following language: "In case I die before my beloved wife, the use, rents and profits of my present home, known as block fifty (50), also block forty-nine (49), both in Conkling's addition to the original town of Leroy, also the west twenty-two (22) feet off of the west side of lot one (1), in block seventeen (17), original town of Leroy, during her life, then," etc. This is the only evidence in the record showing that the testator had changed his residence from the time, in 1892, when the deed in question was made, to the time of his death. We have carefully gone through the record, and find that no witness stated where the testator did live from the time of the making of the deed until the time of his death, or at the time of his death. The land in controversy is mentioned by all witnesses as the homestead, and so designated in the bill.

The cause was referred to the master to take the evidence, and he made his report finding that the proof sustained the allegations of the bill. Among the special findings made by the master are the following:

"(10) I further find that complainant was married to said Henry C. Dickerson in the year 1849, and that soon after that time she turned over to him money and land to the amount of about \$500, and during the years following she turned over to him over \$2,000 that she had received from her father and mother's estate, which moneys Mr. Dickerson used in his business and in the purchase of land without ever repaying in cash any of same to her.

"(11) I further find that on the occasion of the taking of the deed from him to her in question in this case no money was paid to him by her, but he simply deeded this eighty acres of land to her of his own free will.

"(12) I hold, as a matter of law, that the general rule is that a court of equity will not

aid a mere volunteer to carry into effect an imperfect gift, and will do nothing to enforce the completion of a voluntary gift, but I hold that that rule does not apply to the facts of this case; that this transaction is a completed transaction, and that this bill is filed, not to complete a gift or even complete a conveyance, but simply to correct an error in a description; that all the essentials of a complete conveyance, including delivery of deed and actually taking possession of the land, are present in this case, but by mistake of the scrivener the deed delivered failed to describe the land actually conveyed; that in such case the grantee takes the equitable title to the premises, and may in a court of equity correct the faulty description.

"(13) I hold, further, that, even if it may be said that there is no valuable consideration for this conveyance, there was at least a meritorious consideration for this conveyance, and that a conveyance based upon such meritorious consideration will be aided, if necessary for its completion, by a court of equity; that a voluntary settlement fairly made is binding on the grantor, unless there is clear, decisive proof that he never parted, or intended to part, with the title, legal or equitable, and if he had retained possession of the deed it would have to be shown by him that the conveyance was not intended to be absolute, the presumption being much more favorable to the grantee in such conveyances than in ordinary conveyances, and the law recognizing clearly an exception in such cases.

"(14) However, I find that the consideration in this case may be said to be a moral obligation, arising from an antecedent legal obligation to pay back money and property received from the complainant, the enforcement of which obligation had been suspended by the operation of some positive rule of law, and hold, as a matter of law, that such consideration takes this case out of the class of cases denominated 'voluntary gifts,' and gives to this conveyance a sufficient consideration to call for the aid of a court of equity to complete the conveyance, even if the transaction is deemed to be incomplete because of the error in description."

To this report and finding of the master exceptions were made by appellant before the master, and by him overruled, and again made in the circuit court, and overruled by the chancellor.

Appellants offered no evidence. The cause was heard upon the bill, answers, and report of the master, with the testimony and exhibits accompanying the same.

The errors relied upon are that the decree is not supported by the evidence; that the court erred in overruling the exceptions to the master's report, and each of them; and that the court erred in rendering a decree for the complainant in the bill.

Tipton & Tipton, for appellant. John Stapleton, for appellee.

RICKS, J. (after stating the facts). The errors assigned in this case bring before us for review the entire record, and we are called upon to ascertain whether the evidence, under the law applicable thereto, makes such a case as will sustain the decree of the court below.

The question first presented for consideration is as to the character of the contract or deed upon which the relief is sought—is it an executed or executory contract? Appellee contends that it is an executed contract, and cites in support thereof *Chilvers v. Race*, 196 Ill. 71, 63 N. E. 701, and *White v. Cannon*, 125 Ill. 412, 17 N. E. 753. The cases cited are not in point and do not support the contention. In *Chilvers v. Race*, supra, a husband executed certain trust deeds for the benefit of his wife for life, and remainders to certain persons therein named. The person named as trustee was a party to and signed each of said deeds charging him with the trust, and the deeds were promptly recorded. The maker died, and the deeds were found among his papers. The only question there was the sufficiency of the delivery of the deeds and acceptance by the trustee to carry the estate to the remaindermen. The second case cited was where a husband and wife conveyed to a third party lands of the husband, with a verbal agreement on the part of the grantee that he would pay off certain claims against the land and reconvey the same to the wife. The grantee paid off the indebtedness, and was killed before making the conveyance to grantor's wife. The question was whether the heirs of White, the grantee, were entitled to be reimbursed for the money White had paid to take up the mortgage against the land. It was held that he was a volunteer, and was not entitled to subrogation, and that the money thus paid by him became an executed gift. Nor do we think any well-grounded case can be found holding that where a deed is made intending to convey one tract of land, but in fact conveys another not intended to be conveyed, it can be regarded as an executed conveyance of the tract intended to be conveyed, but not in fact conveyed. An executed contract is one in which the object of the contract is performed, and if the object of the contract in question, which appellee in her bill says was the conveyance of certain land in section 29, had been performed, she would have had no occasion to bring her suit. She was in possession of her land and deed, and nobody was interfering with either. But the deed she had was not for the land she had possession of and for which she claims it ought to be.

We are not without authority, however, upon the proposition, if authority were needed. In *German Mutual Ins. Co. v. Grim*, 32 Ind. 249, 2 Am. Rep. 341, the following language is used: "If, then, the deed had been made to Mrs. Grim as she claims it was intended to be, she would have occupied the position of a voluntary grantee, without a

valuable consideration; but if the conveyance did not describe the premises intended to be conveyed it would still have been inoperative, and for that reason would not have been an executed gift, and as the conveyance was merely voluntary it did not invest her with any equity which she could have enforced." When made for a sufficient consideration, such a deed is treated in equity as an agreement to convey the land intended to be conveyed, and performance enforced. *Willey v. Hodge*, 104 Wis. 81, 80 N. W. 75, 76 Am. St. Rep. 852. There was no trust created and no power conferred by the deed in question, and cases involving such questions have no application to the case at bar.

We are unable to see from the evidence in this case that there was a valuable consideration, or, in fact, that there was a consideration of any kind other than love and affection, and such consideration as prompted the husband to make gifts to his wife, and we think this a gift *inter vivos* which was attempted to be made by deed. The master did not find that a valuable consideration was paid. He did find there was no money paid as a consideration for the deed. He also found that the consideration "may be said to be a moral obligation, arising from an antecedent legal obligation to pay back money and property received from complainant, the enforcement of which obligation had been suspended by the operation of some positive rule of law." If this latter finding was supported by the evidence, there is abundant authority for holding such a consideration good. But we are unable to find in the evidence facts warranting the conclusion reached. The moral obligation sufficient to support the contract must have at some antecedent time been a legal one. *Hart v. Strong*, 183 Ill. 349, 55 N. E. 629. Complainant and the donor were married in 1849, at which time she had \$500 in land and money. The land was disposed of within five years of the marriage. From the time of the marriage to the close of the war, along at irregular intervals, various sums of money, no one of which was fixed, but aggregating \$2,000, were received by appellee from her father's and mother's estates and turned over to her husband. All the money that was received by the husband from the wife prior to 1861 was the absolute property of the husband, and that which he received between 1861 and 1874 could not have been the subject of contract between them, as until that time their power to contract with each other was not recognized by law in this state. *Thomas v. Mueller*, 106 Ill. 36. There was not, then, at the time of the receipt of the money, or of any part, by the donor from appellee, any existing legal obligation to pay it back, and there was therefore no antecedent legal obligation suspended by the operation of any positive law out of which the moral obligation could arise.

Nor does the evidence sufficiently show that

the moral obligation to repay this money so advanced by appellee to the donor was recognized by him to the extent of forming the consideration, or any part of it, for the conveyance in question. Appellee was allowed to testify, and she does not state that this money was mentioned in any way at the time of or before this conveyance. This was not a mere oversight, as she was particularly inquired of relating to the advancement of the money to her husband, and thus given the opportunity to say that, although on the occasion of the making of the deed she did not pay him any money, this money previously had of her by him was talked over between them, and it was agreed that it was to stand as the consideration, but, instead, appellee said that the intention of the donor was to give her the 80 acres of land of his own free will. This latter statement is supported by the deed itself; wherein the money consideration of \$1 is placed, coupled with love and affection, of which the latter would seem to have been the real consideration. It is hardly reasonable to suppose that if they had talked over the consideration from a money standpoint, and had agreed that he had received from her \$2,500 which he felt it his moral duty to pay, and that he was going to make the deed in question for that purpose, they would not have related the matter to the attorney who drew the deed, and seen that that sum appeared as the real consideration. It would rather appear that because she had given all to him he felt for her a greater and deeper affection than he might otherwise have felt, and that the increased love and affection for her were the inducing cause and consideration for the deed. This view is further sustained by the testimony of Wesley M. Dickerson, a brother of the donor, with whom he talked a number of times about the transaction, and stated in connection with it the fact of having had money from his wife when they were married, and a similar conversation with his attorney, who was appellee's attorney in this proceeding also, and with whom he talked about making the will, and in that connection told him that the homestead 80 had been deeded to appellee, and that he had land and property of her when they were married. But in none of these conversations did he say that the repayment of the money was the consideration for the deed. The deed being from the husband to the wife, the presumption is that it was intended as a gift or advancement, and the burden is upon the grantee to show the contrary. *Lewis v. McGrath*, 191 Ill. 401, 61 N. E. 135; *Smith v. Smith*, 144 Ill. 299, 33 N. E. 35.

The master further finds that a meritorious consideration, at least, was given, and in effect holds that this involves a voluntary settlement, and that such a settlement, when once made, is binding, unless there is clear, decisive proof that the donor never parted, or intended to part, with the legal or equita-

ble title. No authority is cited in support of this holding, and is not relied upon by appellee, so far as we can learn by her brief and argument. The rule, as it seems to be established in this state, is "that the court will not execute a voluntary contract, and that the principle of the court to withhold its assistance from a volunteer applies equally whether he seeks to have the benefit of a contract, a covenant, or a settlement." *Wadhams v. Gay*, 73 Ill. 415. This rule is quoted from 1 Story's Eq. Jur. § 433, where the question, after elaborate consideration, is thus resolved: In the early case of *Webb v. Alton Marine & Fire Ins. Co.*, 5 Gilman, 223, it was said (page 226): "It is a stern rule of equity that it will not decree the specific execution of a contract unless it is based on some fair and valuable consideration." And in the case of *Preston v. Williams*, 81 Ill. 176, which was a suit by the children to have the deed of the father corrected, after stating the rule as announced in *Webb v. Alton Marine & Fire Ins. Co.*, supra, the court said: "Upon the same principle it may be said that a court of equity might refuse its aid to rectify a mistake in a contract that is voluntary and without any consideration to support it, when a bill is brought against the party who executed the instrument." The above rule is further announced in *McCartney v. Ridgway*, 160 Ill. 129, 43 N. E. 826, 32 L. R. A. 555, and is supported by the unquestioned weight of authority, as the following will show: 14 Am. & Eng. Ency. of Law (2d. Ed.) 1046; *Willey v. Hodge*, supra; *Stone v. King*, 84 Am. Dec. 557; *German Mutual Ins. Co. v. Grim*, supra.

It is further urged by appellant that as the deed in question, according to the contention of appellee, was to convey the homestead of the donor and appellee, and, as appellee did not join in the conveyance or in the release of the homestead, the conveyance for that reason is void. By section 1, c. 52, of our Statutes, the estate of homestead to the value of \$1,000 is created and excepted "from the laws of conveyance, descent, and devise, except as hereinafter provided." *Hurd's Rev. St. 1899*, p. 867. By section 4 of the same act it is provided: "No release, waiver or conveyance of the estate so exempted, shall be valid, unless the same is in writing, subscribed by said householder and his or her wife or husband, if he or she have one, and acknowledged in the same manner as conveyances of real estate are required to be acknowledged, or possession is abandoned or given pursuant to the conveyance." In construing this act, we have held that, instead of being a mere exemption of an estate theretofore existing, it is the creation of a new estate known as the estate of homestead, and where the homestead property does not exceed \$1,000 in value the homestead estate embraces the entire title and interest, and that a deed to property embracing the homestead, in which the wife has not

joined, leaves the homestead estate in the grantor precisely as though the deed had not been executed, and that such estate may be transferred by sufficient conveyance or it may descend to the heirs. *Gray v. Schofield*, 175 Ill. 36, 51 N. E. 684. In the same case we also held that if the grantee in a deed claim the benefit of the deed, under the above statute, upon the ground that the grantor had abandoned possession of the granted premises pursuant to the deed, it must be made to appear from the evidence that such abandonment was for the express purpose of giving effect to the deed, and not simply because another homestead had been secured to which the husband and wife transferred their home.

In the case at bar appellee did not join in the execution of the deed made by her husband, through which she claims title to the premises in question. The record is silent as to the value of the premises. It is not shown whether the land was worth more or less than \$1,000, and, as the burden was upon appellee to bring herself within the provisions of the statute affecting such conveyance, she should have shown the value of the property. Nor is there any evidence in the record showing, or tending to show, an abandonment of the premises conveyed, for the purpose of giving effect to the conveyance, or "pursuant to the conveyance," as the statute requires. All the evidence that shows anything upon the subject or has any bearing in that direction shows that the property in question was the homestead at the time of the conveyance. It is so designated in the bill. It is so referred to by every witness who speaks in regard to it, and the attorney who drew the will tells of visiting the donor at his homestead in the country, after the making of the deed and before the making of the will. No witness testified as to where the residence of the donor was at the time of his death or at any time after making the deed in question, or that he ever changed his residence from the premises now in controversy to any other place. The only evidence in the record upon that subject is the recitals in the will, made in 1893, and in the codicil, made in 1898, in the first of which the testator speaks of his residence property in Leroy, Ill., "on which I now live," and in the codicil speaks of the property in Leroy, Ill., as "my present home." This being all the evidence, if this mere recital can be considered by the court as any evidence at all of the fact of the removal of the donor from the premises claimed by appellee, it is apparent it falls far short of such an abandonment as could give effect to the deed under the requirements of our statute.

There is not sufficient evidence in this record to warrant the decree rendered. In fact, we think the decree is so contrary to the evidence that it is our duty to reverse it, and it is accordingly reversed, and the cause re-

manded to the circuit court of McLean county for such further proceedings as equity and justice may require.

Reversed and remanded.

(205 Ill. 108)

TINKER et al. v. CATLIN.*

(Supreme Court of Illinois. Oct. 26, 1903.)

SURETYSHIP—NEGOTIABLE PAPER—EVIDENCE OF SURETYSHIP—SUFFICIENCY—STATUTES—INDORSEMENT—GUARANTY.

1. In an action against the indorsers on a note, evidence considered, and *held* not to show that one of the indorsers agreed with the others that if they would go on the note with him he would save them harmless.

2. Hurd's Rev. St. 1890, c. 132, § 3, provides that whenever the "principal maker" of any note shall die, and the creditor does not within a certain time present the note for allowance, the surety shall be released to the extent that the same might have been collected from the estate of the principal maker. *Held*, that there could not be a parol agreement between various indorsers on a note whereby the first should be "a principal maker" as to the others, and the second a "principal maker" as to those following, etc., which, by communication to the payee, would require him under the statute to follow the estates of each in the order named, in case of death, or lose the debt or release the sureties.

3. Where a note is made payable to the order of the maker and indorsed before delivery, the obligation is merely that of a simple indorser.

4. Where a note is payable to a specific person, all indorsers become guarantors for the payment.

5. Where, on the renewal of a note indorsed by several, the indorsers were all notified that in the giving of the general note they were to change their relation toward the holder, and were as to him to become makers instead of indorsers or guarantors, and they signed the note and gave further collateral security, there was a new contract between them, and hence any understanding between them when the first note was given, to the effect that one of them should stand as a maker to the others and save them harmless, was superseded.

Appeal from Appellate Court, First District.

Suit by Robert H. Tinker and others against Thomas D. Catlin. From a judgment of the Appellate Court (102 Ill. App. 264), affirming a decree dismissing the bill, complainants appeal. Reversed.

This was a bill for injunction filed by appellants, against appellee, in the circuit court of Cook county, August 3, 1894. A temporary injunction was granted, but on the hearing it was dissolved and the bill dismissed for want of equity. An appeal was prosecuted to the Appellate Court, where the decree of the circuit court was affirmed, and this appeal is prosecuted.

The bill alleged "that on April 6, 1891, the appellee, Thomas D. Catlin, commenced an action at law against appellants, Robert H. Tinker and F. G. Tibbits, and one Sidney A. Stevens, in the superior court of Cook coun-

ty, in assumpsit, to recover \$40,000, alleged to be due to said Catlin upon a promissory note executed October 1, 1890, due and payable six months after date, for \$34,290.05, said note being executed by Sidney A. Stevens and one Benjamin H. Campbell as principal makers, and orators as sureties; that said note was signed by orators as sureties for the payment of the indebtedness which had prior thereto been contracted by Sidney A. Stevens and B. H. Campbell; that at the May term, 1891, of said superior court, appellants appeared in said action at law and filed a plea in bar in said cause; that prior to the commencement of said suit at law, and on November 28, 1890, B. H. Campbell, one of the principal makers of said note, died, leaving an estate valued at about the sum of \$70,000; that on the 6th day of February, 1891, Augustus S. Campbell was appointed executor of the estate of said B. H. Campbell, and said estate was finally closed and settled in the probate court of Cook county on December 30, 1893; that said Thomas D. Catlin did not, during the two years the estate of said B. H. Campbell was being probated, exhibit his claim against the said estate, as in law and equity he should have done, and under the statute in such case made and provided he was compelled to do; that, had the said Catlin presented his said claim to the probate court according to the provisions of the statute, the same would have been fully paid and discharged, as said estate was fully able to pay said claim and discharge the same in full had the same been presented within the two years; that prior to the time of the signing and execution of the note upon which said suit was brought, said B. H. Campbell and said Sidney A. Stevens executed their certain promissory note to the said Thomas D. Catlin; that, to secure the payment of said note so executed by them as aforesaid, the said Stevens and the said Campbell hypothecated with the said Catlin a large amount of the capital stock of various companies; that said note was for the sum of \$35,000, and was executed on or about the 1st day of April, 1888, payable to the order of Sidney A. Stevens, and was guarantied by said Stevens and said Campbell, payable six months after date; that at the maturity of said note Stevens and Campbell did not pay the same, but gave a renewal note therefor, which renewal note was dated October 1, 1888, for the same amount, payable one year after date, and that said Campbell and Stevens hypothecated with said note, as collateral security, the same stock as with the former note, together with additional stock, as orators are informed and believe; that the said Catlin, as orators were informed by Campbell at the time, wanted further personal security, and to obtain the same Campbell applied to orators to sign said note as sureties, at the same time assuring orators that he, said Campbell, and the said Stevens, had

*Rehearing denied December 2, 1903.

¶ 2. See Bills and Notes, vol. 7, Cent. Dig. § 549.

placed with said Catlin collateral security sufficient to take care of and discharge said note, and in case there was any failure in this respect that he, said Campbell, would pay and take care of the same, so that orators would not be called upon in any event to pay said note; that their signatures were required for the sole purpose of pleasing the said Catlin, and not otherwise, as Campbell represented to orators that he was abundantly able to pay and discharge said note, which representation was true in substance and in fact, as at that time and at the time of the death of said Campbell he was worth more than half a million dollars, and was abundantly able to pay all his obligations, and able to discharge whatever obligations and claims were exhibited against his estate as provided by the statute; that the note sued on was a renewal note of the note given on the 1st day of April, 1888, as aforesaid, and at the time of the giving and signing thereof by orators the indebtedness specified and made payable was in fact the indebtedness of said Stevens and the said Campbell, and not of orators; that orators never received any consideration whatever on account of the execution or the signing of said note; that the entire consideration of said note went to and was received by said Stevens and Campbell, and that orators were accommodation signers of said note, and not principals, and their liability on said note was that of sureties, and not otherwise; that Catlin, in not presenting and filing his claim in the probate court against the estate of said B. H. Campbell within two years allowed therefor, thereby discharged and released one of the principal makers and the only responsible maker of said note for the payment of said debt, and that in law and equity, and under the statute in such case made and provided, orators are likewise released and discharged; that at the commencement of said action orators had no knowledge whatever of the intention of Catlin to release the estate of Campbell from the payment of said indebtedness, and that, while orators knew it was the duty of Catlin to file said claim in the probate court against the estate of said Campbell, they also knew and were advised that said Catlin had two years within which to file and present said claim, and therefore orators could not avail themselves of this defense in making defense to said action at law, and, notwithstanding orators used all diligence in the defense of said action at law within their power, yet judgment was rendered against them and the said Sidney A. Stevens on the 8th day of June, 1891, for the sum of \$18,169.93, from which judgment orators prosecuted an appeal to the Appellate Court, wherein, on the 4th day of March, 1892, said judgment was affirmed, from which said judgment of affirmance orators appealed to the Supreme Court, and the judgment of the Appellate Court was af-

firmed by the Supreme Court in a decision rendered and filed on the 19th day of June, 1894; that therefore orators were unable to interpose a defense to said action at law upon the ground that Catlin had released one of the principal makers of said note by failing to file his claim in the probate court against the estate of said B. H. Campbell, as in equity and law he was compelled to do."

The bill further alleges that execution had been issued upon the judgment so obtained against orators, and was in the hands of James H. Gilbert, sheriff of Cook county, to execute; that Stevens, one of the principal makers of said note, was insolvent and had no property subject to execution. Prayer was to require the defendants in the bill to answer without oath, and that the judgment so rendered against orators may be set aside and vacated, so far as they are interested therein and are liable thereunder, and that a temporary injunction be granted restraining Catlin, and Gilbert, the sheriff, from enforcing the collection of the judgment pending the suit, and that on the final hearing the injunction be made perpetual, and for general relief.

Afterwards appellants amended their bill by alleging that upon the appeals prosecuted to the Appellate and Supreme Courts from the judgment at law they had executed certain appeal bonds, in which orators appeared as principal makers, and one Charles C. Heisen and one George H. Cormack are sureties, and amended the prayer, asking for an injunction restraining the collection and prosecution of the suit at law, or otherwise, upon said appeal bonds. Afterwards, in June, 1890, appellants further amended their bill by striking out the prayer, and adding the further allegation "that, while they were and are mere sureties to and for the said Campbell upon the said renewal note of October 1, 1888, mentioned and described in the bill of complaint, and that as to them said Campbell was the principal maker of said note, and while said Catlin had at all times full and actual knowledge and notice of the character of the liability of orators, yet said Catlin wholly failed and neglected to institute any proceedings or take any steps of any kind against said Campbell, or his heirs or personal representatives, estate or property, to enforce the payment of said indebtedness, and, instead of thus enforcing the prior and primary liability of said Campbell and his personal representatives, said Catlin is seeking to compel orators to pay said note, and gives out that he will cast the entire burden of the payment of said note upon orators, and wholly release and discharge the personal representatives and heirs of said Campbell."

The bill then sets out the names of the heirs at law and devisees of said B. H. Campbell, and avers that they received from him and his estate real estate amounting to \$100,-

000, and personal property to the value of \$100,000, of which properties they became the absolute and unconditional owners by virtue of their heirship, and asks to make them parties defendant to the bill, and to require Catlin to proceed against them and require the heirs of said Campbell to make discovery of the estate, real and personal, that came to them as such heirs, and avers it is the duty of Catlin to collect said indebtedness from the heirs and devisees of said Campbell, and the duty of said heirs and devisees to pay said indebtedness and exonerate orators. The bill contains the further allegation "that, on information and belief, and some time after the maturity of the note of October 1, 1888, the exact date being unknown to orators, said Catlin promised and agreed to and with the personal representatives and heirs of said Campbell to wholly release and discharge the estate and heirs of said Campbell from all obligation and liability upon said note, and did promise and agree not to institute any proceeding of any kind or character against the personal representatives, heirs, or devisees of said Campbell to compel the payment of said indebtedness or any part thereof; that orators are unable to say whether the agreement was verbal or in writing, or the exact date thereof, or the consideration upon which the same was based, and charge that under and in pursuance of said agreement Catlin had wholly failed and refused to take any steps to procure the indebtedness from Campbell, or said personal representatives, heirs, or devisees; that, having no knowledge of such facts, orators were during the pendency of the suit at law unable to avail themselves of such matters as a defense in law to the action, as they had learned of the matters and agreement therein set forth within the last ten days."

This amendment was made June 15, 1890. The prayer was amended, requiring that all the defendants answer without oath, and that the judgment should be set aside and vacated so far as it related to orators; that the sheriff and said Catlin be restrained from collecting or attempting to enforce the collection of said judgment; that the injunction be made perpetual; that the heirs and devisees of Campbell be required to pay the indebtedness and relieve orators, and for general relief.

To the bill, as it existed before the last amendment, Catlin filed a plea, averring that while all the makers of the promissory note for \$34,290.05, mentioned in said bill, became, by said note, jointly and severally liable upon said note to defendant, Catlin, apparently as principal makers thereof, yet said Sidney A. Stevens, mentioned in the said bill, was, as to the other signers and makers of said note, the principal debtor upon and maker of said note, and the other three makers of said note were all sureties for and signed said bond at the request of and for the bene-

fit of said Stevens; that said B. H. Campbell was, equally with said complainants, a surety for Sidney A. Stevens, mentioned in said bill of complaint as amended, with respect to said note; that said B. H. Campbell was liable upon said note as surety for said Stevens, and not otherwise; and avers that said Stevens was, as between himself and the other makers of said note, the only principal maker of said note.

After the last amendment Catlin answered so much of the bill as related to the last amendment, and admitted that he did not institute any proceeding or take any steps against said Campbell or his heirs or personal representatives; denied that he threatened or had given out that he had or would cast the entire burden of said note upon the complainants, and wholly release and discharge the personal representatives and heirs of said Campbell; denied that Campbell was a principal in said note or liable before the complainants; denied that he at any time agreed to release and wholly discharge the estate and heirs of Campbell from all obligation and liability upon said note; denied that he did at any time promise not to institute any proceeding of any kind and character against the personal representatives, heirs, and devisees of said Campbell in order to compel payment of said indebtedness.

The Campbell heirs and devisees filed answer, and replication was filed, and the cause was heard and the bill dismissed. As to so much of the decree as dismissed the bill, and prayer thereof asking for relief against the heirs and devisees of Campbell, no error was assigned or insisted upon either in the Appellate Court or this court, and need not be further noticed in the consideration of this case.

Kretzinger, Gallagher & Rooney, for appellants. Bentley & Burling, for appellee.

RICKS, J. (after stating the facts). The evidence discloses that the litigation in question is the result of the following business transactions: On August 14, 1885, Sidney A. Stevens, of Chicago, borrowed \$15,000 of John R. Mitchell, and gave his note, due June 1, 1886, for the same. This note was indorsed by B. H. Campbell, and as collateral security for the payment of it Stevens gave to Mitchell 15 shares Chicago Safe & Lock Company, and 150 shares Citizens' Gaslight & Heating Company of Bloomington, Ill. This note was extended one year. The interest was paid to June 19, 1886, and \$10,000 of the principal paid October 27, 1886. On September 30, 1887, Sidney A. Stevens borrowed of one Kent \$35,000, to pay the \$5,000 balance of the Mitchell note and for other purposes, and gave a note to the order of the maker, due in six months, which was indorsed by Sidney A. Stevens, B. H. Campbell, and F. G. Tibbits, in the order named; and said Ste-

vens placed with one Thomas D. Catlin, to secure said note, \$6,000 Kokomo Gas 7 per cent. bonds, \$3,000 Consumers' Gas Company 5 per cent. bonds, 150 shares Citizens' Gaslight & Heating Company, 100 shares Chicago Safe & Lock Company, 30 shares Commerce Vault Company, 465 shares Chicago Mining & Reduction Company, 60 shares National Gaslight & Heating Company. The above note, payable to the order of Sidney A. Stevens, appears to have been taken up and exchanged for another note, dated September 30, 1887, for \$35,000, due one year after date, payable to Thomas D. Catlin, which note was indorsed on the back, "F. G. Tibbits, B. H. Campbell," in the order named, and with which the same stocks as in the last note above mentioned were placed as collateral. The interest was paid on the last-named note to October 1, 1888, and that note was renewed or taken up by the giving of another note payable to the order of Sidney A. Stevens, the maker, dated October 1, 1888, for \$35,000, accompanied by the same collateral as mentioned in the two previous notes, and indorsed by B. H. Campbell, F. G. Tibbits, R. H. Tinker, Sidney A. Stevens; and over their signatures, purporting to be for value, was a contract of guaranty. The note of October 1, 1888, was renewed January 1, 1890, by a note for \$35,000, due in six months, signed by Sidney A. Stevens, and indorsed on the back by B. H. Campbell, F. G. Tibbits, and R. H. Tinker, in the order named, and secured with the same collateral as above mentioned. The interest and a portion of the principal of this last note were paid by the sale and application of some of the collateral, and on October 1, 1890, a new note for \$34,290.05 was given to Thomas D. Catlin, due six months after date. This note purports to be a joint note, and is as follows:

"\$34,290.05. Chicago, October 1, 1890.

"Six months after date, for value received, we promise to pay to the order of Thomas D. Catlin the sum of thirty-four thousand two hundred ninety and 05/100 dollars at the Commercial National Bank, with interest at the rate of seven per cent per annum after date, having deposited with the holder as collateral security." (Here then follows a list of the collateral securities.)

"Sidney A. Stevens.

"B. H. Campbell.

"R. H. Tinker.

"F. G. Tibbits."

Prior to the making of the last note in question, Catlin, through his attorney, Towne, demanded payment and refused a further extension; but it was finally agreed that if all those who had formerly been indorsers upon the previous note would become makers of the note in question, and \$10,000 additional collateral security should be placed with the note, the debt might be extended for six months more. Campbell, one of the parties to the note, put up the \$10,000 additional se-

curity by pledging 100 shares of the Northwestern Safe & Trust Company stock.

The allegation of the bill that the indebtedness was that of Sidney A. Stevens and B. H. Campbell, and that Campbell, because of his relation to the debt, was an original maker of the note, and as having received any portion of the money for which the note was given, as a loan, was abandoned after the evidence was all in, and it was expressly stipulated by the parties "that Sidney A. Stevens was a principal as to all the other signers, namely, B. H. Campbell, R. H. Tinker, and F. G. Tibbits, and that each was entitled to exoneration from the said Stevens." It may well be doubted whether they are any allegations in the bill that would support any other theory of the case than that which was expressed by the above stipulation. Appellants point out in their brief the following allegation: "Orators further charge and represent that, while they were and are mere sureties to and for the said B. H. Campbell upon the said renewal note of October 1, 1888, mentioned and described in this bill of complaint, and that as to the complainants the said B. H. Campbell was a principal maker of said note, and while the said Thomas D. Catlin had at all times full and actual knowledge and notice of the character of the liability of orators, yet the said Thomas D. Catlin wholly failed and neglected to institute any proceedings or take any steps of any kind or character against the said B. H. Campbell, or his heirs or personal representatives, or estate or property, to enforce the payment of said indebtedness," etc. That allegation is not with reference to the note that was sued on, but was in regard to the note of 1888, which is therein designated as "said renewal note of October 1, 1888." After that note was given, at least two other notes were given with reference to and forming a part of this transaction, and the allegation, upon looking at the whole bill, was upon the theory of the relative position of the names of the indorsers upon the note of 1888. It is too well understood to need more than the mere statement, that the proofs must support the allegations of the bill, and that parties cannot have relief by making one case by their bill and another by their evidence. We are disposed, however, to consider the case upon its merits, accepting the view of counsel for appellants that the allegation above mentioned may be broad enough to authorize relief, if established by the evidence.

The duty of Thomas D. Catlin, if any, toward appellants, arose from the statute, which is as follows: "Whenever the principal maker of any note, bond, bill or other instrument in writing shall die, if the creditor shall not, within two years after the granting of letters testamentary or of administration, present the same to the proper court for allowance, the sureties thereon shall be released from the payment thereof to the

extent that the same might have been collected of such estate if presented in proper time; but this section shall not be construed to prevent the holder of any such instrument from proceeding against the sureties within said two years." Hurd's Rev. St. 1899, c. 132, § 3. Unless appellants have brought themselves within the terms of this statute, it is apparent they are not entitled to the relief prayed, or any relief.

Appellants have admitted of record that B. H. Campbell was not a principal maker of the note in the ordinary acceptance of that term, and their position is, first, that B. H. Campbell promised and agreed with appellants that if they would go upon the note with him he would save them harmless, or would take up the note so owed by Stevens, and held out and entertained and expressed the opinion that the collaterals were ample security; second, that in the original notes, of which the note sued on and in question was a renewal, their names appeared in certain order with reference to the name of B. H. Campbell, or in other words, that their names appeared under his name, and that they were all indorsers, and that the liability was in the order of indorsement, and that the renewal notes did not in any manner change that liability.

With reference to the first position, it is our view that there is not a particle of evidence in this record to support the allegation in so far as it relates to appellant Tinker. The \$35,000 was borrowed in 1887, and a note for that amount was executed, with Stevens as maker and Campbell and Tibbits as indorsers. R. H. Tinker was not a party to that note. It was not paid, but was renewed October 1, 1888, and Tinker appears on the note of October 1, 1888, for the first time in the transaction as an indorser. The manner in which Tinker became a party to that note is stated by himself as follows: "I indorsed a note at the request of Sidney A. Stevens. Had a very brief conversation with him in reference to it. It occurred in the Commercial National Bank of Chicago. We met by chance at the entrance to the Commercial Bank as he was going in his office. I was going there also. I was not going to see him in reference to any business. I had had no conversation with him in reference to signing or indorsing the note, or with any one, and had received no letter. Mr. Stevens told me that he had a note, amply secured and amply indorsed, which was falling due, and the holder of the note desired him to give additional indorsement or security, and he asked me if I would be willing to indorse the note, and I looked at it and gave him my indorsement. I had not met Campbell, and had no conversation with him, before that time. I had no conversation with F. G. Tibbits in regard to the note before that time."

The next note signed by this witness was that of January 1, 1890, which was a renewal

of the note just above mentioned, and of this Tinker says: "I remember signing note of January 1, 1890, described in that letter. I signed it at the request of Sidney A. Stevens. I think it was in the same form as the note of October 1, 1888, except in the matter of the change of date. I understood it to be a renewal. It was so represented to me by Sidney A. Stevens. I received no consideration for signing it. When I signed the second note the names of Campbell and Tibbits were on it. I had no conversation with Campbell or Tibbits before indorsing second note." As to the note sued on, Tinker said: "I signed that note in Towne's office, in Chicago. I went there with Sidney Stevens at his request. We met to effect a renewal. I don't remember of meeting Campbell at that meeting. Tibbits and I went together with Stevens. Nothing was said, except that Towne had arranged an extension—that Catlin insisted upon our becoming makers instead of indorsers. I signed this last note on that day. Towne asked for additional security, and I don't recall now what he suggested, but Campbell said he would add one hundred shares of some stock. He did add such collateral then and there. I received no consideration for signing this last note. Towne made the suggestion of having the note put in its present form. He was acting for Catlin. I received no consideration of any kind in this transaction from any one. There was no agreement, in writing or orally, with Campbell in reference to our liability between ourselves as to the debt. The matter was never talked over between us. There was no correspondence. I understood the last note was a renewal or extension of the former notes. The first time I met Campbell was at the signing of this last note. I don't recall any further conversation in reference to this transaction that occurred in the meeting in Towne's office in my presence and hearing. I was not present when this printed form of guaranty was stamped on the note of October 1, 1888. I had no talk with any one in reference to that. I never consented to having this put on there. I don't remember of ever having any conversation with Jamieson in reference to the transaction. My best recollection is that my only talk with Campbell is what occurred at that meeting in Towne's office. I don't know that I ever saw Campbell. I never had any conversation with him touching this subject."

From this explicit and clear statement of appellant Tinker it is apparent that there was no contract or agreement between him and Campbell other than that arising by operation of law from their indorsement and signatures to the various notes that were executed from time to time in this transaction. Nor do we think appellant Tibbits has established, by the evidence, any such contract as would create the relation of principal maker and surety between him and Campbell. Tibbits lived at Milwaukee, Wis., and

his name first appears on the \$35,000 note made September 30, 1887. He had been many years a friend of Stevens. They had roomed together 10 years, and had kept up a social and business acquaintance from boyhood. When the \$35,000 was borrowed, Stevens wired Tibbits that he was coming to see him, and on the evening of the 29th of September, 1887, he did go to Milwaukee to Tibbits' home. There they had a conversation, which Tibbits relates as follows: "He said Mr. B. H. Campbell is a rich man; is the president of the company, and has offered to indorse for a large amount of money, in view of the collateral which he had, which would make the note good. He showed me the title to the collaterals, amounting to considerably more than the amount he required. Besides that, Campbell was a man worth some \$300,000 or \$400,000. Campbell's indorsement was on the note when I indorsed it. I indorsed the note that afternoon, when Stevens came from Chicago, at the request of Stevens. Before that I had no conversation with Stevens in reference to the note." Witness had no conversation with Campbell in reference to this note of September 30, 1887, the first one signed by him, until it had matured.

The evidence shows that when Stevens borrowed this \$35,000 he arranged for it for a year, but gave his note for six months; that it was understood that it should be renewed or extended if he was not ready to pay it then. About the time it matured Stevens found that he would not be able to pay it, and arranged to have it extended, and the new note was dated of the same date as the first note that was signed by Tibbits, and was for a year instead of six months. On February 15, 1888, Stevens sent the renewal note, of date September 30, 1887, for the \$35,000, to Tibbits in a letter, in which he said: "Enclosed I send you my note for \$35,000, one year from date. The note you and Mr. Campbell endorsed, it showed six months in it, and the last I made was for one year. Besides, I paid the brokerage for one year, and so am entitled to the time. Mr. Campbell told me he would endorse the year paper, and so I wish to ask you to do the same. The same collateral is in the year note that was in the six months note, and it is in every respect the same, except the additional time. I will be greatly obliged if you will do this."

Appellant Tibbits testified that he received the above letter and the note inclosed; that he signed it and took it to Chicago and delivered it to Stevens, and that he and Stevens then went over to Campbell's office. Tibbits says: "I complained because his [Campbell's] name was not on before mine. He then turned to me and said, 'Mr. Tibbits, don't be alarmed about that note; I will take that note up and pay it myself; take the securities.'" Campbell, at the time of this renewal, signed his name under the name of ap-

pellant Tibbits. That note ran until October, 1888, when it was again renewed for \$35,000. Of this note Tibbits says: "This note of October 1, 1888, was a renewal of the note made by Stevens at the time he requested me to indorse it. He spoke of having an understanding; that it was agreed about, and he wanted my indorsement. My recollection is that the names of Sidney A. Stevens and B. H. Campbell were on the note when I indorsed it. Mine was the other indorsement."

At the time of this renewal and indorsing there was no conversation whatever between Tibbits and Campbell. The note was again renewed January 1, 1890, and all these parties signed it as indorsers or sureties, and at that time there was no conversation between the various parties who were sureties, but each of them signed at the request of Stevens, the maker. The note was not offered in evidence. It seems to have been lost or mislaid, and it is uncertain whether it was payable to Catlin or to the order of Stevens; nor, except as an indistinct memory on the part of those who signed it, was the manner of the indorsements, or the order thereof, shown.

When the note executed January 30, 1890, matured, Jamieson & Co., bankers, wrote the maker and all the indorsers, of date September 1, 1890: "We have for collection a note, date January 1, 1890, at six months, for \$35,000, signed by Sidney A. Stevens, endorsed and guaranteed by B. H. Campbell, F. G. Tibbits and R. H. Tinker; collateral [here giving list of collateral as described in note]. The note is past due and unpaid, and we have been instructed by the holder of same, Mr. T. D. Catlin, to demand payment of you." About the same time Stevens wrote the sureties, asking permission to sell a part of the collateral that was held for the note of January 1, 1890, and to apply the proceeds upon that note. Permission was granted, and the sale was made, and the debt, on October 1st, was reduced to \$34,290.05. The parties did not pay this note of January, 1890, and were having difficulty about arranging for it, and Catlin was insisting upon payment and threatening suit, when Stevens, on October 1, 1890, wrote Tibbits: "Yesterday I saw Mr. Catlin, and he agreed to call off his dogs until October 15, if Mr. Campbell and you and Bob would become the makers of the note instead of endorsers and guarantees, as is the case now. The note will be made to my order and I endorse and guarantee it. This will put it off for one year and save just so much trouble. The reason for making this change is in appearance only, and not in fact. The guarantor is in fact the maker, only the other looks better and helps its sale. Please let me know when you come, and set time and place for meeting you." It is true, Tibbits says he was a mere indorser upon the note of January 1, 1890, but the letter from the bank and the

letter from Sidney Stevens, both introduced in evidence by Tibbits, tend very strongly to show that he bore the relation of a guarantor.

This note remained unpaid until in November, when Stevens, Campbell, Tibbits, and Tinker met at the office of Mr. Towne, in Chicago. Towne was the attorney for Catlin, and insisted upon immediate payment of the note, or proposed that if a change of the amount of collateral was added, variously stated from \$20,000 to \$30,000, and the parties would all become makers of a new note, six months more time would be given. All the parties were anxious for this extension, as none of them were in condition or ready to pay the note. Campbell said that he would put up \$10,000 additional security, and Tibbits said that he had stock in a Mexican mine, on deposit in the Chicago Trust Company, and he was willing to put up 2,500 shares of that, or if a sale was perfected, which was then being negotiated, that he would put up \$10,000 of the proceeds. Arrangements were finally made by which all of them did sign a note payable to Catlin six months after October 1, 1890, and Campbell did put up the additional \$10,000 in stock. Tibbits was not called upon, and did not put up the stock that he had proffered. Tibbits testified that at the meeting at Towne's office Catlin was there, and before the meeting he (Tibbits) had been to Campbell's office and had a conversation with Campbell, in which the latter said: "Well, I suppose we have got to obtain an extension of that note again. I can't make a change of my money affairs to take up that note now." Tibbits further says: "Stevens did not add to the encouragement at all. He said he was unable to pay it. Campbell said, 'I suppose Catlin will ask for some additional security.' I said, 'Mr. Campbell, I have no securities now that I could put up.' 'Well,' he says, 'I have told you, and I still maintain, that I will take care of that note—that you shall be free from it.' I said, 'How is that going to work? Now, we have got to settle this thing some way.' He said he would put up some additional security and get an additional extension, and by that time 'I will be able to make a turn.'" He says they then went to Towne's office, and he thinks Catlin was there, and that he had a conversation with Catlin and repeated to him what Campbell had told him, and that Campbell had agreed to guaranty him against liability on the note. No other witness recollects of Catlin being present at that conversation, and there is very strong documentary evidence offered by Tibbits contradicting him in that regard. The testimony of both Tibbits and Tinker is that at that conversation on November 24th, when they were trying to arrange for the renewal of the note and to complete the execution of the note that is now in controversy, Towne said he would submit the matter to Mr. Catlin,

and if it was satisfactory to him it would be accepted. If Mr. Catlin was present and took part in the transaction there could be no occasion for the remark that the matter would be submitted to him. He had his counsel there, and the arrangement was being made, the additional security given, and the change in the former note agreed upon and the note executed. And as contradicting Tibbits, is a letter dated November 25, 1890, which was the day after this meeting at Towne's office, in which Stevens wrote Tibbits: "I have only a moment in which to write. Mr. Catlin accepted the offer made yesterday by Mr. Campbell, and the note is extended for six months from October 1, and is due April 1. I shall now make every effort possible to sell my collateral and get the amount down to the figure we talked yesterday. Mr. Campbell paid Mr. Towne \$200 to-day and wants to be reimbursed. This I should pay, but must have a little help at this time. Please send me one-third and I will write to Bob to do the same, and will in a little while pay him my one-third. He was very much gratified at your offer to send him a paper giving him the right to \$10,000 of the amount received from the twenty-five hundred shares in escrow in the Chicago Trust Company."

It seems strange, indeed, if Mr. Catlin was present when this note was drawn up and this agreement was made, and with his attorney, that it should have to be delayed a day before it could be ascertained whether he would accept the new note and the additional securities. Another circumstance tending to contradict Tibbits is a letter of November 24, 1890, the same day of the meeting, written by Stevens to his brother, and introduced in evidence by appellant Tibbits, in which it is said: "Messrs. Campbell, Tibbits, Tinker and I met Mr. Towne at his office this morning. After considerable talk Mr. Towne, in view of the present stringency in the money market, said he would give a six months' extension of the Catlin claim if Campbell would put up \$30,000 in security as additional collateral. This Mr. Campbell said he could not do. Then Mr. Towne reduced the amount to \$20,000, and Mr. Campbell said he would put up \$10,000 of this present stock, and that was the best he could do. Mr. Towne said he would submit it to Mr. Catlin."

By the letter of November 25, 1890, from Stevens, the maker, to Tibbits, Tibbits was expressly advised that Campbell, who he now claims was the principal maker of the note as to him, had paid \$200 to Towne for his services as attorney in procuring the extension, and Stevens' proposition was that Tibbits, Stevens (the maker), and Tinker should each pay one-third of that \$200 back to Campbell, thus leaving Campbell to pay no part of the \$200 which he had advanced Towne. Tibbits testifies that he did send one-third of

the \$200 so called for by that letter to be paid back to Campbell. There is no possible way of reconciling Tibbits' conduct then with his present contention that Campbell was the principal maker of the note as to him, and had agreed to take care of the note and protect himself with the collateral securities. The most natural thing for Tibbits to have done, if his present contention had been correct, and when the parties were all alive, would have been to have written both Stevens and Campbell declining to pay any part of it, and reminding Campbell of his undertaking to save him harmless in the transaction.

Assuming, however, that Catlin was present at the meeting when the note was drawn up, and that Tibbits did have a conversation with him, as asserted, we are still unable to say that, within the meaning of the statute, there was anything that took place between Tibbits and Campbell, or that was communicated from Tibbits to Catlin, that would make Campbell a principal maker of the note. The statutory requirement is: "Whenever the principal maker of any note * * * shall die," etc. The term "principal maker" of a note, within the meaning and intention of that statute, would seem to be the person who would have been the party to the note had there been no sureties or indorsers. In other words, he would be presumed to be the person who received the consideration for making the note, and, in a case where it is made for money loaned, it would ordinarily be the person who borrowed the money. It is true, there may be more than one principal maker to a note. Two persons might borrow the money, but ordinarily that does not occur unless the persons bear the relationship of partners. It is unusual for two persons to borrow a sum of money and undertake in some manner to divide the money between themselves, and each of them be a principal maker upon the note; but such transaction might be had, and, if it were, those borrowing the money would, as the term is commonly understood, be the principal makers of the note. But we are unable to concur in the contention that a number of sureties may, by arrangement between themselves, constitute each but the last, with reference to all the others, a principal maker of a note. We are unable to admit the contention that there could be a parol agreement by which Campbell was a principal maker as to Tibbits and Tinker, and that Tibbits and Tinker could make a parol agreement by which Tibbits could be a principal maker as to Tinker, and that each of these oral contracts could be communicated to Catlin, the holder, and he would be required, under this statute, to follow the estates of each in the order named, in case of death, or lose his debt or release the sureties.

In the construction of statutes, terms and

expressions there used are given their ordinary and common significance, and to hold that the term "principal maker" means just any party to a note who by some oral and extraneous agreement bears a different relation to the note than another, or bears a relation by which, as to some other, he becomes first bound for the debt, or would be deprived of his right of contribution in case he should pay the note—to hold such as these to be principal makers, within the meaning of the statute, would be to stretch terms, and give the expression "principal maker" a meaning that would add great uncertainty to commercial paper, and leave the holder thereof in a condition that he could seldom know, if there were sureties on it, what his rights were.

It is further urged that these notes being renewals, one of the other, the relation of these parties was fixed by their first undertaking upon the first note, and that the subsequent changes did not change their obligation or their relation to each other. In other words, as we understand the contention, it is that, inasmuch as the first note was made payable to the order of Sidney Stevens, and B. H. Campbell indorsed the note, and Tibbits became the next indorser, and Tinker the next, by the contract of indorsement Campbell stands simply as a first indorser, and is bound to hold both Tibbits and Tinker harmless and pay the note. One difficulty with this contention is that Tinker was not upon the first note signed by Tibbits, and there are many more reasons for rejecting the conclusion here contended for. Several of these notes were made payable to specific persons, and by the indorsement on the back thereof by Tibbits, Tinker, and Campbell, they became guarantors and not mere indorsers. *Blatchford v. Milliken*, 35 Ill. 434. It is not even shown by the evidence how the note of date January 1, 1890, read, or to whom it was payable. It is true that if a note be made payable to the order of the maker, and be indorsed before delivery, such obligation is that of simple indorser. *Blatchford v. Milliken*, supra. It is also the rule in this state that, if a note is payable to a specific person, all indorsers become guarantors for the payment, and there is no question, under the evidence in this case, but what these parties bore both of these relations, at various times, upon the notes in this series. But that contention, it seems to us, must fall within the reasoning of the other contention that, even conceding the position taken by appellants, that ordinarily where notes are renewed for the same debt the persons who are indorsers stand in the same relation that they did at the first. no such arrangement as that could make, nor could the application of such rule make, such persons, or any of them, principal makers of the note within the meaning of the statute, or place an additional obligation upon the

(205 Ill. 191)

RYAN v. HAMILTON.*

(Supreme Court of Illinois. Oct. 26, 1903.)

CONTRACTS—RESTRAINT OF TRADE—AGREEMENT NOT TO PRACTICE MEDICINE—TERRITORIAL LIMITATION—EQUITY—CONSIDERATION—EVIDENCE—SUFFICIENCY.

holder of the note, by virtue of our statute, than would arise ordinarily between maker and surety. Furthermore, it must also be borne in mind that Tibbits had signed two of this series of notes before he ever saw Campbell, and at the time he claims that Campbell agreed to save him harmless he was already on the note and the note in the hands of Stevens for negotiation. There is no pretense that he paid Campbell any consideration for this contract of indemnity, or that such contract did in any manner induce him to sign the note that he had already signed. But whatever the relation of these parties may have been to this series of notes up to the time of giving the last note, it cannot be seriously contended that it was not within their power to change their relation and assume a new relation in regard to it, if they saw fit to do so. These parties were all notified, when the note of January 1, 1890, matured, and before and at the time the note in question was made, that they were to change their relation toward the holder and payee of that note, and were, as to him, all become makers instead of indorsers or guarantors, and were, in addition thereto, required to give further collateral security, and this they did, as evidenced by the signing of the note and as shown by the undisputed testimony. This was a new contract made between all the parties advisedly, and was expressly understood by all of them as the condition upon which a further extension of payment of the debt would be made, and the extension of the time of payment was a sufficient consideration for the new relation. Under such state of the case we are unable to yield to the contention that these parties, so far as Catlin, the holder of the note, is concerned, bore any other or different relation to it than that ordinarily held by makers of notes. It is true, they could show that they were sureties and that Stevens was the principal maker, and if they could have shown that Catlin, the payee, did anything that under the law would release a surety, they had a right to show that—and such was one of the allegations of the bill, that Catlin had released, and had agreed to release, Campbell and his estate. The allegation was imperfectly and badly made, and was wholly lacking in proof, and was abandoned.

The views expressed hereinabove make it unnecessary to go into the discussion of the liability of appellants on the appeal bond. Their contention in their bill and argument is that the appeal bonds are mere incidents to the judgment, and, if the court should set the judgments aside, the right of recovery on the bonds would be lost and their collection should be enjoined.

We think the circuit court properly dismissed appellants' bill, and the judgment of the Appellate Court affirming that action is affirmed. Judgment affirmed.

1. A contract whereby a physician agrees not to practice medicine within a certain territory, where the territorial limitation is reasonable, and there is a legal consideration for the restraint, is valid, and enforceable in equity, and relief by injunction is proper to restrain a violation thereof.

2. On an application for an injunction to restrain violation of a contract whereby a physician had agreed not to practice medicine within certain territory the court will not inquire as to the adequacy of the consideration, but the contract will be upheld if a legal consideration appears.

3. In a suit to restrain a physician from a violation of an agreement made by him not to practice medicine within certain territorial limits the defense was lack of consideration. It appeared that defendant had been in partnership with another physician, and that the latter determined to specialize, and that the partners had been considering entering on special work as a firm; that word had been sent to plaintiff that the business was for sale, and he had purchased the interest of the retiring physician on the understanding that he should not practice within the territory in question; and, according to the testimony of plaintiff, the contract involved was then executed with the other partner, though he denied that such contract was executed until afterwards. There was evidence that defendant, in speaking of the transfer of the business, had said that the "firm" had sold its business, and it appeared that on desiring to re-enter general practice he had made plaintiff an offer to repurchase. Subsequently the two partners engaged in special practice. *Held*, that there was consideration moving to defendant, inasmuch as defendant was to be benefited by carrying out his design to become a specialist and practice with his former partner.

4. A contract between physicians provided that one of them should no longer practice medicine within certain territorial limits, unless forced to return because of unforeseen circumstances, in which event he should repurchase from the other party; and in a suit to enjoin the physician from practicing contrary to his agreement it appeared that after the contract he had gone into business at another city for a time, but, not being successful, then desired to form a partnership with the other party to the contract, offering \$780 for an interest therein. *Held*, that the evidence did not show that defendant had been forced to return to the scene of his former practice.

5. Where a contract between physicians provided that one of them should cease the practice of medicine within certain territorial limits, and should not resume the same unless forced to do so by unforeseen circumstances, and in a suit by the other to restrain violation of the contract the bill alleged that defendant was not forced to return because of unforeseen circumstances, such allegation did not place on plaintiff the burden of proof on the allegation, it being in the nature of a negative allegation, the proof of which rested within the especial knowledge of defendant.

6. A member of a firm of physicians sold out his interest therein to plaintiff, and the other partner contracted with plaintiff not to prac-

*Rehearing denied December 3, 1903.

¶ 1. See Contracts, vol. 11, Cent. Dig. §§ 556, 560, 566; Injunction, vol. 27, Cent. Dig. § 122.

tice medicine within certain territorial limits, the consideration for such latter contract being plaintiff's purchase, and that the partner making the latter contract might be enabled to carry out the purpose of becoming a specialist and continuing in business with his former partner. *Held*, that a contention that the latter contract was lacking in mutuality in that it did not provide anything to be done by plaintiff was without merit, since there was nothing that could be put into the contract that was to be done by plaintiff.

7. The true consideration for a contract or agreement may always be shown, whether it appears from the contract or not.

8. A contract whereby a physician agreed not to practice medicine within certain territorial limits was valid, though the consideration was not a money one.

9. A contract required a physician to cease the practice of medicine within certain territorial limits unless he should be forced to return by reason of some unforeseen necessity. *Held*, that such provision as to the unforeseen necessity did not render the contract so indefinite that it could not be enforced in equity.

Appeal from Appellate Court, Second District.

Action by W. Spencer Ryan against J. Shirley Hamilton. From a judgment of the Appellate Court (103 Ill. App. 212) reversing a judgment in favor of plaintiff, plaintiff appeals. Reversed.

This suit was begun by appellant, W. Spencer Ryan, on November 22, 1900, filing his bill for injunction in the Mercer county circuit court, praying an injunction against J. Shirley Hamilton, the appellee, restraining him from practicing general medicine in or within eight miles of the village of Viola, in Mercer county, Ill., in violation of the following contract:

"12/1, 1899.

"The undersigned, J. S. Hamilton, M. D., on this date, December 1, 1899, agrees never again in the future, either separately or as one of a firm, to practice general medicine in or within (8) eight miles of Viola, Mercer county, Illinois, without the consent of Dr. W. S. Ryan, while said Ryan is located in Viola or within (8) eight miles of Viola, Mercer county, as a practicing physician in general medicine, unless forced to by some unforeseen circumstances, in which case I agree to pay Dr. Ryan a reasonable sum for his business interests. J. S. Hamilton.

"Attest: S. C. Fugate."

To the bill the appellee demurred, and, upon demurrer being overruled, answer was filed. The case was thereupon referred to the master in chancery to take proofs and report findings of law and fact. In addition to the general findings of the master were the two following specific findings: "First. That the contract in question is more than a mere moral obligation on the part of the defendant to perform. Though perhaps inadequate and remote, the consideration is sufficient in law to sustain an action at law. Second. That it is not such a contract as equity will enforce by injunction." To these findings both parties objected, which objections were overruled by the master. The

exceptions were renewed in the circuit court, where the cause was heard at the December term, 1901. The findings of the master were by the chancellor modified, and a decree rendered in favor of the appellant. According to the decree the chancellor found: "(1) That each and every material averment of the amended bill is true as therein stated; (2) that in the autumn of 1899 the defendant, for a valid consideration, entered into a contract with the complainant as follows [reciting the contract above set out]; (3) that from the time said contract was executed until March 1, 1900, defendant refrained from the practice of medicine in Viola, and then commenced to practice without the consent of the complainant, and without being forced so to do by some circumstances unforeseen by the parties to said contract at the time it was entered into." From this decree appellee prosecuted an appeal to the Appellate Court for the Second District, which court reversed the decree of the circuit court, and remanded the cause to the circuit court, with instructions to dismiss the bill for want of equity. From this judgment appellant prosecutes the present appeal.

The facts out of which this controversy grows, as shown by the evidence, may be briefly stated as follows: Prior to September, 1899, one H. J. Stewart and J. Shirley Hamilton (appellee) were engaged jointly in the practice of medicine at Viola, Mercer county, Ill. Stewart owned the office, which was on leased ground, the office furniture, and a buggy, and also other articles of personal property used in and about the practice of the parties. About the date above mentioned Stewart went to Chicago for the purpose of studying to be a specialist in the treatment of the diseases of the eye, ear, nose, and throat. Before leaving Viola he arranged with Hamilton to sell out all his interests at Viola, and there is considerable evidence to show that Stewart and Hamilton had arranged, before Stewart left, that they each should go to Chicago, prepare themselves along the special line above mentioned, and then engage in a partnership for the practice of their specialty. After Stewart's departure Hamilton communicated with Ryan, who lived at Cable, with a view of selling out the interests of Stewart, and, as Ryan claims, the interests of himself also, at Viola. As a result of these negotiations, Ryan finally agreed with Mrs. Stewart to pay \$780 for all of Stewart's interests, and S. C. Fugate, a justice of the peace residing in Viola, drew up a contract to that effect. About the same time a contract similar to the one in question in this suit was executed by Stewart, and, when it was returned to Ryan, Ryan also drew up the contract in question here for Hamilton to sign, which he did. Hamilton and Ryan, according to their arrangement at that time, continued to work together until October 27, 1899, when Ryan formed a partnership with a Dr. Packer.

and shortly thereafter Hamilton went to Chicago, where he took up the study of his specialty. About January 1, 1900, Stewart and Hamilton went to Peoria, and there formed a partnership for the practice of their specialty, but continued there only about a month, when they concluded that the prospects were not favorable for them there, and Stewart went to Kewanee and engaged in practice, and Hamilton went to Elmwood, and was about to form a partnership there, when he received a request to come to Viola, which he complied with, and there entered into negotiations with Ryan with a view of forming a partnership. These negotiations, however, proved unsuccessful, and about March 1, 1900, he went into the practice of medicine at said place on his own account. Before doing so, however, and after the partnership negotiations proved unsuccessful, Hamilton offered Ryan \$780, concerning which he testified: "When I offered to pay Dr. Ryan the \$780, I had in mind this contract that I had made not to practice at Viola, and made the offer for the purpose of relieving any liability I might have on that. When he refused the offer of \$780, I thought I had a right to go ahead and practice there."

Guy O. Scott, for appellant. McArthur & Cooke and Bassett & Bassett, for appellee.

RICKS, J. (after stating the facts). Appellee contends that the judgment of the Appellate Court should be upheld, and that the complainant below, as a matter of law and justice, is not entitled to the relief he prays, and to support his position argues that there is not sufficient consideration to support the contract in question; that it is not sufficiently fair and certain to be enforced in equity; that, if appellant has any remedy, it is only a legal one, and not enforceable in equity.

The principles of law applicable to this case are the same as those governing the specific performance of contracts in restraint of trade. That contracts in general restraint of trade are generally held to be illegal is beyond controversy. But the rule admits of well-defined exceptions, and among the exceptions are contracts of the kind and character presented in this case. Contracts of this class, where the limitation as to territory is reasonable, and there exists a legal consideration for the restraint, are valid and enforceable in equity, and in such cases relief by injunction is customary and proper. In all such cases it is not the business of a court to inquire whether the consideration is adequate, or of equal value to that which the party loses by the restriction. In cases of this character it is impossible for courts to tell how valuable to the complainant or how injurious to the defendant may be the restraint sought to be imposed. It is sufficient to uphold such contracts if the court arrives at the conclusion that there is, as a matter of fact, some legal consideration;

but the adequacy of the consideration is within the exclusive dominion of the parties where they contract freely and without fraud. *Linn v. Sigsbee*, 67 Ill. 75; *Hursen v. Gavin*, 162 Ill. 377, 44 N. E. 735; *Doty v. Martin*, 32 Mich. 463; *Eisel v. Hayes* (Ind. Sup.) 40 N. E. 119; *Beatty v. Coble* (Ind. Sup.) 41 N. E. 590; *Up River Ice Co. v. Denler*, 114 Mich. 296, 72 N. W. 157, 68 Am. St. Rep. 480; *McCurry v. Gibson*, 108 Ala. 451, 8 South. 806, 54 Am. St. Rep. 177; *French v. Parker*, 16 R. I. 219, 14 Atl. 870, 27 Am. St. Rep. 733.

It is contended, however, by appellee, that there is no sufficient consideration to support the contract here involved. That is a matter about which there is a conflict of evidence. Ryan, the appellant, contends that Hamilton, the appellee, agreed with him that if he (Ryan) would purchase the property which he did purchase, both Stewart and Hamilton would refrain from practicing in Viola and vicinity, and that both Stewart and Hamilton were to sign the same, or similar agreements to that effect. Hamilton contends that the contract signed by him was not signed until after the purchase made by Ryan was consummated, and then only as an accommodation to Ryan to enable him to procure a partner. We think there is considerable evidence corroborative of appellant's contention, and the master who took and reported the testimony given in the case and the chancellor who entered the decree in the lower court each found that there was a sufficient consideration to support the contract made.

The evidence discloses that Dr. Stewart, of the firm of Stewart & Hamilton, was the original member of that firm, and had practiced medicine in Viola for some four or five years, and that appellee had been there but about nineteen months; that Dr. Stewart found that his health was not such as would justify him in remaining in the general practice, and had determined to specialize, and for that purpose had in August, 1899, gone to Chicago and entered upon a course of study; that Dr. Stewart owned the building in which the business was conducted, which was situated on leased ground; that he also owned a horse and buggy, office fixtures, etc., used in the business. His determination to retire from the general practice would, of necessity, sever the partnership between him and appellee unless the business could be disposed of, so that appellee could also specialize, and they in their new line arrange another partnership; and there is abundant evidence that this was appellee's desire, as it is disclosed that as early as July, 1899, and from that time on to the time he left Viola, appellee talked to various persons who held business relations with him and Dr. Stewart of his intention to become a specialist, and in these talks usually referred to the firm of Stewart & Hamilton, and of their future course. With these things in his

mind, appellee caused word to be carried to appellant, where he was engaged in practice at Cable, that the business was for sale, and early in September appellant went to Viola, and met appellee, and was taken by appellee to Dr. Stewart's house, and was introduced to his wife, and remained there overnight. It is further shown that the appellee was then endeavoring to sell Dr. Stewart's property, and there can be no doubt from a reading of the evidence, that he was holding out to appellant that, if he should become the purchaser of that property, he would succeed to the business of the firm. No arrangement was made at that time, except that it was understood that appellant should return to Viola in a short time and participate in the practice with appellee, in order to determine its extent and character before he should conclude to make the purchase; and in September he did come, and remained about two weeks, until he became sufficiently acquainted with the business to warrant him in making the purchase. Appellant and appellee continued negotiations until it was practically agreed that appellant should pay \$800 for the property, with the condition that both Drs. Stewart and Hamilton should agree that, if appellant did become the purchaser, they would not again resume practice in Viola or in the vicinity thereof. When the negotiations reached this stage, the appellee turned appellant over to Mrs. Stewart, who still resided in Viola, and who was acting for her husband, and in view of the fact that the house was upon leased premises she agreed to deduct \$20 from the price that he had agreed to pay, and accept \$780 for the property, and caused papers to be executed transferring the property and the lease for the lot upon which the house stood to appellant, and also sent an agreement in practically, if not identically, the same words to be executed by Dr. Stewart as the agreement of Dr. Hamilton which forms the basis of this suit. When these papers were returned they were put in the hands of appellee, and appellant then gave his notes for the \$780, which were delivered to appellee, and by appellee placed in the bank for Dr. Stewart, and the contract of sale and the assignment of the lease and the agreement signed by Dr. Stewart with reference to the practice, were turned over to appellant by appellee. Appellant testifies that at the same time appellee executed the instrument in controversy. This appellee denies, saying that it was not executed, in fact, until three or four days after that time. In his answer he states that it was not executed until December 1st, but in his testimony he says that it was within three or four days of the time of the execution of the notes, and that it was not talked of until the time it was signed, and in no way entered into any part of the negotiations between him and appellant with reference to the sale of the property of Dr. Stewart. The evidence discloses that

the purchase by appellant of the Stewart property was made and the notes given in view of appellee's ceasing to practice, and the business of Dr. Stewart being the business of the firm, and when speaking to persons who testified in the case with reference to his intention to leave Viola and of the desire of the firm to sell the business Hamilton spoke of it in a general way as the business and property of the firm. It also appears, to one James R. Blinkensopp, who was the collector for the firm of Stewart & Hamilton, appellee said, in a conversation between the 16th of September and the latter part of that month, that Dr. Ryan had bought him out, and that he and Stewart were going away together; that they did not know just where they would locate, but maybe in Bloomington, Peoria, or Davenport. George M. Babcock, another witness, testified that appellee, as early as July, told him that he was going to take up the work of a specialist of the eye, ear, nose, and throat, and that they wanted to sell their practice, and that in the conversation Dr. Hamilton talked with him about signing the agreement not to practice there in case they sold. This witness was a dentist, and had made a similar agreement in Rock Island, and advised appellee to be careful about making any such agreement, and advised him not to sign an agreement of that character, but appellee said that he knew what he wanted to do, and, if he could not make it with the eye and ear business, he could go some place else to practice; that he could go back to Indiana, and practice there. This latter conversation was had before Dr. Ryan came to Viola at all. E. S. Harkrader, another witness, testified that he was the publisher of a newspaper in Viola, and that on Tuesday or Wednesday before the 27th of September, 1899, he had a conversation with appellee in appellee's office, in which appellee said the firm had sold out to Dr. Ryan; that he (appellee) was going to take a special course; that he did not know where he would locate. This witness fixed the time of the conversation by the date of his paper, which contained a notice of the sale of the business of Stewart & Hamilton to Dr. Ryan, written by the witness at the time of this conversation. To Mrs. Effie Hoover, a patient of the firm of Stewart & Hamilton, whose child he was visiting in the fall of 1899, appellee said that he and Dr. Stewart were going away; that they had not made up their mind yet where, but they had several places in view; that he hated to go, but Stewart's health was not good, and that the people were getting as good a doctor in the person of Dr. Ryan.

The evidence shows that appellee remained in Viola until about the 23d of October—until he disposed of such personal effects as he had. These he sold to Dr. Packer, who became the partner of appellant, and at the time of making the sale to Dr. Packer the latter insisted upon his signing an agree-

ment not to again engage in practice at that place; and appellee stated that it was not necessary, as he had already made such an agreement with the appellant. Appellee then went to Chicago, and took a special course, after which he and Dr. Stewart established a business at Peoria as specialists. They remained there but about a month, as the business did not seem to prosper, and Dr. Stewart went to Kewanee, and appellee went to Elmwood, and was about to form a partnership there with Dr. Hoyt, and while engaged in the negotiations for that partnership he received a telegram from Dr. Stewart, who was in Viola, requesting him to come there. He went to Viola, and attempted to form a partnership with appellant. Failing in this, he offered appellant \$780 for the property that appellant had purchased of Stewart, and the business. This appellant declined, and appellee, in disregard of his agreement, entered into general practice at that place.

Appellee himself seems to have recognized that a binding obligation rested upon him by virtue of said contract, for when he returned to Viola, and was unsuccessful in effecting a partnership with appellant, he then offered to pay appellant \$780, which, as he states, was for the purpose of relieving himself of any liability which he may have incurred by reason of said contract. Under such circumstances it cannot be reasonably contended that there exists any warrant for us now to hold that there was no consideration for the contract that is here sought to be enforced, and, as we have already stated, if there was a legal consideration to support said contract the adequacy of such consideration is not for our determination, no fraud being alleged; and relief to the party injured by reason of the nonfulfillment of such contract, and the granting of an injunction restraining the adverse party from violating his agreement, come within the domain of equity.

The bill avers that Hamilton was not forced to return to Viola because of any unforeseen circumstances, which averment the answer denies, but, as we regard the evidence, the denial in the answer is not sustained. There is no evidence that appellee might not have engaged profitably in the practice of his profession at other places than Viola. He was about to do so at Elmwood. He had gone into business at Peoria, which location he tried for only a month; and, failing to form the kind of a partnership with Ryan that he desired, he offered to pay him \$780, so that it appears he was not out of money, and was not forced to return to his former practice at Viola by reason of pecuniary or other unforeseen necessity.

It is urged, however, that, as appellant alleged in his bill that appellee was not forced to return to his former practice by reason of unforeseen necessity, appellant was bound to make the burden of proof upon that allegation. This was in the nature of a negative

allegation, the proof of which rested within the especial knowledge of appellee. Appellant could not be presumed to know the especial things that moved appellee to action. We think it sufficient that appellant showed that appellee returned and engaged in the practice of his profession after making an effort to form a partnership with appellant and an effort to purchase the business of appellant, and, if there was anything other than the ordinary business motives that prompted him, it was the duty of appellee to have disclosed it. *Cole v. Cole*, 153 Ill. 585, 38 N. E. 703.

It is also said that the contract is so uncertain that a court of equity cannot enforce it, and that one of the particular features of uncertainty is that there is no mutuality in the contract, and that there is nothing that appellant was to do stated in the contract. If the allegations of the bill are true, and the consideration was that appellant should become the purchaser of the property that he did purchase from Stewart, so that appellee might be enabled to carry out his purpose of becoming a specialist and enter into business with Dr. Stewart, then, as the evidence discloses that appellant performed all that he was to perform, there was nothing to put in the contract to be done by appellant. It is well settled in this state that the true consideration for a contract or agreement may always be shown whether one is shown in the contract or not; and, as we have said, the consideration for appellee's agreement being that appellant would make the purchase from Dr. Stewart, and it having been performed, there was no necessity of stating the consideration or stating what appellant was to do. Nor was it necessary that the consideration that was to pass to appellee should be a money consideration, as appellee contends, and as seems to be the view of his counsel. He took great pains to testify that he was not to receive any part of the money that passed to Dr. Stewart for the property, and to be corroborated in that by the testimony of Dr. Stewart. "Any act which is a benefit to one party or a disadvantage to the other constitutes a sufficient consideration to support a contract." *Burch v. Hubbard*, 48 Ill. 164. Here appellee was to be benefited by being enabled to carry out the design he had formed to become a specialist, and to be enabled to go with Dr. Stewart as a partner in such new line; and appellant was to part with his money for the property purchased, including the right to be freed from any future opposition on the part of Drs. Stewart and Hamilton. We think the consideration sufficient.

It is true that the condition at the end of the contract, that appellee should not engage in the practice of his profession in Viola unless forced to return by reason of some unforeseen necessity, is somewhat indefinite; but that may be said of many other agreements that courts are called upon to enforce.

In interpreting such writings it is the duty of courts to give them a reasonable and sensible construction, and, as far as may be, carry out what was the intention of the parties. It can hardly be said that it was the intention of the parties that, if appellee should try some place in his special line, and make a failure, or should receive a telegram from some one to come to Viola, that that should be accepted as an unforeseen necessity that should force him to resume his practice in that place. In all cases it is the duty of courts to uphold, rather than to defeat, contracts of parties freely and fairly entered into. The modern trend of the law has been to recognize a person's property right in the good will of a business built up by him, and the tendency is to remove the restrictions formerly placed upon its sale. According to well-established rules of law in this and other states, we regard the restrictions imposed by the contract in this case as reasonable, and we see no reason for regarding the decree entered by the lower court in this case as incorrect, and from what has already been said we are of the opinion that the judgment of the Appellate Court is erroneous, and should be reversed.

Appellee has made a motion in this case to tax to appellant the cost of filing an additional abstract, which motion, we think, should be denied.

The judgment of the Appellate Court is reversed, and the decree of the circuit court is affirmed. Judgment reversed.

SCOTT, J., took no part in the consideration of this case, the same having been submitted and taken by the court at the October term, 1902.

(205 Ill. 346)

CITY OF CHICAGO v. HULBERT et al.*

(Supreme Court of Illinois. Oct. 26, 1903.)

MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—SPECIAL ASSESSMENTS—ORDINANCE—VALIDITY—REASSESSMENT—RIGHT OF APPEAL—RES JUDICATA—VARIATIONS FROM CONTRACT—INACCURACIES OF DESCRIPTION—INTEREST.

1. Though Hurd's Rev. St. 1901, p. 399, §§ 95, 96, relative to local improvements by special assessments, and appeals in proceedings in relation thereto, merely provide for an appeal by any of the owners or parties interested in lands taken, damaged, or assessed, and do not authorize an appeal by a city, nevertheless the city is entitled to an appeal in such proceedings, under Hurd's Rev. St. 1897, p. 527, § 213, providing that appeals may be taken from the final orders, judgments, and decrees of county courts in proceedings for the confirmation of special assessments.

2. Where the court on appeal reversed an order confirming a special assessment, and, on the case being remanded, the court below sustained objections to the confirmation, but at the same time, and as a part of the same order, giving leave to the city to file a supplemental petition, there was no final judgment, rendering the question of the liability of the property holders

to assessments for the improvement res judicata.

3. Where an appeal was prosecuted from a judgment confirming a special assessment, and such appeal was pending when the local improvement act of 1897 was passed, the case was within the saving clause of section 99 of the act, excepting pending causes from its operation in certain particulars.

4. Under Local Improvement Act 1897 (Laws 1897, p. 121) §§ 57, 58, authorizing a new assessment for local improvements in case any assessment shall be annulled or set aside by any court, providing it shall appear that the work was done in good faith, etc., mere deviations from the strict letter of the ordinance, contract, and specifications, for a sufficient reason, of which the city had notice, and to which it assented, do not indicate bad faith in the construction of the improvement.

5. Local Improvement Act 1897 (Laws 1897, p. 121) §§ 57, 58, declare that, if a special assessment be set aside by any court, a new assessment may be made, and that no special assessment shall be held void because levied for work already done under a prior ordinance, if it shall appear that the work was done in good faith, and that a new or special ordinance may be passed providing for such assessment, etc. In proceedings for confirmation of a special assessment, the court sustained objections based on the invalidity of the ordinance authorizing the improvement, but authorized the city to file a supplemental petition. *Held*, that such authorization entitled the city to file a petition under a new ordinance authorizing an assessment for the work which had already been done under the prior invalid ordinance, and such authority was not limited to a petition under section 59, relating to supplemental assessments where the first assessment proved insufficient.

6. In a street improvement ordinance, mere inaccuracies in the description of the proposed improvement do not render the ordinance void, but merely defective.

7. Where objections to the validity of a street improvement ordinance are urged on appeal from a judgment confirming an assessment under the ordinance, it will be presumed, on a subsequent appeal in proceedings under an ordinance passed by authority of Local Improvement Act 1897 (Laws 1897, p. 121) §§ 57, 58, authorizing an assessment to pay for the work done under the prior invalid ordinance, that all the objections that could have been urged against the first ordinance were presented on the first appeal.

8. A street improvement ordinance being held invalid for defects in description of the proposed improvement, another ordinance was passed to authorize an assessment to pay for the improvement which had been completed at the time the ordinance was held invalid on appeal; Local Improvement Act 1897 (Laws 1897, p. 121) §§ 57, 58, authorizing the passage of such an ordinance. *Held*, that the improvement having been completed, so that a description thereof in the second ordinance could have served no useful purpose, that ordinance was not defective for failure to describe the improvement.

9. The fact that the work was not done in strict compliance with the provisions of the first ordinance did not render the second ordinance invalid; it appearing that the deviations from the requirements of the contract were such as were necessitated by the conditions of the soil and the location of the work, and that the improvement was constructed in a workmanlike manner, and accepted by the proper officers of the municipality.

10. Hurd's Rev. St. 1901, p. 141, c. 6, par. 10, providing that it shall be unlawful for any officer acting for any city, or any contractor under a municipality, to employ any person other than citizens, or those who have declared their intention to become such, when such employees are to be paid out of any funds raised by taxa-

*Rehearing denied December 3, 1903.

tion, is unconstitutional, as interfering with the individual right to contract.

11. Where a street improvement ordinance was held invalid on objections to the confirmation of a special assessment thereunder, and, the work being already done, a new ordinance was passed, as authorized by Local Improvement Act 1897 (Laws 1897, p. 121) § 58, the inclusion in the second ordinance of interest on the amount due for the work was unauthorized and invalid.

12. Where a street improvement ordinance was held invalid on objections to the confirmation of a special assessment thereunder, and a new ordinance was passed, as authorized by Local Improvement Act 1897 (Laws 1897, p. 121) § 58, which new ordinance wrongfully included a certain sum as interest on the amount due for the work, but the sum authorized to be collected as interest was distinctly specified, the ordinance was not void as an entirety on account of such sum being included, but only that portion relating to the collection of interest will be held invalid.

Appeal from Cook County Court; O. N. Carter, Judge.

Proceedings by the city of Chicago against Thomas H. Hulbert and others for the confirmation of a special assessment for local improvements. From a judgment sustaining objections to the assessment, applicant appeals. Reversed.

In July, 1895, an ordinance was passed for the local improvement of a certain portion of Diversey street, in the city of Chicago, by curbing with limestone curbstones, and filling and paving with cedar blocks upon hemlock plank foundation. On November 15, 1895, the appellant filed its petition in the county court for the making and confirmation of an assessment for such improvement. The estimated cost of the improvement was \$25,536.43. The assessment was levied, and a large number of persons, including appellees, filed objections to the confirmation thereof. On the 18th of December, 1895, a judgment of confirmation was made and entered, and the objections were overruled. The objectors, being represented by different attorneys, filed many objections, ranging from 18 to 30 or more by each set of objectors; and by all of them it was objected that the ordinance authorizing said improvement did not specify the nature, character, locality, and description of the proposed improvement, and that the ordinance was insufficient, uncertain, and indefinite in its terms. The county court overruled the objections and confirmed the assessment, with slight deductions in some instances. Appellees and others prosecuted an appeal from that judgment of confirmation to this court, and here insisted that the ordinance was insufficient and defective and void, because the nature, character, and extent of the improvement were not sufficiently specified in the ordinance, and particularly that the flat stones upon which the curbing was to be imbedded by the terms of the ordinance were not sufficiently specified. This court, on a consideration of the appeal, following the case of *Kuester v. City of Chicago*, 187 Ill. 21, 58 N. E. 307, reversed the judgment of the county court and remanded

the cause (*Boyd v. City of Chicago*, 187 Ill. 115, 58 N. E. 1094), on the ground that the ordinance in question was defective, in that the description of the flat stones was not sufficiently definite, as required by the statute.

On May 13, 1901, the cause, in the matter of the assessment under the original ordinance, was redocketed, and the remanding order and judgment of this court were filed therein. Thereupon appellees again filed 20 objections to the confirmation of the assessment, and the court entered an order sustaining the objections. Among the objections filed at this time was the objection that the ordinance authorizing the improvement did not specify the nature, character, locality, and description of the proposed improvement, and was void for uncertainty, insufficiency, and informality; and under these objections certain specifications of the particular defects and informalities charged against the ordinance were set out, and particularly that the ordinance failed to provide the height or grade of the curb, and failed to provide or establish any grade for the improvement. The eighteenth objection was that the Supreme Court of Illinois had declared the ordinance invalid. The nineteenth was that the contract and specifications for the work were illegal, because they provided that eight hours should constitute a day's labor, and the improvements should be constructed by native-born or naturalized citizens, which provisions, appellees urged, were unconstitutional. The order of the court made at the time of the hearing of these objections was as follows: "Now on this day it is ordered by the court that the legal objections to said assessment be, and are hereby, sustained. It is further ordered that said petitioner have leave to file a supplemental petition herein by November 15, 1901."

On November 13, 1901, the petitioner filed a supplemental petition for a new assessment under an ordinance which was passed by the city council of Chicago on November 4, 1901. This ordinance was entitled "An ordinance for a new assessment to pay the unpaid balance of the cost of the improvement of Diversey street," etc. This latter ordinance was passed by the city council on the 4th of November, 1901, and recites the passage of the first ordinance, the estimated cost thereof, the filing of the objections in the county court as docket No. 20,043, the levying of the special assessment, the judgment of confirmation, and that after such confirmation the city "duly let a contract for the making of said improvement, and the contractor duly executed the same, and that the work of constructing and making the said improvement was done in good faith and was in compliance with said ordinance and contract, and was thereafter duly accepted by the city of Chicago"; that the total cost of the improvement, exclusive of the cost of the proceeding, was \$19,862.41, which sum the contractor was

entitled to receive in payment for such improvement, and that vouchers for that sum were issued to said contractor, and that there remained outstanding and unpaid \$8,828.06 thereof, together with the legal interest thereon, and, computing interest to December 31, 1901, the interest was estimated at \$1,324.20. The ordinance then recites the appeal to this court, and the holding by this court that the ordinance was defective and insufficient for failing to properly describe the improvement. The ordinance then specifically declares: "Notwithstanding such omission in said ordinance, said curbstones were firmly bedded upon flat limestone, in strict compliance with the terms of said ordinance." The ordinance further declares that various property holders along said improvement have already paid their assessments, and that equity and justice require that those having paid their assessments should be relieved from the payment of the deficit. The matters above set forth are all stated in the preamble to the ordinance, which of itself contains but six sections. The first section declares that a new special assessment shall be made and levied as hereinafter specified. The second section of the ordinance provides that the unpaid balance of the cost of improving Diversey street under said ordinance of July 8, 1895, and under said contract, which is hereby found to be \$10,152.26, be paid for by special assessment to be levied on property specially benefited thereby to the amount the same may be legally assessed, and as to which the original judgment of confirmation has been set aside, and the remainder of said cost to be paid by general taxation, in accordance with the act of 1897 relating to local improvements. That section expressly provides that no part of the costs of such original proceeding shall be included in or paid from the proceeds of the assessment thereby authorized. It is also provided that the special assessment provided for shall be payable and collectible in one installment, and all property against which there exists valid judgments of confirmation for the original assessments shall be excluded from the new assessment. The ordinance directs that the attorney shall file a petition for proceedings to assess the costs, as above stated, for the improvement.

Under this ordinance the petition was filed, and John A. May, superintendent for special assessment, reported the assessment roll, and, notice being given according to the statute, appellees appeared and filed 31 objections thereto. Among the objections filed were the objections that the original ordinance under which the improvement was constructed was incomplete, informal, and invalid, and did not specify the nature, character, locality, and description of the improvement, in that the flat stones upon which the curbstones were bedded were not described; that the act under which the ordinance of 1895 was passed was repealed by

the act of 1897; that the assessment under the original ordinance was confirmed prior to July 1, 1897, and that after such time, and up to the passage of the act of 1897, there were no such proceedings pending as brought the case within the saving clause; that said original ordinance had been declared invalid by the Supreme Court, and the trial court should therefore dismiss the petition for want of jurisdiction; that the original ordinance was declared void by an order of the county court sustaining objections filed July 3, 1901, from which no appeal had been taken, and which order remained in full force and effect; that the original ordinance was void because the height of the curb to be built was not given, and because it provides that the surface of the pavement shall be at the established grade of the streets, and makes no provision for drains or for a declining grade from the crown of the street to the curb, and is void for the further reason that it makes no provision for catch-basins, manholes, drains, gutters, or street or alley intersections. The county court, upon a hearing under these objections, made certain special findings of fact, upon three of which, namely, the sixth, seventh, and eighth, it expressly predicated its order sustaining the objections of appellees. These findings were as follows:

"Sixth. That the curbstones in said original ordinance provided for, were bedded upon flat stones in the manner following, to wit, that one flat limestone block was placed under each end of each curbstone, but where said curbstones were of unusual length another flat stone block was placed under the middle of said curb; that the said flat stones did not constitute a continuous line of stones; that the said flat stones were not sufficiently described in the original ordinance, and that the new or special ordinance did not amend said original ordinance in respect to said flat stones, nor describe the number of flat stones used, nor cure the defects in the original ordinance in that respect; and that for this reason the objections of said objectors based upon the ground that the said original ordinance was defective for failing to sufficiently describe said flat stones, and that this defect was not cured by the new or special ordinance, must be, and are, sustained.

"Seventh. That the curbstones prescribed in the said original ordinance were set on both sides of the roadway, except across the intersecting streets, with the top of the curb at practically the established grade of said street, the variation of the top of the said curb from said established grade being very slight, if any, but that the original ordinance did not describe or specify the height of said curb, and did not except the street intersections aforesaid, and that the new or special ordinance contained no provisions in these respects for curing these defects, and that therefore the objections based upon the

failure of the original ordinance to prescribe the height of the curb, and to except the street intersections aforesaid, and upon the failure of the ordinance to amend the said original ordinance, or otherwise cure said defect, must be, and are, sustained.

"Elghth. That the pavement was constructed with the center of the finished roadway surface substantially at the established grade of the street, and that it sloped from the center each way toward the gutter, so that the surface of the roadway along the line of the gutter was below the top of the curb and the established grade of the street—a distance of about four inches at the summit of the gutter midway between catch-basin inlets, and about twelve inches below at the said inlets—but that the original ordinance did not sufficiently describe the pitch or the slope of the gutters and pavements aforesaid, and that the new or special ordinance did not amend said original ordinance in this respect or cure said defects, and that the objections to the assessment based upon the defects in said original ordinance above described, and upon the fact that the said defects were not amended or cured in the said new ordinance, must be, and are, sustained."

The county court entered its order in the following words: "In consideration of the premises, the court doth accordingly order and adjudge that said legal objections of the said objectors above named, in the foregoing sixth, seventh, and eighth paragraphs hereof, be, and the same are hereby, sustained, and that the petition for the confirmation of said new assessment be, and the same is hereby, dismissed as to the property of said objectors. To the entry of which order the petitioner, by its counsel, duly excepts, and prays an appeal to the Supreme Court of Illinois, which is allowed, to the allowance of which said appeal the objectors except."

Appellant assigns six grounds of error, and cross-errors were also assigned by appellees. Appellant's grounds of error are (1) that the court erred in sustaining the objections based upon the ground that the original ordinance was defective for failure to sufficiently describe the flat stones placed under the curb-stones, and that the supplemental ordinance did not cure its defect; (2) upon the ground that the original ordinance failed to prescribe the height of the curb, and to except the street intersections, and the failure of the supplemental ordinance to amend the original ordinance in that behalf; (3) upon the ground that the original ordinance herein did not sufficiently describe the pitch or the gutters of the pavement, and that the same was not amended by the new or additional ordinance; (4) the court erred in sustaining the objection that interest upon the unpaid vouchers should not be included as a part of the costs of the improvement; (5) in dismissing the petition, and in not overruling all objections filed. Appellees' cross-errors are that the

court erred in not sustaining all the legal objections filed, and in not dismissing the case for want of jurisdiction; in finding that the improvement was constructed in a workmanlike manner and was accepted by the proper officers of the city of Chicago; in finding that the street was sufficiently rolled by the use of a five-ton roller, instead of by the use of a ten-ton roller, as provided by the ordinance; in not finding that the contractor violated the statute in relation to aliens; and in allowing the appeal.

Edgar B. Tolman and Armand F. Teefy (Charles M. Walker, Corp. Counsel, of counsel), for appellant. Geo. W. Wilbur, for appellees.

RICKS, J. (after stating the facts). A motion was made in this court to dismiss this appeal for want of jurisdiction, upon the ground, first, that appellant had no right of appeal; and, secondly, upon the ground that the judgment of the county court entered July 3, 1901, sustaining objections to the assessment under the original ordinance, pursuant to the remanding order of this court, was *res judicata*.

In support of their motion to dismiss, appellees cite and rely upon sections 95 and 96 of the act of 1897 in relation to local improvements by special assessments and special taxation (Hurd's Rev. St. 1901, p. 399). Section 95 relates to appeals, and section 96 relates to writs of error. Section 95, by its language, authorizes an appeal to the Supreme Court "by any of the owners or parties interested in lands taken, damaged or assessed therein," and section 96 authorizes a writ of error from this court on the application of "owners or parties interested in the property affected thereby"; and it is said that as in each of these sections the only persons named are the owners of the lands, or parties interested therein, there is no statutory authority for the city to prosecute this appeal, and that, the right of appeal being a statutory right, the appeal should be dismissed. The question here urged was before this court in the case of *City of Bloomington v. Reeves*, 177 Ill. 161, 52 N. E. 278, where the statute cited by appellees and the various statutes authorizing appeals were reviewed and fully considered; and Mr. Justice Craig, speaking for the court, in part, said (page 163, 177 Ill., page 279, 52 N. E.): "It is apparent that there is no provision of the act which authorized the city, when it happened to be defeated in the county court, to appeal; and, if the right of appeal depended solely on the act under which the proceeding was instituted, then the appeal could not be maintained. But we do not think that the right of the city of Bloomington to appeal depends on the act. Section 213 of the act relating to courts (Hurd's Rev. St. 1897, p. 527) provides: 'Appeals and writs of error may be taken and prosecuted from the final orders, judgments and decrees of the county court

to the Supreme Court or Appellate Court in proceedings for the confirmation of special assessments, in proceedings for the sale of lands for taxes and special assessments, and in all common law and attachment cases, and cases of forcible detainer and forcible entry and detainer.' See, also, section 89, c. 110, p. 1217, *Id.* These sections of the statute, which expressly allow either party an appeal in a case like the one under consideration, have never been repealed, and under them the city of Bloomington had the right of appeal. If the Legislature had intended to cut off all right of appeal on behalf of a city where it was defeated in the county court, these two sections of the statute doubtless would have been modified or repealed. This not having been done, it will be presumed the Legislature intended to preserve the right of appeal in the city as it existed heretofore. The motion to dismiss the appeal will be denied."

As to the second ground upon which this motion is predicated, we cannot yield our consent to the contention of appellees. The case having been brought to this court upon appeal by appellees, we held the ordinance defective, and reversed the judgment of the county court confirming the assessment under that ordinance, and remanded the cause to the county court. When the cause was redocketed, appellees again filed objections, which the county court, following the decision of this court reversing the cause, sustained, and entered its order to that effect, but at the same time, and as a part of the same order, gave leave to appellant to file a supplemental petition. It does not appear that there were hearings upon any matters of fact at that time, and the order itself shows, as we think, that the court sustained the objections in obedience to and in conformity with the judgment of this court remanding the cause, and that such judgment, when entered in pursuance of such remanding order, cannot now be said to be such a final judgment, if not appealed from, as could be relied upon as *res judicata*. To hold otherwise would be to say that there could never be an end of appeals. The motion to dismiss was denied, and, upon mature reflection, we are satisfied that the order was proper.

The insistence that inasmuch as the assessment under the original ordinance was confirmed in December, 1895, there was no cause pending to bring the case within the saving clause found in section 99 of the act of 1897, is not tenable, if we are able to comprehend the point or the line of argument. From the judgment confirming that special assessment an appeal was prosecuted and pending in this court when the act of 1897 was passed, and the cause was as much pending as if it had remained in the county court and undisposed of all that time.

Appellant relies upon sections 57 and 58 of the local improvement act of 1897 as the authority for the ordinance and assessment

now appealed from. Those sections are as follows:

"Sec. 57. Vacation of Assessment—New Assessment. If any assessment shall be annulled by the city council or board of trustees, or set aside by any court, a new assessment may be made and returned, and like notice given and proceedings had as herein required in relation to the first; and all parties in interest shall have like rights, and the city council or board of trustees, and the court, shall perform like duties and have like power in relation to any subsequent assessment as are hereby given in relation to the first assessment.

"Sec. 58. New Assessment for Completed Work. No special assessment shall be held void because levied for work already done under a prior ordinance, if it shall appear that such work was done in good faith, by the contract duly let and executed, pursuant to an ordinance providing that such improvement should be paid for by special assessment or special tax. This provision shall only apply when the prior ordinance shall be held insufficient for the purpose of such assessment, or otherwise defective, so that the collection of the assessment therein provided for becomes impossible. A new or special ordinance shall in such case be passed, providing for such assessment, and such ordinance need not be presented by the board of local improvements."

Laws 1897, p. 121.

To authorize an ordinance for a new assessment under the foregoing sections, it must appear (a) that the work was done in good faith by contract duly let and executed pursuant to an ordinance providing that such improvement should be paid for by special assessment; (b) that the prior ordinance shall be held insufficient for the purpose of such assessment, or otherwise defective, so that the collection of the assessment therein provided for becomes impossible; (c) that the original assessment be set aside by some court; (d) that a new or special ordinance be passed, providing for such new assessment; (e) that a new assessment be made and returned and like notice given and proceedings had as are required in relation to the first ordinance and assessment, except that the same need not be originated or presented by the board of local improvements.

Appellees, however, say that the work under the original ordinance was not done in good faith, and, in support of that contention, show certain deviations in the performance of the work from the strict letter of the ordinance. For instance, it is said by the ordinance that the pavement should be rolled by ten-ton rollers, and the evidence discloses that it was rolled by a five-ton roller. The provision of section 58, *supra*, is that a new assessment to pay for the improvement shall be made, and shall not be held void "if it shall appear that such work was done in good faith, by the contract duly

let and executed, pursuant to an ordinance providing that such improvement should be paid for by special assessment." The record shows the prior ordinance, the letting of the contract, and the performance of it to the satisfaction of the city authorities, and the full acceptance of the work by the city, and there is no evidence showing bad faith on the part of the contractor. Wherever there was a deviation from the strict letter of the ordinance, contract, and specifications, as to the manner of performing the work, it was upon a good and sufficient reason appearing in the record, of which the city had notice, and to which it assented. As an instance, the ten-ton roller could not be used because the nature of the soil and the foundation required by the ordinance and contract were such that the blocks would be pressed out of place and the pavement made uneven by such great weight. The inspectors were advised of this, and assented to the use of a five-ton roller. The evidence shows such roller to have been the proper one to use in that particular work, and the county court was warranted in finding that the work was done in "a good and workmanlike manner."

Appellees object to this proceeding, and say that, by the order of court, appellant was authorized to file a supplemental petition, and from that argue that the legal inference arises that the court only authorized a petition to be filed under section 59 of the local improvement act, which relates to supplemental assessments where the first assessment proved insufficient, and they insist that there is a conflict between the order of the court and the ordinance and petition that were filed. Appellees' counsel says: "I do not think that the terms 'new assessment' and 'supplemental assessment' are interchangeable. A new assessment is not provided for under section 58 of the act referred to, while the authority for a supplemental assessment is contained in section 59." A supplemental petition would be any petition filed subsequent to the original petition, and in aid of the same improvement. Counsel for the appellees seems to confound "supplemental petition" and "supplemental assessment," and attempts to contrast "supplemental petition" and "new assessment." The court could only allow a supplemental petition to be filed that should be authorized by the statute, and the one authorized under the conditions of the case, as it was then passed upon, was under sections 57 and 58 for a new assessment, on the ground that the assessment had been set aside by the court. The supplemental petition was for a new assessment in supplement and aid of the first assessment, part of which had been set aside. It does not matter what was the cause of setting aside the original assessment, or the particular defects thereof that caused the deficit. If the facts and record were such that a new assessment was au-

thorized to pay for the work already done, then that matter was properly brought before the court by a supplemental petition.

It is next urged that the original ordinance was declared void by this court, and that a void ordinance cannot serve as a basis for a new ordinance calling for a new assessment. If the contention as to the fact is true, the position as to the law will be admitted. But such does not seem to be the fact from an inspection of this record. The original ordinance was held to be defective, not void. The opinion of this court does not state whether it is defective or void, but decides the case upon the authority of *Kuester v. City of Chicago*, 187 Ill. 21, 58 N. E. 307, in which it is said that the ordinance is defective. A careful reading of the cases in which this court has passed upon this and like ordinances will show that for mere inaccuracies of description such ordinances have not been held void, but that they have been held so defective that it was proper to refuse a confirmation of the assessment upon that ground. The question has frequently arisen in special assessment cases where application was made for judgment to sell property, and defects such as were in the original ordinance in question here were urged as grounds of defense against the entering of judgment, on the ground that the ordinances were void. We have held that where the ordinance is void it may be collaterally attacked, but where it is only defective a judgment of confirmation thereon cannot be attacked on an application for judgment for sale. *Blount v. People*, 188 Ill. 538, 59 N. E. 241; *Foster v. City of Alton*, 173 Ill. 587, 51 N. E. 76; *Gross v. People*, 172 Ill. 571, 50 N. E. 334; *Rich v. City of Chicago*, 187 Ill. 396, 58 N. E. 306. The matters complained of against the original ordinance in question were purely matters of description, and were not matters of substance, and the judgment of this court was that the ordinance was defective. It will be presumed that all the objections that could have been urged against the original ordinance were urged against it on that appeal, and we will not again examine it to determine if there might not be other objections. The rule that cases shall not be tried by piecemeal is a necessary rule, and one that obtains in all courts of appeal; and where, as in this case, on appeal, the validity of the ordinance was attacked and passed upon, the court will not in another appeal take up the same ordinance again, and review it and pass upon the validity of its provisions.

It is next insisted that the new ordinance did not amend the defects of the first or original ordinance, and that the same defects in the description of the proposed improvement remained without any ordinance supplying them, and that for that reason the judgment of the county court should be sustained. There is no contention that the improvement was not placed upon the street and between the points designated by the

original ordinance, or that it was not of the general character therein provided for; but it is said that the work was not done in strict compliance with the provisions of the first ordinance, and that there was no ordinance providing for portions of the work as done, and under this head are pointed out the making of gutters, catch-basins, and intersections of streets. It is also said that the work was not performed in strict compliance with the provisions of the original ordinance, in that some of the curbing line was irregular, and that the curbing leaned an inch or two toward the street, and that there were cracks in the pavement, and that the roller used was a five-ton roller instead of a ten-ton roller. These matters relating to mere defects in workmanship could hardly be urged against the validity of an ordinance, or the right to make a new assessment to pay for whatever was done and accepted by the city. Appellees, in their objections set up at the time of the filing of the mandate from this court, expressly declared that the work had been completed and accepted by the city, and that vouchers had been issued to and accepted by the contractors, and urged these matters as grounds for not confirming the assessment; and, upon a hearing of the cause now before the court under the new ordinance, the evidence fully shows that the work was duly accepted by inspectors employed by the city, and was pronounced by them as being done in compliance with the ordinance and specifications, and was fully accepted by the city as satisfactorily done, and vouchers were issued for the payment. The evidence also explains, as we think, all the departures from the strict letter of the specifications and contract, and shows that it was complied with as strictly as the conditions of the soil and location of the work would admit. But at all events, we do not see how these mere departures in the details of the work or the manner of performing it could be a bar to this proceeding for the new assessment, if the work was in fact acceptably done in accordance with the plans and specifications and accepted by the city; and the judgment of the county court expressly finds "that said improvement was constructed in a good and workmanlike manner, and was accepted by the proper officers of the municipality, the city of Chicago," and the new ordinance contains a like declaration. Manifestly, those things could not be cured by any ordinance that could be passed by way of amendment. The matters of description of the character of the work, as to street intersections, and the top of the grade line, curb, and the description of the flat stones upon which the curb was to rest, might have been amended and more specifically set out by the second ordinance, but we can see no beneficial purpose that would have been served by such amendment. The work was already done. The improvement was in, and any ordinance that sought to amend

the first ordinance would have been one simply describing the improvement as made. In the case of *Markley v. City of Chicago*, 190 Ill. 276, 60 N. E. 512, there were other defects than the selection of improper commissioners alleged against the ordinance, and among them was the defect that the flat stones were not particularly described in the original ordinance, and that the new ordinance did not attempt to amend the old in that regard, and we said of it (page 282, 190 Ill., page 515, 60 N. E.): "We do not see how it would benefit appellant to have these stones now particularly described by way of amendment. The improvement has actually been made, and the exact kind and size of the flat stones have been determined by the improvement actually in place. It would not tend to the protection of the appellant or any other property owner by requiring the amendment of the original ordinance in a minor matter of detail, such as setting out the kind or size of the flat stones."

The complaint in the case at bar that the street intersections were not excepted when the curbing was provided for seems to us to fall within the same class of objections and defects. It would be hard to conceive of a contractor who had so little intelligence as one that would bid upon a public improvement, like the paving of a street, and not know that the curbs on the sides of the street were not to extend across street intersections. The evidence shows that they were not put there, but that they were put, as they should have been, to the street lines. The *Markley Case* was very much like the case at bar, and did not go to the extent, even by way of recital or otherwise, of describing the former ordinance and the proceedings had under it, that the ordinance now before us does. We have held in other cases besides the *Markley Case* that it is not necessary to describe the improvement by the new ordinance. *West Chicago Park Com'rs v. Farber*, 171 Ill. 146, 49 N. E. 427; *Freeport Street Railway Co. v. City of Freeport*, 151 Ill. 451, 38 N. E. 137.

When the case was redocketed in the county court, and the mandate of this court was filed there, the objection was filed and insisted upon that the proceeding was invalid because the contract provided that eight hours should constitute a day's labor, and that none but native born or naturalized citizens should be employed upon the work. It is now insisted by appellees that the proceedings are void, and that this ordinance cannot be sustained, because paragraph 10 of chapter 6 of our statutes, entitled "Aliens," was not complied with (*Hurd's Rev. St.* 1901, p. 141). That paragraph provides that "it shall be unlawful for any * * * officer * * * acting for * * * any city, * * * or any contractor, or sub-contractor, under any or either of said municipalities, to employ any person or persons, other than native born or naturalized citizens, or those who have a

good faith declared their intentions to become citizens of the United States, when such employees are to be paid, in whole or in part, directly or indirectly, out of any funds raised by taxation." Paragraph 11 of the same statute requires any one employing labor to be paid out of the public funds to make a list of the persons so employed, showing that they meet the requirements of the foregoing paragraph, and paragraph 12 fixes a penalty for a violation of paragraph 11. Appellees took evidence showing that this statute was not complied with, and insist that, as these public funds go to the contractor who violated that law, the ordinance cannot be sustained. A similar law was enacted by ordinance in the city of Chicago, and we have repeatedly held that such law is invalid, as it is in contravention of the Constitution and the right of individuals to contract. The statute in question is void upon the same grounds, and neither the city nor the contractor was under any obligation to observe it.

In the preamble to the ordinance in question it was found that there was a balance of \$8,828.06 due for the work, and that there was interest to the amount of \$1,324.20, and the ordinance in question provided for the levying of an amount sufficient to pay both the principal sum and the interest thus due. The vouchers issued by the city were non interest bearing vouchers, and there was no authority, in law, for paying interest upon them. It may be that it was an equitable thing to do, but such considerations cannot control in a statutory proceeding. The ordinance sufficiently specifies the portion that is for interest, so that it may be separated from the principal sum that was unpaid; and we think that, in so far as it attempted to levy an assessment for interest, the ordinance was void, but that as the amounts are expressly stated by the ordinance itself, so that the portion that is void or the amount which is levied without authority can be ascertained by an inspection of the ordinance, it is unnecessary to declare the whole ordinance void on that account. Under section 52 of the local improvement act, the court had authority to modify and change the assessment by refusing to confirm that portion of it that was sought to be collected as interest, and affirm it as to the amount that was due upon the work.

In the view that we entertain of the case, the judgment of the county court will be reversed, and the cause remanded for further proceedings not inconsistent with this opinion. Reversed and remanded.

(205 Ill. 580)

WILSON et al. v. MARION COUNTY et al.

(Supreme Court of Illinois. April 3, 1903.)

APPEAL TO SUPREME COURT—SUIT INVOLVING REVENUE.

1. A suit to restrain a county and its board of supervisors from entering into a contract

whereby the other party to the contract was authorized, for an indefinite period, to search the records of the county for evidences of personal property omitted from taxation, was not appealable directly to the Supreme Court, under Practice Act, § 88, authorizing such an appeal in cases relating to revenue; the revenue not being directly involved.

Appeal from Circuit Court, Marion County; Samuel L. Dwight, Judge.

Suit by John W. Wilson and others against the county of Marion and members of the board of supervisors to restrain the county and board from entering into a contract with one I. D. Lear and others. From a decree dismissing the bill and dissolving an injunction, complainants appeal. Appeal dismissed.

L. M. Kagy and Frank F. Noleman, for appellants. W. D. Farthing and W. F. Bundy, for appellees.

WILKIN, J. This was a proceeding instituted by John W. Wilson, a citizen and taxpayer, and John M. Green and Harry Lange-wisch, two members of the board of supervisors, against the county of Marion and the other seventeen members of the board of supervisors, to restrain the county and said board from entering into a contract with I. D. Lear, L. O. Vogt, and certain other individuals who had submitted bids to said board for that purpose, which contract had no specific limitation to its duration, and whereby the successful bidder was to be authorized to search the records of Marion and adjoining counties, and other sources, for evidence of personal property omitted from the tax lists of Marion county for the year 1902 and prior years, to invoke the aid of all county officers, to control by their attorney all suits and compromises looking to the collection of omitted taxes, and to occupy a room in the courthouse free of charge during the indefinite period covered by this proposed contract, and, as alleged, in other ways to usurp and undertake the powers and duties given by the statute to the county board of review, in consideration of which the party to whom such contract was awarded was to be paid a per cent., ranging from 18 to 33½, according to their respective bids, of all county taxes collected from property omitted from the lists for such preceding years. A temporary injunction was awarded by the circuit judge in vacation, and a motion entered to dissolve; but this was virtually abandoned, and an answer filed, and the cause heard upon its merits at a regular sitting during the January term of the Marion circuit court, the bill dismissed, and the injunction dissolved. To reverse that decree, complainants below have taken an appeal directly to this court. It should have been taken to the Appellate Court for the Fourth District. Counsel have, no doubt, brought the record directly to this court under the mistaken supposition that it relates to the revenue, within the meaning of section 88 of the practice act. There is no other possible ground of jurisdiction in the

Supreme Court on a direct appeal. But we have held whenever the question has been presented for our decision that in order to bring a case within that section, "as relating to revenue," the revenue must be directly, and not merely incidentally or remotely, involved. *Hodge v. People*, 96 Ill. 423; *Board of Supervisors, etc., v. People ex rel.*, 159 Ill. 242, 42 N. E. 777; *Wells v. Rogers*, 196 Ill. 292, 63 N. E. 651; *People ex rel. v. Hendee*, 199 Ill. 55, 64 N. E. 1071; *Reed v. Village of Chatsworth*, 201 Ill. 462, 66 N. E. 217. "The most that can be said of the case made by the bill is that the revenue might be incidentally or remotely affected by the result." *Wells v. Rogers*, supra. The proper test of jurisdiction in this court is announced in *Reed v. Village of Chatsworth*, supra.

The appeal must be dismissed. Dismissed.

(205 Ill. 213)

FELT et al. v. BELL.*

(Supreme Court of Illinois. Oct. 26, 1903.)

FRAUD—PURCHASE OF PATENTS—PARTICIPATION IN FRAUD—KNOWLEDGE OF AGENT—RESCISSION—STATUS QUO—DEFENSES—INTEREST.

1. Where a purchaser is induced by false representations to pay a greater sum for a third interest in patents assigned to him than the sellers asked for the entire interest, it is no defense to the allegation of fraud in suit to set aside the assignments that he was willing to pay such sum for a third interest, and obtained the interest for the amount paid.

2. A purchaser was induced by false representations of a joint purchaser to pay a greater sum for a third interest in patents assigned by defendants than they asked for the entire interest, such joint purchaser receiving a two-thirds interest without any expense. The defendants' financial agent drew the assignments in accordance with the directions given by the joint purchaser, and in the presence of one of the defendants delivered the assignments, receiving from the purchasers payment for their respective interest. Subsequently the joint purchaser demanded of such agent the amount which he had paid, and it was returned to him, and the amount which the other purchaser paid and which was the entire consideration was retained. The agent knew the consideration, and stated he was surprised to receive the two-thirds payment from the joint purchaser, but just kept quiet. *Held* sufficient to show that defendants, through their agent, assisted in the perpetration of the fraud.

3. Ratification of an assignment of patents procured by fraud cannot be urged as precluding suit to restore complainant to his rights in the absence of evidence that he had any knowledge of the fraud until it was developed during the trial.

4. Where a purchaser of a third interest in patents is induced by the fraud of defendants and a joint purchaser to pay a sum greater than asked by the defendants for the entire interest, the defendants cannot resist a rescission of the contract on the ground that such purchaser had only an undivided third interest, and could not return the entire interest to them.

5. Complainant was induced by the fraud of a joint purchaser and defendants to purchase a third interest in patents to be used in foreign countries, which required a yearly tax to be

paid on patents, and forfeited them if not worked for two successive years. Complainant paid the taxes up to the time his bill for rescission was filed. After the date on which defendants claimed the patents lapsed, they offered to complainant to surrender what he had paid for his interest in the patents. *Held*, that defendants could not defeat the suit for rescission for fraud on the ground that the patents had been forfeited, and complainant could not place them in statu quo.

6. Where a purchaser who is fraudulently induced to take an interest in patents sues to rescind the contract for the fraud, he is entitled to interest on the sum paid from the date of filing his bill to rescind.

Appeal from Appellate Court, First District.

Bill by John P. Bell against Dorr E. Felt and others to set aside certain assignments of patents for fraud. From a judgment of the Appellate Court (102 Ill. App. 218) reversing a decree for defendants, they appeal. Modified.

The defendant Dorr E. Felt obtained from the United States letters patent in the year 1888 for an invention known as a "comptometer." Felt associated with him in business the defendant Robert Tarrant, and thereafter a corporation was organized known as the Felt & Tarrant Manufacturing Company. Subsequently patents for this machine were granted by the republic of France and the kingdom of Belgium to Felt and Tarrant and the Felt & Tarrant Manufacturing Company. About the beginning of May, 1891, the complainant, John P. Bell, met the defendant Parker R. Mason. Bell at this time stated to Mason that he was looking for something to get into, whereupon Mason asked him, if he (Mason) could mention a good thing in which there was money, would he (Bell) go into it? to which Bell replied, "I would like to find out what it is." Thereupon an appointment was made, and the next day Bell and Mason went to the place of business of the defendant company and examined the machine. Bell and Mason, within the space of two weeks, went to the office of the Felt & Tarrant Manufacturing Company a number of times, something like, as Bell testifies, half a dozen; and Mason, Bell not being present, made an arrangement with Felt and Tarrant and the Felt & Tarrant Manufacturing Company for a sale to them (Mason and Bell) of the French and Belgium patents for the sum of \$7,000. Mason reported to Bell that he had arranged for the purchase of these patents for \$25,000, one-third interest to be conveyed to Bell for one-third of this sum, and a two-thirds interest to be conveyed to Mason for two-thirds of \$25,000. Bell testifies that Tarrant and Felt, before the transfer was made, each told him that the price agreed upon was \$25,000. Tarrant and Felt deny this, and each for himself declares that he never had any conversation with Bell as to the price to be paid for the patents, but that the arrangement was made with Mason alone, and was for the sum of \$7,000.

*Rehearing denied December 3, 1903.

¶ 3. See Cancellation of Instruments, vol. 8, Cent. Dig. § 27.

On the 15th of May, Mason, Bell, De Berard, and Felt met by agreement in the office of the Commercial Safety Deposit Company, in whose vaults Bell had money. At this meeting assignments of two patents by the Felt & Tarrant Manufacturing Company and of two by Felt and Tarrant were made to Mason and Bell. Each of the assignments conveyed to Bell an undivided one-third interest of the patents, and to Mason an undivided two-thirds of the same patents. Two of the assignments were each for the therein expressed consideration of \$5,000, making in all an expressed consideration of \$30,000. This sum Tarrant and Felt say was inserted in the assignments at the instance of Mason, who stated that the assignments were to be used in Europe, and he wished to have the entire consideration expressed therein, \$30,000. Upon this morning of May 15th these four parties, Felt, De Berard, Mason, and Bell, met at the office of the Felt & Tarrant Manufacturing Company, and went from there to the Commercial safety deposit vaults. Before leaving the office of the company Bell executed a note payable to it for \$1,333.33, which he left with De Berard, the secretary and bookkeeper of the company. Bell testified: "Felt handed me the papers all in a large envelope, and we started out and walked over from Tarrant's place of business to the deposit vaults. After a few moments' conversation in regard to the money, I went into the vault and got out \$7,000 in bills of \$1,000 each, and before I paid my money over Mason pulled out some money and paid it over to De Berard. He also handed me over some papers. I wanted to see what the papers were, but De Berard said, 'That is all right; they are all straight and right; they have been looked over,' and he would not show them to me. Before I paid my money over, 'Now,' says I, 'gentlemen, is this straight—is this right?' 'Yes,' says De Berard. I counted out the seven thousand-dollar bills, and I spoke about a receipt. 'Well,' he says, 'the acknowledgment is stated already in the papers; if we have to give you another receipt we will have to change those papers.' Of course, I, knowing all the men being named in the papers, took it for granted that it was all right, and after that we left the office of the safety deposit vaults together, and walked to the corner of Dearborn and Monroe streets. We separated there. I went north; the other three—Mason, Felt, and De Berard—went south." Bell received at this time the assignments of the patents and some other papers, which he was told pertained to the same thing.

De Berard and Felt deny the testimony of Bell as to questions at that time asked by him to the effect if everything was right and straight, and the answers he says were there-to made. De Berard testifies that he drew the assignments in accordance with directions given to him by Mason; that he did at the time of the transfer receive from Bell

\$7,000 in cash and his note for \$1,333.33; that prior to this time Felt had told him that he had agreed to accept \$7,000 for the assignment; that at the time of the assignment he received from Mason \$900 in cash and his check for the difference between that sum and \$16,666.67; that two or three days afterwards he returned to Mason the check he had received from him, and also the \$900 he had received from him; that the \$7,000 received from Bell was kept and paid into the company on Tarrant's account; that the total consideration received for all the assignments made by Felt and Tarrant, and by the Felt & Tarrant Manufacturing Company, was \$7,000 and the Bell note; that at the time of this meeting, May 15, 1891, when the assignments were delivered, nothing was said to the effect that the company would return to Mason the consideration he paid over in the presence of Bell on that date, and that the matter was never, so far as he (De Berard) knows, brought to the attention of Bell in any way; that Felt and Mason fixed the consideration that was to be mentioned and was mentioned in the assignments; that prior to the meeting at the safety deposit vaults there had never been any arrangement with Mason that they were to receive from him the money or check which he handed over, nor any talk that Tarrant and Felt, or the company, or all together, were to get more than \$7,000 on the delivery of the assignments; that a few days thereafter Mason came to him (De Berard), and said, "I want my check and my money back," and that he (De Berard) thereupon gave the money and check given by Mason back to him; that he did this because he understood "we were entitled to \$7,000 only"; that they went to one of the Commercial vaults on that day and expected to receive \$7,000 only, altogether; that he was surprised at receiving a note for thirteen hundred odd dollars and a check for some \$16,000, and \$900 in excess of the \$7,000 which it had been agreed the assignment should be made for; that he did not offer to return the \$900 or either of the notes so given to him; that he was not instructed by the other members of the company to return the money or check given by Mason, but did so on his own motion, and never had any conversation with either member of the company in regard to returning it; that there was really no consideration for the note for \$1,333.33 given by Bell; that the company still had that note, and in open court offered to return it to the complainant, Bell. De Berard testified that he was surprised at receiving the note given by Bell, but that he did not give any expression to his surprise, because he thought the matter was between Bell and Mason, and he was not interested, and he "just kept quiet, and that is all."

That Mason did, in the presence of Bell, at the time this assignment was made, hand over \$900 in money and his check for \$16,666.67, less the \$900, and that a day or two

afterwards the same were returned to Mason, and that the price agreed upon for the transfer of the assignments was \$7,000 and no more, was not denied upon the hearing of the case and is not now. Mason in his last illness testified that he did pay for the assignment two-thirds of \$25,000, all in cash, except his note for \$2,000, which note he afterwards paid, and that he received nothing back. Neither Felt nor Tarrant nor De Berard nor any one corroborated Mason in this regard.

Mason had talked with Bell, the complainant, about his (Mason's) going to Europe to dispose of the French and Belgium patents; but as time ran on, and he failed to do so, and nothing came from the assignments, Bell began to be suspicious, and made inquiries concerning Mason's financial condition at the time of the assignments, and came to doubt whether Mason had actually paid over two-thirds of the \$25,000 he (Bell) understood the price of the transfer to him and Mason made. There was some talk on the part of Mason with Felt and Tarrant, and also on the part of Bell, that they should give to the Felt & Tarrant Manufacturing Company an option for a certain time to purchase, or a price at which the company might sell, the French and Belgium patents. Felt, during the negotiations for such option, went to Bell's house and told him he had an option on Mason's interest in those patents and wanted an option on his (Bell's) interest, and, if he (Bell) would give him (Felt) an option for six months, he (Felt) would give Bell his note, and that if he took the patents within six months he would pay him (Bell) \$7,000, to which Bell replied that he wanted his money down right then and there before he would sign any option or do anything.

During the trial testimony as to the laws of France and Belgium was introduced, from which it appears that a yearly tax has to be paid in each country upon patents issued thereby, and that it is necessary that the patents should be worked; that is, that if the patentee during two successive years ceases to work his patent it will be forfeited, unless in some way he justifies his inaction, and that a failure to pay taxes will cause a forfeiture of the patent. Bell, through the Felt & Tarrant Manufacturing Company, paid taxes for two years. Mason testified that he paid the taxes up to 1897 or 1898. On cross-examination he was uncertain whether he paid them more than for six or seven years after he purchased; finally, he thought it was about six years that he paid them. There was no evidence that either the French or Belgium government had taken any steps towards the forfeiture of any of these patents. It was admitted that no taxes had been paid since the beginning of the present suit, the bill in which was filed May 13, 1896.

May 15, 1894, the complainant's attorney, Mr. Wilbur, wrote to Mr. Tarrant to the effect that unless some settlement was made

with Bell a suit to set aside the assignment on account of fraud, and for the return to Bell of the money paid by him, would be commenced. Bell testified that until he heard the testimony of De Berard upon the hearing of this case he did not know what fraud had been practiced upon him, or that Mason had not paid for the assignments the sum of money it was understood by him (Bell) he (Mason) was to pay; that in fact he had long suspected this, but had never known it until he listened to the testimony of De Berard in this case.

The bill in this suit was filed in 1896. From a judgment of the trial court dismissing the bill for want of equity an appeal was taken to the Appellate Court for the First District, where the decree of the lower court was reversed, and the cause was remanded to the superior court, with directions to enter a decree against appellants for \$7,000, and a decree that the assignment of the patents to Bell and Mason be set aside, and the note of appellee be set aside and held for naught. The case comes here by further appeal.

D. J. & D. J. Schuyler, Jr., for appellants.
William P. Black and George W. Wilbur, for appellee.

RICKS, J. (after stating the facts). The record in this case discloses a transaction which is palpably fraudulent. Bell was induced, by false representations of Mason as to the contract price, to part with \$7,000 in money and his note for \$1,333.33 for a one-third interest in patent rights, although the vendors had placed a valuation of only \$7,000 upon the entire interest. It is no defense to the allegation of fraud to contend that Bell was willing to pay \$8,333.33 for a one-third interest, and that he actually obtained that interest for the amount paid; for if we concede that he obtained the very thing he expected to obtain, and paid no more therefor than he, after investigation, had concluded was reasonable, it does not follow that he was not grossly imposed upon. *Veazie v. Williams*, 8 How. 134, 12 L. Ed. 1018; *Pendergast v. Reed*, 29 Md. 398, 96 Am. Dec. 539. He would not have paid \$8,333.33 for a one-third interest if he had known that the entire property was to be purchased for \$7,000, and that Mason was to profit by the transaction to the extent of receiving a two-thirds interest without any expense whatever. Mason represented as a fact—not as an opinion—that the valuation and price fixed upon the patent rights were \$25,000. By this deception Bell was induced to part with a greater sum of money for a one-third interest than the vendors asked for the entire interest. He was misled by the false misrepresentations of Mason—representations which were made to deceive him and which did deceive him. An unconscionable advantage was taken, which it is within the sphere of equity to remedy. If, therefore, the rec-

ord shows that the defendants are in any way implicated in the fraud by active procurement or deceptive conduct, and if it can be further shown that no rule of equity will be contravened, there will be a clear case for the application of the equitable remedy of rescission. *Cortes Co. v. Tannhauser* (C. C.) 45 Fed. 730; *Yeoman v. Lasley*, 40 Ohio St. 190.

It is next to be determined whether or not defendants Felt and Tarrant and the Felt & Tarrant Manufacturing Company have become implicated in this fraudulent scheme executed by Mason. Bell swears that before the sale was made Felt and Tarrant each told him that the contract price was \$25,000. Felt and Tarrant deny this. Each one swears that he had no conversation with Bell relative to the price of the patent rights, but that all their negotiations were with Mason, and that they fixed the price to him at \$7,000. It is not necessary to weigh this testimony, for the record shows, we think, that De Berard, the agent of the defendants Felt and Tarrant and the Felt & Tarrant Manufacturing Company, while within the scope of his authority, was an active participant in the fraud, and that said defendants have adopted the benefits of the transaction. Therefore, whether it was with or without their knowledge, the defendants are subject to equitable action. De Berard, the financial agent of the defendant company, drew the assignments in accordance with the directions given by Mason. On the 15th of May, 1891, he went to the vaults of the Commercial Safety Deposit Company with Felt, Mason, and Bell. The assignments were transferred, and De Berard received from Bell \$7,000 in cash and his note for \$1,333.33, and from Mason he received \$900 cash and his check for \$15,766.67, making the entire consideration received \$25,000. A few days after this Mason went to De Berard and demanded his money back. De Berard thereupon delivered to him the \$900 cash and the check for \$15,766.67. He retained the \$7,000 and the note for \$1,333.33. De Berard attempts to explain his attitude by saying that he understood at the time that the consideration was to be \$7,000; that he was surprised to receive the check from Bell and the money from Mason, but that he thought the matter was between Bell and Mason, and he "just kept quiet, and that is all." We cannot believe that was all. Even if the matter were between Mason and Bell, there was a surplus of \$18,000 being paid to him. Is it possible that a man will innocently receive \$18,000, for which there is absolutely no consideration, and fail to manifest some surprise? Even if he had not known of this scheme before, being a man of financial experience he must have known that such a proceeding was colorable.

We are considering this transaction in a light most favorable to defendants. These conclusions are drawn from the testimony of

De Berard alone. Bell's testimony tends to make De Berard's conduct much more culpable; but we may disregard his testimony, and still find sufficient evidence to make it clear that De Berard, by affirmative acts, made himself a party to the fraudulent scheme. Let us consider his subsequent conduct. Take, for instance, De Berard's own version of his attitude. He did not know of the fraud. He understood the consideration to be \$7,000, and was surprised to receive \$18,000 in excess of that, but kept quiet because it was a matter between Bell and Mason. Mason came several days later and demanded his money and check, and De Berard unhesitatingly returned them. That is to say, knowing that there were two joint purchasers, and knowing that one was to receive a two-thirds interest and the other a one-third interest in the patent rights, he returned to the one who was to receive the greater interest the entire amount he had paid. If he had been innocent, would he have kept all the consideration from one joint purchaser and returned all that the other had paid? Moreover, not only did he make the \$7,000 cash given by Bell pay for the entire patent interest, but he kept the note made by Bell for \$1,333.33, and one of the objects of this suit is to enjoin the negotiation of that note. Later on we see the defendant company, through Felt, one of the firm and company, offering to surrender this note to Bell as part of the consideration for a proposed purchase of Bell's interest in the patent rights. This evidence, and the inferences deducible from it, show clearly that De Berard had guilty knowledge of the fraud practiced by Mason, and that to assist in its perpetration he lulled the complainant into security by going through the form of receiving from Mason the sum of \$16,666.67, being Mason's two-thirds of the purchase price. The law does not permit one in this manner to assist in cheating another. *Beidler v. Crane*, 185 Ill. 92, 25 N. E. 655, 25 Am. St. Rep. 349. It is not necessary, for the purpose of making De Berard's conduct fraudulent, to show that there was a fiduciary relation between him and Bell. It is sufficient that Mason and Bell, with the knowledge of De Berard and the company, were about to enter into the relation of co-purchasers, and that this was a fiduciary relation. *Bunn v. Schnellbacher*, 163 Ill. 328, 45 N. E. 227; *Cortes Co. v. Tannhauser*, *supra*.

It is undoubtedly true that Mason committed a fraud, and it is just as clear to us that De Berard assisted affirmatively in its commission. This being the case, we need not attempt to show that Mason was actually the agent of the defendants in this transaction, or that his commission for the sale was to be a two-thirds interest, for which he was ostensibly to pay \$16,666.67 and actually paid not one cent. Nor does it affect this conclusion to admit, as the appellants urge,

that Mason was Bell's agent. We recognize the general rule that notice to the agent is notice to the principal; but it would be, indeed, a novel doctrine, if we should hold that if an agent has knowledge that he is defrauding the principal, the principal cannot have a remedy, for the reason that, being charged with the knowledge of his agent in the fraud, he was a guilty party in the plot to defraud himself. From De Berard's own testimony we conclude, without hesitancy, that he assisted in the perpetration of the fraud by his sham conduct; and, this being so, all arguments, however logical in themselves, which rely upon this doctrine of agency as a defense, are specious, because based upon the premise that De Berard was entirely innocent. We conclude, therefore, that the defendants, through their agent, are guilty of fraud. *Fitzsimmons v. Joslin*, 21 Vt. 129, 52 Am. Dec. 46.

If there has been no ratification, and if the parties can be put in statu quo, or, this being impossible, there is some equitable excuse for the inability to do so, this complainant is clearly in a position to invoke the aid of equity in the restoration of his rights. The question of ratification is easily disposed of. There is no evidence whatever to show that the complainant ever had any knowledge that fraud was committed until the time of the trial. Mason swore, even on his deathbed, that the transaction was bona fide, and that he actually paid \$16,666.67 for his two-thirds interest in the patent rights. The defendants, in their answer to the bill, say that the actual consideration was \$25,000. Under such circumstances, it is not difficult to believe that complainant had no knowledge of the fraud until the time of the trial. It is true that he had been suspicious, but suspicion is not knowledge. *Warren v. Tyler*, 81 Ill. 15. Of what avail would an inquiry growing out of suspicion have been, if Mason would swear on his deathbed that the actual consideration was \$25,000, and if these defendants would state in their answer that the actual purchase price was \$25,000? It is not surprising that it required a long time for the complainant to establish his case. The defendants urge that because complainant's solicitor, Wilbur, wrote a letter to the defendants two years before filing the bill, in which he threatened a suit on the ground of fraud, there was knowledge of the commission of the fraud, and that a delay of two years thereafter was a ratification. Wilbur swears that when he wrote that letter he had no positive knowledge of fraud, but that he had looked into Mason's financial standing, and concluded that it was improbable that a man without greater means would pay \$16,666.67 for patent rights, and then not prosecute the enterprise in which he had so much money. We think the testimony of this witness was entirely satisfactory. He, as he said, wrote that letter on a "big, cold guess," thinking thereby

to bring the defendants to a settlement. He suspected fraud, but knew that all proof of it must come from the other side. There is no evidence of ratification, because there is no evidence that complainant had knowledge before the bill was filed.

The principal defense of the appellants is that equity will not rescind the contract because the parties cannot be placed in statu quo. It is insisted that the parties cannot be restored to their original position, because, first, complainant, having only an undivided one-third interest in the patent rights, could not return the entire interest to them; and, second, complainant, having failed to pay certain annuities which were required by the French law, had allowed the patent rights to be forfeited.

As to the first point little need be said. Complainant paid \$7,000 in cash and his note for \$1,333.33 for a one-third interest. De Berard knew that this entire amount came from Bell, because he returned all that Mason had paid. The defendants are therefore in no position to say that complainant cannot rescind the contract as to his one-third interest. If De Berard saw fit, in the transaction, to make Bell pay \$8,333.33 for his one-third interest and make a gift to Mason of the other two-thirds interest, it is certainly not the fault of this complainant that a rescission would leave these defendants without compensation for this two-thirds interest. *Hegenmeyer v. Marks*, 37 Minn. 6, 32 N. W. 785, 5 Am. St. Rep. 808. Mason and De Berard were united in the fraud, and where such a condition exists a court of equity will not refuse a remedy to an innocent party for the mere reason that one of the guilty parties does not release to the other some advantage gained in the transaction. As this court has said before: "Where parties unite in a fraud, they have no such standing in a court of equity as will require that court to adjust nicely the equities between them when their fraudulent transactions are set aside." *Vandyke v. Walters*, 88 Ill. 444.

The second point, as to the status quo made by the appellants, is that, the patents being forfeited under the French laws, complainant is able to deliver back only the worthless paper. The evidence on this point is conflicting. Mason swears that the taxes were paid up to 1897 or 1898. Bell, the complainant, swears that he paid them two or three years, and that after that Mason paid them. He was asked to state how he knew that Mason paid them, and he answered that Mason told him so. Felt swears that they were paid up to 1893 through him, but after that he has no knowledge whether they were paid or not. It is true that Mason's testimony in one respect has been proven to be false, yet it must be remembered that when he swore that he actually paid two-thirds of the \$25,000 for his interest in the patent rights he had a strong motive for

such a falsehood. That was his defense. He was presumably relying upon it to defeat this suit. These defendants in their answer set up the same defense. It is not difficult to understand why he would forswear himself as to this fraudulent transaction. The payment of annuities, however, was no matter of defense. He had no reason to swear falsely with reference to them. It did not strengthen him in his defense to swear that he paid the taxes up to 1896, 1897, or 1898, and it would not have made his position weaker to have sworn that he discontinued payment in 1893 or 1894. We have, then, Mason's testimony that the taxes were paid up to the time the bill was filed. No one swears that they were not paid to that time. This being the case, this court can only conclude that up to the filing of the bill in this case the annuities required by the French government were paid.

Testimony is introduced showing that in France the patentee "shall forfeit his rights who does not work the patent within two years under the date of the signature of his patent, or who has ceased to work it during two consecutive years, unless in one or the other case he justifies himself in the causes of his inaction." For the purposes of argument we shall not question this law or its method of introduction in evidence. Under it the patent rights which Bell purchased lapsed in 1893, yet on September 24, 1894, we find the defendants offering him \$7,000 cash and his note for \$1,333.33 for his interest. If forfeited patent rights were then as valuable as that, we can presume that they are still as valuable. On the whole, then, we believe that even if the burden were upon the complainant (as to that we do not decide) to show that at the time the bill was filed he could have put the parties in statu quo, he has done so. Moreover, granting that the rights did lapse in 1894 and became absolutely worthless, the defendants had notice at that time, from Wilbur's letter, that fraud was suspected, and full knowledge that fraud had been committed, and if they had cared to protect the patent rights they could have paid the annuities from that time. It is true, the letter was a mere conjecture on the part of Wilbur; yet it contained an accusation of fraud, and if the defendants surmised that it was a conjecture they must have thought it a good one. The defendants knew, either actually or through their agent, De Berard (and we think both), that fraud had been committed, and when receiving this letter they could easily have protected themselves by paying the annuities. They must have known, on the receipt of this letter, that sooner or later Bell would discover enough facts concerning the fraud to warrant him in bringing a suit to rescind. Having this opportunity to protect themselves, they are in no position now to resist an equitable remedy upon the alleged ground that the patent rights have lapsed.

This case stands upon its own peculiar facts, and no case can be found parallel or closely analogous to it. The fraudulent scheme, the subject-matter, the astonishing difference in the nature of the defense relied upon in the answer upon the trial—these are all unique and peculiar features. There is difficulty in applying the law to the facts, and, although the proofs are not altogether satisfactory, yet they are such as to show conclusively that a fraud was perpetrated by Mason and that De Berard assisted in its commission. In the absence of all other proof, we think the question of status quo could be decided from two portions of the evidence, to wit, the evidence that unworked patents lapsed in two years, and the letter from Felt and Tarrant to Bell on September 24, 1894, in which they offer him \$7,000 and the surrender of his note for \$1,333.33 for his interest in the patent rights. What are the inferences to be drawn from the fact that the defendants offered such a large price for patents that had lapsed a year previous? Either that the law was not correctly given at the trial, or that Felt and Tarrant were willing to pay more for a one-third interest in patent rights lapsed in France, but still good in Belgium, than they had asked for the entire interest in such rights before they had lapsed. We must assume that the law was given correctly, because it was introduced by these defendants. The alternative is that defendants consider lapsed patent rights a valuable property, and if they do we cannot improve upon the valuation that these defendants have placed upon them in the letter mentioned.

The only basis for the requirement that there must be a restoration to the status quo before equity will permit a rescission of the contract is in the maxim of equity that "he who seeks equity must do equity." *Masson v. Bovet*, 1 Denio, 69, 43 Am. Dec. 651. Equity does not strive to save the perpetrator of the fraud from any harm. *Brown v. Norman*, 65 Miss. 369, 4 South. 293, 7 Am. St. Rep. 663. It does, however, stand for the principle that no party may successfully invoke the aid of equity for the rescission of a contract unless he is willing to restore the other party to the position he enjoyed at the time the contract was made. *Neblett v. Macfarland*, 92 U. S. 105, 23 L. Ed. 471. This complainant offers to give up the assignment of the patent rights. If it were conceded that these rights have lapsed in France, but not in Belgium, we could still look upon the rights as property for which the defendants were willing, and presumably are still willing, to pay a great price.

The appellee assigns as cross-error that the Appellate Court erred in not having directed the allowance of interest on the \$7,000 from the time it was paid by appellee to appellants, on May 15, 1891. Appellants contend that such interest should not be allowed, for the reason that the statute which pro-

vides for the allowance of interest does not include such a condition as this; citing *Fowler v. Harts*, 149 Ill. 592, 36 N. E. 996. In that case the court says (page 597, 149 Ill., and page 997, 36 N. E.): "At the common law interest was recoverable in no case except where there was an express agreement to pay it, and in this state the rule seems to be well settled that it cannot be recovered except where the statute authorizes it, and interest may therefore be regarded as dependent upon and the creature of the statute." In *Sammis v. Clark*, 13 Ill. 544, it was held that in this state, in actions purely ex contractu and where there is nothing tortious in the character of the indebtedness, interest can only be recovered in the cases specified in the statute or where there has been an express or implied promise to pay interest. But this case is not an ex contractu action free from a tortious aspect. It is a suit to rescind on the ground of fraud. In *Warren v. Tyler*, 81 Ill. 15, it was held that where a party rescinds a contract whereby he is induced, through fraudulent representations, to accept unimproved lands in settlement of a debt, he will be entitled to interest from the time of such fraudulent transaction, and will not be restricted to the time when he rescinded. *Steere v. Hoagland*, 50 Ill. 377; *Horne v. Walton*, 117 Ill. 130, 141, 7 N. E. 100, 103; *Deimel v. Brown*, 136 Ill. 586, 27 N. E. 44; *Veazie v. Williams*, supra. We are of opinion appellee should recover interest from the date of filing his bill in this cause, May 13, 1896, which was the time of the actual rescission of said contract by him. The decree of the Appellate Court will therefore be modified to include interest at the rate of 5 per cent. on \$7,000 from May 13, 1896.

The decree, with the above modification, will be affirmed. Decree modified and affirmed.

(205 Ill. 50)

BOUTON et al. v. CAMERON et al.*

(Supreme Court of Illinois. Oct. 26, 1903.)

TRUST DEED — ASSIGNMENT — DEFENSES OF GRANTOR—ACCOMMODATION NOTES—SUBROGATION—FORECLOSURE—DEFICIENCY JUDGMENT — AGENCY — EQUITY — FINDINGS OF CHANCELLOR—REVIEW.

1. The assignee of a trust deed in the nature of a mortgage takes it subject to all defenses which the grantor could make against the grantee, and he should, to protect himself, make inquiry of the grantor whether he has defenses that could be interposed against the grantee.

2. Defendant executed a note payable to himself, and indorsed it in blank. The note was secured by a deed of trust. The note and deed were deposited with a third person to secure him from loss by reason of his having signed a contract for the purchase of land for the benefit of defendant. Subsequently defendant gave the third person the right to use the note and deed as security for a loan of \$1,500, but,

because of the fraud of the third person, defendant signed an instrument authorizing the third person to borrow such an amount on the note and deed as the latter might require. Thereafter the third person induced defendant, by means of fraud, to sign an instrument reciting that plaintiff had executed the note; that the third person had paid to defendant at the time of the execution of the note the amount thereof; that the third person was the owner of the note, authorized to dispose of it for his own use; and that the note was secured by a deed of trust. *Held*, that the note was not made an accommodation note, especially as to persons who were in no way misled by the instruments signed by defendant.

3. Defendant executed a note payable to himself, and indorsed it in blank. The note was secured by a deed of trust. The note and deed were deposited with a third person, to secure him from loss by reason of his having signed a contract for the purchase of land for the benefit of defendant. Subsequently the third person borrowed money, and gave to his creditor the note and deed as collateral, pursuant to an instrument signed by the maker of the note authorizing the third person to use it. Thereafter the third person borrowed money from plaintiff, and gave him the note and deed as collateral. Part of the money obtained from plaintiff was used to pay the debt due the former creditor. *Held*, that plaintiff, being a mere volunteer, could not be subrogated to the rights of the former creditor.

4. Where, in a suit to foreclose a trust deed by one holding it and the note secured thereby as collateral security for a loan, plaintiff fails to recover the amount claimed to be due, he cannot ask for a judgment on the note, a personal decree in foreclosure suits being awarded only because the mortgaged premises will not produce the amount found to be collectible.

5. An assignment of a note and trust deed securing it by means of a separate instrument, and not such an assignment as is contemplated by *Hurd's Rev. St. 1899, c. 98, § 4*, which is by indorsement on the note, is only an equitable assignment, and therefore the assignee takes subject to any defenses which the maker of the note might have against the assignor.

6. A third person was in possession of a note and trust deed securing it. The note and deed had been delivered to him to secure him on his liability due to his having signed a contract for the purchase of land for the benefit of the maker. The third person borrowed money, and gave to his creditor as collateral the note and trust deed, subject to another's claims as pledgee thereof. The son of the creditor had full knowledge of all the facts, and knew the purpose for which the note had been delivered to the third person. The third person, in the presence of the son, solicited the loan from the creditor. The creditor drew his check for the amount of the loan, payable to his son, with instructions to examine the papers and deliver the check to the third person if the securities were satisfactory. The son delivered the check and received the securities. *Held*, that the creditor made his son his agent to pass upon the loan, and therefore was chargeable with the knowledge of the son.

7. In chancery cases, where the chancellor hears the witnesses testify in open court, his findings of fact will not be disturbed on appeal, unless clearly against the evidence.

Appeal from Appellate Court, First District.

Suit by Christopher Bouton and others against Robert Cameron, James G. Wright, and others, in which defendant Wright filed a cross-bill. From a decree of the appellate court (99 Ill. App. 600) affirming a decree granting insufficient relief to plaintiffs and

*Rehearing denied December 3, 1903.

†1. See *Mortgages*, vol. 35, Cent. Dig. §§ 673, 682, 686.

no relief to defendant Wright, plaintiffs and defendant Wright appeal. Affirmed.

February 4, 1895, appellant Christopher Bouton began suit in the circuit court of Cook county to foreclose a trust deed executed by appellees. Various other parties supposed to have some interest in the premises were made defendants, and among them was appellant James G. Wright, who is the only one of the other defendants it is necessary for us to consider in this appeal. Wright answered, and also filed a cross-bill setting up the rights he claimed to have. The trial court decided the cause in favor of appellant Bouton and the cross-complainant Wright as to the property mentioned in the trust deed in the name of Robert Cameron, but dismissed the bill and cross-bill as to the property in the name of Mrs. Cameron. From that decree a writ of error was sued out from the Appellate Court by Robert Cameron. When the cause came before the Appellate Court the decree of the circuit court was reversed except as to the dismissal of the bills with reference to Mrs. Cameron, in which particular the decree was neither reversed nor affirmed, on the ground that Mrs. Cameron was not a party to the writ of error, either by service or appearance, and the cause was remanded to the circuit court. The decision of the Appellate Court is reported in 72 Ill. App. 264. The cause being reinstated in the circuit court and trial had, a decree was entered denying all relief to appellant Wright, and denying relief to appellant Bouton except foreclosure to the amount of \$100 and interest, amounting in all to \$193.39, and \$15.47 solicitor's fees. From that decree separate appeals were taken by the present appellants to the Appellate Court, where, for the purpose of review there, the appeals were consolidated. The Appellate Court affirmed the decree of the lower court, and from the judgments entered in that court appeals were prayed by each of the appellants to this court, where the cases will again be considered together.

In order to make plain the views we entertain of the matters thus brought before us, it will be necessary to set out at some length the facts, as we understand them, that are presented by the record and evidence transmitted to this court.

In the summer of 1892 appellee Robert Cameron became desirous of purchasing certain property on Barry avenue, in the city of Chicago. The title to this property was in two minors by the name of Bruschke, subject to a mortgage held by one William Troost. For the purpose of accomplishing the purchase Cameron applied to Arthur C. Gehr, a real estate agent in Chicago. The father of this man Gehr had long been the confidential friend and adviser of the Camerons, the appellees, and since the death of the elder Gehr, some years previous, Arthur C. retained the same relation with appellees heretofore held by the father, trans-

acting business for them, and keeping various of their papers in his office. Gehr informed Cameron that he could not purchase the property through the administrator, and that the best way to obtain title would be by means of a foreclosure of the Troost mortgage. This mortgage debt amounted, in round numbers, to about \$5,000, including costs, etc., but it was arranged that Cameron was to pay \$10,000 for the property. Thus the minors would realize about \$5,000. Gehr informed Cameron that he (Gehr) would attend the foreclosure sale and bid in the property for him (Cameron), and that Cameron would not need to be present at the sale. Gehr did attend the sale and bought the property, but in his own name. At the same time Gehr entered into a written contract with the guardian of the minors, which recited that Gehr had attended the said sale and bought in the property for \$10,000 on the condition that he would pay the sum found to be due on the mortgage debt by the master, together with costs, etc., amounting to \$4,918.43, to be paid in cash on or before the day of expiration of the time for redemption if said property should not be redeemed, and that he would pay the balance of said \$10,000, being \$5,081.57, into the circuit court, provided that certain allowances be made for interest, taxes, etc. Said sale occurred on March 2, 1893, and the next day a certificate of sale was issued to Gehr, who, upon receipt of the same about two weeks later, assigned and sold the same to James G. Wright. On May 2, 1893, Gehr assigned to Cameron the contract made with the guardian, by writing, in the following words:

"For value received I hereby sell, assign, transfer and set over to Robert Cameron, of Chicago, Illinois, all my right, title and interest in and to the within contract of sale, and for myself, heirs, executors, administrators and assigns, I agree that upon delivery of the within mentioned master's deed to sell and convey said land to said Robert Cameron, who has delivered to me his note for \$11,000, secured by trust deed upon land in Cook county, Illinois.

"Arthur C. Gehr. [Seal.]"

Cameron claims that he was informed by Gehr that he (Gehr) had advanced the money at the master's sale, and that he held the certificate, and that he did not learn until about 14 months afterwards that Gehr had sold the certificate to Wright.

On April 1, 1893, about a month after Gehr had bought the Barry avenue property at the foreclosure sale, and about two weeks after he had sold the certificate to Wright and received the money therefor, when, it appears from the evidence, Cameron believed that Gehr had purchased for him (Cameron) and had in his possession the master's certificate of sale, appellees went to the office of Gehr, and executed the deed of trust sought to be foreclosed, to secure Cameron's note for \$11,000, payable in one year to his order,

and indorsed by him in blank. Cameron and his wife both testified that at the time the deed of trust was signed Gehr assured them that it did not contain the piece of property owned by Mrs. Cameron, but only that owned by appellee Robert Cameron. It is admitted that Cameron cannot read, and both Mrs. and Mr. Cameron deny that the instrument was read to them at the time of signing it. The purpose of the execution of this note and trust deed is stated thus by Gehr: "About early in April, 1893, after I made this contract with Mr. Kriewitz (the guardian of the minors), I suggested to Mr. Cameron that in case of his death that he should give me security for my being obligated to carry out this contract with Mr. Kriewitz for property that I was not buying for myself and did not want. He thought that was a proper thing to do." In regard to it Robert Cameron testified: "The \$11,000 note was given to secure Gehr against loss in case I might die, so as this property would not be left on his hands, and it was made out \$11,000 in place of \$10,000. There was \$1,000 to be spent on the house after I got possession of the property." In the writing of May 3d, hereinafter referred to and set out, the purpose is still further declared as follows: "The said note was deposited with you (Gehr) to secure you from loss by reason of your having signed a contract for the purchase of the property on Barry avenue for my benefit."

April 20, 1893, Cameron and wife borrowed of Gehr \$1,000, for the purpose, as they state, of buying furniture. Of this loan \$900 was subsequently paid back at different intervals, the last payment of \$50 being made May 7, 1894.

On May 3, 1893, Gehr obtained from Cameron and wife the following writing, referred to above:

"Chicago, May 3, 1893.

"Arthur C. Gehr, 114 Dearborn Street: You are hereby authorized to borrow such an amount upon my note for \$11,000, dated April 1, 1893, secured by a deed of trust, as you may require. The said note was deposited with you to secure you from loss by reason of your having signed a contract for the purchase of the property on Barry avenue for my benefit. I have received the sum of \$1,000 on account of said note, and in giving you my consent to raising additional amounts on said note I rely upon you to see that such amounts are paid promptly, though legally I authorize you to use said note for your benefit and accommodation at its face value, at your discretion.

Robert Cameron.

"Sarah F. Cameron."

The Camerons testified with reference to the purpose and intention of this paper as follows:

Mr. Cameron testified: "Gehr told me that he wanted to know if I would do him a little favor that morning, and I said I would if I could, and he said he would like to use that note and the mortgage of mine for \$1,500 for

ninety days, and just about that time Mrs. Cameron came in, and I told her what Gehr wanted,—wanted to use the note and mortgage for \$1,500 for ninety days,—and I says: 'You know Mr. Gehr better than I do; if you say it is all right, I am satisfied,' and Mr. Gehr spoke up, and he says, 'It would be quite an accommodation for me, Mrs. Cameron, if Mr. Cameron would let me use that note for ninety days for \$1,500,' and she says, 'Well, Mr. Gehr, we owe you \$1,000 now, and that would be only \$500 more than what we owe you, and I certainly think that you are good for \$500.' 'Well,' I says, 'You are the doctor, and if you say so I am satisfied.' And then he spoke something about that there were some taxes and interest, or both, on the Lake View property of Walker's and his, and then he told Mrs. Cameron, after that was all talked about a little, that he had brought the contract up, and showed it to her; he had brought the contract up for the Barry avenue property; that he had signed with the guardian, and it was nice property, and no trouble about it but what we would get it. Then he said to me that he would like to have it in writing, to show that he was authorized to use this note for \$1,500 for ninety days, and I said, 'All right,' and he asked Mrs. Cameron if she would get him pen and ink and some paper, and she went and got him the pen and ink and paper, and after he had wrote out what had been written on the paper he asked me to sign it, and I signed it; and after I had signed the paper two or three minutes he said, 'Well, Mrs. Cameron, I guess it would be better for you to sign it too,' and so Mrs. Cameron signed it. I don't believe Mrs. Cameron read that paper. I didn't. I couldn't if I tried to. Nobody else was present at that time besides myself and Mrs. Cameron. Gehr didn't read that paper to me nor to Mrs. Cameron in my presence."

Mrs. Cameron testified: "When Gehr came there I guess Mr. Cameron let him in, and I came in a few minutes, and spoke to him, and asked him how he was, and such as that. Then I went out again of the room in a few minutes, and I came in again, and Mr. Cameron spoke to me and told me what Gehr wanted; that he wanted the loan of \$1,500—used those words; that was in Gehr's presence, and Gehr told—they both told me at the same time—they both told me about it. Gehr said he would like to use those papers for \$1,500, and of course I didn't know that he could use them for any more but the \$1,500. Mr. Cameron said, 'Would it be all right?' and I said, 'Yes, we owe him \$1,000 now, and that surely you could trust him for \$500 more.' So we told him 'Yes'—that he could do it. And then he asked me for paper, pen, and ink, and I brought it, and he wrote this paper, and Mr. Cameron signed it. I didn't read the paper. There was nothing said about the reading of it. Gehr didn't read the paper to me. Gehr told me that the paper was for getting—so

that he could get—the \$1,500. Gehr stayed there it might be twenty minutes or half an hour—might be half an hour. Something further was said by Gehr in reference to the Barry avenue property. He talked a little about that, because that was what Mr. Cameron and him was talking about when I went in; and he brought up some kind of paper—contract or something—I don't exactly remember what it was. * * * Gehr said that was the contract for the Barry avenue property, and that we were going to get it, and such things as that. * * * In reference to this \$1,500, something was said about the time by Gehr. It was for ninety days." Gehr stated that he read the paper to both Cameron and his wife, and stated that he wished to use part of the money on the Lake View property, in which he had an interest.

On May 20, 1893, Gehr borrowed \$6,000 of a man named Straus, for two months, putting up the Cameron note and trust deed as collateral security. On July 19th he repaid \$2,000 of this loan, but was unable to meet the balance when due. Thereupon Straus became suspicious, and refused to extend the time of payment unless Gehr would bring about a meeting between him and Cameron that he might satisfy himself as to the collateral and Gehr's right to so use the Cameron note and trust deed. Thereupon Gehr sent for Cameron to come to the office of Attorney Werthelmer, where Gehr and Straus awaited him, and at that meeting the following writing was procured from Cameron:

"Chicago, July 27, 1893.

"I, the undersigned, Robert Cameron, do hereby declare that I did, on the first day of April, 1893, execute one promissory note, payable one year after date, to the order of myself and by me endorsed, in the principal sum of \$11,000, with interest thereon at the rate of six per cent. per annum, payable half-yearly, on the first day of October and of April in each year, without grace, at the office of Arthur C. Gehr & Co., in Chicago, interest evidenced by two coupon notes of even date; that said sum of \$11,000 was paid me by Arthur C. Gehr & Co., and that said Arthur C. Gehr & Co., upon the execution thereof, became the owners of said note and coupons, and had full authority to negotiate or otherwise dispose of the same for their own use and behoof. Said note and interest aforementioned is secured by trust deed executed by me on real estate in Cook county, which said trust deed bears document number 1,843,226, recorded April 5, 1893, in Book 4289 of Records, page 36.

"Robert Cameron.

"Signed in presence of

"B. J. Werthelmer,

"P. W. Straus."

There seems to be no question but what the procurement of this paper was solely for the purpose of enabling Gehr to effect an

extension of his loan from Straus. As to what took place there, and the understanding of Cameron with regard to it, there is conflict of evidence. Attorney Werthelmer testified that he explained the purpose of the meeting to Cameron, and that his conclusion was that he understood what he was doing, but he would not be certain whether he read the paper to Cameron or Cameron read it for himself, but he was confident that Cameron knew its contents. Straus testified that the matter was explained to Cameron; that Werthelmer explained to Cameron the purpose of the meeting was that Straus, as a business man, wanted to have proper information about the note and trust deed, etc. He then further said: "He [Cameron] spoke to me regarding it. I told him it was all right. He did not ask me what it was, or anything of the sort. The paper had already been read, and I told him it was an acknowledgment by him that I had a right to use this note, the same as the other acknowledgment that I had before." Cameron testified about the meeting, the parties, etc.; that Straus asked him if Gehr had his note for \$11,000, which he replied he had; that he was asked if Gehr was authorized to borrow money on it, etc.; and, further: "Mr. Werthelmer handed me a paper about the time that conversation was through. He asked me to read it, and he would like to have me sign it. Gehr was sitting on the window. * * * I took the paper in my hand, and walked over where Gehr was, and he got up off the window, and I asked him what this paper meant. He said that it was the same as my wife and I had signed at the house; that this was the people he was getting the money from; and that they wanted to see the maker of the note, and have him sign that paper. I signed the paper." He further testified that the paper was not read to him; that nothing was said about Gehr having paid him \$11,000 or about Gehr owning the paper; that he was there about five minutes; that no one told him that Gehr had already borrowed money on the note and trust deed; that he had no conversation with Werthelmer beyond a mere introduction; that he made no inquiry about the loan, because he supposed it was in regard to the \$1,500 which he had given Gehr permission to borrow.

Upon the execution of this paper of July 27th Straus extended the time of payment, and Gehr a short time thereafter repaid the loan in full. In order to do this, however, Gehr had to procure another loan, which he did from appellant Bouton on August 17, 1893, which loan was for \$5,000 for 60 days, and was on Gehr's note, with the Cameron note and trust deed as collateral. At this time Gehr was owing appellant Wright \$2,000 for money which Wright had placed in Gehr's hands a short time before for another purpose but which Gehr had used for him-

self. He also owed Straus \$3,000, balance due on the Straus loan, having paid \$1,000 on said loan a short time previous. At the time of procuring the Bouton loan, so far as the evidence discloses, neither Bouton, nor his agent, Tod, who acted for Bouton in this matter, had ever seen the papers of May 3d and July 27th. Gehr himself testified that the paper of May 3d was placed by him in his vault among a bundle of old papers shortly after the time of procuring it, and he never saw it again until some time in the summer of 1894. Gehr had been negotiating with Bouton, and his agent, Tod, for some time, first with a view of selling, then borrowing on the Cameron securities. The paper of July 27th was in the hands of Straus until after Gehr obtained the money from Bouton, which money it was necessary for him to get before he could secure the release of the trust deed and paper from Straus, and Tod turned this paper back to Gehr a few minutes after Gehr had given it to him.

On March 16, 1894, Gehr procured a loan from appellant Wright, evidenced by his judgment note of that date for \$7,700, to secure payment of which he executed to Wright a paper purporting to be an assignment from him to Wright of certain other securities and also Gehr's interest in the Cameron note and trust deed. The language of the instrument, as to the note, is as follows: "Also all right, title and interest in and to a certain note for the sum of \$11,000, made by Robert Cameron and dated April 1, 1893, secured by deed of trust recorded in the recorder's office of Cook county, Illinois, in Book 4289 of Records, at page 36, subject to an encumbrance or loan upon said note of the sum of five thousand dollars (\$5,000) for which said note is pledged with Walter Tod & Co. of Chicago, Illinois." Walter Tod & Co. is the name of appellant Bouton's firm. The purported assignment of the note and trust deed was necessarily by a separate instrument, the note and trust deed being in Bouton's possession at the time of the transaction.

During the time of all these transactions between Cameron and Gehr, J. J. Wright, son of appellant Wright, was a clerk in Gehr's office, and familiar with what was going on. Cameron said that in his visits to Gehr's office he saw Wright, Jr., much oftener than he did Gehr. Wright, Jr., took the acknowledgment of the trust deed from Cameron and his wife, and from his relation in the office we would suppose he knew the object for which it was given. That object is also stated in the paper of May 3d, between which and the paper of July 27th there is an obvious discrepancy, the former stating the trust deed was to secure Gehr against loss, and the latter that Gehr had paid to Cameron \$11,000, which Wright, Jr., must have known to be untrue. Wright, Jr., testified that he had received both of these

papers before making the Wright loan to Gehr, as well, also, as the paper purporting to assign to Wright, Sr., Gehr's interest in the Cameron note and trust deed. This transaction with appellant Wright was about two weeks prior to the maturity of the Cameron note. Near the middle of April, about two weeks after the maturity of said note, Wright delivered to Tod, Bouton's agent, a writing to the effect that Gehr had assigned his equity in the Cameron note and trust deed to himself (Wright), subject to the claims of Bouton. After May 7th, the date of the last payment by Cameron on the \$11,000 loan from Gehr, Cameron received a letter from Tod notifying him that his \$11,000 note had not been paid, which appears to have been the first information that Cameron had that Gehr had hypothecated his note with Bouton. Cameron had several interviews with Tod and Bouton after this in regard to the matter, in one of which he explained to them how he came to give the note and trust deed to Gehr, and Bouton replied that it was too bad, but that he would have to be paid.

When the period of redemption under the foreclosure sale of the Barry avenue property had expired, Gehr was unable to carry out his contract for the purchase of the property. During all this time Cameron declares he supposed that the certificate of sale was being held by Gehr for him (Cameron). When Cameron became aware of the true status of affairs he was much incensed at Gehr, and to appease him Gehr assigned him some alleged securities, none of which appear to have been of any real value.

From the foregoing it will be seen that the position of appellants Bouton and Wright is that the former is seeking here to foreclose the Cameron trust deed and note to recover the amount due him under the Gehr \$5,000 note, with interest, solicitor's fees, etc. Wright claims by his cross-bill that he is entitled to whatever is due on the Cameron note and trust deed, less the amount to which Bouton is entitled; that he has an equitable assignment of these securities to secure his loan of \$7,700.

In addition to what has already been said in reference to the findings of the decree rendered by the trial court as to the equities of the parties to this suit, the decree finds that Gehr fraudulently represented to the appellees that he had bought for them the Barry avenue property at the foreclosure sale, and held in his possession a certificate of sale for said property, when, in fact, the said Gehr had transferred and assigned said certificate to James G. Wright, and that said certificate was paid for by money received from said Wright; that relying upon such fraudulent representations, which were material, appellee Robert Cameron executed his principal note for \$11,000, and coupon notes, and the trust deed for certain property owned by him; and that the other appellee, Mrs. Camer-

on, being induced by said fraudulent representations, joined with her husband in the execution of said trust deed for the purpose of releasing her dower, and that such acts of appellees were for the purpose of securing said Gehr harmless by reason of his supposed purchase. The decree further finds that said Gehr suffered no loss by reason of such pretended purchase; that about April 20, 1893, appellees borrowed of said Gehr \$1,000, of which appellees have repaid \$900, the last payment being May 7, 1894; that about May 3, 1893, by fraudulent representations, said Gehr obtained permission from appellees to use said note and trust deed executed by them as accommodation paper to the extent of \$1,500; that, instead of only borrowing \$1,500, the said Gehr borrowed \$6,000 of one Straus, using said note and trust deed as security; that on August 17, 1893, Gehr borrowed from appellant Bouton \$5,000 upon his individual note for 60 days, with interest, and as collateral security to said note deposited with said Bouton the notes and trust deed hereinbefore mentioned, executed by the appellees; that said deposit was without the consent, authority, or knowledge of appellees or either of them; that said appellees had no knowledge of such fact until after May 7, 1894, and that no notice of such fact was received by them until after said date. The decree further finds that, because of the loan of appellees from Gehr, said Gehr became entitled to a lien on the note and trust deed for the unpaid balance due him on account of said loan, which amount is, including interest, \$193.39, and that, by reason of Gehr's deposit of said securities with Bouton, said Bouton acquired the rights of Gehr, and is entitled to a lien to the same extent that Gehr would have been. The decree further finds that about March 16, 1894, appellant Wright loaned Gehr \$7,700, and that Gehr assigned to Wright certain securities, among them being the attempted assignment heretofore mentioned with reference to the note and trust deed of appellees; that at the time of such transaction Gehr was not in possession of said note and trust deed, and that Gehr's act was without the consent, knowledge, or authority of appellees, or either of them; that said appellant Wright failed to maintain the material allegations of his cross-bill, and that the equities thereunder were with the appellees, and \$15.47 solicitor's fees are allowed.

Heckman, Elsdon & Shaw, for appellants.
Matz, Fisher & Boyden, for appellees.

RICKS, J. (after stating the facts). Appellant Bouton contends (1) that, whatever might have been the original purpose of the execution of the \$11,000 note and trust deed, the note became accommodation paper when the Camerons authorized Gehr to use them for his accommodation, and that the liability of appellees herein is to be measured by the rules of law applicable to accommodation

paper; (2) that his loan to Gehr upon the \$11,000 note and trust deed having gone to the extent of \$3,000 to pay off the prior loan from Straus upon such note and trust deed, and the same having been thereby released, he is entitled to be subrogated to the rights of Straus to the extent of such payment; (3) that, if the circuit court was right in only decreeing a foreclosure for the amount that was decreed, then, even in that case, he is entitled to a personal decree against Robert Cameron for the balance due on the \$11,000.

Addressing ourselves to the first proposition, our opinion is that such contention is not well taken. There seems to be no question as to the well-established rule of law that the assignee of a trust deed in the nature of a mortgage takes it subject to all defenses which the grantor could make against the grantee, and that if the assignee would protect himself he must make inquiry of the grantor whether he has any defenses that could be interposed against the grantee. *Olds v. Cummings*, 31 Ill. 188; *McAuliffe v. Reuter*, 168 Ill. 491, 46 N. E. 1087; *Buehler v. McCormick*, 169 Ill. 269, 48 N. E. 287. Neither of the appellants is shown to have exercised any diligence whatever to protect himself upon the taking of these securities. Cameron lived in Chicago, and was accessible to them, as shown by the fact that he received Tod's letter shortly after its date.

But appellants contend that the note of appellees was made accommodation paper by the writings of May 3d and July 27th, and that the above rule does not apply, and the case of *Miller v. Larned*, 103 Ill. 562, is cited as sustaining this position. We think the evidence set out in the statement preceding this opinion makes it clear that the note in question was not intended or given as an accommodation note, and such was the finding of the chancellor in the trial court, but it was given as mere security to Gehr against loss by reason of his undertaking to purchase the property on Barry avenue for appellees. The original purpose of the note and trust deed is too clear for dispute. The chancellor found, and we think properly, that the writing of May 3d was for but a limited purpose—that of enabling Gehr to borrow \$1,500 for 90 days—and we do not see how that paper, given under the circumstances and for the purpose disclosed by the evidence, can now be construed as a general authority making appellees' note accommodation paper to its full face value, and how its protection can be invoked by persons who were never deceived by it and unaware of its existence. When the authority given under the papers of May 3d and July 27th was exhausted by the first loan obtained from Straus, the note and trust deed existed only for the purpose for which they were originally given, viz., security to Gehr against loss, especially so far as all persons were concerned who were in no way misled or deceived by the papers of May 3d and July 27th.

We do not accede to appellants' contention that the case of *Miller v. Larned*, supra, has application to the facts of this case and is controlling of it. In that case the court said (page 569): "A recognized definition of accommodation paper is either a negotiable or nonnegotiable bill or note made by one who puts his name thereto without consideration, with the intention of lending his credit to the party accommodated;" and the court in that case held that the notes there in question were accommodation notes ab initio, and were so understood by the parties to them. There is no contention that Bouton, or his agent, Tod, ever saw or heard of the paper of May 3d before he made the loan to Gehr; and it is equally clear that neither of them saw the paper of July 27th until after they had given Gehr the money which they loaned him, and even then, when Tod did receive the paper of July 27th, he almost immediately returned it to Gehr, thus indicating that even after he saw and possessed it he attached no or but little value thereto, and certainly it had no place in his calculations about the loan he had just made to Gehr. The decree of the circuit court finds, and we think on ample grounds, that Gehr used fraud and deceit in the procurement of both of these papers, and used them in a manner that he had no authority to do. This element of fraud alone is sufficient to distinguish the present case from all of those cited by appellants as furnishing precedents for the decision of this case, and as laying down rules for the government of accommodation paper.

It is next contended that appellant Bouton should be subrogated to the rights of Straus, inasmuch as \$3,000 of the money obtained from Bouton went to the repayment of the Straus loan. We do not think the doctrine of subrogation can be applied to the facts in this case. Bouton was a mere volunteer. The money he paid to Gehr was not an advancement for the protection of any interest held by him, for at that time he possessed no interest. He was under no obligation whatever to loan his money to Gehr, and if he did so it was a business transaction of such a nature as affords him no right to invoke the doctrine of subrogation. In *Beach on Modern Equity Jurisprudence* (section 801) the author says: "But one who is only a volunteer cannot invoke the aid of subrogation, for such a person can establish no equity. He must have paid on request, or as surety, or under some compulsion, made necessary by the adequate protection of his own right. * * * The loaning of money to discharge a lien does not subrogate the lender to the rights of the lienholder." The law of subrogation is declared in the following language in the *American and English Encyclopedia of Law* (volume 24, p. 281), and the rule sustained by the citation of numerous cases from this and other states: "One who advances money to pay the debt of another, in the absence of agreement, express or implied, for

subrogation, will not be entitled to succeed to the rights and remedies of the creditor so paid unless there is some obligation, interest or right, legal or equitable, on the part of such person in respect of the matter concerning which the advance is made, as otherwise he is a stranger, a volunteer, an intermeddler, to whom the equitable right of subrogation is never accorded."

It is next contended that appellant Bouton is entitled to a personal decree against Cameron for the amount of the \$11,000, less the amount found to be due from him by the trial court. The court found that Gehr had no authority to pledge the note and trust deed as collateral security, and we are unable to see on what ground he would, in equity, be entitled to such a decree. If Bouton cannot foreclose this trust deed for the full amount of his claim, he has no standing in equity. It is only by virtue of the statute that a money decree can be rendered by a court of equity in a foreclosure proceeding, and the statute only provides for a deficiency decree for the balance remaining due after a sale of the property has failed to produce the full amount found to be due. That a money decree can be rendered, in a foreclosure suit, for a deficiency only, has been decided by both this court and the Appellate Court. In *Cotes v. Bennett*, 183 Ill. 82, 55 N. E. 661, it was declared (page 85, 183 Ill., and page 662, 55 N. E.): "It is only in virtue of power conferred by the statute a money decree can be rendered by a court of chancery in a foreclosure proceeding against the mortgagor or other person liable for the mortgage debt. 8 Am. & Eng. Ency. of Law, 264. Section 16 of chapter 95 of the Revised Statutes, entitled 'Mortgages,' authorizes courts in this state to render such decrees 'for any balance of money that may be found due to the complainant over and above the proceeds of the sale or sales' of the mortgaged premises, and provides that such a decree may be conditionally rendered at the time the decree of foreclosure and sale is entered, or that it may be entered after the sale and ascertainment of the balance due. It is to be noted this statute authorizes such decrees to be rendered only 'for any balance of money that may be found due to the complainant over and above the proceeds of the sale or sales' of the mortgaged premises."

In *Phelan v. Iona Savings Bank*, 48 Ill. App. 171, the rule is declared in the following language (page 175): "Decrees upon such bills [foreclosure] rested upon purely equitable principles, and were solely for the purpose of foreclosing this right of redemption. The courts rendering them were without power or jurisdiction, in such proceeding, to render personal decrees for the indebtedness secured by the mortgage, or even for a part of such indebtedness remaining unpaid after the sale of the mortgaged premises. * * * The mortgagee might, if he desired a judgment in personam, bring his action at law

upon the indebtedness, and might at the same time file a bill in chancery for the foreclosure of the mortgagor's equity of redemption. The remedies are concurrent. 4 Kent's Com. 184. The powers and jurisdiction of the courts of Illinois have been increased in respect of such matters by statutory enactment, but with this statutory power added the courts of our state are yet without jurisdiction to render judgments or decrees for the payment of the mortgage indebtedness against defendants in foreclosure proceedings. The only addition to their power is such as is given by section 18 of chapter 95 of the Revised Statutes, which authorizes the rendition of a personal decree 'for the balance of money that may be found unpaid' after the mortgaged premises have been sold and the proceeds applied upon the indebtedness. A decree against the defendants in a foreclosure proceeding for the whole debt would, therefore, be wholly extrajudicial. In the case at bar the court did not attempt to exercise the statutory power, and it had otherwise no authority to render a money decree against any one."

In this case the trial court found that only \$193.39, principal and interest, with \$15.47 solicitor's fees, can be collected out of the mortgaged premises under the foreclosure of the trust deed. A deficiency decree is not asked because a sale of the mortgaged premises will not produce the amount found to be collectible, but for an entirely different purpose. Appellants having failed to recover the amount they claim to be due in this foreclosure proceeding, they ask to have a judgment upon the note, which we do not think is proper.

Appellant Wright makes the further contention that he is the equitable assignee of the Cameron note and trust deed, and that by the writings of May 3d and July 27th the Camerons are estopped from asserting any equities against him. The assignment to Wright was by a separate instrument, and was not such an assignment as is contemplated by section 4 of chapter 98 of our Statutes (Hurd's Rev. St. 1899), which is by indorsement on the note. The assignment could be no more than an equitable one, and Wright, as such equitable assignee, would take subject to any defenses which Robert Cameron, the maker of the note, might have against Gehr. "The only assignment which will cut off the equities of the maker of the note is an assignment made in conformity with the statute." Peck v. Bligh, 37 Ill. 317; Haskell v. Brown, 65 Ill. 29; Melendy v. Keen, 89 Ill. 395.

What has already been said with reference to the papers of May 3d and July 27th will also apply to the question of estoppel, which principle is sought to be invoked by appellant Wright. The evidence disclosed that Gehr and Wright, Jr., met appellant Wright, Sr., on the street, when Gehr solicited the loan of \$7,700 from him, proposing to

put up other security not involved in this litigation, together with his equity in the Cameron note, which he informed him was pledged to Bouton for \$5,000. Wright, Sr., after a short conversation, went to the bank and drew his check, payable to Wright, Jr., who was the son of appellant J. G. Wright, with instructions to examine the papers, and if the securities and papers were satisfactory to make the loan and deliver the check. The same day Wright, Jr., did deliver the check and received the securities and the writing signed by Cameron of date July 27, 1893. We think Wright, Sr., made Wright, Jr., his agent to pass upon this loan. The son had full knowledge of all the facts, and knew that Gehr's interest in the note was merely for the purpose of indemnity. He and Gehr were operating together, willing, if not active, agents in the attempt to defraud the Camerons, and Wright, Sr., was chargeable with the knowledge of his agent. It is quite certain that if Wright, Jr., lacked full knowledge of the real relation of Gehr and Cameron he had sufficient knowledge to put him upon inquiry, which, if made, would have prevented the transaction, if it was an honest one, in its inception.

Numerous assignments of error are made as to the findings of facts by the trial court. Concerning those findings we need only say that they do not appear to us to be clearly and manifestly against the weight of the evidence, and according to our practice we are not authorized to disturb them. It is the established rule of this court that in a chancery cause in which the chancellor, as here, heard the witnesses testify in open court, the findings of fact are not to be disturbed unless clearly against the evidence. Burgett v. Osborne, 172 Ill. 227, 50 N. E. 206; Delaney v. Delaney, 175 Ill. 187, 51 N. E. 961; Blomstrom v. Dux, 175 Ill. 435, 51 N. E. 755; Elmstedt v. Nicholson, 186 Ill. 580, 58 N. E. 381; Mayrand v. Mayrand, 194 Ill. 45, 61 N. E. 1040; McCormick v. Miller, 102 Ill. 208, 40 Am. Rep. 577.

The judgments of the Appellate Court are affirmed. Judgment affirmed.

(206 Ill. 230)

DOWNEY et al. v. PEOPLE ex rel. RAYMOND.*

(Supreme Court of Illinois. Oct. 26, 1903.)

MUNICIPAL CORPORATIONS—LOCAL IMPROVEMENTS—ASSESSMENTS—STATUTES—CONSTRUCTION—CONSTITUTIONAL LAW—JUDGMENT OF SALE—APPLICATION—DEFENSES.

1. An objection that inferior materials were used in paving certain streets, and that the work was deficiently performed, is not available on an application for judgment for the sale of property for nonpayment of an assessment for such improvement, where the evidence did not show that the improvement as constructed was wholly different from that provided for by the ordinance and contract.

*Rehearing denied December 2, 1903.

¶ 1. See *Municipal Corporations*, vol. 24, Cent. Dig. § 1257.

2. Under Local Improvement Act 1897, § 66, as amended by Laws 1901 (4 Starr & C. Ann. St. 1902, p. 188, c. 24, par. 103), providing that, where an application is made for the sale of land for a matured installment of a special assessment, no defense or objections can be made which might have been interposed in the proceedings for the making of such assessment, or the application for the confirmation thereof, and that, where the application is for judgment of sale for a subsequent installment only, no defense, except as to the legality of the pending proceeding, the amount to be paid, or actual payment, shall be made, a property owner who had filed objections to the first and second installments, and had had two hearings thereon, was not entitled to object, on an application for judgment of sale for nonpayment of the third installment, that the improvement was improperly done, and that the ordinance authorizing it was void.

3. Under Local Improvement Act 1897, § 66, as amended by Laws 1901, providing that the voluntary payment of any installment of any assessment by the owner shall be deemed an assent to the confirmation of the assessment roll, and shall be held a waiver of all objections to the application for judgment of sale, etc., where owners voluntarily paid one or more installments of assessments for local improvements they thereby waived their right to object to a judgment and order for sale for nonpayment of subsequent installments.

4. Local Improvement Act 1897, § 66, as amended by Laws 1901, provides that, on an application for judgment of sale of property for an unpaid subsequent installment of a special assessment, no defense, "except as to the legality of the pending proceeding," shall be made. *Held*, that the phrase "as to the legality of the pending proceeding" applied only to the proceedings in the application for judgment of sale.

5. Local Improvement Act 1897, § 66, as amended by Laws 1901, limiting defenses on applications for judgment of sale for nonpayment of matured installments of special assessments, is not in contravention of Const. art. 3, prohibiting one department of government from exercising the powers of another, as an infringement on the powers of the judiciary.

6. Such section is not in contravention of Const. art. 6, § 29, requiring all laws relating to courts to be of general and uniform operation.

Appeal from Cook County Court; O. N. Carter, Judge.

Application by the people, on relation of one Raymond, against Joseph Downey and others, for a judgment of sale of land for nonpayment of special assessments for local improvements. From a judgment in favor of relator, defendants appeal. Affirmed.

Geo. W. Wilbur, for appellants. Edgar Bronson Tolman (Charles M. Walker, Corp. Counsel, of counsel), for appellee.

RICKS, J. This is an appeal from a judgment of sale entered by the county court of Cook county against the property of appellants for the nonpayment of the third installment of a special assessment made by the city of Chicago for paving Jefferson street to Madison street and Van Buren street. The appellants appeared and filed objections to the application for such judgment, and introduced evidence. The court, however, overruled all objections and entered judgment of sale, from which judgment the present appeal is taken.

ment of sale, from which judgment the present appeal is taken.

The appellants urged, and offered evidence under, the following objections: First, the improvement as constructed is other and different from the one provided for in the ordinance, as the materials used are not those required by the ordinance, and such materials as were used were of an inferior quality and not suited to the purposes to which they were put by the contractor, and certain materials called for by the ordinance and specifications were wholly omitted in the making of the improvement; second, that the ordinance is void because of the provisions therein that eight hours shall constitute a day's labor, and that alien labor should not be employed upon the work.

The evidence under the first objection does not sustain the objection, in so far as it is alleged that the improvement is other and different from the one provided for in the ordinance. The evidence does show that inferior materials were used, and that the workmanship was in many respects deficient; but that the kind of improvement provided for in the ordinance was placed in the street as required by the ordinance, the evidence abundantly shows. We have repeatedly said that this objection cannot avail on the application for judgment for sale unless it be shown by the evidence that the improvement as constructed was a wholly different improvement from that provided for by the ordinance and contract. In the view we take of the case, however, all the matters urged here may be disposed of without consideration of the evidence relating to them. The application was for judgment for sale for the third installment of the assessment for the improvement made.

By the local improvement act of 1897, and the amendment thereto of 1901, the statute relating to the practice and governing the rights of property owners was materially changed; and many holdings of this court have, in consequence of such changes, become inapplicable, inoperative, and without controlling effect. By section 66 of said act (4 Starr & C. Ann. St. 1902, p. 188, c. 24, par. 103), it is provided: "Upon the application for judgment of sale upon such assessment or matured installments thereof, or the interest thereon, or the interest accrued on installments not yet matured, no defense or objection shall be made or heard which might have been interposed in the proceeding for the making of such assessment, or the application for the confirmation thereof, (and no errors in the proceeding to confirm, not affecting the power of the court to entertain and consider the petition therefor, shall be deemed a defense to the application herein provided for. When such application is made for judgment of sale on an installment only of an assessment payable by installments, all questions affecting the jurisdiction of the court to enter the judgment of confirmation

and the validity of the proceedings shall be raised and determined on the first of such applications. On application for judgment of sale on any subsequent installment, no defense, except as to the legality of the pending proceeding, the amount to be paid, or actual payment, shall be made or heard. And it shall be no defense to the application for judgment on any assessment or any installment thereof that the work done under any ordinance for an improvement does not conform to the requirements of such ordinance, if it shall appear that the said work has been accepted by or under the direction of the board of local improvements. And the voluntary payment by the owner or his agent of any installment of any assessment levied on any lot, block, tract or parcel of land, shall be deemed and held in law to be an assent to the confirmation of the assessment roll, and to be held to release and waive any and all right of such owner to enter objections to the application for judgment of sale and order for sale." The section above quoted from is an enlargement and amendment of section 39 of the former and amended acts, as they were prior to the act of 1897, and as found in volume 1 of Starr & Curtis' Annotated Statutes of 1896, p. 771, c. 24, par. 155; and an examination of the two sections will readily disclose that the statute as now in force is a radical and marked departure from the former statute, and the limitations as to the rights of the property holders in matters of defense are so much greater that it must be admitted that the former decisions of this court construing the earlier acts must be of limited application to the act in question. The one provision in section 39, supra, restricting the rights of defense, and under which most of the opinions of this court upon that question were written, reads as follows: "Said report, when so made, shall be prima facie evidence that all the forms and requirements of the law in relation to making said return have been complied with, and that the special assessments mentioned in said report are due and unpaid, and, upon the application for judgment upon such assessment, no defense or objection shall be made or heard which might have been interposed in the proceeding for the making of such assessment, or the application for the confirmation thereof." All that portion of section 66, supra, between the parentheses, beginning with the words "and no errors" and concluding with the word "sale," being the conclusion of the quotation, has been added. The above section 66, as enacted in 1897, was amended in 1901 by inserting that portion thereof between the stars, as shown in the quotation. Section 66, as enacted in 1897, contains all the above quotation relating to the practice and the rights of the property holders when the application is for the installment of an assessment and upon application for subsequent installments after the first, the effect of a voluntary pay-

ment of any installment, and the restriction of the right to raise the question that the work done under any such ordinance does not conform to the requirements of the ordinance, where it appears that it has been accepted by the board of local improvements.

The appellants are Joseph Downey, the Chicago Newspaper Union, and D. R. Fraser, Franklin Hess, David E. Fisk, W. L. De Wolf, Mary Fischback, Mrs. Arthur Farrar, J. B. Mayo, and W. B. Cooper. It is admitted of record that all of said objectors have paid both the first and second installments, except W. L. De Wolf and Mary Fischback, who have paid the first installment, and that David E. Fisk filed objections to the first and second installments, but that the objections had been overruled and judgment of sale entered. It is also shown that the work has been accepted under the directions of the board of local improvements.

If effect is to be given to the above section 66, it is manifest that David E. Fisk is precluded from urging the objections herein presented, by having filed objections to the first and second assessments, and having had two hearings previous to the one at bar. *Gross v. People*, 193 Ill. 260, 61 N. E. 1012, 86 Am. St. Rep. 322. He is so precluded by the provisions of the above section that, where the application is for the matured installment of the assessment, no defense or objections can be made or heard which might have been interposed in the proceedings for the making of such assessment, or the application for the confirmation thereof, and by the further provisions that, when the application is made for judgment of sale of a subsequent installment only, no defense, except as to the legality of the pending proceeding, the amount to be paid, or actual payment, shall be heard or made, and he is precluded upon the objections as to the character of the work by the acceptance of the work by the board of local improvements. As to the other objectors, all the provisions of said section 66 are applicable. All the matters now urged as ground of objections, except that relating to the character of the work, could have been made at the application for judgment for the first installment. All of these objectors, except Fisk, have voluntarily paid one or more installments of the assessment, and are by the statute deemed to have waived and released any and all right to enter objections to the judgment and order for sale, and the work has been accepted by the board of local improvements.

No question is raised "as to the legality of the pending proceeding." This last quotation is from section 66, supra, and, we hold, applies only to the proceedings in the application for judgment of sale, and relates to the proper returns, notices, and formal matters pertaining only to the proceedings under such application for judgment and order for sale. In *Gross v. People*, supra, we had occasion to

consider the above section 66. In that case application was made for the sale of the fifth installment of the special assessment. The objection urged was that the improvement made was not the one contemplated by ordinance, but varied therefrom in various material particulars. The county court overruled the objections, and on appeal that judgment was sustained; and in considering the question relative to the above section, among other things, we said (page 262, 183 Ill., page 1013, 61 N. E., 86 Am. St. Rep. 322): "Some of these applications for judgments and orders of sale were made after the act of 1897 took effect, and became applicable to proceedings for their collection; and we need only inquire whether these objectors can, on this application, file objections which could have been adjudicated in any one of the former adjudications where they appeared and objected to judgment. We are of the opinion they cannot, but that they are estopped by the former judgments, and are expressly precluded by the statute. Every question embraced in their first objections filed in this case could have been raised in the former proceedings. They were fully known to them at that time. * * * The questions that are res judicata are not confined to those raised and insisted on at the former adjudication, but they embrace also those which were involved in the issue and might have been properly insisted on."

Appellants cite *Upton v. People*, 176 Ill. 632, 52 N. E. 358, and quote that portion of the opinion which holds that previous payments of installments upon assessment against land, where the description of the land is so uncertain that the land cannot be identified or located, do not estop the landholder from objecting to judgments on that ground. No application is made by appellants of that case to the case at bar, nor do we think one could be made. In that case numerous authorities are cited, showing that, where the description of land is void, it may be taken advantage of whenever payment of taxes against it is sought to be enforced. Section 66 of the statute, *supra*, was not applied or discussed in that case.

Appellants say, if section 66, *supra*, is to be given effect, it contravenes article 3 of the Constitution of the state of Illinois, which defines the three departments of government, and prohibits one department from exercising the powers of another, and that said section is a curtailing by the legislative branch of the powers of inquiry of the court. We do not think the section subject to the vice attributed to it. Upon a review of the entire act relative to local improvements, we think the Legislature has been careful to guard the interests of the property holder, and vouchsafes to him all the legal remedies and judicial inquiry necessary for the proper maintenance of his property rights. While it is fundamental that the courts do and must recognize the rights of the individual in re-

spect of both his person and his property, it must not be overlooked that it is the duty of both the legislative and judicial departments to subserve the interests of the public. It is to the common interest of the public, and the individuals composing it, that litigation shall have an end. In all these plans for public improvement, it is necessary, in order that the work may be economically and skillfully done, that contractors and those dealing with the public authorities shall have confidence that such authorities are acting within their powers, and that there should be at the earliest practical time a judicial determination of any matter of doubt in the exercise of such power. The act in question, although it provides for many hearings relative to the organization of the improvement district, the making and confirming of the assessments, and the collection thereof, in all of which and at every step the property owner is notified, has at the same time classified the matters to be heard and considered at the various times, and has provided that the matters that may be considered at one time and at one hearing shall not be considered at some subsequent one. If the property owner will attend the various hearings of which he is notified and required to attend, and there protect his rights, as defined by the act in question, he will have no subsequent ground for complaint. Nor does the existence of this act preclude the property holder from the assertion of his rights in other forums and under other forms of law. In the case at bar, appellants had a remedy by injunction to prevent the performance of acts under what they now say was an illegal contract, and the right of mandamus to compel the construction of the improvement according to the provisions of the ordinance and the specifications thereof. Nor is the provision of section 29 of article 6 of the Constitution, containing the requirement that "all laws relating to courts shall be general and of uniform operation," violated by the act in question. The proceeding in question is a special provision not known at common law, and of which special courts only have jurisdiction. To all courts having jurisdiction in matters involved in this act, it is applicable. To all persons affected by it, its provisions are general and of uniform operation.

The judgment of the county court of Cook county is in accordance with the views entertained by this court, and is affirmed. Judgment affirmed.

(205 Ill. 242)

MAHER et al. v. ALDRICH et al.*

(Supreme Court of Illinois. Oct. 26, 1903.)

TRUSTS—PERSONAL PROPERTY—ESTABLISHMENT—PAROL EVIDENCE—STATUTE OF FRAUDS—LIMITATIONS—LACHES.

1. Evidence reviewed, and *held* sufficient to establish a trust in personal property, and to

*Rehearing denied December 8, 1908.

show that the trustee held the income of property purchased with the trust fund in trust for the joint use of herself and complainants.

2. An express trust in personal property is not within the statute of frauds, and may therefore be created by parol.

3. Where a parol trust in personal property is established, the beneficiaries of the fund may follow it into all forms of investment which it may assume.

4. Where a trust was not repudiated by the trustee until subsequent to the year 1897, a bill brought to enforce the same in 1899 was not barred by limitations.

5. Where a trust had been recognized by the trustee and managed in a manner satisfactory to the beneficiaries until a few months prior to the filing of a bill to enforce the same, after the trustee had repudiated it the beneficiaries were not barred by laches.

6. Where a trust of personal property had been managed by the trustee to the satisfaction of the beneficiaries and the income had been applied to their support until a short time before the filing of a bill to enforce the same, and no complaint had been made by any of the parties to the suit to the trustee's management until September 24, 1898, an accounting subsequently ordered should be taken only from the date of such objection.

Error to Circuit Court, Cook County; R. S. Tuthill, Judge.

Bill by Ella L. Aldrich and another against Lillie B. Maher and others. From a decree in favor of complainants, defendants Maher bring error. Affirmed.

This was a bill in equity filed by Elizabeth Stevens and Ella L. Aldrich against Lillie B. Maher and others to enforce an alleged trust in favor of the complainants in the income from certain real estate situated in the city of Chicago, herein referred to as the "Lake Avenue Property"; in the proceeds of the sale of certain other real estate located in the city of Chicago, herein referred to as the "Oakwood Boulevard Property"; and in the income from certain real estate located in the city of Boston, herein referred to as the "St. Botolph Street Property"; and for an accounting as to the rents and profits of the said properties, which were alleged to be held in trust by Lillie B. Maher for the benefit of the complainants and said Lillie B. Maher during their natural lives, and during the natural life of the survivor of them.

The bill of complaint, as amended, alleged that in the summer of 1883, at the farm of one Benjamin Sumner, at Woodstock, Conn., where the complainant Elizabeth Stevens and the defendant Lillie B. Maher (then Lillie B. Stevens) resided, and where the complainant Ella L. Aldrich and one Sybil Aldrich, since deceased, were visiting, one William S. King, who was also at said farm, proposed to make provision for the above-mentioned women for their lives, by transferring to said Lillie B. Maher, in trust for their joint lives or the life of the survivor of them, shares of stock in the American Paper Barrel Company, then owned by him, or the proceeds thereof, to the value of \$30,000; that immediately thereafter said William S. King carried his said purpose into effect, and transferred \$30,000 worth of stock of said company to Lillie B. Maher

in trust for the use of said Elizabeth Stevens, Ella L. Aldrich, Sybil Aldrich, and Lillie B. Maher for their natural lives, or the life of the survivor of them; that subsequently said stock was sold by King, and the proceeds, amounting to \$30,000, were turned over to said Lillie B. Maher, and were held by her upon the same trusts; that in the spring of 1885 the Oakwood Boulevard property was purchased for the sum of \$8,000, with the consent of said Elizabeth Stevens, Ella L. Aldrich, Sybil Aldrich, and Lillie B. Maher, with the advice and consent of William S. King, and paid for by Lillie B. Maher out of the proceeds of said stock, and the legal title to said property taken in the name of said Lillie B. Maher upon the same trusts upon which said stock had before that time been transferred to her; that in the fall of 1886, with the consent of said Elizabeth Stevens, Ella L. Aldrich, Sybil Aldrich, and Lillie B. Maher, the Lake avenue property was purchased for the sum of \$13,800, with the advice and consent of William S. King, and paid for by Lillie B. Maher out of the proceeds of said stock, and the legal title to said property taken in the name of Lillie B. Maher; that said property was held upon the same trusts upon which said stock was held by Lillie B. Maher; that shortly prior to the year 1890, with the knowledge and consent of Elizabeth Stevens, Ella L. Aldrich, and Lillie B. Maher (Sybil Aldrich being then deceased), the further sum of \$8,500, which was a part of said trust fund of \$30,000, was loaned by William S. King upon the promissory note of Benjamin Sumner, secured by mortgage upon the farm of said Sumner located at Woodstock, Conn., said note being for the sum of \$9,000, and including, besides the \$8,500 from said \$30,000 fund, the further sum of \$500 due from Sumner to Elizabeth Stevens; that said note and mortgage were delivered to said Lillie B. Maher, and were received and held by her upon the same trusts above referred to; that subsequently, and in the year 1897, said Lillie B. Maher, in violation of her duty as trustee, and without the consent of the other parties in interest, exchanged the Sumner note and mortgage for the equity of redemption in the St. Botolph street property; that said American Paper Barrel Company stock, said Oakwood Boulevard property, said Lake avenue property, and said Sumner note and mortgage were transferred to Lillie B. Maher at her special instance and request, and upon her verbal promise to hold said properties upon the trusts alleged; that Elizabeth Stevens and Ella L. Aldrich are the sisters of the deceased mother of Lillie B. Maher; that Elizabeth Stevens brought up and educated Lillie B. Maher from her infancy until she was grown to womanhood; that Sybil Aldrich was the mother of Elizabeth Stevens and Ella Aldrich, and the grandmother of Lillie B. Maher; that from shortly after the transfer to Lillie B. Maher of the American Paper

Barrel Company stock, in 1883, up to the time of the marriage of Lillie B. Maher, in 1897, Elizabeth Stevens and Lillie B. Maher lived together; that during that time, with the exception of the time intervening between 1890 and 1892, Ella L. Aldrich resided with them; that Sybil Aldrich also resided with the complainants and said Lillie B. Maher from 1883 up to the time of her death, in 1887; that the parties resided at Worcester, Mass., as a family, from the fall of 1883 until the spring of 1885, when they removed to Chicago and took up their residence in the Oakwood Boulevard property, where they lived until 1890; that in 1890 the Oakwood Boulevard property was leased for three years, and the rent paid to Lillie B. Maher; that in the year 1893 the parties returned to the Oakwood Boulevard property, where they resided until 1897; that in 1897 the Oakwood Boulevard property was sold for \$8,000, and the proceeds received by Lillie B. Maher; that in 1893 the Lake avenue property was leased for 99 years to Wallace L. De Wolf for \$2,000 per annum; that the rent therefrom has been paid to Lillie B. Maher; that prior to such leasing Lillie B. Maher received \$2,000 from one J. Frank Aldrich on a forfeited lease of the said property; that Lillie B. Maher received all the income from the Sumner note and mortgage, and all the rents from the St. Botolph street property; that Lillie B. Maher paid the family expenses out of the various trust properties, or the income thereof, and paid Ella L. Aldrich an allowance at one time of \$15 a month, and at a later period \$50 a month; that from December, 1898, Lillie B. Maher repudiated the trusts and denied the rights of Ella L. Aldrich; and that shortly afterwards she repudiated the trusts as to Elizabeth Stevens. The bill prays that trusts be declared and established in the Lake avenue property and the St. Botolph street property, and in the proceeds of the sale of the Oakwood Boulevard property; that Lillie B. Maher be compelled to account for the rents, issues, and profits of all of the various trust properties; that she be removed as a trustee; and that a new trustee be appointed. The parties defendant to the bill were Lillie B. Maher, Peter S. Maher, her husband, Wallace L. De Wolf, lessee of the Lake avenue property; Edward S. Hill and Charles L. Beale, trustees of the estate of Charles A. Smith, deceased, who claimed an interest in certain of the rentals of the Lake avenue property as assignee thereof under Lillie B. Maher.

Lillie B. Maher and Peter S. Maher filed a joint and several answer, in which they deny the allegations of the bill as to the alleged proposal of William S. King to transfer to Lillie B. Maher \$30,000 worth of stock of the American Paper Barrel Company in trust for Elizabeth Stevens, Ella L. Aldrich, Sybil Aldrich, and Lillie B. Maher, as averred in said bill; that William S. King ever made any such proposition; that William S. King

ever transferred to Lillie B. Maher \$30,000 worth of stock of said company, or any stock of said company or any other company, in trust or otherwise; that William S. King sold said stock, and turned over the proceeds to Lillie B. Maher; that William S. King paid or turned over any sum of money whatever to Lillie B. Maher, to be held by her upon any trust whatever; that the Oakwood Boulevard property, the Lake avenue property, or the Sumner note and mortgage were purchased out of the proceeds of the sale of stock or any trust fund, and aver that each of said properties was purchased by King with his own funds, and not out of any funds held in trust, and that he caused said properties to be conveyed and transferred to said Lillie B. Maher as a free and voluntary gift to her, and not upon any trust whatever. They deny that said properties, or any of them, were placed in her name at her request, or that she ever promised to hold the same, or any of them, upon the trusts alleged in the bill, or upon any other trust. They deny that the family expenses and allowance of Ella L. Aldrich were paid out of the proceeds of the sale of the \$30,000 worth of stock of the American Paper Barrel Company, or out of any trust fund whatever, and aver that William S. King voluntarily paid to said Lillie B. Maher, from time to time, small amounts of money, sufficient for her support and the expenses of said family, and that she voluntarily gave complainants and Sybil Aldrich a home, and Ella L. Aldrich an allowance. The answer also avers that the alleged trusts are not evidenced in writing signed by the said Lillie B. Maher, and sets up the statute of frauds. The answer likewise sets up the defense of laches and of the statute of limitations, and avers the want of necessary parties to the bill of complaint. It is admitted by the answer that the Lake avenue property was leased by Lillie B. Maher to Wallace L. De Wolf for 99 years for \$2,000 a year, and that she has received the rents therefrom; that she leased the Oakwood Boulevard property from the year 1890 to 1893, and received the rents; that she sold the property for \$8,000 in 1897, and received the proceeds; that she received the interest on the Sumner note and mortgage, and subsequently exchanged said note for the equity in the St. Botolph street property. Wallace L. De Wolf filed an answer setting up an assignment of the 99-year lease on the Lake avenue property to secure the payment of \$1,500. Hill and Beale disclaimed.

The decree entered by the court below sustained objections to the master's report, which recommended the dismissal of the bill for want of equity, found the facts substantially as alleged in the bill of complaint, granted the relief in the bill prayed, except that no removal of the trustee is decreed, and re-referred the cause to the master in chancery for an accounting. Lillie B. Maher

and Peter S. Maher have sued out a writ of error from this court, and the errors relied on for a reversal of the decree are (1) that the decree is against a preponderance of the evidence; (2) that the court should have dismissed the bill of complaint for want of proper parties; (4) that the complainants are barred by reason of their laches; (5) that the complainants are barred by the statute of limitations; (6) that the court erred in sustaining objections to the master's report; and (7) that the court should have dismissed the complainants' bill for want of equity.

Hamlin & Boyden (Louis M. Greeley, of counsel), for plaintiffs in error. Parker H. Hoag (Francis A. Riddle, of counsel), for defendants in error.

HAND, C. J. (after stating the facts). The evidence found in this record is voluminous, and upon vital questions conflicting. It, however, appears from the testimony of all the witnesses who testified upon the subject that the relationship of the parties as stated in the bill was correct, and that Elizabeth Stevens brought up Lillie B. Maher from her infancy, and that she regarded Mrs. Stevens in the light of a mother, though she was never legally adopted; that in the summer of 1883 Elizabeth Stevens, Ella L. Aldrich, Sybil Aldrich, and Lillie B. Maher were at the farm of Benjamin Sumner, near Woodstock, Conn., where Mrs. Stevens had served in the capacity of housekeeper for Mr. Sumner for many years and where Lillie B. Maher had spent the greater part of her life, and where Mrs. and Miss Aldrich were then visiting; that while there they met William S. King of Minneapolis, Minn., a man of wealth who often visited at the Sumner farm, and was then at the farm upon business with Mr. Sumner, who was then financially embarrassed; that the four women were without means of support, and that an arrangement was made at that time by William S. King with Lillie B. Maher, or with all of said women, whereby, in the fall of that year, Mrs. Stevens, her mother, her sister, and Lillie B. Maher left the Sumner farm and removed to Worcester, Mass., rented a house and lived together until the spring of 1885, their expenses during that time being provided from funds furnished by William S. King; that during the spring of 1885 the Oakwood Boulevard property was purchased and paid for by Lillie B. Maher with funds received from King, the deed thereto being made to Lillie B. Maher; that the family on May 1st of that year moved to Chicago, took possession of the Oakwood Boulevard house, and continued to reside there until May 1, 1890, at which place Sybil Aldrich died in the year 1887; that on May 1, 1890, the Oakwood Boulevard property was rented, and Elizabeth Stevens and Lillie B. Maher went East, Miss Aldrich remaining in Chicago, where she was preparing herself for the

profession of teacher at the Cook County Normal School; that in the spring of 1892 she joined Mrs. Stevens and Lillie B. Maher in New England; that in the spring of 1893 the three women returned to Chicago, and took up their residence as a family in the Oakwood Boulevard property, where they resided until in May, 1897, when the property was sold, and Mrs. Stevens and Lillie B. Maher went to Boston, where Lillie B. Maher was shortly thereafter married; that Ella L. Aldrich remained in Chicago; that in the fall of 1886 the Lake avenue property was purchased for \$13,800 and paid for by Lillie B. Maher with money received from King, and the title thereto was conveyed by the seller to Lillie B. Maher; that in 1893 a ground lease was made thereon, under the advice of William S. King, by Lillie B. Maher to Wallace L. De Wolf, for 99 years, at the annual rental of \$2,000; that prior thereto Lillie B. Maher had received the sum of \$2,000 on the forfeiture of a lease of that property from one J. Frank Aldrich; that in 1890 William S. King turned over to Lillie B. Maher the Sumner note and mortgage for \$8,500; that Lillie B. Maher received all rents from the Oakwood Boulevard property, and the proceeds of the sale of that property, also all the rents and forfeiture money from the Lake avenue property, also the interest on the Sumner note and the rents of the St. Botolph street property; that from the time the parties went to live in Worcester, in 1883, up to the time of the marriage of Lillie B. Maher, said women, and each of them, had no property or income other than such as was received, directly or indirectly, from William S. King, excepting a small amount earned by Ella L. Aldrich making corsets during their residence in Worcester; that during that time all expenses of the family, including the allowance to Ella L. Aldrich, were paid by Lillie B. Maher out of funds received by her, directly or indirectly, from William S. King—that is, from money paid to her by him, or from the rents and profits of the property which had been purchased and paid for by her with funds received from him.

The main controverted question of fact is as to what the arrangement was between William S. King and Lillie B. Maher and the other three of said women, by virtue of which Lillie B. Maher became possessed of the property, the use of which during the lives of said women, or the survivor of them, is now in controversy. The evidence offered on behalf of the complainants tended to show that in the year 1883, and while the parties were all at the Sumner farm, William S. King created a trust for the support and maintenance of the complainants, their mother, Sybil Aldrich, and Lillie B. Maher, or the survivor of them, by the transfer to Lillie B. Maher, in trust, of \$30,000 worth of stock of the American Paper Barrel Company; that King shortly afterwards sold said

stock for \$30,000; that the proceeds of the sale were turned over by him to Lillie B. Maher from time to time, and that, by consent of all the parties in interest, \$8,000 of the proceeds was invested in the Oakwood Boulevard property, and \$13,800 in the Lake avenue property; that the title to these properties was taken in the name of Lillie B. Maher by the consent of all the parties, the reason for making the transfer to her being that she was the youngest of the number, and the best able to manage the same; that she took title to said properties upon the same trusts upon which the original trust was created; that in the spring of 1890 King turned over to her the balance of said \$30,000 in the form of \$8,500 of the Sumner note and mortgage, which she also held in trust; that Lillie B. Maher recognized such trust until after the time of her marriage by repeatedly admitting that she held the income of all of said properties for the benefit of said women, and, in recognition of said trust, used the income from said properties as they became income-bearing, as well as the interest upon the Sumner note and mortgage, in defraying the family expenses and paying the allowance to Miss Aldrich. The testimony of the defendant was to the effect that William S. King never owned any stock in the American Paper Barrel Company; that he never set aside or transferred to her any stock or moneys or securities of any sort as a trust fund, upon the trusts alleged or otherwise; that the stock of the American Paper Barrel Company was absolutely worthless at all times; that the moneys used by Lillie B. Maher previous to 1890 for the family expenses was money that was voluntarily given to her by King in small amounts, from time to time, for the purpose of meeting her expenses, and that she voluntarily and as a gift supported the complainants, who were her aunts and were members of her family, out of said moneys; that she voluntarily and as a gift, subsequent to 1890, paid all family expenses out of the issues and profits of the Oakwood Boulevard and Lake avenue properties and the Sumner note and mortgage; that she also paid the allowance made to Miss Aldrich out of the same moneys; that the Oakwood Boulevard and Lake avenue properties and the Sumner note were each and all of them given to her by William S. King as gifts, without any solicitation or request upon her part, and not upon any trust; that he paid the money for these several properties, and caused them to be transferred to her as gifts; that he paid for them out of his own money, and not out of any trust fund; and that she never promised to hold said properties, or any of them, upon the said trusts or upon any trusts.

The testimony bearing upon the question as to whether or not the property transferred to Lillie B. Maher by William S. King was given to her by him absolutely, or whether it was transferred to her in trust, the object

of the trust being to create an income for the support of said women and the survivor of them, is confined almost entirely to the testimony of the complainants and that of Lillie B. Maher. As we view the matter, the testimony of Elizabeth Stevens and Ella L. Aldrich, standing alone and uncontradicted by that of Lillie B. Maher, is amply sufficient to establish that William S. King set aside a fund of \$30,000, consisting of shares of stock of the American Paper Barrel Company, or \$30,000 in cash in lieu thereof, the earnings of which were to be used to support said women during their lives, or during the life of the survivor of them; and it cannot be controverted that trusts in personal property of the character mentioned may be established by parol evidence, if the evidence to establish the trust is clear and convincing. The testimony of the complainants is corroborated by that of a number of witnesses who met and conversed with Lillie B. Maher at their respective homes, and at her home in Chicago, with reference to the manner in which she held said property. Nellie Whitcombe testified she knew Mrs. Stevens and Lillie B. Maher. She said: "I first met them in my own home in 1885. Mrs. Stevens and Miss Stevens were present. They told us of acquiring property through W. S. King, and told us the property was the result of stock of the barrel factory; that he had given them the stock in this paper barrel factory; that they were to have the income. Mrs. Maher said the property was for her mother, her grandmother, the aunt, and herself." Grace B. Foster, Isabel N. Adams, Rebecca Adams, and Winnie H. Wiles testified to admissions of Lillie B. Maher of a similar character. These witnesses appear to be entirely reputable and not unfriendly to either of the parties. Shortly after the marriage of Lillie B. Maher, in reply to a letter written by Ella L. Aldrich to her, demanding that she account to her for her interest in said trust fund, Miss Aldrich received a letter bearing date October 6, 1898, from Lillie B. Maher, which is as follows: "Your letter of September 24 was received. In answer will say, you will have \$50 (fifty) a month (\$600 per year) as you have been having and as intended you should have as long as you needed it, and it can be paid to you direct once a quarter, but cannot be given to you outright, as none of it is given to any one outright." From a careful consideration of this evidence, in connection with the evidence of the complainants, we are unable to say that the chancellor erred in holding that the trust had been established, and that Lillie B. Maher held the income of said properties in trust for the joint benefit of Sybil Aldrich, Elizabeth Stevens, Ella L. Aldrich, and herself during their natural lives, and during the life of the survivor of them.

There is evidence in the record tending to show that William S. King was never a

stockholder in the American Paper Barrel Company, and that the stock of said company had no market value. If it be conceded that this testimony is in part true, we do not think these facts a bar to the right of recovery in this case. It must be conceded that William S. King was largely interested in the American Paper Barrel Company, that he spent large sums of money in attempting to perfect the manufacture of flour barrels from paper, and that he and others believed in the ultimate success of the company. If he set aside, or agreed to set aside, for the benefit of said women, the income from \$30,000 worth of that stock, and the stock afterwards proved to be worthless, and he substituted in the place of the stock \$30,000 in cash, which he delivered in lieu of the stock to Lillie B. Maher upon the same trust upon which the stock was to be held, it would seem clear that after she had received the cash she ought not to be permitted to repudiate the trust, and hold the property purchased therewith freed from the trust by reason of the fact, alone, that the \$30,000, which was ultimately invested by her in the property which she now holds, was not money received from the sale of the stock, but was cash substituted by the donor in lieu of said stock. A perusal of this record must convince, we think, any fair mind, that Elizabeth Stevens and Lillie B. Maher, in company with Sybil Aldrich and Ella L. Aldrich, would not have left the Sumner farm, where they had made their home for 16 years, without any property or means of support, and set up an independent establishment at Worcester, unless there was a definite understanding with William S. King that their future support was provided for. The fact that William S. King did talk with said women about setting aside for their support certain interests in said American Paper Barrel company cannot be questioned. It is also admitted that from the time said four women left the Sumner farm they were provided for by William S. King, and that he did ultimately make an investment, in the name of Lillie B. Maher, of about \$30,000, the income of which was used for their maintenance and support by Lillie B. Maher down to shortly after her marriage. These admitted facts, in our opinion, afford strong presumptive evidence that the title to said property is held by Lillie B. Maher in pursuance of the original arrangement made between William S. King and said women in the summer of 1883 at the Sumner farm. While there is no direct proof that William S. King substituted \$30,000 in cash in lieu of the stock, which appears to have proven worthless, we think said substitution can be legitimately inferred from the fact that after he had agreed to set aside the stock, and it had proven worthless, he, without notifying the complainants that the stock was without value, invested a like amount through the trustee who had originally been selected to administer the trust, and that

said trustee recognized the original trust and executed the same for a period of 15 years in a manner satisfactory to all parties interested therein.

The bill is framed upon the theory that a parol trust in personal property was created, and the property thus set aside was invested by the trustee in the property the income of which is now sought to be reached, and that the original trust thereby became impressed upon the property now held by the trustee; and, this contention having been sustained, the statute of frauds does not apply, for the reason, as has been already suggested, that a verbal trust in personal property may be created by parol (*Price v. Laing*, 152 Ill. 380, 38 N. E. 921); and, when such trust is established, it is well settled the beneficiaries of such fund may follow the fund into all forms of investment which it may assume (*Breit v. Yeaton*, 101 Ill. 242).

The trust here was not disavowed by the trustee until subsequent to the year 1897, and, as the bill was filed in 1899, the statute of limitations will not bar a recovery, as that statute never begins to run so as to bar the recovery of a trust fund until subsequent to the disavowment of the trust by the trustee. *Albretch v. Wolf*, 58 Ill. 186; *Hancock v. Harper*, 86 Ill. 445.

The trust having been recognized by the trustee and executed in a manner satisfactory to both trustee and cestuis que trustent until a few months prior to the time of the filing of the bill herein, there was no occasion to file a bill to enforce the same at an earlier date, and the complainants are not barred by reason of their delay in commencing suit, as laches is imputable only where there has been gross negligence or great delay in asserting a right.

The question sought to be litigated here is the ownership of the rents and profits arising from said trust properties now held by Lillie B. Maher; and William S. King, or he being deceased, his heirs and personal representatives, were not necessary parties, as no relief was demanded of them. *Grafton Dolomite Stone Co. v. St. Louis, Chicago & St. Paul Railway Co.*, 199 Ill. 458, 65 N. E. 424.

The important question in this case is one of fact, and we are of the opinion that the evidence found in this record fully justifies the findings of the chancellor that Lillie B. Maher held the income produced by the fund received by her from William S. King in trust, in its present form of investment, for the benefit of the complainants and herself, and that she should account to the complainants for their share of such income.

The question arises, however, from what date should the account be had? The decree does not fix such date, but simply refers the case to the master for the purpose of an accounting. It clearly appears that for many years the appellant, Mrs. Maher, administered the trust in a manner

satisfactory to both the complainants, and it is reasonable to infer from the evidence in this record that the income from this trust fund, whether received in the form of rent or interest, was used for the joint benefit of the complainants and the defendants, and, while perhaps not used for their benefit in equal proportions, it was used in such manner that all were satisfied with its disbursement. At least no complaints are made by any one of the parties to this suit until September 24, 1898, the date of the letter of Miss Aldrich to Mrs. Maher. That letter appears to have been the first time complaint was made by Miss Aldrich, or any one else, as to the manner in which the income arising from said trust fund was being applied by Mrs. Maher. We are therefore of the opinion that date should be taken as the date from which Mrs. Maher should be required to account for the rents and interest derived by her from said trust fund, whether held by her in money, securities, or invested in real estate.

The decree of the circuit court will be affirmed.

(69 Ohio St. 142)

BALTIMORE & O. R. CO. v. McCLELLAN.

(Supreme Court of Ohio. Oct. 27, 1903.)

RAILROADS—ACCIDENT AT CROSSING—CONTRIBUTORY NEGLIGENCE—DIRECTING VERDICT.

1. The rule that a person in full possession of his senses of sight and hearing should exercise them to protect himself from danger when about to cross a known track of a steam railroad at a street crossing, applies to a condition where the atmosphere is more or less clouded by steam and smoke, and it is negligence on his part which will defeat a recovery for injuries received from a passing train to undertake to cross without waiting for the atmosphere to clear so that his vision may be unobstructed, or taking other adequate means to ascertain the presence of danger.

2. Where the testimony of the plaintiff raises a clear presumption of negligence on his part which directly contributed to his injury, and no testimony is offered by him tending to rebut that presumption, it is the duty of the trial court to sustain a motion by the defendant, made at the conclusion of plaintiff's evidence, to direct a verdict, and a refusal to sustain such motion is error.

(Syllabus by the Court.)

Error to Circuit Court, Richland County.

The action below was brought by defendant in error, Ida L. McClellan, administratrix, against the Baltimore & Ohio Railroad Company, to recover for the negligent killing of Madison McClellan, who met his death by being run over by the caboose of a local freight train. The defense was a denial of negligence by defendant and a charge of contributory negligence on the part of the deceased. At the conclusion of the plaintiff's testimony defendant moved the court to direct a verdict for defendant, which was overruled, and the cause submitted to the jury on plaintiff's testimony. A recovery was had,

which was sustained by the circuit court, and the company brings error. Reversed.

J. H. Collins and Cummings & McBride, for plaintiff in error. Douglass & Mengert, for defendant in error.

SPEAR, J. The accident occurred at a street crossing in the village of Butler, Ohio, about 3 o'clock of the afternoon of March 17, 1900, at a point where the main street of the village is crossed by two tracks of the company. At the point stated the street runs substantially north and south, and the railroad tracks substantially east and west. The station house is at the southeast angle of the intersection, facing north. The southerly track is the main track and the northerly one a side track, and both tracks curve sharply to the northeast from a point about 160 feet from the crossing. About 165 feet easterly from the crossing a spur track starts on the south side of the main track and extends upon a curve several hundred feet in a northeasterly direction, veering to the north and northwest. To the east of the station some 150 feet stands a water tank. The depot platform extends from the station house northerly to the main track, easterly to a point near the water tank, and westerly to the line of the street. At the time of the accident there stood upon the side track, headed west, a freight train with two locomotives attached, the forward one extending across the sidewalk and a few feet into the street proper. This train had been in that position 25 to 30 minutes. A passenger train, known as "No. 3," had passed east just before the accident. Upon the spur track there had been standing a local freight train, placed there to allow the passage of No. 3, and intending to follow so soon as No. 3 had passed. The caboose of this train stood near the point of junction of the spur with the main track, the locomotive being at the other end. The cylinder cocks of the head engine of the freight train (the one standing on the side track headed west) were open, and considerable steam was escaping, making some noise, and a good deal of smoke was issuing from the smokestack. The smoke and steam came on the south side of the engine, much of it to the ground. It was a little windy at the time, and the wind, being from the northwest, carried the steam and smoke in a southeasterly direction; that is, toward the easterly portion of the station house and over the main track.

The deceased was the keeper of a restaurant situated on the east side of the street a short distance north of the crossing. Just before the accident he had been to the station to inquire about some oysters he was expecting, and was on his return when it occurred. He was seen coming out of the door of the freight office and passing westerly on the platform. He was also seen in the act of stepping off of the platform and onto

the track—the main track. He was going in a northwesterly direction, his back being partially toward the east. Some two or three minutes after No. 3 had passed, the local freight, the train which had been waiting on the spur track, backed westerly to clear the switch, coming at a speed of about 12 miles an hour. No alarm of any kind was given by the trainmen on the local, nor was any one stationed in the rear of the caboose to give warning. McClellan had just stepped down off the platform onto the track when the caboose struck him, having apparently made but two steps. He was not seen to stop from the time he was first seen going out of the door of the freight office until he was struck, nor was he seen to look to the east, the direction from which the caboose was coming. He had just reached the middle of the track, had made a second step, was in a walking position, walking in a northwesterly course, headed in that direction, to avoid the front of the engine of the freight train.

Three features of the case call for comment—one respecting the presence of the locomotives of the freight train on the side track, another the operation of the local freight, and, third, the action of the deceased himself.

1. It is claimed that the placing and maintaining of the locomotive partially across the street, and the producing there of smoke and of steam, with accompanying noise, was of itself negligence. But locomotives cannot be handled without the issuing of more or less smoke, nor can they be held in a waiting position, which was the fact as to this freight train, without the escape of more or less steam with some noise. A use which is a natural and necessary use of a locomotive cannot be of itself a negligent use. The leaving of the nose of that forward locomotive across the sidewalk for the length of time it stood there was an improper act. It may, for aught we know, have been a misdemeanor, but it was not actionable negligence in this case, although its presence there is an incident to be considered.

2. The management of the local freight was of a different character. It stood upon that spur track, awaiting the passing of the passenger train, in a position where necessarily, when it should back far enough to get upon the main track, its rear would be protruded upon the street; and, whether in backing the train that afternoon without the sounding of the whistle and the ringing of the bell the trainmen violated the statute or not, it certainly was incumbent upon them in some reasonable way to give warning—as by placing a watchman at the rear of the caboose—of the approach of the train to the street. The neglect of all attempt to warn was palpable negligence.

3. But what shall we say of the action of the deceased himself? He was possessed of all his faculties. He was a resident of the

village, and knew the location of the spur track and its uses. He knew, apparently at least, that the passenger train had passed, and that the local freight was in, for he was expecting a shipment of oysters, probably coming by one or the other of those trains. He was at the station to inquire for that consignment, so that the presence of trains of that character, then or shortly before, near the station, would naturally be known to him. He had been on the platform far enough to the east to see the local freight as it stood upon the spur track. He knew—that is, he must be held to have known—that a steam railroad track is necessarily a dangerous place; that locomotives and cars, once in motion, are not easily or quickly stopped. All this must be attributed to him. What, then, was his duty from the standpoint of self-preservation? Wasn't it to look and listen for danger before stepping upon that track? What less could be expected of a person in possession of his senses? It is true that there is a more or less strong presumption of fact that the instinct of self-preservation will prevent a man from rushing into danger, but do we not see by everyday experience that men become careless of danger, either because of familiarity with it, or of temporary absence of mind which causes them to be oblivious of its presence? No doubt this latter condition obtained with the unfortunate gentleman who lost his life that afternoon, for not only is there no evidence in the record that he either did look or listen, but the strong inference from the whole record is that he did neither.

But it is claimed—and this is the real and serious contention of counsel—that neither listening nor looking would have availed; that the noise of the escaping steam would have neutralized the one and the cloud of smoke and steam would have rendered useless the other. There really is no evidence in the record that warrants this conclusion. It is evident that the train must have been making some considerable noise as it approached the crossing—a noise different in character from that of the escaping steam, and the volume of the latter noise is left very shadowy by the testimony. Nor is there greater certainty about the presence of any considerable amount of steam and smoke in the immediate whereabouts of the deceased at the fatal moment. Four witnesses testified to the presence of steam and smoke in the vicinity, but one only (McLaughlin) was in a position to notice their presence at the moment of the accident. One witness (Crownor) was in the hotel office, about 60 feet south. He testified to the presence of smoke and steam generally, but was silent as to its presence at the moment when and the exact place where the accident occurred. He heard the noise of the trucks, and the first he saw of the accident was a man under the wheels. One witness (McCready), who saw all of the transaction of the acci-

dent from the telegraph office in the depot, did not observe the presence of steam and smoke at all. Another (Miller), who stood by him in the office at the time, saw the smoke and steam, and observed that it was carried easterly and over the main track by the wind, but he did not see McClellan when he was struck, and did not know of the fact until his attention was called by McCready to the presence of a man under the caboose. Another witness (McCurdy) testified with much fervor for plaintiff below, and was ready to speak with confidence respecting smoke and steam, but this witness met McClellan going west on the platform while he (the witness) continued some distance east, and did not then look around or know of the accident until he heard the scream, and finally admitted on the stand that he did not know, by looking, anything about the situation at the moment. McLaughlin, above referred to, saw the whole of the accident. He was on the street, about 200 feet south from the scene, and speaks of the general presence of steam and smoke in the vicinity. "There was considerable smoke. I noticed the steam. It [the steam and smoke] came on the south side of the engine, and some of it came to the ground. It blowed to the ground and toward the depot. Saw some along the sidewalk at the depot, between that and the crossing." This much respecting the observation of the witnesses as to the presence of steam and smoke. It is to be noted that two only of the witnesses saw the deceased just before and when he was struck, viz., McCready and McLaughlin, and their testimony is vitally important as to his conduct. The former saw the caboose when within a very few feet of the deceased, and saw nothing to prevent McClellan seeing the caboose if he had looked. He first saw McClellan as he stepped down from the platform in front of the rear end of the local; was going in a northwesterly direction; he had just stepped down off of the platform onto the track when the train hit him. McLaughlin doesn't undertake to say that the deceased could not have seen the caboose if he had looked, but says he don't know; and adds that he didn't see him look. He saw McClellan when he was struck. He was in the middle of the track; had just stepped from the platform to the track, and had made his second step; was in the middle of the track in a walking position, walking in a northwesterly direction. As McClellan was headed northwest, he would have had to turn somewhat to look to the east, and this witness had then good opportunity of noting whether he turned or not. But one other (McCready) had such opportunity, and he saw no attempt on McClellan's part to look. Both witnesses saw the caboose before McClellan was struck. Indeed, every witness saw the caboose as it was backing down, although the position of some of them was such as to make their observation of much

less significance than that of McCready and McLaughlin. Taken as a whole, however, the plaintiff's own evidence shows clearly that the deceased could have seen the caboose if he had looked before stepping on the track, and that he did not look. It is manifest that the condition of the atmosphere would be changeable. What would be its condition at one moment might be entirely changed the next; and it is a most significant fact that every witness who saw the accident, or was near it, himself saw the caboose before it struck McClellan.

This résumé is given not for the purpose of weighing the evidence, but for the purpose of illustrating the kind of a case which the plaintiff below presented, and which was sustained by the trial court and by the reviewing court as one warranting a recovery, and for the further special purpose of showing what ought to have been done with the motion to direct a verdict. It must be apparent that the evidence produced by the plaintiff below at the trial, giving to each circumstance appearing in proof the most favorable construction possible, showed beyond question that the deceased was negligent in a manner directly contributing to his death, unless the presence of steam and smoke released him from the duty to exercise care. Does the presence of the smoke and steam, conceding all that is claimed for it, change the case? He knew the exact situation. He knew the dangers as well as any man could—the dangers that lurk about the track of a steam railroad. He found, if the claim of plaintiff below is correct, a temporary obstruction to his vision. A little patience, a wait only of a moment, and the atmosphere would be cleared, and the opportunity for effective vision restored, and, as afterward proved, the whole danger obviated. His stepping upon the track at that point at that moment was an unnecessary act. He could easily have crossed the street south of the track, and then have been free from danger. The rule of law of this state is clear. A person in possession of his senses approaching such a steam railroad known to him must look and listen; failing this, he is guilty of contributory negligence, which prevents a recovery from injuries arising from such failure, unless some further fact appears which relieves him. In the present case the plaintiff's testimony raised a clear presumption of contributory negligence, and no tangible proof whatever was given which tended to rebut that presumption.

The case made is not one which presented a conflict in the evidence on any vital point. If such conflict had been presented, then the motion to direct a verdict should have been overruled, and the cause given to the jury. The rule is that whether or not there is evidence tending to prove an essential fact is a question for the court, and, if it be determined that there is not, then there can be no conflict, and there is no question for the

jury. The case is wholly dissimilar from the reported cases where a close question of fact appears and the judgment of a jury is required to determine it. As in *Hart v. Devereaux*, 41 Ohio St. 565, where the deceased was driving a pair of spirited horses over a crossing at the side of which stood a locomotive blowing off steam which frightened the horses, and so engaged the driver's attention that he did not observe the approach of an express train coming rapidly and without warning from the opposite direction, the view down the track being obscured by buildings, and was killed by the express. As, also, in *Railway Co. v. Snell*, 54 Ohio St. 197, 43 N. E. 207, 32 L. R. A. 276, where there was a conflict in the evidence as to whether the injured party was exercising his faculties of seeing and hearing, and it was held a proper question to be submitted to the jury. The case at bar more nearly resembles *Railway Co. v. Whitacre*, 35 Ohio St. 627, where it is held that where a person familiar with a dangerous railroad crossing, in passing over the same, neglects the exercise of an care to ascertain if a passing train is near, he is guilty of negligence, and the mere fact that he had forgotten that he was in the vicinity of the crossing will not excuse; also that, where the plaintiff's own testimony raises a presumption of contributory negligence, the burden rests upon him to remove it. A point pertinent is held in *Railway Co. v. Depew*, 40 Ohio St. 121—that a person upon a railroad track may not rely upon a signal being given of the starting of a train, and that the expectation that such signal will be given will not relieve such person from constant watchfulness for his safety. Law applicable to the present case is held in *C., C. & I. Ry. Co. v. Elliott*, 28 Ohio St. 340, as follows: "The omission to ring the bell or sound the whistle at public crossings is not of itself sufficient ground to authorize a recovery, if the party, notwithstanding such omission, might, by the exercise of ordinary care, have avoided the accident. What is such contributory negligence as will defeat a recovery is usually a question of mixed law and fact, to be determined by the jury from all the circumstances of the case and under proper instructions from the court; but where the undisputed facts show that by the exercise of ordinary care a party might have avoided injury, he cannot recover. It is the duty of a traveler upon the highway, when approaching a railroad crossing, to make use of his senses, to ascertain if there is a train in the vicinity; and if, when in full possession of his faculties, he fails to see or hear anything, when a prudent man, exercising his eyes and ears with ordinary care, would have discovered a train in close proximity, and he is thereby injured, he is guilty of such negligence as will prevent a recovery." Our case also in one aspect resembles *Railroad Co. v. Skiles*, 64 Ohio St. 458, 60 N. E. 576. It is there held that where a person, without look-

ing or listening, steps upon a railway track from a place of safety on a platform, immediately in front of and close to a backing switch engine, and is injured, he is guilty of contributory negligence, and cannot recover. The propositions here indicated are supported by a great number of cases, some of which are here cited: *Railroad Co. v. Crawford*, 24 Ohio St. 631, 15 Am. Rep. 633; *Heaney v. L. I. R. R. Co.*, 112 N. Y. 122, 19 N. E. 422; *Hoyt v. The City of Hudson*, 41 Wis. 105, 22 Am. Rep. 714; *Bancroft v. B. & W. R. R. Co.*, 97 Mass. 275; *McCrory, Adm'x, v. C., M. & St. P. Ry. Co. (C. C.)* 31 Fed. 531, opinion by Brewer, J.; *D. & R. G. Co. v. Ryan*, 17 Colo. 98, 28 Pac. 79; *Mann v. R. & S. Y. Co.*, 128 Ind. 138, 26 N. E. 819; *C., K. & W. R. R. Co. v. Fisher*, 49 Kan. 460, 30 Pac. 462; *Chase v. M. C. R. Co.*, 78 Me. 346, 5 Atl. 771; *I. C. R. Co. v. Hall*, 72 Ill. 222. A number of cases in other states are cited, which with more or less force sustain the contention of plaintiff in error; but the rule in Ohio, as we understand it, evidenced by the general trend of decisions, is in accord with the conclusions here indicated.

We are of opinion that the motion to direct a verdict for defendant should have been sustained. The judgments below will therefore be reversed and judgment entered for plaintiff in error.

Reversed.

BURKET, C. J., and DAVIS, SHAUCK, and CREW, JJ., concur.

(69 Ohio St. 101)

DAVIS v. TURNER.

(Supreme Court of Ohio. Oct. 27, 1903.)

TRIAL — GENERAL VERDICT AND SPECIAL FINDINGS — JUDGMENT ON SPECIAL FINDINGS — NEW TRIAL — PROSECUTION OF ERROR — PLEADINGS — PROCEDURE — SERVANT INJURED IN COAL MINE — NOTICE OF DANGER — DUTY OF MASTER — CONTRIBUTORY NEGLIGENCE.

1. In the trial of a civil action, wherein the jury returns with a general verdict special findings on question of fact, under the instructions of the court, the party against whom the general verdict is returned may first move for judgment in his favor on the special findings, and, if his motion is refused, he may then file his motion for a new trial within the time prescribed by law. But where the court fails to pass on the motion for judgment on the special findings within the time allowed for filing a motion for a new trial, the latter motion may be filed within such time, and before the decision of the motion for judgment. In either case the motions should be filed and decided in the order indicated. And while it is irregular practice to file both motions at the same time, as was done in the lower court, no one has been prejudiced thereby in this case, and the order in which the trial court heard and decided said motions constitutes no bar to a review of its judgment on the special findings.

2. A party to a civil action, whose motion for judgment on special findings of fact made by the jury in accordance with the provisions of section 5201, Rev. St. 1892, on the ground that the special findings are inconsistent with the general verdict, is overruled, may prosecute error in the circuit court to review and reverse the judgment of the trial court on said motion;

and where the circuit court affirms the judgment of the trial court on said motion, but grants a new trial for other reasons, its judgment of affirmance may be reviewed in this court on proceedings in error, without submitting to a retrial of the case in the lower court.

3. To be inconsistent with the general verdict, as contemplated by section 5202, Rev. St. 1892, it must appear that the special findings are irreconcilable, in a legal sense, with the general verdict; and, to justify the court in setting aside or disregarding the general verdict on the ground that it is inconsistent with such special findings, the conflict must be clear and irreconcilable.

4. A servant employed in a coal mine to haul cars of coal from the rooms where the coal is mined, through an entry, to a hoisting shaft, by the use of a mule and cars, is chargeable with actual notice of every fact which he would have known, had he exercised ordinary care to keep himself informed as to matters concerning which it is his duty to inquire; but as it is the duty of the owner or operator of the mine to furnish a reasonably safe entry, and to keep it in a reasonably safe condition, the driver of the coal car may rely upon that duty being performed, and he is not required to test and inspect the roof of the entry through which he passes, and is not charged with the knowledge of its condition, further than the knowledge he would ordinarily obtain in the proper discharge of the work he is employed to perform. If, under such circumstances, while in the performance of his duty, the servant is injured by slate falling from the roof of the entry on account of the negligence of the mine owner or operator, he may recover. *Wellston Coal Co. v. Smith*, 61 N. E. 143, 65 Ohio St. 70, 55 L. R. A. 99, 87 Am. St. Rep. 547, approved and followed.

Davis, J., dissenting.

(Syllabus by the Court.)

Error to Circuit Court, Jackson County.

Action by one Turner against one Davis. From a judgment of the circuit court reversing a judgment in favor of plaintiff, defendant brings error. Affirmed.

The issues between the parties in the trial court were joined upon the second amended petition, the answer of plaintiff in error, and the reply thereto. The plaintiff below claimed a right of recovery against the defendant for damages resulting from a personal injury received in the coal mine of the defendant on the 27th day of September, 1900. By the averments of the second amended petition, it is disclosed that at the above date the plaintiff below was in the employ of the defendant as a driver in said mine, at an agreed price per day, and that such employment had continued for about two weeks before the injury. The plaintiff's duty was to haul coal, in cars drawn by a mule, from the rooms of a portion of the miners who mined the coal to a hoisting shaft. While passing through a main entry of the mine in the discharge of his duties as such driver, and without negligence on his part, he was injured by slate falling upon him from the roof of said entry, directly over the track placed therein, along which he was at the time passing in the discharge of his duties. The injuries alleged are four fractures of the jaw and the loss of several teeth, which affected his ability to take food, and also his powers of speech, which injuries, he says, are perma-

nent. The entry wherein the plaintiff was injured is alleged to be about one-half mile in length, from 8 to 10 feet in width, and, on an average, about 4½ feet in height. It is further alleged that above the track along which plaintiff was required to pass with the cars of coal, and at a point about 50 yards towards the hoisting shaft, there was loose and defective overhanging slate in the roof of the entry, which rendered the passage that way dangerous, by reason of its liability to fall, of which dangerous condition the plaintiff had no knowledge at any time, nor did he have equal opportunity or means with the defendant of knowing the same. It is then alleged that the defendant himself, and by his agent in charge and control of the mine, well knew of the dangerous and unsafe condition of the entry where plaintiff was injured, or, if he did not actually know of the same, he could and would have known of it by the exercise of ordinary prudence and care, before the plaintiff was injured, and in time to have prevented the injury by securely propping, posting, or securing the roof of the entry. The negligence charged is that, with knowledge or means of knowledge of the unsafe condition of the roof of the entry, defendant failed and neglected to securely prop, post, or remove the overhanging slate. The damages laid consist in loss of time, incurring medical and dental bills, and general damages—in all, \$10,175.35. The foregoing is the substance of the second amended petition. The answer admits that the defendant operated the coal mine at the time of the injury; that plaintiff was in his employ, and that his duties were about as alleged by him; and that he was injured about the time and in the entry as described; but it denies each and all the other allegations of the petition. It avers that the plaintiff was not without fault, "but contributed to whatever injury he received by his own careless and negligent driving of the mule and management of the car, whereby one or the other was driven or thrown against certain props and posts which were then and there used to support the roof of said entry, and displaced them and knocked them down, and thereby permitted certain caps and portions of the roof of said entry to fall upon plaintiff, to his injury. * * *" The reply denies all the allegations of fault and contributory negligence made in the answer.

On the issues joined, the case went to trial to a jury. On request of the defendant, the court submitted to the jury, for answer, certain interrogatories, to be answered and returned as answered, with the general verdict. The interrogatories and answers are: "The jury in the above cause are required to make answer to the following interrogatories, and return the same as their special verdict: (1) About how often did plaintiff, while at work for defendant, pass along the entry at the point where he was injured? Answer. About three hundred and sixty times. (2)

Did plaintiff, while working in said entry, make any endeavor to ascertain the condition of the entry through which he passed? Answer. No. (3) Did plaintiff, while at work in said entry, take any notice of or pay any attention to the roof of the same, or observe that the same was propped, and cross-timbers used in it for the protection of the roof? Answer. No. (4) Was the defect in the roof of the entry at the point where plaintiff was injured obvious, and noticeable to a person going in or out of such entry? Answer. Yes. (5) Was it, under the evidence in this cause, the duty of plaintiff, while driving for defendant, to notice, examine, or pay any attention to the roof of the entry in which he was at work? Answer. No. John C. Steele, Foreman." The jury returned a general verdict for the plaintiff in the sum of \$1,481. The defendant filed a motion for new trial, containing, among other grounds, that the court erred in refusing to give the jury certain special instructions asked by the defendant, that the court erred in the general charge, and "that the general verdict is inconsistent with the special verdict." At the same time the defendant moved for judgment in his favor upon the special findings of the jury, notwithstanding the general verdict. The court overruled both motions, and the defendant excepted. Judgment was rendered on the general verdict, and defendant prosecuted error in the circuit court, assigning among other errors committed by the trial court that it "erred in overruling and not sustaining the motion of defendant below for a judgment in his favor upon the special verdict notwithstanding the general verdict for plaintiff." The circuit court found and decided "the court of common pleas erred in refusing to give to the jury special instructions numbered 4 and 7, as requested by plaintiff in error (defendant below)," and found no other error apparent on said record. For the errors found, the judgment of the court of common pleas was reversed, and the cause remanded for such further proceedings as may be authorized by law. The plaintiff in error excepted to the decision of the circuit court for the reason that it did not find and adjudge "that the court of common pleas erred in overruling the motion of plaintiff in error (defendant below) for a judgment in his favor upon the answers made by the jury to the interrogatories submitted to be answered by them, and in not rendering judgment in favor of plaintiff in error upon said interrogatories, as the court below should have done." Without waiting for a new trial of the case in the court of common pleas, the plaintiff in error prosecutes error in this court to reverse the circuit court for not giving him judgment on the answers of the jury to said interrogatories.

J. M. McGhillvray, for plaintiff in error.
Elmer C. Powell, for defendant in error.

PRICE, J. (after stating the facts). The record in this case presents two questions which are worthy of consideration, the first of which is a question of practice. The plaintiff in error was defeated in the trial court, his motion for new trial overruled, and judgment rendered on the general verdict returned by the jury. Before judgment, and contemporaneous with the motion for new trial, he asked judgment upon the answers to certain interrogatories submitted to the jury by the court. This was refused, and the case was taken on error to the circuit court, where the judgment for the trial court was reversed on the sole ground that there was error in refusing to give certain instructions requested by the defendant, and the cause was remanded for further proceedings. The circuit court refused to render judgment for plaintiff in error on the special findings of the jury, and overruled his motion for that purpose. There has been no retrial in the court of common pleas, and we are asked to review and reverse the decision of the circuit court overruling the motion of plaintiff in error for judgment on the special findings of the jury.

1. Has he a right to prosecute such proceedings in this court? This is our first question for consideration. The defendant in error says there is no basis for this proceeding, and no judgment to reverse, because the circuit court reversed the judgment of the common pleas and remanded the cause to that court for further proceedings; that, as a result of the reversal, a new trial was granted, and the special findings were vacated with the general verdict. This claim was made heretofore in this court by motion to dismiss the petition in error, and it is still urged and relied upon.

The particular questions of fact appear to have been submitted by the trial court without objection. At all events, they were submitted and answered by the jury and became a legitimate part of the record. As such, the judgment of the trial court was invoked upon them by the motion of defendant below, and that court exercised its judgment thereon in overruling the motion, to which exception was entered. In the circuit court he was not content with a reversal of the judgment on the grounds stated, but relied and still relies on the special findings as being inconsistent with the general verdict. And if the special findings are inconsistent with the general verdict, and are sufficient in their legal effect to defeat a recovery, there can be no doubt that he was entitled to judgment in the trial court. If so, the circuit court, when it reversed the judgment of the trial court, should have rendered the proper judgment, instead of remanding the case for a new trial. It seems entirely clear that if the special findings are inconsistent with the general verdict, and entitle the defendant below to a judgment, he would be justified in standing upon them in the trial court, and

also in the circuit court, regardless of the privilege of a new trial, rather than be compelled to abandon what he had fairly obtained, and incur the labor and expense of a retrial of the case. Otherwise the submission of special questions to the jury is but an idle and fruitless ceremony. But in this case the circuit court agreed with the trial court, and refused the judgment demanded. Is there no direct remedy in this court to review the decision of that court, and correct its error, if any has been committed in overruling the motion for judgment? If not, the party has lost a valuable right which the law has furnished him for a very clearly expressed purpose, and it is lost, it is said, because the circuit court set aside the general verdict and granted a new trial. However, it did more. It decided that plaintiff in error was not entitled to judgment on the special findings, which he claimed are inconsistent with and should control the general verdict. We discover no good reason why he does not have a direct remedy in this court to review the circuit court on that branch of the case. This view is founded upon the unequivocal meaning of sections 5201, 5202, Rev. St. 1892. In accordance with the former section, the court instructed the jury to find specially upon the particular questions of fact contained in the record. Whether all were proper questions, we need not now determine. They were submitted and answered. By the latter section it is provided that "when the special finding of facts is inconsistent with the general verdict, the former shall control the latter, and the court may give judgment accordingly." If the special findings are such as should control the general verdict, it becomes the duty of the trial court to enter the judgment which such "control" would clearly indicate, and in this we think there is no room for the exercise of mere discretion. Moreover, we regard the decision of the circuit court overruling the motion for judgment on the special findings as a judgment determining the rights of the parties in that behalf, and a proper predicate for proceedings in error. See section 6710, Rev. St. 1892.

As authorities against the views here expressed, counsel for defendant in error cites and relies upon the following cases: *Fitzpatrick et al. v. Papa*, 89 Ind. 17; *Hollenbeck v. City of Marshalltown*, 62 Iowa, 21, 17 N. W. 155; *State ex rel. Downard v. Templin*, 122 Ind. 235, 23 N. E. 697; *McCrum v. Corby*, 15 Kan. 112; *Insurance Co. v. Shillito*, 15 Ohio St. 559, 86 Am. Dec. 491; *Andrews v. Youngstown*, 35 Ohio St. 218. We have carefully examined each of these cases, and are unable to find a rule in either that is contrary to our position. In *Fitzpatrick et al. v. Papa*, supra, it appears that appellants urged their right to judgment in the appellate court on answers to interrogatories at the first trial of the case in the lower court. No ruling seems to have been asked or made at that

trial with reference to such interrogatories, but the court set aside the general verdict and granted a new trial. The parties had their new trial. From the judgment rendered on the second trial, appeal was taken, and appellant asked for judgment on the findings made on the first trial. It was easy to conclude and hold that, having submitted to a second trial, the party waived his rights on special findings made at the first trial. It was upon that state of the record the appellate court made its holding. *Hollenbeck v. City of Marshalltown*, supra, was an action to recover for injuries sustained by reason of a defective sidewalk. The first trial resulted in a verdict for the plaintiff, which was set aside and a new trial granted. The second trial resulted in a verdict for the plaintiff. On this—the second—trial the jury, in answer to a special interrogatory, found that the defect in the sidewalk was not so open and notorious as to render the city liable. It fairly appears that the city asked judgment on this special finding, and also for a new trial. The trial court refused judgment on the special finding, but granted a new trial. A third trial was had, and the plaintiff again recovered. From the judgment rendered on the last verdict, appeal was taken by the city, and it was there insisted that the city was entitled to judgment on the special finding made at the second trial. This the court denied, as well it could, because, by submitting to a retrial after the finding had been made, the city waived its rights thereunder. *State ex rel. Downard v. Templin*, 122 Ind. 235, 23 N. E. 697, contains no holding pertinent to the present inquiry. The same may be said about *McCrum v. Corby*, 15 Kan. 112. There, when the motion for new trial was granted, nothing was said about the special findings, and no one sought any order of court respecting them. The appellate court say in that case: "Counsel claim that, as no mention was made to set them aside, they still stand, and must control any subsequent verdict, and therefore a new trial is unnecessary and improper." The court denied the correctness of the proposition. In *Insurance Co. v. Shillito*, supra, the superior court, at special term, upon the facts found by it, rendered judgment against the plaintiff. The court at general term reversed the judgment and remanded the cause to the special term for new trial. The insurance company prosecuted error in this court to reverse the judgment at general term on the ground "that there was no error in the proceedings of said court at special term." It is clearly discerned, that the office or function of special findings of a jury are quite different from the findings of a court to which a cause is submitted without the intervention of a jury. The difference is both natural and statutory. Besides this observation, the question we have before us was not before the court in that case, either in form or substance. Nor does the case of

Andrews v. Youngstown, supra, shed any light on this controversy. The court there held that, "where a judgment is reversed for error accruing on the trial, the party against whom the reversal is had, by voluntarily submitting to a new trial which results in a verdict and judgment, waives his right to prosecute a petition in error to reverse the judgment of reversal." The latter holding is in entire accord with our construction of the Indiana and Iowa cases cited. We therefore hold that the plaintiff in error is properly in this court, and that it has jurisdiction to hear and determine his assignments of error.

Incidental to the argument of the foregoing subject, counsel for defendant in error assert as a rule of practice that plaintiff in error is without remedy on error, because he filed the motions for new trial and for judgment on the special findings simultaneously, and that both were decided by the trial court at the same time, and it so appears of record. It also appears that, in one judgment rendered by the circuit court, it granted a new trial on the ground that certain instructions were refused, and also adjudged that there was not error committed in overruling the motion for plaintiff in error in the special findings. We presume that the point intended to be made is that, the judgment of the circuit court being thus joint in form, the plaintiff in error cannot so divide it as to accept the benefits of a judgment for new trial, and also prosecute error to the balance of the judgment. The argument on this subject is very obscure, and the reasons back of it are equally obscure. The plaintiff in error did not submit to a new trial, and avail himself of that relief, but proceeded to this court to test his right to judgment on the special findings. We can discover no trace of prejudice to any one in the exercise of this right, arising out of the fact that both motions were filed and decided at the same time, and the condition of the record in that respect is no bar to the present proceeding. It is proper here to add what we regard as the proper order to be observed in cases where it is desired to file one or both of the motions referred to, although it is not adopted as an absolute or invariable rule to govern under all circumstances, but as the better and general rule of practice. We therefore think that in the trial of a civil action, wherein the jury return with a general verdict special findings on questions of fact under the instructions of the court, the party against whom the general verdict is returned may first move for judgment in his favor on the special findings, and if his motion is refused he may then file his motion for a new trial within the time prescribed by law. But where the court fails to pass on the motion for judgment on the special findings within the time allowed for filing a motion for new trial, the latter motion may be filed within such time, and before the decision of the motion for judgment. In either case

the motions should be filed and decided in the order indicated.

2. We now come to the second inquiry in the case: Is the plaintiff in error entitled to judgment on the special findings made by the jury? Is the special finding of facts inconsistent with the general verdict? The provision of our statute regarding special findings obtains, in substance, in many, if not all, of the states having a code of civil practice. It is found also in the statutes of some of the states where a code of civil procedure does not prevail, as in Indiana. The object of such provision has been defined by the appellate courts of several of such states, and, when we clearly understand the purpose to be served, we will be better enabled to say whether the findings in this record are inconsistent with the general verdict. It was said by Justice Hanna, of Indiana, in *Buntin v. Rose*, 16 Ind. 209, that, "before the enactment of our statute enabling a party to ask that a jury shall respond to interrogatories, it was difficult to have placed upon the record of a trial the component parts of, or elements which entered into and formed, the verdict of a jury. This was felt and considered as operating injuriously in many instances, because of the current of decisions in this court for many years to the effect that a verdict in a civil case should not be disturbed on the evidence where there was proof tending to sustain it." In *Morrow v. Commissioners*, 21 Kan. 484, the Supreme Court of that state, through Justice Brewer, says on page 503 that "the main object of special questions is to bring out the various facts separately, in order to enable the court to apply the law correctly, and to guard against any misapplication of the law by the jury. * * *" In *Davis v. Town of Farmington*, 42 Wis. 425-432, the Supreme Court of Wisconsin is of opinion that, "by requiring the jury to pass separately and specifically upon each controverted question of fact material to the issue, a more careful and methodical consideration of the testimony by the jury may be secured, and the precise grounds upon which the judgment is based will be disclosed." And in *Moss v. Priest*, 19 Abb. Prac., the New York superior court say on page 317: "The object of the provision in regard to special findings was to enable the court to leave the case to the jury generally, but to control their general verdict by findings which would render a second trial unnecessary in cases where no exceptions were taken, or, rather, to prevent exceptions to the charge. * * *" In connection with these authorities, we keep in mind another proposition—that the special finding is inconsistent with the general verdict only when the two are irreconcilable. *Elliot, C. J.*, in *Railway Co. v. Beyerle*, 110 Ind. 102, 11 N. E. 6, makes the very strong declaration that "nothing will be presumed in aid of the answers to the interrogatories, nor will they control the general verdict unless they are

invincibly antagonistic to it." In *Woollen v. Wishmier*, 70 Ind. 108, the Supreme Court of Indiana declare that "it must be remembered that a special finding must be irreconcilably inconsistent with the general verdict, before the latter can be set aside, and the former substituted in its place." See, also, *Amidon v. Gaff*, 24 Ind. 128-130; *Railroad Co. v. Stout*, Adm'r, 53 Ind. 143. In the latter case it is held: "Special findings in answer to interrogatories override the general verdict only when both cannot stand, and the Supreme Court will not direct a judgment in favor of a party against whom the general verdict has been rendered unless this antagonism is apparent on the face of the record, and the special finding cannot by any hypothesis be reconciled with the general verdict." To same effect are *Alexander v. University*, 57 Ind. 466; *Murray v. Phillips*, 59 Ind. 56; *Railroad Co. v. Barton*, 61 Ind. 293; *Hersman v. Hersman*, 63 Ind. 451. See, also, *Bills v. City of Ottumwa*, 35 Iowa, 107, where it is held that, "to justify the court in setting aside general verdicts on the ground that they are inconsistent with the special findings, the conflict must be irreconcilable." The latter statement of the rule seems to be the conservative judgment of the courts passing on the question.

Are the special findings disclosed in this record inconsistent with the general verdict? We think not. What are they? (1) The defendant in error passed the entry where he was injured about 360 times; (2) he did not, while working in the entry, make any endeavor to ascertain the condition of the entry through which he passed; (3) he took no notice of, nor did he pay any attention to, the roof of the entry, or observe that the same was propped, and cross-timbers in it for the protection of the roof; (4) the defect in the roof of the entry at the point where plaintiff was injured was obvious and noticeable to a person going in or out of such entry; (5) it was not the duty of the plaintiff, while driving for defendant, to notice, examine, or pay any attention to the roof of the entry in which he was at work. These, in substance, are the special findings. It was no part of the duties of the plaintiff below to inspect or repair the entry to the mine. His employment was to drive the mule hauling cars of coal from the rooms where mined to the hoisting shaft. It is true, the jury found that he made no endeavor to ascertain the condition of the entry through which he passed, and that the defect in the roof of the entry was "obvious and noticeable to a person going in or out of such entry." There is no finding that he did notice its condition, or that he could, by the exercise of ordinary care, while passing through the entry, have discovered the defect. The person mentioned in the finding to whom it would be noticeable might be an expert, or one whose duty it was to inspect and repair such defects. To such a person a defect in

the roof might be readily seen, because its discovery or presence formed a part of his duty, while it would not be obvious or noticeable to one whose duties were entirely different, and who had primarily the right to rely upon the operator of the mine to keep the entry in reasonably safe condition. We think this branch of the case is ruled by the doctrine laid down by this court in *Wellston Coal Co. v. Smith*, 65 Ohio St. 70, 61 N. E. 143, 55 L. R. A. 99, 87 Am. St. Rep. 547. The fourth section of the syllabus is: "In the business of mining coal, it is the duty of the owner or operator of a mine to furnish reasonably safe entries for the ingress and egress of those employed in such mine, and to keep such entries in a reasonably safe condition, and the miners may rely and presume that this duty has been properly performed." It is also held in that connection that "It is the duty of the miner, as to such entry, to use ordinary care for his own safety, in view of what he knows or ought to know as to the condition of such entries; and he ought to know every fact which he would know if he exercised ordinary care to keep himself informed as to matters concerning which it is his duty to inquire in the employment in which he is engaged." On page 82, 65 Ohio St., and page 146, 61 N. E., through *Burket, J.*, this court says: "If the plaintiff knew the roof of the entry to be unsafe, and entered notwithstanding such knowledge, he was negligent and ought not to recover; but as it was the duty of the mine boss to furnish a reasonably safe entry, and to keep it in a reasonably safe condition, the miners could rely upon that duty being performed, and were not required to test and inspect the roof of the entry themselves, and were not charged with knowledge of its unsafe condition, farther than the knowledge they would ordinarily obtain in the proper discharge of the work they were employed to perform."

We think this covers the whole law applicable to special findings, and we need not discuss them further. The judgment of the circuit court is affirmed. Judgment affirmed.

BURKET, C. J., and SPEAR, SHAUCK, and CREW, JJ., concur.

DAVIS, J. (dissenting). I cannot bring myself to concur in the last paragraph of the syllabus in this case, or in the judgment. It seems to me that both are illogical. In the syllabus it is said that "a servant employed in a coal mine to haul cars of coal from the rooms where the coal is mined, through an entry, to a hoisting shaft, by the use of a mule and cars, is chargeable with actual notice of every fact which he would have known, had he exercised ordinary care to keep himself informed as to matters concerning which it is his duty to inquire." This is sound law, and since the jury, in its an-

swers to special interrogatories, found that the plaintiff had gone in and out through the entry 360 times, and that while working in the entry he made no effort to ascertain the condition of the roof thereof, and took no notice of, and paid no attention to, the roof of the entry, nor the support thereof, and that the alleged defect was obvious and noticeable to a person going in and out of such entry, it seems to be conclusively established that he was chargeable with actual knowledge of the defect, for under such circumstances he could not be ignorant of that which was "obvious and noticeable," without the want of ordinary care. Yet in the face of that which, to the average mind, must seem to be an irresistible inference from the law and facts as found, it is held that the plaintiff may nevertheless put behind him all knowledge or its equivalent—ability to know if he had looked—and blindly rely on the master to perform his duty to furnish him a safe place in which to work, and that, when he is injured through the negligence of the master, he may recover therefor, notwithstanding he has assumed the risk with full knowledge, or has recklessly refused to see an obvious thing. That is precisely the effect of the judgment in this case, however the opinion may be worded, although I do not think that I have misconstrued the language used. It seems to me that this ruling is contrary to all precedent, and especially to the law as laid down in *Coal & Car Co. v. Norman*, 49 Ohio St. 598, 32 N. E. 857, and *Coal Co. v. Estievenard*, 53 Ohio St. 43, 40 N. E. 725. It is true that the plaintiff avers in his amended petition that he was without knowledge of the defect, but the jury has expressly found that he had such knowledge, or the equivalent thereof.

It also seems to me to be both indefensible and misleading to indicate that this judgment follows *Wellston Coal Co. v. Smith*, 65 Ohio St. 70, 61 N. E. 143, 55 L. R. A. 99, 87 Am. St. Rep. 547. I did not concur in that opinion in its entirety; but I never understood the ruling in that case as justifying a miner either in ignoring his actual knowledge, or in neglecting to know when knowledge was perfectly "obvious and noticeable," for in this case the controversy is not about occult things which might require expert tests to discover. Under the facts specially found by the jury, this was not a case requiring "tests" or "inspections" in order to discover the danger. Nor do I think the court so understood the cited case, for on page 82, 65 Ohio St., and page 146, 61 N. E., *Burket, J.*, says: "If the plaintiff below knew the roof of the entry to be unsafe, and entered notwithstanding such knowledge, he was negligent, and ought not to recover;" and in the syllabus of the case it is held that "It is the duty of a miner, as to such entry, to use ordinary care for his own safety, in view of what he knows or ought to know as to the condition of such entries," and surely

ly he "ought to know" when he could know by mere looking. It is said in the case at bar that the jury found that it was not the plaintiff's duty to notice defects in the roof of the entry, or in the supports thereof; but, in a legal sense, the jury could not find that, when the law requires that the plaintiff ought to know everything concerning his own safety which he could learn by the exercise of mere ordinary care. The special findings are absolutely irreconcilable with the general verdict, because they plainly indicate either (1) assumption of risk, with actual knowledge of the defect; or (2) want of ordinary care; or (3) both assumption of risk, with knowledge of the defect, and want of ordinary care.

For the reasons here briefly outlined, I entertain the opinion that the plaintiff in error is entitled to judgment on the special findings notwithstanding the general verdict.

(69 Ohio St. 91)

STATE v. ROSELOT.

(Supreme Court of Ohio. Oct. 27, 1903.)

HOMICIDE—INSANITY AS A DEFENSE—PROCEDURE—SPECIAL JURY.

1. The provisions of section 7240, *Bates' Ann. St.*, are mandatory, and the mode therein prescribed for a trial of the question of the present insanity of a person under indictment is peremptory and exclusive.

2. When, therefore, at any time before sentence, the insanity of a defendant under indictment is suggested and brought to the attention of the court in which such indictment is pending in the manner provided in said section 7240, it is the imperative duty of the court to order a jury to be impaneled to try such question, and such jury, when so impaneled, shall be specially sworn to try the question whether the defendant is or is not then sane.

3. Where counsel for a defendant on trial for murder in the second degree during the progress of such trial suggests to the court that the defendant is not then sane, and presents to the court the certificate of a "respectable" physician to the same effect, and demands that a special jury be impaneled to try the question whether or not such defendant is then sane, it is error for the court to refuse such demand. And such error is not cured by the court thereafter, in its general charge to the jury trying said case, instructing said jury that "if you think that you have not heard all of the truth in the case, because of defendant's mental condition, and that you believe you are not justified, because of that fact, in finding him guilty, you may acquit him."

(Syllabus by the Court.)

Error to Circuit Court, Hamilton County.

Frederick Roselot was indicted for murder in the second degree. This proceeding in error is one taken by the prosecuting attorney of Hamilton county, Ohio, on behalf of the state, under favor of section 7306a, *Bates' Ann. St.*, to obtain a reversal of the order and judgment of the circuit court of Hamilton county reversing a judgment of conviction against the defendant in error obtained in the court of common pleas of said county at the October term thereof, 1901. Affirmed.

Hoffheimer, Morris & Sawyer, for the State.
Thomas F. Shay, for defendant in error.

CREW, J. The defendant in error, Frederick Roselot, was on the 29th day of September, 1900, indicted by the grand jury of Hamilton county for the crime of murder in the second degree. On April 1, 1901, he was duly arraigned on said indictment, and pleaded thereto, "Not guilty." Thereafter the case was continued from time to time until December 16, 1901, when the case came on for trial, and the defendant, Frederick Roselot, and one of his counsel, Mr. Cogan, being then present in court, a jury to try said cause was then and there selected, impaneled, and sworn. On said day, after said jury had been impaneled and sworn, an adjournment was had, and said cause was continued until the following morning, December 17th, at 10 o'clock a. m. On December 17th, at 10 o'clock a. m., the trial of said cause was resumed, and the hearing of testimony was begun. Three witnesses were called and examined on behalf of the state, two of whom were cross-examined by Mr. Cogan, of counsel for defendant. Thereupon, and at this point, a recess was taken until 2 o'clock p. m. of the same day. At 2 p. m., the hour to which a recess had been taken, Mr. Thomas F. Shay, a member of the law firm of Shay & Cogan, and one of counsel for the defendant, Frederick Roselot, but who had been absent from the city of Cincinnati, and had not theretofore appeared at or participated in said trial, appeared in court, and filed his affidavit suggesting and alleging the then present insanity of said Frederick Roselot, and asking "that this cause should be passed until a reasonable opportunity is afforded to inquire into the question of the defendant's present sanity." Counter affidavits were submitted on behalf of the state tending to establish the sanity of the defendant. Upon consideration of these several affidavits, and after inquiry made by the court of divers persons to ascertain if defendant was in mental condition to proceed with the trial, the court decided and announced as follows: "It is the opinion of the court at this time that the defendant is able to proceed with the trial, and the trial must go on." Thereupon the trial proceeded. On the following morning, to wit, December 18, 1901, Thomas F. Shay, counsel for defendant, filed and presented to the court his further affidavit alleging and suggesting the insanity of the defendant, Frederick Roselot, and at the same time also filed and presented to the court the following certificate of Dr. John T. Booth, to wit: "Cin'ti, Dec. 18, 1901. To the Honorable Wm. Littleford: I, the undersigned, being a respectable physician practicing medicine in the city of Cincinnati, do hereby present to this court that I have examined the defendant, Fred. Roselot, and say to this court that he is at present an insane man wholly unable to give his counsel any assistance at present and is wholly unable to give intelligent testimony as a witness in his own behalf on this trial. [Signed] John

T. Booth, M. D." Thereupon, and before proceeding further with said trial, counsel for defendant demanded that a special jury be impaneled, under section 7240, Bates' Ann. St., "to try whether or not the accused is sane." The court refused to impanel said jury, and directed the trial to proceed. After hearing the evidence, arguments of counsel, and charge of the court, the jury returned a verdict of guilty. Thereafter a motion for new trial and in arrest of judgment was overruled by the court of common pleas. The case was taken to the circuit court, where the judgment of the common pleas was reversed on the ground, as appears from the journal entry, that there was error in the record and proceedings of the court of common pleas in this, to wit: "That the court below, on the application being filed under section 7240, Bates' Ann. St., should have arrested the proceedings of the trial, and impaneled a special jury to try said issue." To procure a reversal of this judgment of the circuit court, this proceeding in error is prosecuted.

The principal question presented for determination by the record in this case is whether the provisions of section 7240, Bates' Ann. St., which prescribe the mode and provide the means for a trial of the issue of present insanity of a person under indictment, were intended to be and are mandatory and exclusive, or whether the provisions of said section are so far directory only as that a court may, in its discretion, adopt some other and different mode of ascertaining the fact as to the sanity or insanity of the accused. Section 7240 is as follows: "When the attorney of a person indicted for an offense suggests to the court in which the indictment is pending, at any time before sentence, that such person is not then sane, and a certificate of a respectable physician to the same effect is presented to the court, the court shall order a jury to be impaneled, to try whether or not the accused is sane at the time of such impaneling; thereupon a time shall be fixed for a trial, and a jury shall be drawn from the jury box, and a venire issued, unless the prosecuting attorney, or the attorney of the accused, demand a struck jury, in which case such jury shall be selected and summoned as required by law; the jury shall be sworn to try the question whether the accused is or is not sane, and a true verdict give according to the law and the evidence; and on the trial the accused shall hold the affirmative; if three-fourths of the jurors agree upon a verdict, their finding may be returned as the verdict of the jury; and a new trial may be granted on the application of the attorney of the accused, for the causes and in the manner provided in this title." This statute is explicit in its terms as to the manner in which the question of the insanity of a defendant under indictment, when properly brought to the attention of the court, shall be submitted and

determined; and it is peremptory in its requirement that when the insanity of a defendant is, at any time before sentence, suggested to the court in the manner therein provided, the court shall order a jury to be impaneled to try the question whether or not the accused is sane at the time of such impaneling, and, further, it prescribes the form of oath that shall be administered to the jury when so impaneled. While it has long been the humane and settled policy of our law that no man shall be indicted and put upon trial upon a criminal charge, or be called upon to make his defense to such charge in a court of justice, who by reason of insanity is unable to comprehend his position, or is by reason of his insanity incapable of making his defense, yet in this state, prior to the enactment of section 7240, Bates' Ann. St., the method of determining the question of the sanity or insanity of a person under indictment was a matter largely within the discretion of the trial court, and had not been made the subject of statutory regulation. Prior to this enactment the court might, in the exercise of its discretion, either submit the question to a jury, or it might itself inquire into and determine the same without the aid or intervention of jury. The practice was by no means uniform, but differed in different jurisdictions. To provide for uniformity in the method of procedure, and to secure to the accused the right to have the question of his sanity submitted to and determined by a jury specially impaneled and specifically sworn and instructed to try that particular issue, was, we think, plainly the purpose of this enactment. And such being its purpose, it must have been intended by the Legislature that the method therein provided for the submission and determination of such question should be followed, and should be exclusive; and this whether the question be raised before or during the progress of the trial, provided only that it be raised at some time before sentence. Whether this enactment, without other or further limitation and restriction than is therein contained as to the time when the question of insanity may be raised or presented to the court, is wise and expedient legislation, is a matter with which we are not now concerned, inasmuch as the right to enact such statute is clearly within the legislative authority. The language of the statute is plain and unambiguous, and its provisions mandatory and emphatic that when, at any time before sentence, the attorney of a person indicted suggests to the court that such person is insane, and presents to the court the certificate of a "respectable" physician to the same effect, such court shall order a jury to be selected and impaneled as therein provided, which jury, when so impaneled, shall be sworn to try the question whether the accused is or is not sane at the time such jury is impaneled. Upon the admitted facts of this case, there was, we think,

such compliance with the requirements of this statute on the part of defendant's counsel as to clearly entitle the defendant to avail himself of its provisions, and to give to him the right to demand and have impaneled a special jury, particularly sworn, to try and determine the question of his sanity. This privilege and right was denied him by the court of common pleas, and in this the court erred.

It is, however, insisted by counsel for the state that, if this action and judgment of the court of common pleas were erroneous, nevertheless such error was not prejudicial to the defendant, and he ought not to be heard to complain thereof, for the reason, as is claimed, that the court thereafter submitted to the regular jury then trying the case the question of defendant's sanity, and that such question was submitted under an instruction from the court most favorable to the defendant. That instruction was as follows: "It may be that he [defendant] has been prevented from disclosing matters to you that are of great importance to him. If you think that you have not heard all of the truth in this case, because of the defendant's mental condition, and that you believe that you are not justified, because of that fact, in finding him guilty as charged, you may acquit him." Palpably erroneous and unauthorized as this charge was, and apparently favorable to defendant as in some respects it certainly is, yet nevertheless the instruction so given is not the equivalent of such instruction as the defendant was entitled to have upon the submission to a jury of the question of his present insanity. Nor is this charge so favorable to defendant as his counsel would seem to understand and assume. Counsel for the state, in argument, erroneously assume that the jury was told by this charge that, if they should find that at the time of the trial defendant was then insane, they must acquit him. But such is not the language of this charge. By this charge the jury was not instructed that if they so found they must acquit, nor that it would be their duty to acquit, but were told only that, in the event they should so find and believe, they might acquit him. This charge cannot, because favorable to the defendant, have the effect to deprive him of the right to complain of the submission of the question of his then present insanity to the trial jury—a jury impaneled and sworn to try only the question of whether or not he was guilty of the crime with which he stood charged, and for which he was then on trial. Under this charge the jury was told "that if they thought they had not heard all of the truth in this case, because of defendant's mental condition, they might acquit him." Thus the jury was given to determine whether they had heard all of the truth, and, if they should be of opinion they had not, because of the defendant's mental condition, they were told they might acquit him. Under this instruc-

tion the insanity of defendant could only avail him, as ground for acquittal, and acquittal could be had on that ground only after a finding by the jury that defendant was then insane, and before this jury was authorized to make such finding it was necessary that the whole of their number should concur therein. But the law provides (section 7240, supra) that on the trial of such issue (that of present insanity) "if three-fourths of the jurors agree upon a verdict their finding may be returned as the verdict of the jury." Defendant, through his counsel, having made proper demand therefor, was entitled to have the question of his insanity submitted to a jury impaneled and sworn to try that question alone, three-fourths of whom could have determined a verdict. The right to such jury having been denied him by the court of common pleas, the judgment of that court was properly reversed by the circuit court.

Judgment of circuit court affirmed.

BURKET, C. J., and SPEAR, DAVIS, and PRICE, JJ., concur.

(184 Mass. 401)

BRIGHTMAN v. BUFFINGTON et al.

(Supreme Judicial Court of Massachusetts.
Bristol. Nov. 25, 1903.)

GIFT—EVIDENCE—OBJECTIONS WAIVED.

1. Evidence held sufficient to show the transfer of money by a son to his mother was intended as a gift, and not as a payment on a note due from the son to the mother.

2. Statements that a mother understood that money given to her by a son was intended as a gift, and not as a payment on a note due from the son, when not objected to, become evidence in the case.

Exceptions from Superior Court, Bristol County; Jabez Fox, Judge.

Action by Charles P. Brightman, executor of the will of Rebecca L. Brightman, deceased, against Joseph L. Buffington, Jr., and another, administrators of the estate of Frank W. Brightman, deceased. There was a verdict for plaintiff, and defendants bring exceptions. Exceptions overruled.

J. W. Cummings and Chas. R. Cummings, for plaintiff. L. Elmer Wood, for defendants.

LORING, J. This is an action on a promissory note in the sum of \$3,200, made by the defendants' intestate, payable to his mother. The only defense set up was payment for all but \$1,789, and the facts relied on in support of this defense were also made the subject of a declaration in set-off. In the declaration in set-off the defendants counted on 23 payments of \$50 each, for which the defendants produced receipts, signed by the mother. These receipts stated in terms or in substance that the money had been received, and was to be charged to her account. In addition, the defendants produced receipts, signed

by a nurse or nurses who took care of the mother, for \$85, the balance of the sum declared on in set-off. The plaintiff's answer to the declaration in set-off was that these sums were paid to the mother by way of a gift. The case is here on two requests for instructions to the jury which were refused. One was a request that there was no evidence warranting a finding that any of the payments stated in the declaration in set-off were intended by the son as a gift, and the other was a request that there was no evidence warranting a finding that any of the payments made after June 27, 1899—that is, any but the first five—were intended by the son as a gift.

It is not necessary to state the case at length, as we are of opinion that there is one piece of evidence which is decisive of both requests. After the son's death one of his administrators tendered the mother, who was then alive, but who died before this action was begun, the balance due on the note now in suit, after deducting the sums set forth in the declaration in set-off. This was refused by her on the ground (so one of the defendants testified) that she understood that the money paid to her by the son who signed the note was a gift to her. The contention of the executor of the son is that this evidence as to what the mother understood is not evidence of what the son intended; that the fact that the mother understood that the payments were made by way of gift does not warrant a finding that the son intended to make them as a gift, and that, except for this statement, the uncontradicted evidence showed that the intent of the son was to be paid for these advances; that this was known to the mother, and could not be defeated by this subsequent statement, made after his death, as to her understanding. No objection was made to this evidence of what the mother understood, and thereby it became evidence (*Damon v. Carrol*, 163 Mass. 404, 40 N. E. 185; *Boyle v. Columbian Fire Proofing Co.*, 182 Mass. 93, 64 N. E. 726; *Allen v. Fuller*, 182 Mass. 202, 65 N. E. 31), although it was not competent. If an objection had been made, it could not have been admitted. But the difficulty with the defendants' argument is that, although the testimony of the defendant Buffington was that the mother at that time said that she understood it was a gift. Mrs. Grouard, who was also present, testified that the mother then said that the \$1,235 was a present; that she thought she did not owe Frank anything; that she had settled with him. She also testified that a number of times after that the mother said she was not indebted to him at all. However improbable the fact that the son intended these payments to be made by way of gift when other evidence in the case is considered, this testimony gave the jury the right to believe that it was so.

Exceptions overruled.

(134 Mass. 358)

VALLIE v. HALL.

(Supreme Judicial Court of Massachusetts.
Worcester. Nov. 25, 1903.)

MASTER AND SERVANT—EVIDENCE OF RELATION—SUFFICIENCY—INJURIES TO SERVANT—LIABILITY OF MASTER.

1. On the issue whether plaintiff's intestate was a servant of defendant while at work in a building, when he sustained injuries causing his death, defendant testified that he had his office in the building, and furnished materials for keeping it in order, and that, when consulted by the intestate as to what should be done with some varnish in the building, he did not refer him to any one else for directions. He also admitted hiring the intestate to finish some rooms in the building. A witness stated that defendant hired the intestate, and gave him orders, and paid him, while another witness present at the time of the accident said that defendant directed the intestate to do the work on which he was injured. *Held* sufficient to warrant a finding that the intestate was defendant's servant.

2. Where it was not shown that a master had any knowledge of the qualities and nature of varnish, other than that of an owner of buildings, in the care and keeping in order of which he had caused varnish to be used, and it was shown that the servant was a man of mature years, and a carpenter by trade, who had been employed for some years as an all-round man to make repairs and keep things in order in a large building, comprising stores and offices and a hotel, it must be *held* that the servant had equal knowledge of the qualities and nature of varnish with that of his master, and therefore the master was not liable for injuries sustained by the servant while emptying varnish from a barrel, resulting from an explosion of the varnish.

Exceptions from Superior Court, Worcester County; John H. Hardy, Judge.

Action by Ellen Vallie, administratrix of Joseph J. Vallie, deceased, against Amos R. Hall. Verdict for plaintiff, and defendant brings exceptions. Sustained.

This is an action of tort to recover for personal injuries which plaintiff's intestate received while in the alleged employ of defendant. The evidence showed that the intestate, a carpenter, was employed to do carpenter and other work at a building. While engaged in emptying a barrel of varnish in the basement of the building, an explosion of the varnish occurred, causing injuries from which he died.

Rockwood Hoar, for plaintiff. Burton W. Potter and Paul Potter, for defendant.

BARKER, J. We think there was evidence for the jury upon the issue whether the relation of master and servant existed between the plaintiff's intestate and the defendant, who was the owner of the building in which the intestate was employed. According to the defendant's own testimony, he had his own office in the building, furnished materials for keeping it in order, and, when consulted by the intestate as to what should be done by the latter with the varnish which the defendant owned, did not refer him to any one else for directions. The defendant also admitted that at one time he had hired

the intestate to finish off some rooms in the upper part of the building. The first lessee testified that the defendant hired the intestate, and gave him orders, and paid him; and the boy who was present at the time of the explosion testified that the defendant came down to the basement, and directed the intestate to do the work upon which he was engaged when hurt. There was evidence from which the jury could find that that work was not a mere single instance of gratuitous service.

The defendant was not shown to have had any knowledge of the qualities of varnish, other than that of an owner of houses and buildings, in the care and keeping in order of which he had caused varnish to be used. The intestate was a man of mature years, having a son who was 11 years of age at the time of the trial. He was a carpenter by trade, and had worked for the Norcross concern, as well as for others; and there was no dispute but that he had been employed at the building, which was a large one, comprising a hotel, with stores and offices, for some years, as an all-round man, to make repairs and keep things in order. The plaintiff herself testified that he did everything and repairing around the building, and there was nothing to contradict the testimony of the defendant and of the later lessee that the intestate did painting. But even if the jury should disbelieve that testimony, there was nothing to throw doubt upon the fact that the intestate was a carpenter of experience. We think it follows that he must be deemed to have had equal knowledge of the qualities of varnish with that which the defendant, from his own knowledge and experience, must be deemed to have had. It was for the plaintiff to produce evidence from which fairly the inference could be drawn that the defendant knew the danger of an explosion, while the plaintiff's intestate did not. In our opinion, the evidence would justify no such inference. Whether the intestate did painting or not, his experience as a carpenter, as well as his work as an all-round man in the building where he was hurt, must have given him as great familiarity with varnish as the defendant's experience with the care and repair of buildings could give. The case seems to us one in which all that fairly can be said is that the employer had no more knowledge of the danger, and no more opportunity for such knowledge, than the servant, and that the servant, proceeding under the most general directions to do by himself and in his own time and way a certain work, which could have been done with safety, and receiving an injury which came from the way which he himself selected, was injured, if not by his own negligence, at least without any fault on the part of his employer, so far as fairly could be found from the evidence. If the danger was obvious, one knew it as well as the other. If it was unknown to the in-

testate, the evidence would not justify a finding that it was better known to the defendant, or that he had had better opportunity to know it than his servant.

Exceptions sustained.

(184 Mass. 344)

DALTON v. NEW YORK, N. H. & H. R. CO.
(two cases). SLANEY v. SAME.
SPENCE v. SAME.

(Supreme Judicial Court of Massachusetts.
Hampden. Nov. 25, 1903.)

RAILROADS — CROSSING INJURIES — NEGLIGENCE — CONTRIBUTORY NEGLIGENCE
— EVIDENCE — QUESTION FOR JURY.

1. Where the evidence as to whether an electric car sounded its whistle and gong on approaching a crossing was conflicting, the question was for the jury.

2. In an action against a railroad for injuries at a crossing, evidence examined, and held to present a question for the jury as to whether plaintiff was guilty of contributory negligence in attempting to cross the track without waiting for the smoke of a train, which had just passed, to disappear.

Exceptions from Superior Court, Hampden County; Elisha B. Maynard, Judge.

Separate actions of tort for personal injuries by Emma Dalton, Sarah A. Dalton, John L. Slaney, and Alice Spence against the New York, New Haven & Hartford Railroad Company. There were verdicts for plaintiffs, and defendant excepted. Exceptions overruled.

J. B. Carroll and W. H. McClintock, for plaintiffs. Walter S. Robinson, for defendant.

HAMMOND, J. The defendant's theory of this accident is that the whistle and gong of the electric car were sounded as required by law; that at a time when the view of the third rail track was obstructed by the freight train and by the smoke from the engine, so that the plaintiffs could not see whether or not an electric car was approaching, and while the noise of the train was so great as to lessen very much the chances of hearing the sound of the signals, the plaintiffs, without waiting for these temporary hindrances to sight and hearing to disappear, and, indeed, without looking or listening, entered upon the crossing and attempted to pass over it immediately after the caboose of the train had cleared the highway. It must be said that there was much evidence, direct and indirect, to support this theory, and it might reasonably have been expected that the jury would adopt it. Upon such a theory a verdict for the defendant would have been the necessary result. But it must also be said that, if the evidence for the plaintiffs was believed, the jury were warranted in rejecting this theory. The crossing was in the state of Connecticut, and, in accordance with the law of that state, the jury were instructed,

ed, in substance, that the defendant could not be found negligent if the whistle and gong of the electric car were sounded as required by the statutes of that state. Upon the question whether they were so sounded, the evidence, as is quite usual in cases of this nature, was conflicting, witnesses called by the defendant positively testifying that the signals were given, and witnesses called by the plaintiffs testifying that they listened for the sounds, and did not hear them. The evidence on this question need not be rehearsed in detail. It is plain that under our decisions it raised a question of fact for the jury. In this respect the case is clearly distinguishable from cases like Tully v. Fitchburg Railroad, 134 Mass. 499, and Hubbard v. Boston & Albany Railroad, 159 Mass. 323, 34 N. E. 459, and must be classed with those like Menard v. Boston & Maine Railroad, 150 Mass. 386, 23 N. E. 214, and Davis v. New York, New Haven & Hartford Railroad, 159 Mass. 532, 34 N. E. 1070. If the signals were not given, then the defendants might have been found negligent, and upon the whole evidence the jury might have concluded that this negligence was contributory to the accident.

The more difficult question is whether the evidence was sufficient to warrant the finding that the plaintiffs were in the exercise of due care. Many of the facts are not in dispute. The four plaintiffs were in an open "canopy top wagon," which, with the single horse attached, had been hired at a livery stable by Slaney for that ride; and he was driving. There were two tracks at the crossing; the southerly being used only for the cars propelled by steam, and the northerly, called the "third rail track," being used only for the electric cars. A little after 9 o'clock in the summer evening the plaintiffs were in the vicinity of this crossing; and as they were approaching it from the south, and were opposite the house of one Davitt, which was about 250 feet from it, they observed a west-bound freight train approaching it from the east. After the train had passed over, Slaney drove to the crossing, and as he reached the northerly track his team was struck and overturned by an electric car which came from the west at a speed of about 25 miles an hour. Going westerly from the crossing, the grade of the track ascends, and the engine, after passing the crossing, emitted considerable smoke, which settled upon the third rail track, thus more or less obscuring the plaintiffs' view. Slaney was familiar with the crossing, and knew that an electric car was scheduled to reach it from the west shortly after 9 o'clock. He testified, however, that at the time he thought it was hardly time for the car to reach there. Both the highway and the railway tracks were above the surface of the adjacent ground, and to one standing in the highway there were no permanent objects to obstruct the view of the tracks for a distance of several hundred feet

¶ 1. See Railroads, vol. 41, Cent. Dig. § 116L.

either side of the crossing. The evidence introduced for the plaintiffs tended to show that they stopped opposite Davitt's house "two minutes or so"; that during that time the freight train was passing the crossing, and that they were looking up and down the track and listening for signals; that at that time the engine was puffing and emitting considerable smoke; that before the train had entirely passed the crossing they started and drove to within 50 feet of it, looking during the time, and listening for signals from the electric car; that they then stopped "probably a minute and a half or two minutes," and again looked and listened for the signals; that while stopping there the caboose passed the crossing, and immediately the horse, which had become somewhat restless, started of its own accord for the crossing; that Slaney stopped the horse when its head was possibly over the first rail of the southerly track; that while there the plaintiff looked down the track towards the west; that the smoke from the engine "settled right down on the third rail track" up to within 50 feet of the crossing; that while there they listened for signals from the electric car, but could hear none, and then, believing the track to be clear, they started to cross, and just as the horse reached the northerly track the light of the electric car "came right out of the cloud," three sharp whistles instantly sounded, and the team was struck. The evidence introduced by the plaintiffs tended further to show that the night was dark and cloudy; that while the plaintiffs were stopping at the southerly track the freight train had passed so far that the view of the third rail track was no longer obstructed by that train, but only by the smoke and the darkness; that there was but little, if any, wind; that upon getting to the southerly track the plaintiffs were for the first time aware of the serious interruption to the view caused by the smoke; and that while stopping there they had reason to think that it would not quickly disappear. In this position, with a horse which already had manifested some symptoms of uneasiness which might lead to some apprehension as to what it might do, the plaintiffs, according to their own testimony, looked as well as they could and listened, and, hearing no whistle or gong, thought that there was no electric car, and that it was better to cross than to wait for the lagging smoke to rise. Under all the circumstances of the case, the question whether the plaintiffs were in the exercise of due care in approaching the crossing and in attempting to cross it without waiting for the smoke to disappear was for the jury. The case must stand with cases like *Randall v. Connecticut River Railroad*, 132 Mass. 269, and not with those like *Debbins v. Old Colony Railroad*, 154 Mass. 402, 28 N. E. 274. We see no error in the way the court dealt with the requests for instruction.

Exceptions overruled.

(184 Mass. 440)

BARRON v. INTERNATIONAL TRUST CO.

(Supreme Judicial Court of Massachusetts.
Suffolk. Nov. 25, 1903.)

CONSOLIDATION OF CORPORATIONS—BONDS—
UNDERWRITING AGREEMENT—CONTRACT
FOR ADVERTISING—CANCELLATION OF
AGREEMENT—FRAUD—PLEADING.

1. Where the underwriters of bonds to be issued by consolidated breweries agree to pay for the advertising of the securities out of any money that is paid in on them, and after certain subscriptions are secured, on which a per cent. is paid as evidence of good faith, the underwriters cancel their underwriting agreement on account of misrepresentations by the brewery companies, and no bonds are issued, and the amounts paid on subscriptions are returned to the subscribers, the advertiser has no claim against the underwriters for compensation.

2. A declaration by an advertiser of consolidated corporation bonds against the underwriters, which alleges performance of a contract for advertising, by which plaintiff was to be paid out of money received on bond subscriptions, will not let in proof that the underwriters broke the contract by fraudulently canceling their underwriting agreement and refunding the subscriptions.

3. Fraud in canceling an agreement to underwrite consolidation corporation bonds, whereby one contracting with the underwriters to advertise the bonds, and look to the subscriptions for payment, was denied compensation, must be affirmatively alleged and proved.

Exceptions from Supreme Judicial Court, Suffolk County; Wm. Caleb Loring, Judge.

Action by one Barron against the International Trust Company. Verdict for defendant returned by order of court, and plaintiff excepts. Exceptions overruled.

Whipple, Sears & Ogden, for plaintiff.
Robt. M. Morse and Wm. M. Richardson, for defendant.

BRALEY, J. This is an action of contract, in which the plaintiff seeks to recover for money paid by him in advertising in certain newspapers a proposed subscription for, and sale of, mortgage bonds to be issued by a corporation known as the Boston Breweries Company, of which the defendant was to be trustee for the bondholders. The declaration contained three counts, but the first and second become immaterial, as the case was tried on the third count, which, in substance, alleges that the defendant, being "interested in the promotion of a combination of corporations," desired to place the bonds on the market, and agreed with and promised the plaintiff that, if he would advertise the enterprise in certain newspapers, it would pay him out of "such money or securities as might be paid to it, or such subscriptions as might be made thereafter to said securities," and that subscriptions were made to the bonds, and money paid on account thereon to the defendant, who has failed and neglected to pay the plaintiff. After the plaintiff had begun to advertise the securities, and under the terms of the agreement between it and the Boston Breweries Company, the defendant obtained subscrip-

tions for the bonds to the amount of \$60,000, on which the several subscribers therefor paid 10 per cent. on a par value of \$100 for each bond, and in this way the defendant received the sum of \$6,300. For reasons not necessary to be stated, the undertaking did not prove financially successful. No trust deed was ever executed or delivered to the International Trust Company, neither were any bonds prepared and engraved, and "the subscription was a failure." The underwriting agreement was canceled by the defendant on the ground of "misrepresentations in the prospectus." These misrepresentations related particularly to the earning capacity of the different breweries, it being claimed that the amount of the entire earnings had been greatly overstated. After the cancellation of the agreement the money which had been paid to the defendant on account of subscriptions to the bonds was returned by it to the several subscribers. A verdict having been returned for the defendant by order of the court, the case is here on exceptions to this ruling by the plaintiff, as well as to the admission of certain evidence at the trial.

The questions raised are so closely connected that they may be considered together. The relation of the parties to this suit is well stated in the closing language of the interview between the plaintiff and the president of the defendant when the contract was made: "I said, 'If the money comes in, you will pay me?' 'Certainly,' he said; 'I will pay you out of the money that comes in, but I do not guaranty that any money will come in.' I said, 'That is satisfactory to me.'" Plainly, no promise was made by the defendant to pay the plaintiff absolutely, but only on condition that payment was to be made out of such money, securities, or subscriptions as might be paid in; and the plaintiff now contends that as the defendant received an amount sufficient, at least, to pay his claim, it is liable therefor. And if nothing further appeared, this would be so. But the evidence offered by the defendant to show why the scheme failed was competent; and it cannot be successfully contended that, upon the plaintiff showing that it had received the money, the defendant is precluded from proving the cancellation of the underwriting agreement and abandonment of the undertaking, and thereby showing that the condition under which the plaintiff could lawfully call upon it to pay had not arisen. All the parties who took part in the negotiations to put the enterprise through, as well as the plaintiff, who was fully informed of the relation of the defendant thereto, must have understood that they were dealing with a combination whereby customers were to be secured for the bonds to be put on the market, and that these bonds were to be prepared and issued in the usual way. When the final result of the subscription to the bonds was ascertained, and the securities

successfully floated, and not before, the promise to pay out of the money received therefrom would arise and become operative. The money actually received was paid in by the subscribers on the direct understanding that the whole undertaking would be consummated as represented, and it may fairly be inferred that none of those who subscribed would have done so on any other basis. When the defendant ascertaining that misrepresentations had been made in the earning capacity of at least one, if not more, of the various concerns which made up the Boston Breweries Company, refused to go on, and so notified the agent of the proposed combination, and canceled the underwriting agreement, the money in its possession received from subscribers for bonds that had not been and could not be issued belonged to those who had paid it. They subscribed for bonds, and no bonds were ever sold and delivered, for the simple reason that the proposed combination went to pieces, and there were no bonds to sell. And the object and purpose of the subscription having wholly failed, each was entitled to a return of the sum so paid. The temporary deposit made by subscribers was to insure good faith on their part, and that they would take and pay for the bonds subscribed for by them, and cannot be regarded and treated as a fulfillment of all the conditions under which the subscriptions were made, because each subscription was conditional upon the whole amount being taken and issued, or at least enough to make the issue of bonds a success; and this view is in accordance with the terms of the offer made when they were placed on the market. It can make no difference whether the amount repaid is treated as a trust fund to be returned to those who paid it on the express understanding that bonds were to be issued therefor, or as money received on account, which the defendant might mingle with its funds and use for general business purposes. In either way, it had received money which in equity and good conscience must be paid back, if the bonds could not be issued. *Kelly v. Beede*, 141 Mass. 184, 4 N. E. 832. Nor can the force of this understanding arising from the whole plan to float the bonds, and the general situation of the parties and their relation to the subject-matter, be successfully met by the argument of the plaintiff that a jury might find that the cancellation of the agreement by the International Trust Company was fraudulent, as against the plaintiff, and not made in good faith. It would be enough to dispose of the position taken to say that the declaration on which the plaintiff relies alleges performance of the contract, and not a breach of it, by the defendant. But if this had been cured by an amendment at the trial, the plaintiff must have failed to maintain his contention. The evidence as to the cancellation of the underwriting agreement was given on cross-examination by the presi-

dent of the defendant company, a witness called by the plaintiff, and against whom no claim was then or is now made that he was untruthful or under any bias or prejudice in the case. Not only is fraud never presumed, but it must be affirmatively alleged and proved by the party who relies upon it either for the purpose of attack or defense. And nothing appears in the evidence recited in the record to show want of good faith by the defendant. If the plaintiff, in order to avoid the effect of this evidence, sought to charge the defendant or its officers with fraudulent conduct, it became his duty to so allege, and offer some affirmative proof to overcome the presumption of fact that they had acted honestly. *Hatch v. Bayley*, 12 Cush. 27-30; *Beatty v. Fishel*, 100 Mass. 448; *Wood v. Mass. Mutual Accident Association*, 174 Mass. 217-221, 54 N. E. 541. He failed so to do. And as the case stood at the close of the evidence, the plaintiff had not proved that the defendant had received any money under the terms of the agreement declared on, and the verdict was ordered rightly in its favor.

Exceptions overruled.

(184 Mass. 350)

PAINE v. PRICE et al.

(Supreme Judicial Court of Massachusetts.
Worcester. Nov. 25, 1903.)

POWERS — APPOINTMENT BY WILL — SUBSEQUENT MARRIAGE—REVOCATION—ADMISSION TO PROBATE—EFFECT.

1. Though, ordinarily, a will, so far as it is an exercise of a power of appointment, is excepted from Rev. Laws, c. 135, § 9, declaring that a marriage shall act as a revocation of a will not made in contemplation thereof, yet where, in default of an appointment, the property is to go to those who would have been entitled to it had it belonged to the donee, the case is, for practical purposes, to be treated as if the property belonged to the donee, and hence falls within the statute.

2. The question whether an appointment by a will is revoked by the subsequent marriage of the donee of the power does not depend on the validity of the will, and hence is not concluded by the decree of the probate court allowing it.

Appeal from Supreme Judicial Court, Worcester County; James M. Barker, Judge.

Bill for instructions by one Paine, as trustee, against Price and others. On appeal from the decree. Reversed.

Geo. S. Taft and T. Hovey Gage, Jr., for appellants. Thos. G. Kent, for appellee Mary L. Cogswell.

LORING, J. So far as a will is the exercise of a power of appointment, it is excepted from the act declaring that a marriage shall act as a revocation of a will not made in contemplation of it. The reason for this exception is that the donee of a power, in making an appointment, is acting for the donor in disposing of the donor's property. But where the property in question goes, in default of appointment, to those who

would have been entitled to it had it been the property of the donee of the power, a case arises where the property to be disposed of by the appointment is for all practical purposes the property of the donee of the power, and for that reason it is taken out of the exception, and left within the operation of the act. Rev. Laws, c. 135, § 9. In the case at bar the one undivided seventh which, in default of appointment, went to Susan Trumbull, afterwards Mrs. Price, comes within the modification of the exception, and is revoked by her marriage. We see no difficulty in holding that the effect of the statute (now Rev. Laws, c. 135, § 9) is to revoke the appointment so far as it operates on property which, in default of appointment, belongs to the donee of the power, and at the same time in holding that it is unrevoked so far as it operates on property which, in default of appointment, goes to strangers. The question whether the appointment by will is revoked by the subsequent marriage of the donee of the power is a question arising as to the exercise of the power, not as to the validity of the will. For that reason it is not concluded by the terms of the decree of the probate court in allowing the will in question.

Decree reversed.

(184 Mass. 354)

THOMPSON v. CITY OF WORCESTER.

(Supreme Judicial Court of Massachusetts.
Worcester. Nov. 25, 1903.)

MASTER AND SERVANT—SAFE PLACE TO WORK—TEMPORARY STAGING—DUTY OF MASTER—VICE PRINCIPAL—WITNESSES—EXPERT TESTIMONY.

1. Where workmen on a temporary staging called for planks as they needed them, and workmen on the ground selected them from the pile provided for general use, the whole duty of the master consisted in furnishing enough sound planks and employing competent workmen, and he was not responsible for injuries resulting from the choice by a workman on the ground of an unsound plank.

2. Testimony that defendant's foreman was not under duty to inspect planks used on a temporary staging, but merely to see that there were sufficient planks on hand, and that proper planks were used in general, and that he was taking entire charge of the job, did not warrant a finding that it was such foreman's duty to see that the staging was safe.

3. It was not error for the trial judge to find as a fact that a witness who had been a contractor and builder for 14 years, but who had never made any study with reference to the bearing strength of wood, was not qualified to testify as an expert to the weight which a spruce board of a certain size, with a knot in the middle, would bear.

Exceptions from Superior Court, Worcester County; Ohas. A. De Courcy, Judge.

Tort for personal injuries by William Thompson against the city of Worcester. Verdict for defendant, and plaintiff excepts. Exceptions overruled.

¶ 1. See *Master and Servant*, vol. 34, Cent. Dig. § 392.

The testimony of the superintendent of sewers, referred to in the opinion, is as follows: "When Fox wanted some plank he might send the order to me and might not. He might telephone for the lumber himself. I did not make any more than a casual observation of the planks at that time, but I should say there were fourteen or fifteen. These were eighteen-foot plank. Pat Fox was foreman on the job. He was a skilled man. I did not consider it his duty to inspect the plank. It was his duty to have sufficient plank of suitable length, and to see that proper plank were used on the work in general. Fox was taking entire charge of the job of putting the machine up, and the putting of the plank in their proper position is just as much his as the putting up of the machine. This lumber appeared all right." Otherwise the facts sufficiently appear in the opinion.

Charles C. Milton, Evans, Saunders & O'Toole, George A. Gaskill, and H. H. Fuller, for plaintiff. Arthur P. Rugg, for defendant.

LORING, J. The plaintiff was one of a gang of 14 or 15 city employ  s engaged in setting up a portable overhead railway, used for carrying buckets back and forth in excavating a trench to hold a sewer pipe. The railway was made up of sections 16 feet long. Each section consisted of two upright joists at each end of the section, braced across, and carrying a girder on the braces on the top of the uprights. The railway for the travelers carrying the buckets back and forth was suspended from and below this girder. The plaintiff and another man were screwing the track onto the girder over the second section, when the staging broke on which they were standing, and the accident happened which is here complained of. The staging for each section consisted of a single plank, which was laid on two cross-braces, one at each end of the section, resting on and in iron hooks driven into the forward end of the uprights for the purpose. The number of sections in the railway in question was variously stated to be 8, 10, and 12, but it appeared that all of them had been set up in the forenoon of the day in question, and also that the temporary planks which made the staging for screwing on the railway had been laid in that forenoon in all the sections. After dinner the plaintiff and another man went to the middle of the plank on the second section to screw on the railway, when, as we have said, the plank broke. The planks used for these stagings were taken from a pile of new spruce planks 12 inches wide and 2 inches thick, which had been delivered on the side of the street that forenoon for general use in the work. Four or five had been taken to construct the platform for the engine, and they "were sometimes used for other pur-

poses. They put them in the ditch as sheathing." The number of planks in the pile when they were delivered was estimated to be from 20 to 30, and the number left at the end of the day's work in question from 9 to 10. The work was in charge of one Fox, who was foreman in the defendant's sewer department. There was no testimony that Fox selected any of the planks to be put on the braces to form the temporary stagings, or that he took any part in putting them up beyond the fact that he was present superintending the work generally, if that be a fact which, under the circumstances of this case, warrants that conclusion. The plaintiff's witnesses testified that when the time came to put on the planks the men who were upon the uprights would call for a plank. Then the men who were on the ground would get one from the pile, and either hand it up "by forks made to lift the plank," or haul it up by a rope thrown over the girder. The planks used as a staging from which to screw the track onto the girder are taken off and the braces on which they are laid are taken down when the work of putting the track in place is done. It appeared that there was a knot as large as a man's hand in the center of the plank where it broke, and that such a plank would not hold two men. It is plain that the staging in question was a staging even more temporary in character than the stagings in question in *Kelley v. Norcross*, 121 Mass. 508; *Colton v. Richards*, 123 Mass. 484; *Killea v. Faxon*, 125 Mass. 485; *Clark v. Soule*, 137 Mass. 380; *Hoppin v. Worcester*, 140 Mass. 222, 2 N. E. 779; *O'Connor v. Neal*, 153 Mass. 281, 26 N. E. 857; *Kennedy v. Spring*, 160 Mass. 203, 35 N. E. 779; *Adasken v. Gilbert*, 165 Mass. 443, 43 N. E. 199; *Brady v. Norcross*, 172 Mass. 331, 52 N. E. 528; *Callahan v. Phillips Academy*, 180 Mass. 183, 62 N. E. 260. It was more like the staging in question in *Morris v. Walworth Manuf. Co.*, 181 Mass. 326, 63 N. E. 910. The case before us is a case where the men on the uprights called for the planks as they were needed, and the workmen on the ground selected them from the pile of planks provided for general use. In such a case the master performs his whole duty by furnishing enough sound planks and employing competent persons as fellow workmen. It differs from *Arkerson v. Dennison*, 117 Mass. 407. In *Arkerson v. Dennison* "the plaintiff was injured by the falling of a staging upon which he was directed to go by the defendant," and "the staging had been erected before the plaintiff entered the employment of the defendant," in the words used by Wells, J., in beginning his opinion in that case. And, further, the testimony given by Mehan, who, with Bennett, did the work of constructing the staging in that case, warranted the finding that the work of constructing the staging had not been intrusted to the workmen, and was retained by the defendant. In the case at bar

we do not think that the testimony of the superintendent of sewers warranted a finding that it was the duty of Fox, who had general superintendence of the work, to see that this staging was safe. In *Brady v. Norcross*, 174 Mass. 448, 54 N. E. 874, also relied on by the plaintiff, there was evidence that the defect in the staging was called to the attention of one who was a superintendent within the employers' liability act. The case does not come within *McIntyre v. Boston & Maine Railroad*, 163 Mass. 189, 39 N. E. 1012. The rule there applied is the rule where a manufactured instrument is supplied by the master (see *Callahan v. Phillips Academy*, 180 Mass. 183, 186, 187, 62 N. E. 260, and *Colton v. Richards*, 123 Mass. 484, 487), and not to a case where material is furnished out of which an instrument is to be manufactured. Although the stagings for each section were made by laying a single plank on the braces when they had been put in position, we do not think that the planks came within the rule as to manufactured articles. The plaintiff relies on *Prendible v. Connecticut River Mfg. Co.*, 160 Mass. 131, 35 N. E. 675, in support of his contention that the judge was wrong, as matter of law, in finding as a fact that a witness who had been a contractor and builder for 14 years, but who never had made any study with reference to the bearing strength of wood, was not qualified as an expert to testify to the weight which a spruce plank would bear which was 20 feet long, 12 inches wide, and 2 inches thick, with a knot as long as your hand in the middle of it. But there is nothing in *Prendible v. Connecticut River Mfg. Co.* which supports this contention. In that case it was held that an engineer could be allowed to give his opinion as to whether a staging erected in a specified way could safely be trusted to carry a particular weight, on the ground "that a person who has made a special study of the strength of materials and the proper mode of building structures to sustain weight" may be allowed so to testify. No question was raised as to that engineer's being qualified as an expert, and, so far as the case goes, it supports the ruling made at the trial.

Exceptions overruled.

(184 Mass. 365)

HARTFORD v. NEW YORK, N. H. & H. R. CO.

(Supreme Judicial Court of Massachusetts.
Worcester. Nov. 25, 1903.)

RAILROADS—PERSONS UNLOADING CARS—INJURIES—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTIONS FOR JURY.

1. In an action against a railroad for negligent death of one employed by a shipper in unloading cars, the evidence showed that decedent's duty was to remove a steel "brow," which connected the car in which he was working with a chute in his employer's building, on receiving the signal from the conductor in charge of a switching crew that the cars were

to be moved. The brow was some 5 feet long, 3½ feet wide, and about ¾ of an inch thick. Death resulted from the car on which decedent was working being coupled to another car, in pursuance of the usual direction of defendant's conductor, before decedent had got the brow disengaged. *Held*, that the questions whether sufficient time to remove the brow was given to decedent, and whether he proceeded with due diligence and skill in the performance of that duty, were for the jury.

2. Whether the conductor was negligent in starting the car without taking pains to ascertain defendant's situation was for the jury.

3. In view of the danger to life and limb by a premature moving of the car under the circumstances, the question whether the negligence of the conductor was gross was for the jury.

Exceptions from Superior Court, Worcester County; Francis A. Gaskill, Judge.

Tort by Essie Hartford, as administratrix of the estate of Robert H. Hartford, deceased, against the New York, New Haven & Hartford Railroad Company. There was a verdict for plaintiff, and defendant excepts. Exceptions overruled.

Plaintiff's intestate was in the employment of the Natural Food Company, and was at the time of the accident engaged in unloading a car on a switch track of the Natural Food Company near its factory in Worcester. Evidence on behalf of plaintiff disclosed the following facts: It was Hartford's duty to do general work, loading and unloading cars. Part of his duty was the unloading of shooks from the car. This was done by connecting a steel "brow," about 5 feet long and 3½ wide, and ¾ of an inch thick, with the car which was being unloaded, and a chute from near a window into the basement of the Natural Food Company's building. The shooks were thrown through this brow down through the chute. The brow was so shaped that it would hold on the inside of the threshold of the car door; one end engaging the threshold, and the other the chute. Hartford was in a car, unloading shooks, when the conductor in charge of the switching for defendant railroad gave a signal, "All right, go ahead." The signal was repeated to the head brakeman, and the engine backed up and coupled a car to the car in which Hartford was working, and when the cars were coupled they moved about a car length, when one of the defendant's employes shouted that some one had been hurt. The cars were then immediately stopped, and Hartford was found clinging to the sash of the window where the chute was; his left leg, between the brow and the building, most seriously cut, and barely hanging by the flesh, and his right leg extending over the brow.

E. H. Vaughan, John A. Thayer, and C. B. Perry, for plaintiff. Arthur P. Rugg, for defendant.

HAMMOND, J. The evidence was ample to show that while the plaintiff's intestate was engaged in unloading the car he was told by Carruth, the conductor in charge of the crew who were to remove the cars from

the side track, to "look out," because the cars were to be moved; that upon such information it was the duty of the intestate to take down the steel "brow" which connected the car with the chute in the building; that shortly afterwards the cars were moved in obedience to orders from Carruth, and after they had been moved a few feet the intestate was found caught between the brow and the building, and badly injured. So far the case is plain. As to many of the other parts of the case the evidence is conflicting, and the defendant stoutly contends that there is nothing to show due care of the intestate, or gross negligence of the defendant's servants. While it is true that upon the evidence a strong argument can be made in favor of the defendant, still we are of opinion that, in view of the weight, size, and shape of the brow, the narrow space between the car and the building, the duty of the intestate upon being warned, and the other circumstances of the case, the questions whether sufficient time to remove the brow was given to the intestate, whether he proceeded with due diligence and skill to the performance of that duty, and was injured while thus acting, and whether Carruth was negligent in starting the car without taking more pains to ascertain the situation of the intestate, were for the jury. And in view of the danger to life and limb by a premature moving of the car under the circumstances, the question whether the negligence of Carruth was gross was also for the jury. For cases somewhat analogous in principle to this case as to some of the questions raised, see *Thyng v. Fitchburg R. R.*, 156 Mass. 13, 30 N. E. 169, 32 Am. St. Rep. 425; *Maguire v. Fitchburg R. R.*, 146 Mass. 379, 15 N. E. 904.

Exceptions overruled.

(184 Mass. 422)

HUMPHREYS v. PORTSMOUTH TRUST & GUARANTEE CO.

(Supreme Judicial Court of Massachusetts.
Essex. Nov. 25, 1903.)

CARRIERS—ELEVATORS—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY.

1. Evidence examined, and held to warrant a finding that plaintiff, who was injured in walking into an elevator well in the dark while going to his work, was in the exercise of due care.

2. In an action for injuries caused by falling into an elevator well, testimony by a lessee of a part of the building that, during his occupation, defendant, the owner of the building, took care of the elevators, warranted a finding that the elevator was within defendant's control.

Report from Superior Court, Essex County; William Cushing Wait, Judge.

Tort for personal injuries by Walter Humphreys against the Portsmouth Trust & Guarantee Company. Verdict for plaintiff, and defendant excepts. Exceptions overruled.

Plaintiff was injured by falling into the well of an elevator in a building owned by defendant, and in which plaintiff was em-

ployed by a firm which occupied the second floor of the building. Plaintiff had been employed in the building for only 2½ days before he was hurt. He testified that he did not know there was an elevator or an elevator entrance at the place where he was injured, and on the day of the accident he was alone, and walked past the entrance he had used the previous morning, and came to the elevator entrance; the doors being open, and without guard or gate, and flat against the side of the building. He supposed that it was the same door he had entered the previous morning, and he stepped in, intending to go upstairs. A door on the left-hand side put him off the track, as there was a door on the left-hand side of the entry which he had previously entered, and when he stepped in he was going to open that door and step upstairs, the same as he did the morning before. When he stepped in, he fell to the bottom of the elevator well. He also testified that it was dusk; that he was walking at a moderate rate, not knowing there was an entrance there, and was not looking for any door; that all he saw was blackness; that he could not see into the hole at all; that he stepped in to get to the door and go upstairs, and the blackness seemed the same as it did the day before, when he entered in safety. The morning before he fell, people were going into the entrance, and up a flight of stairs, and that was sufficient to satisfy him that it was a safe way. There was also testimony as to the surrounding conditions, the walls, light, etc., and evidence of other witnesses corroborative of that of plaintiff. Plaintiff's employer testified that he had a written agreement with defendants for the lease of the part of the building occupied by his factory, and entered in and took possession and occupied under it; that during his occupation defendant took care of the elevators; that all repairs were made on the elevators by the owners.

Wm. H. Niles, for plaintiff. Jas. H. Sisk and Richard L. Sisk, for defendant.

LORING, J. We are of opinion that the exceptions must be overruled.

1. The evidence warranted a finding that the plaintiff was in the exercise of due care. It is ordinarily true that a person who walks into an elevator well is guilty of contributory negligence. *Taylor v. Carew Mfg. Co.*, 143 Mass. 470, 10 N. E. 308; *Patterson v. Hemenway*, 148 Mass. 94, 19 N. E. 15, 12 Am. St. Rep. 523; *Keenan v. Edison Electric Illuminating Co.*, 159 Mass. 379, 34 N. E. 366; *Ballou v. Collamore*, 160 Mass. 246, 35 N. E. 463; *McCarvell v. Sawyer*, 173 Mass. 540, 54 N. E. 259, 73 Am. St. Rep. 318. It is also true that a person who goes forward in the dark in a place with which he is not acquainted is not in the exercise of due care. *Campbell v. Abbott*, 176 Mass. 246, 57 N. E. 462;

Daley v. Kinsman, 182 Mass. 306, 65 N. E. 385. But in the case at bar the plaintiff, under the circumstances, might well mistake the elevator door, which was open, for the door by which he entered the day before, which was shut, without being guilty of negligence. The accident happened at five to seven minutes after 7 o'clock in the morning of January 4th, and there was evidence that the morning was damp, misty, cloudy, and dark. There was also evidence that the alleyway on which the two doors opened was no more than 10½ feet wide, and was hemmed in on each side by brick buildings of the ordinary color, 6 stories in height; that it was so dark there at the time that a person in the alleyway could see only as in the dusk. It appeared that the two doors were similar in appearance, the door of the elevator being 5 feet beyond the door which the plaintiff should have taken, and that, while the door he should have taken was closed, the shutters of the elevator were open, and "lay against the wall, shining nice and bright." We are also of opinion that, under the circumstances of this case, the plaintiff might be found to have gone forward in the dark without being guilty of negligence. The jury were warranted in finding it to be so dark beyond the entrance to the elevator that the plaintiff could not see whether there was a hole or floor in front of him. There was also evidence that the landing beyond the proper entrance was equally dark when the plaintiff used it the day before. Added to this, there was a door on the left of each entrance which might be found to have further misled the plaintiff. The case is very like *Gordon v. Cummings*, 152 Mass. 513, 25 N. E. 978, 9 L. R. A. 640, 23 Am. St. Rep. 846. See, also, *Parker v. Barnard*, 135 Mass. 116, 46 Am. Rep. 450.

2. The testimony of the plaintiff's employer warranted a finding that the elevator was within the defendant's control. He testified "that during his occupation the defendant took care of the elevator."

Judgment on the verdict.

(184 Mass. 413)

GILE v. J. W. BISHOP CO.

(Supreme Judicial Court of Massachusetts.
Bristol. Nov. 25, 1903.)

NEGLIGENCE—MANAGEMENT OF PREMISES— LICENSEE.

1. Where a construction company is engaged in altering a building of a manufacturing company, which at the same time continues its business, so that the construction company is not in the exclusive occupation of the grounds, but the employes of the manufacturing company are expected to use them so far as necessary, such an employe is not a mere licensee, as against the construction company, and the latter is bound to use reasonable care to prevent his injury.

Exceptions from Superior Court, Bristol County; Frederick Lawton, Judge.

Action by one Gile against the J. W. Bishop Company. Judgment for plaintiff, and defendant excepts. Exceptions overruled.

E. D. Stetson and G. O. Tobey, Jr., for plaintiff. Arthur E. Perry and Otis S. Cook, for defendant.

KNOWLTON, C. J. The evidence tended to show that the defendant's servants piled timbers of North Carolina hard pine, whose dimensions were 18 by 12 inches, and which were of various lengths, making their weight 2 to 2½ tons each, along the side of a driveway in the yard of the City Manufacturing Company. They were piled upon blocking, some of which was very short. These men were engaged in squaring and chamfering the ends of the timbers, and, as they finished one, they rolled it over and started on the next. While the plaintiff, the master mechanic of the City Manufacturing Company, was standing at the side of one of these piles of timbers, talking with the yardmaster on business of the company in which he was engaged, the defendant's servants rolled over one of these timbers, and thereby caused the timber next to which the plaintiff was standing to fall over upon him and injure him. The evidence well warranted the jury in finding that there was negligence for which the defendant was liable, either in the mode of piling the timbers, or in the conduct of the workmen in rolling over one of them just before the accident, or in both, and that this negligence caused the plaintiff's injury. *Mahar v. Steuer*, 170 Mass. 454, 49 N. E. 741.

The defendant contends that the plaintiff was a mere licensee, and that it owed him no duty, except to refrain from willfully or wantonly injuring him. But this contention is not supported by the evidence. The defendant was engaged in the alteration of a picker house of the City Manufacturing Company, and the company was at the same time continuing its business. The defendant was not in exclusive occupation of the yard and grounds of the City Manufacturing Company. It used them so far as was necessary for the convenient performance of the work which it had undertaken, and at the same time the employes of the company were expected to use them so far as was necessary or proper in the prosecution of the business of that company. The defendant was therefore bound to exercise reasonable care in reference to these employes who were rightfully there.

There was evidence for the jury in support of the proposition that the plaintiff was in the exercise of due care. They might find that he had no reason to expect that the timber would fall, either from negligent piling, or from the careless conduct of the workmen in rolling over one of the timbers while he was standing at the side of the pile.

Exceptions overruled.

(184 Mass. 388)

HAZEN v. MATHEWS.(Supreme Judicial Court of Massachusetts.
Hampden. Nov. 25, 1903.)**DEED—COVENANT AGAINST INCUMBRANCES—
RESTRICTION IN FORMER DEED—VALIDITY—
LAW OF ANOTHER STATE—PRESUMPTION.**

1. Where no evidence is introduced to show the law of another state as to whether a provision in a deed to land in such state creates an equitable restriction, it is presumed that its law is the same as the common law of the forum.

2. A provision in a conveyance of a lot prohibiting the grantee or his heirs or assigns from building on the lot within 50 feet of its front is ineffective after the death of the grantor, where he was the owner in common with another of the adjoining land, and there was no clause in the deed that the restriction was for the benefit of other lots in the neighborhood, and is no breach of a covenant against incumbrances in a subsequent conveyance of the lot.

Exceptions from Superior Court, Hampden County; Albert Mason, Judge.

Action by Lucius D. Hazen against Estelle V. Mathews for breach of a covenant against incumbrances in a deed to land in New York. From an order directing a verdict in favor of defendant, plaintiff brings exceptions. Exceptions overruled.

Brooks & Hamilton, for plaintiff. T. W. Kenefick, J. B. Carroll, and W. H. McClintock, for defendant.

LORING, J. In 1866 one Cray bought of Gilbert and Peter Shute a farm containing some 51 acres; and at some time not stated in the bill of exceptions he purchased another tract, lying north of the Shute farm, "known as the Straub purchase." On November 5, 1868, he filed in the office of the register of Westchester county the accompanying plan, in which both parcels are laid out in building lots fronting on streets shown on the plan. On July 27, 1868, he sold to one McDougall lots 96 and 104, and to one Komp lot 97, referring to a map to be recorded, and they are shown on the plan recorded in the succeeding November, mentioned above. On March 1, 1869, he conveyed to one Darling an undivided half interest in all the tract shown on the plan; that is to say, an undivided half of the Shute purchase and the Straub purchase, excepting lots 96, 97, and 104, which had been previously conveyed away by him, and also lots 81, 87, 91, 102, 103, 114, and 115, which had not been conveyed. All of these lots were originally part of the Shute purchase. Cray also excepted a part of the Straub purchase, being the land included in lot 49 and a portion of lot 67 on said plan. On March 20, 1869, he sold to one Wooster lot 91, which had been excepted from the conveyance to Darling. That lot was conveyed by Wooster to the defendant, and by the defendant to the plaintiff; and in the conveyance to the plaintiff the defendant covenanted that he owned the lot free from incumbrances.

The plaintiff's claim is that by the deed from Cray to Wooster lot 91 became subject to an incumbrance by way of equitable restriction, and this action was brought to recover from the defendant the difference between the market value of lot 91 free from incumbrances, and its value subject to the equitable restriction in question.

No evidence was introduced at the trial of the fact that by the law of New York the deed from Cray to Wooster created an equitable restriction, nor of what the law of New York on that subject is. In the absence of such evidence, the case must be disposed of on the presumption that the law of New York in this respect is the same as the common law of this commonwealth.

On April 30, 1869, two months after the conveyance of the undivided half of substantially the whole tract to Darling, and one month after the conveyance to Wooster, a plan was filed in the register's office for Westchester county, covering the tract of land covered by the former plan, and another tract of land equally large. On this second plan Summit avenue was cut through from Sidney avenue to Prospect avenue. Otherwise the lay-out of the land is substantially the same. There were changes in the division of the land into lots within the side lines of the streets, which do not seem to be material in this case. It was provided in the deed from Cray to Wooster, among other things, that neither the grantee, nor his heirs or assigns, should at any time thereafter erect a dwelling or other building within 50 feet of the front line of said lot. The plan referred to in the deed is the first plan, on which Summit avenue stops at Sidney Place, and is not represented as going through to Prospect avenue, as it did on the second plan. The front line of the lot is the line of Prospect avenue. In June, 1874, Cray and Darling conveyed to Wooster a small triangular piece of land, formerly part of lot 90, left on the east side of Summit avenue, and butting on the upper side of lot 91; and Wooster conveyed to Cray and Darling a small triangular lot taken from the lower end of 91, which was within the side line of Summit avenue. There was an attempt made at this time to impose restrictions on that portion of lot 91 which fronts on Summit avenue, but no claim for damages by reason of that is made here, and it may be disregarded.

The plaintiff's contention is that an incumbrance by way of equitable restriction was imposed on lot 91 by the deed to Wooster, taken in connection with the deeds to McDougall and Komp, made before the first plan was recorded, in connection with the two plans, and also in connection with subsequent deeds of certain lots which were excluded. The subsequent deeds covered the lots lying next on the east and north of lot 91, and those to the west on the other side of Summit avenue, and also lot 257 on the second plan (formerly 98), and lots 220, 221,

¶ 1. See Evidence, vol. 20, Cent. Dig. § 101.

219, and 222 (formerly 57, 58, 59, and part of 56 and 60). The prior deeds to McDougall and Komp contained a clause beginning with these words: "Subject, nevertheless, to the following restrictions, subject to which this conveyance is made and accepted by the party of the second part, that is to say, that neither the party of the second part, his heirs or assigns," shall, in substance, (1) permit any noxious trades on the premises conveyed; (2) or erect any building except dwellings; or (3) any dwelling house costing less than \$2,500; or (4) erect any dwelling or other building within 30 feet of the front lines of said lots; or (5) any stable or other buildings within 75 feet of those lines. The restrictions in the deed of lot 91 were the same, with two exceptions. In addition to noxious trades, it prohibited "any store or place for the sale of beer or liquors or other store whatever"; and the buildings to be erected for dwellings were to be set back 50, in place of 30, feet from the front line of the lot. In the subsequent deeds made by Darling and Crary, which were excluded, the restrictions seem to be the same as in the deeds to McDougall and Komp, made before lot 91 was conveyed to Wooster. The plaintiff contends that subsequent deeds are admissible in evidence to prove that there was a general scheme in pursuance of which his deed was made, that the deeds and plans show that there was such a scheme in the case of this land, and that the two matters in which the restrictions in the deed in question differ from those in the prior and subsequent deeds are not so important as to take lot 91 out of the scheme. On the last point he relies on *Hano v. Bigelow*, 155 Mass. 341, 20 N. E. 628; *Hills v. Metzneroth*, 173 Mass. 423, 53 N. E. 890; and *Bacon v. Sandberg*, 179 Mass. 396, 60 N. E. 936. All that had taken place when lot 91 was conveyed to Wooster were the conveyances to McDougall and Komp of lots 96, 97, and 104, the filing of the first plan, and a conveyance to Darling of an undivided half interest, free from any restrictions, of the original tract shown on the first plan, with the exception of the three lots previously conveyed, of lot 91, and of six other lots, none of which are in the immediate neighborhood of lot 91. Had Crary inserted a clause in his deed of lot 91, stating that the restrictions contained in that deed were inserted for the purpose of imposing upon lot 91 an equitable restriction for the benefit of, and as appurtenant to, the lots on the same side of Prospect avenue and the other lots in that neighborhood belonging to himself and Darling, the clause would not have been effectual. An easement cannot be imposed by deed in favor of one who is a stranger to it. *Edwards Hall Co. v. Dresser*, 168 Mass. 136, 46 N. E. 420. Darling, who owned one-half of the adjoining land, was a stranger to the deed of lot 91 made by Crary to Wooster, and an easement cannot be attached to land owned in common by a

conveyance to one only of the tenants in common. Such a conveyance would be personal to the grantee, and would not inure to the benefit of subsequent owners of the land.

In the case at bar it appeared that Crary is dead. The restrictions contained in the deed of lot 91 are at an end, and the presiding judge was right in excluding the subsequent deeds, and in directing a verdict for the defendant.

In stating the principle of equitable restriction in *Whitney v. Union Ry.*, 11 Gray, 359, 365, 71 Am. Dec. 717, Bigelow, J., restricts the doctrine to a case where it was the intention to create an easement "for the benefit of other land owned by the grantor, and originally forming, with the land conveyed, one parcel."

Exceptions overruled.

(184 Mass. 429)

HAVERHILL SAV. BANK v. GRIFFIN.

(Supreme Judicial Court of Massachusetts.

Essex. Nov. 25, 1903.)

DEEDS—CONSTRUCTION—RESERVATION—EASEMENT.

1. A grantor conveyed a lot to G., and subsequently conveyed an adjacent lot to a third person. The latter deed contained the words, "And reserving to the lot next south owned by G. the right to enter a drain into a private sewer now on said land." When the second deed was made, no such right had been granted to, or prescriptively acquired by, G., and the drain was not in existence at the time of the deed to G. *Held*, that the stipulation in the deed constituted a reservation, and G., not being a party to it, acquired no rights under it.

Report from Superior Court, Essex County; Wm. B. Stevens, Judge.

Suit by the Haverhill Savings Bank against Caroline M. Griffin. Decree for plaintiff, and case reported to the Supreme Judicial Court. Decree affirmed.

This is a bill in equity brought by the Haverhill Savings Bank, asking to have defendant enjoined from using and maintaining a drain from land owned by her on the east side of Auburn street through land owned by plaintiff on the east side of Auburn street and south side of Sixth avenue—both parcels being in Haverhill—and also asking that plaintiff be authorized to close that portion of the drain which is on its land. Defendant is the owner of a parcel of land bounded on the east by Auburn street and on the north by the plaintiff's land, which was conveyed to her by one Algernon P. Nichols by warranty deed in common form, dated November 4, 1885. Subsequent to the conveyance to defendant a drain was constructed by her from the lot owned by her into and through the land on the north then owned by her grantor, now owned by plaintiff, and connected with the sewer on land now owned by plaintiff, and from the fall of 1885 it has been in continuous use, draining the defendant's

¶ 1. See Deeds, vol. 16, Cent. Dig. § 464; Easements, vol. 17, Cent. Dig. §§ 40, 115.

lot. The land owned by plaintiff was conveyed to one Warren Hoyt by warranty deed in common form from said Algernon P. Nichols, dated July 12, 1886. The dates of the execution and record of this deed were subsequent to the dates of the execution and record of the defendant's deed before mentioned. In the deed of plaintiff's land, it was described as bounded on the south by land of Caroline Griffin about 107 feet, and on the west by Auburn street about 100 feet, and it contained the following clause: "And reserving to the lot next south owned by Griffin the right to enter a drain into a private sewer now on said land." Plaintiff acquired its title through a mortgage given to it by said Hoyt, which was foreclosed. The mortgage to the plaintiff did not contain any words relating to the drain.

Francis H. Pearl, for plaintiff. Henry N. Merrill, for defendant.

BRALEY, J. At the time the defendant obtained title to her land the drain was not in existence, and the deed under which she holds is silent as to any right to lay and maintain such a drain through the land of the plaintiff. Neither does it appear that this alleged right whereby the defendant would be entitled to connect her premises with the public sewer can be said to arise by implication. See, in this connection, *Bumstead v. Cook*, 169 Mass. 410, 48 N. E. 767, 61 Am. St. Rep. 293. And the case falls within the well-recognized general rule that, where an easement is not set out in the instrument under which the party claiming the privilege holds title, it must be shown to be actually in existence and connected with the estate conveyed, in order to pass as appurtenant by implication. *Philbrick v. Ewing*, 97 Mass. 133; *Bass v. Edwards*, 126 Mass. 445-449. In order, therefore, to maintain her claim, she is necessarily obliged to rely on the clause in the deed to the plaintiff's grantor which is in these words, "And reserving to the lot next south owned by Griffin the right to enter a drain into a private sewer now on said land," and the rights of the parties must be determined on the construction to be given to this clause. At the date of this deed, so far as the facts appear by the record, no such right had been granted to, or prescriptively acquired by, the defendant, and which might be preserved for her use by the language used, on the ground that thereby an exception was created, and hence the easement claimed was excepted from the grant. But they must be construed as an attempt to vest in the grantor a new interest or right that did not before exist, and therefore constitute a reservation, rather than an exception. *Wood v. Boyd*, 145 Mass. 176, 13 N. E. 476; *White v. New York & New England Railroad Company*, 156 Mass. 181, 30 N. E. 612. And as the defendant was not a party, but a stranger, to the deed she could gain no rights under the

reservation, which inured solely to the grantor, and for this reason she did not acquire any easement under it. *Murphy v. Lee*, 144 Mass. 371-374, 11 N. E. 550.

It follows that the decree entered in the superior court was right, and should be affirmed. Decree affirmed.

(184 Mass. 437)

WILLIAMS v. CITIZENS' ELECTRIC ST. RY.

(Supreme Judicial Court of Massachusetts. Essex. Nov. 25, 1903.)

CARRIERS—INJURY TO PASSENGERS—EVIDENCE—SUFFICIENCY—COMPETENCY.

1. On appeal by plaintiff in an action for injuries sustained by a passenger on a street car owing to a defective device for opening and shutting the door, it is not to be presumed, in favor of appellant, that an inspection of the car by the jury added anything to the evidence contained in the bill of exceptions.

2. In an action against a street railway for injuries to a passenger, it was plaintiff's theory that the slot in the door which contained the opening device was defective, and exposed those opening the door to the risk of having their fingers bruised when the door was slid back. It appeared that the passenger had declared that he "jammed his finger in the door," and one witness, who saw him open the door, testified that he used his right hand, while it was his left that was injured. *Held*, that there was nothing to warrant a finding that plaintiff was injured by means of the opening device.

3. In an action against a street railway for negligence causing the death of a passenger, it was plaintiff's theory that the passenger's fingers were bruised in the device for opening the door, and that from such injuries he fainted, and fell from the car, and was killed. There was evidence that he had taken six or eight glasses of ale that evening, and there was no evidence to show that he did faint. *Held*, that the jury would not have been warranted in finding that his fall was caused by an injury to his finger, it being as reasonable to suppose that he might have fallen from sleepiness, apoplexy, or from the effects of the ale.

4. In an action against a street railway, where plaintiff claims that a passenger was injured by his fingers having been bruised in the slot used for opening the door of the car, there was nothing to show that the injury to his hand was caused by any difficulty in opening the door. *Held*, that testimony of a witness as to whether he had observed any difficulty in opening the door in that car, or one like it, was incompetent.

Exceptions from Superior Court, Essex County; Frederick Lawton, Judge.

Action by one Williams against the Citizens' Electric Street Railway. Judgment in favor of defendant, and plaintiff brings exceptions. Overruled.

Alden P. White, for plaintiff. Walter I. Badger, Wm. Harold Hitchcock, and Chester F. Williams, for defendant.

KNOWLTON, C. J. On the morning of November 4, 1900, about half an hour after midnight, the plaintiff's intestate, while riding on the rear platform of one of the defendant's cars, fell off and was killed. The theory of the plaintiff is that the patented device for opening and shutting the sliding

door of the vestibule of the car was improper and unsafe, because in opening the door from the outside one must insert his fingers into a metallic slot sunk into the wood of the side of the door, near the main part of the car, with which the door came in contact when it was closed, and that when the door was opened it slid in such a way that the outer edges of the metallic slot, being sharp and rectangular, came into close proximity with the inner corner of the door post towards which the door slid, the door sliding from the main part of the car into the grooved end of the vestibule; that the plaintiff, who had previously injured the third finger of his left hand, so that it was then sensitive and tender, injured this finger again, by reason of the improper device, while opening the door; and that some time afterwards, while riding in the vestibule, he fainted because of the condition of his finger, and fell off.

It is a grave question whether the bill of exceptions shows any evidence which would warrant the jury in finding the device for opening and shutting the door to be improper, so that the use of it by the defendant would constitute negligence. We cannot assume in favor of the excepting party that the inspection of the car by the jury added anything to the evidence stated in the bill of exceptions. But if it were found that the metallic slot exposed those who opened the door to the risk of getting their fingers bruised against the corner of the door post when the door was slid back as far as possible, there is no proof in this case that the plaintiff's intestate hurt his finger in this way. We have testimony of his declaration that he jammed his finger in the door, but he said nothing as to how he happened to jam it. The testimony of the only witness who saw him open the door tends to show that he used his right hand in sliding the door open, and there is no testimony that the fingers of his left hand came in contact with the sunken metallic slot complained of. There is nothing better than conjecture on which to rest this part of the plaintiff's case.

Proof is also wanting to support the contention that the injury to the finger was the cause of his falling from the car. There is a possibility that pain in his finger caused him to faint, but there is no evidence that tends to show that he fell from this cause, to the exclusion of other causes. He might have fallen from weariness or sleepiness, or from some effect of six or eight glasses of ale which the testimony shows that he had drunk that evening, or from apoplexy, or from his own carelessness. There is nothing to show that he fainted, and, if he did faint, it is not shown that the faintness was caused by an injury to his finger. The jury would not have been warranted in finding that his fall was caused by the injury to his finger. Possibly it was, but other theories and conjectures are quite as probable.

It is not contended that there was evidence of any other negligence on the part of the defendant, and, in the view we have taken, there is no occasion to consider whether the jury might have found that the plaintiff was in the exercise of due care.

The question as to whether a witness observed any difficulty in starting the door open from the outside in this car, or one like it, was incompetent. There is nothing to show that the injury to the intestate's finger on his left hand was caused by any difficulty in starting the door open. Moreover, the door of another car like this might stick and open with difficulty, when the door of this car might move freely.

Exceptions overruled.

(184 Mass. 425)

WORMSTEAD v. CITY OF LYNN.

(Supreme Judicial Court of Massachusetts.
Essex. Nov. 25, 1903.)

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—CONTRACTS—AUTHORITY TO MAKE—EVIDENCE—ESTOPPEL.

1. The order for widening a public way does not of itself enable the surveyor of highways to enter into a contract for the performance of the work necessary to widen the way, but the municipality must by vote contract for the work, or authorize some one else to do so in its behalf.

2. Under Rev. Laws, c. 51, § 6, providing that if a town neglects to vote a sufficient amount for the repairs of highways, or does not otherwise effectually provide therefor, the surveyor of highways may employ persons to make the repairs, who shall be paid by the town, a city superintendent of streets, exercising the powers of surveyor of highways, has no power to bind the city for the repair of its streets unless the repairs are unprovided for, and then only by complying with the statutory requirements.

3. In an action against a city on a contract to do certain work in widening a public way, entered into with the superintendent of streets with the approval of the mayor and a member of the committee on streets of the board of aldermen, plaintiff showed that the city engineer gave him the lines to follow, and offered to prove that the superintendent of streets for the past 11 years had been in the habit of letting contracts for amounts in excess of \$10 for blasting and other similar work without authority from the council committee on streets, and that he had previously had a contract with the city to widen a certain street which amounted to more than \$10, and that he completed the work and received his pay. *Held* no evidence of authority of the superintendent of streets, given by practice or custom impliedly adopted by a vote of the city government, to enter into the contract.

4. Where a person entered into a contract with a public officer undertaking to act for and to bind a city, the city was not estopped from showing that the officer had no authority to make the contract by mere proof that the same officer had previously made similar contracts which the municipality had recognized as binding.

Report from Superior Court, Essex County; William Cushing Wait, Judge.

Action by one Wormstead against the city of Lynn. On report from superior court. Judgment on verdict.

John A. O'Keefe, for plaintiff. Starr Parsons and H. Ashley Bowen, for defendant.

LORING, J. This is an action for damages for breach of a contract, in which the plaintiff's claim was that the defendant city agreed to pay him for riprapping an embankment, as part of the work necessary to carry into effect an order for widening a public way within the city limits. The breach relied on was a refusal on the part of the defendant to allow the plaintiff to do any work at all under the alleged contract. The defense set up was that it never entered into any contract with the plaintiff.

Where a public way is widened by the public authorities, it becomes the duty of the city or town in which it is situated to perform the work of construction. But the order for widening does not, without more, enable the surveyor of highways, or any officer of the city or town, as the case may be, to perform the work on behalf of the municipality in question, or to enter into a contract on its behalf to have it performed. The city or town must by vote contract for the work, or authorize some one else to do so in its behalf. *Bean v. Hyde Park*, 143 Mass. 245, 9 N. E. 638. It is not pretended that any such vote was passed by the city of Lynn in the case at bar. The plaintiff, however, relies on this: He proved that one Tarbox, who was superintendent of streets of the defendant city, and who, as such, had the duties and powers of a surveyor of highways, made with the plaintiff, by word of mouth, the contract sued on, with the approval, but not by vote, of the mayor and one member of the committee of the board of aldermen on streets. The committee on streets consisted of the mayor and two aldermen. The plaintiff also proved that the city engineer came to the location of the work, and gave him the lines to be followed. He then offered to prove by Tarbox (the present superintendent of streets of the defendant city), by one Bates (a former superintendent of streets of the defendant), by one Ramsdell (a former mayor), and one Sampson (a former alderman of the city) "that the superintendent of streets for the city of Lynn for the past eleven years had been in the habit of letting contracts for amounts in excess of \$10 for blasting and other similar work without authority from the committee on streets of the city council." The plaintiff also "offered to prove, if competent, that he had previously had a contract amounting to more than \$10 with the city of Lynn to widen a portion of Walnut street, in said Lynn, and that he had completed said contract and received his pay." The plaintiff's contention is that a city or town, by a practice or custom adopted by it, may authorize one of its officers to make contracts in its behalf, or at any rate that it may by such a practice or custom hold him out as having such authority, and be estop-

ped to deny that he had such authority in case a person acts on the faith of such holding out; and he relies on what was said in *Blanchard v. Ayer*, 148 Mass. 174, 178, 19 N. E. 209, in support of his contention.

It is not necessary to go at length into the powers of a surveyor of highways in making repairs. Speaking generally, he has no power to bind the city or town unless the repairs are unprovided for, and then only if in entering into the contract he pursues the statutory requirements. *Blanchard v. Ayer*, 148 Mass. 174, 19 N. E. 209. The statutory requirements in question in *Blanchard v. Ayer* were changed by the effect of St. 1895, p. 418, c. 374, § 1. See notes by commissioners on Rev. Laws, c. 51, and Rev. Laws, c. 51, § 6.

As we have said, no one has authority to enter into a contract for the construction of a way which it has become the duty of a city or town to construct, until a vote of the city or town has been passed authorizing him so to do, expressly or impliedly.

The plaintiff misapprehends what was meant by *W. Allen, J.*, in *Blanchard v. Ayer*, 148 Mass. 174, 178, 19 N. E. 209, 211, when he said that a town may authorize the surveyors to make contracts not within the statute "by express vote or by a practice and custom adopted by the town." What was meant by "a practice and custom adopted by the town" is explained by what is said in the next paragraph of the opinion, beginning with the words, "If for instance," and putting a case where a town by vote adopts a rule "that all bills for labor and materials in repairing the ways should be paid by the town treasurer, on the order of a highway surveyor approved by the selectmen, there can be no doubt that a person performing labor at the request of a surveyor, and having the proper order upon the treasurer for payment therefor, would have a right of action against the town. Authority by the town to make the contract for labor would be implied." In the case at bar there was no evidence of authority given by practice or custom impliedly adopted by a vote of the city government of Lynn.

The other contention of the plaintiff is that the defendant city has held out the superintendent of streets as one having authority to contract, and is estopped to deny that authority as against the plaintiff, who has acted on the faith of the practice which the city has allowed. We do not stop to point out that the plaintiff's offer of proof might well be taken to be confined to letting contracts for the repair, and not to extend to a contract for the construction, of public ways. For the decisive answer to the whole contention is that the doctrine relied on by him has no application where a person enters into a contract with a public officer who undertakes to act for and to bind a municipal corporation or other body politic. Such a person is bound, at his peril, to ascertain the

extent of the authority of the public officer with whom he deals. In such a case the money pledged for the payment of the contractor is the money of the public, or of an ascertained portion of the public; and the public is not estopped by a violation of duty on the part of public officials, no matter how many officials may have been concerned in it, and no matter how long it may have continued. See, in this connection, *Abbott v. North Andover*, 145 Mass. 484, 486, 14 N. E. 754. To bind the public, the body must act which by law can bind them. The rule has been enforced in cases where parties have undertaken to make out a ratification by use of a public structure constructed without authority. In *Keyes v. Westford*, 17 Pick. 273, a better road was built than was provided in the lay-out by the county commissioners under a vote of the town authorizing the construction of the road as laid out. It was argued that, as "the town have the benefit of it," it was bound to pay for the better road. See page 279. It was held that the fact that the town never had voted for the better road was decisive of that argument. In the subsequent case of *Hayward v. School District of Bridgewater*, 2 Cush. 419, the fact that a school was kept in a schoolhouse built without authority, and that this was done by vote of the prudential committee of the school district, did not make the district liable, because that committee had no authority to contract for the erection of a schoolhouse for the district. To the same effect, see *Boston Electric Co. v. Cambridge*, 163 Mass. 64, 39 N. E. 787; and see *Delafield v. Illinois*, 2 Hill, 159; *Marsh v. Fulton County*, 10 Wall. 676, 19 L. Ed. 1040.

The entry must be: Judgment on the verdict.

(184 Mass. 409)

DOYLE v. KIRBY.

(Supreme Judicial Court of Massachusetts.
Bristol. Nov. 25, 1903.)

SLANDER—SPECIAL DAMAGES—NECESSITY OF ALLEGATION—WHAT IS SLANDEROUS PER SE—WORDS IMPUTING CRIME—SALE OF VOTE.

1. When special damage is stated as a cause of action in slander, it is necessary to set forth the particulars of the damage sufficiently to enable defendant to know what is relied on.

2. In an action for slander by spoken words there can be no recovery, in the absence of a plea and proof of special damages, unless the words impute the commission of a crime.

3. Rev. Laws, c. 11, entitled "Of Elections," which contains over 400 sections, and covers 102 pages, and is divided into 44 subtitles, some of which are "Corrupt Practices," "Penalties on Officers," "Penalties on Voters," "General Penalties," and which provides for the punishment of a great many different offenses, among which are those relating to "Bribery at Elections" and "Attempting to Influence Voters by Threats," etc., was intended to completely cover the subject of offenses at elections, and, as it nowhere mentions the offense of receiving a bribe, super-

seeded the common law under which the reception of a bribe in consideration of a vote was a crime.

Appeal from Superior Court, Bristol County.

Action by Andrew P. Doyle against Frank R. Kirby. From a judgment for defendant, plaintiff appeals. Affirmed.

Doran & Bannon, for appellant. Hadley & Barney, for appellee.

KNOWLTON, C. J. The defendant demurred to the declaration on different grounds, some of which it is unnecessary to consider. The declaration contains no proper averment of special damages to the plaintiff. It does not allege that the words were spoken of him in any office or occupation. It does not state how they caused him any special damage. When special damage is stated as a cause of action in slander, it is necessary to set forth the particulars of the damage sufficiently to enable the defendant to know what is relied on, so that he may properly prepare his defense. *Cook v. Cook*, 100 Mass. 194; *Morasse v. Bruch*, 151 Mass. 567-572, 25 N. E. 74, 8 L. R. A. 524, 21 Am. St. Rep. 474; *Swan v. Tappan*, 5 Cush. 104. As this action is not for a libel, but for a slander by spoken words, there can be no recovery in the absence of a plea and of proof of special damages, unless the words impute the commission of a crime. *Goodrich v. Hooper*, 97 Mass. 1, 93 Am. Dec. 49; *Sillars v. Collier*, 151 Mass. 50, 23 N. E. 723, 6 L. R. A. 680; *Odgers' Libel & Slander* (3d Ed.) 59. The plaintiff is charged with having "sold his vote." If we assume in his favor, without deciding, that upon the facts alleged in the declaration the words might be found to mean that he sold his vote at an election of citizens of New Bedford, we come to the question whether such a sale is a criminal offense under our laws. The plaintiff concedes that there is no statute which makes such a sale punishable in this commonwealth. But he contends that it is a crime at common law, and that this part of the common law is still in force here. Bribery at elections of members of Parliament was an offense at common law in England, and so, probably, was bribery at municipal elections. 1 Black. Com. 179; Russell on Crimes, 154; 2 Whart. Crim. Law, § 1858; 1 Bish. Crim. Law (8th Ed.) § 471; *Rex v. Pitt*, 3 Burrows, 1335; *Rex v. Plympton*, 2 Ld. Raymond, 1377; *State v. Jackson*, 73 Me. 91, 40 Am. Rep. 342. See, also, *Com. v. Sillsbee*, 9 Mass. 417. At common law, as well as under some of the English statutes, there seems to be no difference in liability between the giver and the taker of a bribe. St. 2 George II, c. 24, § 7; 17 & 18 Vic. c. 102. In this commonwealth our statutes punishing the giving of money for voting at elections have not made the receiver punishable. Pub. St. 1881, c. 7, §§ 60, 61; Gen. St. c. 7, § 31. Assum-

¶ 2. See Libel and Slander, vol. 32, Cent. Dig. § 97.

ing, in favor of the plaintiff, that before the enactment of statutes on this subject the receipt of money as an inducement to vote in a certain way at an election was punishable in this commonwealth as a crime at common law, it becomes necessary to consider our legislation. It is a recognized principle that the enactment of a statute which seems to have been intended to cover the whole subject to which it relates impliedly repeals all existing statutes touching the subject, and supersedes the common law. *Com. v. Cooley*, 10 Pick. 37; *Com. v. Marshall*, 11 Pick. 350, 22 Am. Dec. 377; *Jennings v. Com.*, 17 Pick. 80; *Lakin v. Lakin*, 2 Allen, 45, 46; *Com. v. Dennis*, 105 Mass. 162. From time to time statutes have been enacted dealing with the subject of bribery at elections. In the later of these statutes the Legislature has attempted to cover the whole subject of elections, and especially the subject of offenses in connection with elections. Chapter 11 of the Revised Laws is entitled "Of Elections." It contains 426 sections covering 102 pages. The general title "Of Elections" is divided into 44 subtitles, of which one is "Corrupt Practices," one is "Penalties upon Officers," one is "Penalties upon Voters," and another is "General Penalties." Besides these, seven sections are devoted to the title "Inquests in Election Cases," which contain provisions for the discovery of violations of the law. The 22 sections relating to "Corrupt Practices" provide for the punishment of a great many different offenses. The 21 sections dealing with "Penalties upon Officers" prescribe punishment by fine or imprisonment for 21 different offenses. There are also six sections which prescribe "General Penalties," each one of which creates a separate offense punishable by fine or imprisonment. Of these, section 415 is for "Bribery at Elections," and section 440 is for "Attempting to Influence Voters by Threats," etc. These sections prescribe punishment for one who bribes or attempts to bribe, and for one who threatens a voter to influence his vote. St. 1890, p. 389, c. 423, from which most of the provisions of Rev. Laws, c. 11, relating to penalties, are taken, is entitled "An act to revise the laws relating to elections." It seems pretty plain that the Legislature in these statutes intended to cover the whole subject of punishment for illegal voting and illegally influencing voting at elections, including as well improper conduct on the part of voters as improper conduct by bribery or otherwise on the part of those seeking to influence voting. After creating such a large number of punishable offenses, going into such detail as to every kind of misconduct, it is inconceivable that the Legislature intended to leave the common law in force as to any form of bribery at elections. It seems, rather, that in accordance with earlier statutes in this state, and statutes in other states, and the general practice in America, the Legislature thought it wise to

deal with the purchase of votes through the prosecution and punishment of those who buy them, rather than through the punishment of the voter whose action is improperly influenced by the receipt of money. We are of opinion that the statutes referred to supersede the common law in regard to bribery at elections, and that the language of the declaration does not charge the commission of a crime.

Judgment affirmed.

(184 Mass. 361)

TATMAN v. HUMPHREY

(Supreme Judicial Court of Massachusetts.
Worcester. Nov. 25, 1903.)

BANKRUPTCY — PREFERENCE — UNRECORDED CHATTEL MORTGAGES—AVOIDANCE— DATE OF TRANSFER.

1. Bankr. Act, § 3a, Act July 1, 1898, c. 541, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422], declares a transfer of property while insolvent, with intent to prefer creditors, an act of bankruptcy, and, for filing a petition based on such an act, allows four months from the date of recording the instrument, or from the date of notorious exclusive possession by the beneficiary. Section 60a, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], makes such a transfer as above enumerated a preference, and, if given within four months before the filing of the petition, the beneficiary having reason to believe that a preference was intended, declares it voidable by the trustee. *Held* that, in case of a preference by way of an unrecorded chattel mortgage, the transfer dates from the acquisition of possession under the mortgage.

Appeal from Superior Court, Worcester County; F. A. Gaskill, Judge.

Action by Charles T. Tatman, trustee in bankruptcy of Nelson H. Davis, against John B. Humphrey. From a judgment for defendant, plaintiff appeals. Reversed.

Charles T. Tatman, in pro. per. Wm. H. Brown, for appellee.

KNOWLTON, C. J. The question in this case is whether the defendant's title under an unrecorded mortgage of personal property, made to him more than two years before the bankruptcy of the mortgagor, which covered the stock of goods and fixtures then owned by the mortgagor and such future additions as he should make thereto, and which was made to secure payment of certain notes and of future indebtedness, is good against the trustee in bankruptcy of the mortgagor. Under Rev. Laws, c. 198, § 1, because of the failure to record the mortgage within 15 days of the date written therein, and because the property had not been delivered to and retained by the mortgagee, the mortgage was not valid against any person other than the parties thereto. *Haskell v. Merrill*, 179 Mass. 120, 60 N. E. 485. About three weeks before the commencement of the proceedings in bankruptcy, the mortgagor then being insolvent, and the defendant having reasonable cause to believe him insolvent, the defend-

¶ 1. See Bankruptcy, vol. 6, Cent. Dig. § 277.

ant took possession of the property covered by the mortgage, by removing it from the mortgagor's store, and afterwards retained it. After taking possession he served a notice of his intention to foreclose the mortgage under the provisions of Pub. St. c. 192, §§ 7-9. The defendant's acquisition of possession of the mortgaged property before the commencement of the proceedings in bankruptcy, and before third persons had acquired liens or rights by attachment or otherwise, gave him a title which was good at common law against creditors, and which would have been good against an assignee in insolvency under the statutes of this commonwealth, or against an assignee in bankruptcy under the United States bankruptcy act of 1867 (14 Stat. 517, c. 176). *Folsom v. Clemence*, 111 Mass. 273; *Chase v. Denny*, 180 Mass. 566; *Blanchard v. Cook*, 144 Mass. 207, 11 N. E. 83; *Bennett v. Bailey*, 150 Mass. 277, 22 N. E. 916; *Bliss v. Crosier*, 159 Mass. 498, 34 N. E. 1075; *Haskell v. Merrill*, 179 Mass. 120, 60 N. E. 485; *Gibson v. Warden*, 14 Wall. 277, 20 L. Ed. 797; *Sawyer v. Turpin*, 91 U. S. 114, 23 L. Ed. 235.

The question of difficulty in the case arises under the United States bankruptcy act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]), whose provisions in regard to preferences and acts of bankruptcy differ materially from those of the bankrupt act of 1867. In *Wilson Bros. v. Nelson*, 183 U. S. 191, 22 Sup. Ct. 74, 46 L. Ed. 147, 7 Am. Bankr. R. 142, the Supreme Court of the United States, in an elaborate opinion, discussed this difference, and pointed out its effect in cases similar to the present. In that case the bankrupt, when solvent, nearly 13 years before his bankruptcy, gave an irrevocable power of attorney to confess judgment for a debt which he then contracted, and this power was exercised by the creditor shortly before his bankruptcy. Among the acts of bankruptcy mentioned in section 3 of the act, one is defined as follows: Having "suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference, vacated or discharged such preference." In section 67f, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3450], it is provided "that all levies, judgments, attachments or other liens obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment or other lien, shall be deemed wholly discharged and released from the same," etc. In section 67c [U. S. Comp. St. 1901, p. 3449] it is declared that "a lien created by or obtained in or pursuant to any suit or proceeding, at law or in equity, including a judgment upon mesne pro-

cess or a judgment by confession, which was begun against a person within four months before the filing of a petition in bankruptcy by or against such person, shall be dissolved by the adjudication of such person to be a bankrupt, if it appears that said lien was obtained and permitted while the defendant was insolvent and that its existence and enforcement will work a preference," etc. In view of these and other provisions of the act, it was decided in the case just cited that suffering and permitting the creditor to obtain a preference through legal proceedings was an act of bankruptcy, by the express provisions of the statute, irrespective of any active intent of the debtor at that time to hinder, delay, or defraud his creditors, or to give a preference, and notwithstanding that the power of attorney to confess judgment was given many years before, and it was said that the preference could be avoided and the property recovered by the trustee. It was held that, in determining the time of an alleged act of bankruptcy, it must be deemed to have occurred when something open and notorious was done affecting the debtor's estate. It is also said in the opinion that "the act of 1898 makes the result obtained by the creditor, and not the specified intent of the debtor, the essential fact." Under another clause of the statute the same distinction is drawn between this and the former act in the case of *In re Klingman* (D. C.) 101 Fed. 691, 4 Am. Bankr. R. 254, where it is said that "the intent of this section is to declare that, as against creditors of an insolvent, the limitation of time for invoking relief against a preference does not begin to run until in some form they have received actual or constructive notice of the transfer to the preferred creditor, and this intent is reached by the declaration that in such cases the transfer constituting the act of bankruptcy shall be held to date from the time the instrument of transfer is recorded, or the possession is taken, or notice is otherwise brought home to the creditors of the bankrupt." The facts in this case were somewhat analogous in principle to those in the case at bar. Other federal decisions tend in the same direction. *White v. Bradley Timber Company* (D. C.) 119 Fed. 989; *In re Metzger Toy & Novelty Company* (D. C.) 114 Fed. 957; *In re Edward W. Wright Lumber Company* (D. C.) 114 Fed. 1011; *In re Sheridan*, 3 Am. Bankr. R. 554, 98 Fed. 406.

Even though the proceedings by which the mortgagee obtained his lien three weeks before the filing of the petition were not proceedings in court, and not legal proceedings, if the term is construed narrowly, they were proceedings to enforce his legal rights. If the present case is not covered by the decision in *Wilson Bros. v. Nelson*, *ubi supra*, the principles upon which the two cases rest are very similar.

In section 3a, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422], one of the acts of bankruptcy

mentioned is having "transferred while insolvent any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors." In the same section, under "b," the time for filing a petition founded on such an act of bankruptcy is within four months after "the date of the recording or registering of the transfer or assignment * * * if by law such recording or registering is required or permitted, or if it is not, from the date when the beneficiary takes notorious, exclusive or continuous possession of the property, unless the petitioning creditors have received actual notice of such transfer or assignment."

In view of these several provisions, and the language of sections 60a and 60b, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], and the construction put upon the statute by the Supreme Court of the United States, we are of opinion that, in the case of a preference by way of an unrecorded chattel mortgage, the transfer dates; under the bankruptcy act of 1898, and the amendatory act of February 5, 1903, c. 487, 32 Stat. 797 [U. S. Comp. St. Supp. 1903, p. 409], from the acquisition of possession under the mortgage.

In *Matthews v. Hardt*, 79 App. Div. 570, 9 Am. Bankr. R. 373, 90 N. Y. Supp. 462, the Appellate Division of the Supreme Court of New York, in a well-considered opinion, made a decision which entirely covers the present case. The court held that the preference should be deemed to have been obtained at the time "when possession was taken, though the taking of possession was merely to effectuate an agreement made in good faith, and many months before the prohibited time for making the transfer."

The case at bar certainly falls within the spirit and reason of the statute as interpreted in these decisions. The reason for the enactment, as it is interpreted, is well illustrated by the fact that the mortgagor in this case, less than four months before the proceedings in bankruptcy, made a statement to certain of his creditors and to commercial agencies that there was no incumbrance on his stock or fixtures—a statement which was literally true if we look only to the state of the title as against creditors, but wickedly false in its understood meaning if the mortgagee, on the eve of the debtor's bankruptcy, could take all of the debtor's property, and leave nothing for the other creditors, who had trusted him because of his possessions.

Judgment for the plaintiff.

(184 Mass. 394)

SMITH v. SMITH.

(Supreme Judicial Court of Massachusetts.
Dukes. Nov. 25, 1903.)

SEPARATE MAINTENANCE—APPEAL—JURISDICTION OF SUPERIOR COURT—ENFORCEMENT OF ORDER.

1. Pub. St. 1882, c. 147, § 33, provides that proceedings for separate support for married women living apart from their husbands for

justifiable cause shall be brought in the superior court, and that either party may appeal to the Supreme Judicial Court. Under Rev. Laws, c. 162, §§ 9, 10, 18, 19, 23, amended by St. 1887, p. 954, c. 332, this original jurisdiction is given to the court of probate, and the appellate jurisdiction transferred to the superior court, with the provision that all proceedings on such appeals shall be the same, so far as practicable, as on like appeals to the Supreme Judicial Court. Pub. St. 1882, c. 156, §§ 12, 13, 17, as amended in Rev. Laws, c. 162, §§ 9, 10, 18, 19, 23, provides that the Supreme Judicial Court, acting as the supreme court of probate, may reverse or affirm in whole or in part the decree or order appealed from, and may pass such decree thereon as the probate court ought to have passed, and may remit the case for further proceedings, or make any other order therein as law and justice may require. Pub. St. c. 147, § 33 (Rev. Laws, c. 153, § 33), provides that in proceedings by married women for support the court may from time to time revise any order made, or make a new order, as circumstances may require. *Held* that, though the sections last quoted contemplate the continued pendency of the case in the probate court for an application by either party, nevertheless under the former provisions the superior court may make an order to enforce its decree on an appeal to it from the probate court in separate maintenance proceedings, and may enforce such order by contempt proceedings.

Report from Superior Court, Dukes County; John A. Aiken, Judge.

Action by Ellen N. Smith against Amos Smith for separate maintenance. From a decree of the probate court in favor of plaintiff, defendant appealed to the superior court, where a decree was entered requiring defendant to make certain periodical payments to plaintiff. Defendant failed to make the payments as required, and plaintiff filed a petition praying that defendant be adjudged guilty of contempt, for failure to comply with the decree. Defendant was adjudged guilty of contempt, and the case reported to the Supreme Judicial Court. Affirmed.

W. H. Powers and J. N. Pierce, for plaintiff. R. F. Raymond, for defendant.

KNOWLTON, O. J. The question in this case is whether the enforcement of obedience to a decree of the superior court ordering payments of money under Pub. St. 1882, c. 147, § 33, should be by proceedings in the superior court, or by proceedings in the probate court in which the case was begun, and from which it was carried by appeal to the superior court. This kind of relief, for married women needing support, and living apart from their husbands for justifiable cause, was first obtained under St. 1874, p. 132, c. 205, through proceedings brought in the Supreme Judicial Court; and then, by St. 1880, p. 45, c. 64, this jurisdiction was transferred to the probate court (see Pub. St. 1882, c. 147, § 33), with a right in either party to appeal to the Supreme Judicial Court under the provisions which were embodied in Pub. St. 1882, c. 156, §§ 12, 13, 17, and which now appear, with amendments, in Rev. Laws, c. 162, §§ 9, 10, 18, 19, 23. By St. 1887, p. 954, c. 332, this appellate jurisdiction, with jurisdiction

In other kindred matters, was transferred from the Supreme Judicial Court to the superior court, with the provision that "all proceedings on such appeals shall be the same, so far as practicable, as now are provided by law on like appeals to the Supreme Judicial Court." St. 1888, p. 231, c. 290, is "An act relating to appeals from probate courts," which, by St. 1890, p. 223, c. 261, is made to apply to these appeals to the superior court, as well as to appeals to the Supreme Judicial Court. So far as pertains to the questions arising in this case, it was probably applicable without such express provision. The question before us is therefore to be decided under the rules of law applicable to appeals from the probate court to the Supreme Judicial Court, as stated in Pub. St. c. 156, §§ 12, 13, 17, and amendments thereto.

The nature and effect of appeals from the probate court to the Supreme Judicial Court were considered in *Dunham v. Dunham*, 16 Gray, 577, and more fully in *Gale v. Nickerson*, 144 Mass. 415, 11 N. E. 714. In the latter case, Chief Justice Morton, referring first to appeals under the old practice from the court of common pleas to the Supreme Judicial Court, by which the whole case was taken out of the jurisdiction of the lower court, and referring then to cases transferred by appeal or by exceptions or by report from the superior court to the Supreme Judicial Court for the determination of questions of law, said in the opinion: "A probate appeal lies between these two classes of cases. It does not bring the case to the supreme court of probate. That remains within the jurisdiction of the probate court. It does more than to bring here the question of law ruled on by the probate court. It brings the whole question, including both the law and the fact whether the decree appealed from is invalid for any of the reasons of appeal assigned by the appellant." After a decision by the supreme court of probate, a copy of the record of the order or decree should be certified by the clerk and transmitted to the probate court, where it has effect for all proper purposes in the cause as if originally made in the probate court. In the language of Mr. Justice Metcalf in *Dunham v. Dunham*, 16 Gray, 577-578: "The judgment of the appellate court has been and still is only upon the order, etc., from which the appeal is taken, and has been and still is certified to the probate court, where further proceedings are had or are stopped, as if the decision had been made by that court. The appeal gives no jurisdiction to the appellate court to proceed in the settlement of the estate, but only to reconsider the order, etc., appealed from; and its judgment is to be carried into effect by the probate court, whose jurisdiction over the case and the parties is not taken away by the appeal." See *Choate v. Jacobs*, 136 Mass. 297-298. In each of these cases from which we have quoted, the

original proceeding was a petition for the probate of a will, and on granting the petition the case remained in the probate court for further action by the petitioner and the court in the settlement of the estate. We can conceive of cases in which the appeal would take to the appellate court every question that could ever arise in the case, and in which the decision upon the appeal would necessarily be a final disposition of the case in every possible aspect of it. In such cases the execution of the decree by processes from the appellate court, if such execution were needed, might be convenient and proper, and there would be no need of treating the case as longer pending in the probate court. If probate appeals generally were of this kind, doubtless they would be treated as removing the case for all purposes to the appellate court, as appeals from the court of common pleas to the Supreme Judicial Court, under the old practice, took away jurisdiction from the lower court. Because they are generally of a different kind, the cases are treated as still pending in the probate court, although, so far as they are affected by the appeal, they are taken to the appellate court.

The statute gives the appellate court great latitude in regard to the course of the proceedings and the form of the decision on the appeal. "The supreme court of probate may reverse or affirm in whole or in part the decree or order appealed from, and may pass such decree thereon as the probate court or the judge thereof ought to have passed, and may remit the case for further proceedings, or take any other order therein as law and justice may require." Pub. St. c. 156, § 17 (Rev. Laws, c. 162, § 23). The appeal in this case brought up for revision everything in the case which was open for immediate consideration, namely, the questions whether the petitioner was living apart from her husband for justifiable cause, whether the husband should be prohibited from imposing any restraint on her personal liberty, and what order, if any, should be made concerning her support, and the care, custody, and maintenance of the minor children. Pub. St. c. 147, § 33 (Rev. Laws, c. 153, § 33). Under this section the court "may from time to time afterwards, on a similar application, revise and alter such order, or make a new order or decree, as the circumstances of the parents or the benefit of the children may require." We think that this contemplates the continued pendency of the case in the probate court after the entry of a decree, for an application by either party in the case, without filing a new petition. This view is strengthened by the fact that the court has no power to order support by the appellant by the payment of a gross sum, but only by payments from time to time. *Doole v. Doole*, 144 Mass. 278, 10 N. E. 811. But the appellate court may make any proper order or decree covering conditions then existing to which the appeal relates. The court made

such a decree in this case, and, in reference to the monthly payments, decreed that they were "to continue until the further order of this court." If for the words "this court" the words "probate court" had been substituted, they would have conformed exactly to the statute. We have no doubt that the decree might have provided expressly for its own enforcement by execution to be issued by the probate court, or by other proceedings in that court; and, if it had made such a provision, the decree in that part, upon certification to the probate court, would have been in effect there as if originally made there, and that court could have issued its execution for the enforcement of it. So, also, willful disobedience of a decree in effect there, which by its express provisions it was the duty of that court to enforce, would have been a contempt of that court punishable there; but as to all matters within the jurisdiction of the Supreme Court, which included the determination of the rights of the parties under conditions then existing, and an enforcement of the decision, we have no doubt of the power of the superior court to enforce its own decree, instead of providing for the enforcement of it in the probate court. To that extent the case was removed, although it remained in the probate court for further applications. The decree made no provision in terms for any action in the probate court. It was a decree of the superior court, which might be enforced by execution from that court, and willful disobedience of it would be contempt of that court.

In view of the form of the decree, there having been no application for a modification of it, we are of opinion that the superior court may entertain these proceedings for contempt for willful disobedience of the decree. By the terms of the report, the decree ordered by the justice prescribing punishment for contempt is to be entered and affirmed. The issuing of process for commitment will be a supplemental proceeding.

Decree affirmed.

(184 Mass. 404)

PHILLIPS et al. v. WATUPPA RESERVOIR CO.

(Supreme Judicial Court of Massachusetts.
Bristol. Nov. 25, 1903.)

WATERS AND WATER COURSES—DAMS—RIGHT TO OVERFLOW LANDS—CORPORATIONS—ULTRA VIRES ACTS—DEEDS—PROOF—ANCIENT RECORD.

1. Where a company was incorporated for the purpose of constructing a reservoir in a certain pond, and was given power to make reserves of water in such pond by erecting a dam across its outlet so as to raise the water to a specified height, the erection by it of a dam across the river, the outlet of the pond, below the pond, was not ultra vires, when there was nothing to show that it was erected an unreasonable distance from the pond, and it was within the limits of the town within which it was authorized to erect the dam.

2. The fact that land overflowed by a corporation authorized to build a dam, etc., was in

another state, did not make the conduct of the corporation in building the dam so as to overflow such land ultra vires, where it did nothing in violation of the law of that state.

3. A deed conveying the right to "flow and overflow" lands to a corporation, authorizing it to build a dam maintaining the waters of a pond at a certain height, implies a right to have the land left as a part of the reservoir to be filled with water, and is not a mere release of damages for such overflowing.

4. A deed, though ineffectual, except as between the parties, to pass title, is evidence of the nature of the use in reference to the right claimed to be exercised thereunder by one claiming a prescriptive title.

5. A deed affecting lands in Rhode Island was, by mistake, recorded in Massachusetts. Subsequently the land was transferred to Massachusetts, and the county where the deed was originally recorded became its proper place of record. Held that, the original being lost, the record, though ineffectual as against third persons, was admissible as evidence of the execution of the deed.

Exceptions from Court of Registration, Bristol County; C. T. Davis, Judge.

Proceedings by Phillips and others, petitioners, against the Watuppa Reservoir Company. There was a decree rendered, and petitioners excepted to certain rulings and refusals to rule. Exceptions overruled.

Arthur S. Phillips, for petitioners. Jennings, Morton & Brayton, for respondent.

KNOWLTON, C. J. This is a petition by three tenants in common to register their title to a tract of land on the river between Watuppa ponds and the dam of the respondent in Fall River. The court of registration found and ruled that the land is subject to an easement in favor of the respondent to flow the property to a specified depth, which easement precludes filling the land by the owners of the soil. A decree for the petitioners was entered, subject to this easement, and the petitioners excepted to certain rulings and refusals to rule touching the existence and nature of the easement. The petitioner Jennings disclaimed any right to deny the existence of the easement, and the exceptions are prosecuted by the other two petitioners alone.

The questions are raised under St. 1826, p. 371, c. 31, in reference to the acts of the respondent as a corporation. By this statute the Watuppa Reservoir Company was incorporated "for the purpose of constructing a reservoir of water in Watuppa pond, so called, * * * for the benefit of the manufacturing establishments on Fall river." It is given "power to make reserves of water in the Watuppa pond, so called, by erecting a dam across the outlet of said pond in the town of Troy," so as to raise the water in the ponds to a specified height, and is authorized to acquire and hold real estate for this purpose by purchase or otherwise. There is also a provision for the recovery of damages by persons injured by the flowing.

¶ 4. See *Adverse Possession*, vol. 1, Cent. Dig. § 417.

The town of Troy is now a part of the city of Fall River. In the year 1827 the respondent erected a dam on the river in the town of Troy at a little distance from the nearest pond, and has maintained it ever since. The petitioners' land is a swamp lying along the river between the dam and the pond, and until the entry of the decree of the Supreme Court of the United States in December, 1861, which established a new boundary line between Massachusetts and Rhode Island, it was in the state of Rhode Island. In a part of the land the respondent claims an easement under a deed which it received from one Currier on September 1, 1827, which was duly recorded, and which conveyed a perpetual "right to flow or overflow" so much of the lot described as may be flowed by raising the water of the Watuppa ponds to a stated height. In the remainder of the land the respondent claims a similar right by prescription. Since the erection of the dam in 1827 the respondent has maintained it continually; and has thereby flowed the lands during the greater part of every year to the height prescribed by the deed. The land over which the right is claimed by prescription is included in another deed from one Dwelly to the respondent, dated September 14, 1827, which was duly executed and delivered, but which, instead of being recorded in the proper registry in Rhode Island, was recorded, by mistake, on March 25, 1828, in the registry of deeds for Bristol county. In 1862, after this land had become a part of Massachusetts, a transcript of the records of that part of the town of Tiverton, R. I., to which the land had previously belonged, was filed in the registry of deeds for Bristol county, and a person searching the records for conveyances in this part of Fall River previously to that date would examine this transcript instead of the earlier records in Bristol county. The petitioners contend that the acquisition of a title to the easement in this land by this respondent under the deed or by prescription was *ultra vires*, because the corporation was authorized to raise the waters of Watuppa ponds, and not the waters of the river below, and because the land was not then in the commonwealth of Massachusetts. We are of opinion that this contention is without foundation. The corporation was authorized to erect a dam "across the outlet of said ponds in the town of Troy." The river was the outlet of the ponds, and the dam was erected in the town of Troy. The precise point on the river at which the dam should be erected was not fixed by the statute. The distance of the dam from the pond is not stated in the bill of exceptions, but there is nothing to show that it was unreasonably great for the construction of a reservoir of water in the ponds, under authority of the statute. The fact that the land between the dam and the pond was in another state did not make the conduct of the corporation *ultra vires*, so long as the corporation did nothing

ing in violation of the law of that state. *Kennebec County v. Augusta Insurance Company*, 6 Gray, 204-208. Moreover, the conduct of the respondent in this particular has been considered by the court in previous cases, and treated as within the authority of its charter. *Watuppa Reservoir Company v. Mackenzie*, 132 Mass. 71; *Watuppa Reservoir Company v. Fall River*, 134 Mass. 267-271.

The petitioners contend that the deed from Currier was not a conveyance of an easement, but the release of damages for the exercise of a right to maintain a dam without interference with the right of the grantor at any time to fill his land, like damages which may be recovered under the mill act. See *Lowell v. Boston*, 111 Mass. 454-466, 15 Am. Rep. 39. But the language of the deed contradicts this contention. The deed conveys a right "to flow and overflow," and this, taken in connection with the purpose of the respondent to maintain the reservoir as shown by the statute under which it was acting; implies a right under the deed to have the land left as a part of the reservoir to be filled with water. This was expressly adjudicated in reference to another deed of similar language in *Watuppa Reservoir Company v. Mackenzie*, 132 Mass. 71. See, also, *Boston and Roxbury Mill Corporation v. Newman*, 12 Pick. 467-482, 23 Am. Dec. 622; *Com. v. City of Roxbury*, 9 Gray, 451-500. This right is an easement in the land, which precludes filling by the owner to exclude the water. The right claimed by prescription results from an open, continuous adverse use of the land by flowing for more than 75 years. The deed from Dwelly, whose language descriptive of the right conveyed is almost identical with that of the deed from Currier, shows that the right claimed, and which must have been known by the grantor to be claimed, by the respondent in connection with the flowing, was a right to flow and overflow for the purpose of maintaining a reservoir of water, and not merely a right to maintain a dam to set back water which the landowner might exclude from his premises by filling them. The deed, although for want of proper recording not effectual to pass a title except as between the parties to it, is evidence of the nature of the use in reference to the right claimed to be exercised in keeping water on the premises, and the principle applicable to the title held under Currier's deed is applicable to this holding by which a prescriptive right was gained. See *Watuppa Reservoir Company v. Mackenzie*, *ubi supra*.

The remaining exception relates to the admission of the Dwelly deed in evidence. After referring to the deed from Currier, the petitioners' bill of exceptions states as a fact which was not controverted the following, namely: "September 14, 1827, Jeremiah Dwelly, the then owner of the Dwelly lot, granted or attempted to grant to the respondent

ent company the right to flow his portion of the locus by a deed which was never recorded in Rhode Island, but was recorded March 25, 1828, by mistake, with Bristol county, Northern District, deeds, a copy of which deed is hereto annexed, and made a part of these exceptions." The respondent being unable to find the original Dwelly deed, a copy of the registry record of it was admitted against the petitioners' objection and exception. It is difficult to see how the admission of the copy harmed the petitioners, or added anything to the uncontroverted fact above stated. But if we assume that the fact was proved by the evidence admitted under exception, we are of opinion that there was no error. The original deed having been lost, secondary evidence was admissible to prove it. The copy was from an ancient official record. Such a record showing such a deed is good evidence of the existence of the deed when it was recorded. If this registry were the place then prescribed by law for recording the deed, the proof would be perfect. By the transfer of the land to Massachusetts it has become the place where the record of all deeds of the lands transferred should be found. St. 1862, p. 35, c. 48, § 11. Although the recording in this case was not effectual, we are of opinion that the existence of such an ancient record may be shown, in connection with other facts, as evidence of the execution and delivery of the deed. An ancient deed, if found where such a deed might be expected to be found, and if the possession has been in conformity with it, is admissible in evidence without proof of its execution. *Stockbridge v. West Stockbridge*, 14 Mass. 257; *Green v. Chelsea*, 24 Pick. 71. When secondary evidence is admissible to establish a title, the law of this commonwealth is very liberal in allowing the introduction of ancient records as well as ancient deeds. *Stetson v. Gulliver*, 2 Cush. 494; *King v. Little*, 1 Oush. 436; *Chenery v. Waltham*, 8 Cush. 327; *Palmer v. Stevens*, 11 Cush. 147-152; *Rust v. Boston Mill Corporation*, 6 Pick. 158-165.

Exceptions overruled.

(184 Mass. 433)

SUMNER v. GARDINER et al.
SAME v. GARDINER.

(Supreme Judicial Court of Massachusetts.
Essex. Nov. 25, 1903.)

**PARTNERSHIP—ACTION AGAINST PARTNERS—
EVIDENCE OF PARTNERSHIP—LETTERS—
STATEMENTS—ESTOPPEL—ORDER OF PROOF.**

1. Where, in an action against several partners, plaintiffs offered in evidence to show a partnership certain postal cards and letters, it was immaterial whether such evidence was preceded or followed by other evidence tending to connect defendants with the letters.

2. In an action against G. and another as partners there was evidence that they were manufacturing a certain "counter," which was being sold by the B. Co.; that G. was frequently at the office of the company, where signs

were displayed showing his name and that of the other defendant and the company in connection. Plaintiff testified that he had received a postal card stating that G. and the other defendant "and Co., B. Co." were to be found at a certain address; that he found G. at the desk of the B. Co., and that he stated that he and the other defendant were behind the company; and that subsequently he received a letter on a letter head bearing the name of G., but written by one F., and relative to a sale of goods which he had made to G.; and that thereafter he received another postal card announcing the removal of G., the other defendant "and Co." and the B. Co. to another street. *Held*, that the evidence showed that G. was doing business as claimed by plaintiff, and that the letter written by F. was written by his direction.

3. In an action against several as partners doing business as the B. Co. there was evidence that one of plaintiffs met one of the defendants, and said, "I didn't connect you in any way with the B. Co., but I understand that you are, and I had no way to prove it but to bring suit," to which assertion he made no reply. *Held*, that it was open for the jury to say whether defendant's failure to deny his connection with the firm amounted to an admission that he was a member.

Exceptions from Superior Court, Essex County; Wm. Cushing Wait, Judge.

Actions by Charles P. Sumner against John D. Gardiner and others and by Arthur D. Sumner against John D. Gardiner. Subsequently the plaintiffs amended their writs by joining Charles D. Ford as a defendant, and the actions were consolidated. Judgment for plaintiffs, and defendants bring exceptions. Exceptions overruled.

The letter referred to in the opinion was on a letter head bearing the name of the defendant Gardiner, and was relative to goods sold by Arthur D. Sumner to defendant Gardiner.

Mellen A. Pingree and John J. Ryan, for plaintiffs. Wm. H. Niles, for defendants.

BRALEY, J. It was necessary for the plaintiffs to prove that a copartnership existed between the defendants, as alleged in their writs, and that at the time the debt was contracted which was the subject of the suits they were doing business as the Boston Shoe Stock Company. As tending to support this allegation, they offered in evidence, and the court admitted, two postal cards containing, among other things, a statement from which it might be inferred that the defendants Gardiner and Beardsell either composed the company or were connected with it. Bearing on the relation of the defendant Gardiner to the contract declared on, a letter was also put in evidence written by the defendant Ford, in which Gardiner was represented as a member of the firm of Gardiner & McManus, to which Gardiner and Beardsell were represented as successors. The only question raised is whether there was any evidence connecting the defendants with the postal cards and letter. The order in which the proof was introduced is wholly immaterial, and there was evidence, both circum-

stantial and direct, from which a jury might find that the defendants Gardiner and Beardsell were doing business as Gardiner, Beardsell & Co. in manufacturing the "Hatch Counter"; that the Boston Shoe Stock Company sold this counter; and that the defendant Gardiner was frequently at the office on Summer street, and subsequently at the one on Lincoln street, at each of which places the Boston Shoe Stock Company and Gardiner, Beardsell & Co. purported to be carrying on business. Signs were put up at each place showing in connection the names of Gardiner, Beardsell & Co. and Boston Shoe Stock Company. The evidence of the plaintiff Arthur D. Sumner was to the effect that prior to the order given to his firm a postal card had been received by him, which was like one of those admitted in evidence, stating that "Gardiner, Beardsell and Company, Successors to Gardiner and McManus, * * * Men's Department, Boston Shoe Stock Company," were to be found "at 135 Summer Street, Boston, Mass., C. A. Ford, Manager." He called there at the time he obtained the order, and found the defendant Gardiner "sitting at the desk of the Boston Shoe Stock Company," and had some talk with him about selling the counters which the plaintiffs were engaged in making, and during that talk the defendant Gardiner told him "that he was running the men's department of the Boston Shoe Stock Company; that he was behind it"; and also "that Gardiner and Beardsell was behind the Boston Shoe Stock Company in the men's department, and I should get my pay for these goods." After this conversation he received the letter written by Mr. Ford, and another postal card similar to that admitted at the trial, announcing the removal of Gardiner, Beardsell & Co. and the Boston Shoe Stock Company from Summer street to Lincoln street. This evidence tended clearly to show that the defendant Gardiner at least was doing business as claimed by the plaintiffs, and that after the order had been given to make the counters Ford wrote the letter admitted in evidence, and, for aught that appears from the bill of exceptions, must have obtained this information from Gardiner, and it may fairly be inferred that the letter was written by his direction. It is argued by the defendants that, even if the postal cards and letter are competent as admissions made by Gardiner, they should not be received as evidence against the defendant Beardsell. But George W. Folger, a witness called by the plaintiff, among other things, testified in substance that he was in the employment of Gardiner, Beardsell & Co., and was present when Charles P. Sumner, one of the plaintiffs, met the defendant Beardsell, and introduced them to each other, and at that time a conversation took place between them. "Mr. Beardsell says: 'How do you do? I have heard of you before,' to which Mr. Sumner said: 'I didn't connect you in any

way, shape, or manner with the Boston Shoe Stock Company. I understand from Mr. Ford that you are connected, and I had no other way to prove it but by bringing suit.'" To this assertion Beardsell made no reply. It would be open for a jury to say whether, under all the circumstances, a suit having been brought in which it was alleged that he was a partner of Gardiner, and that they were doing business as the Boston Shoe Stock Company; and, his attention being called by one of the plaintiffs to this contention, and the direct statement made to him that he was connected with the company, he was called upon to deny the statement, if such was not the fact; and his failure to make any denial where naturally it would be expected might cause his silence to be construed as an admission by him of the truth of the allegation. *Com. v. O'Brien*, 179 Mass. 533, 534, 61 N. E. 213. Under the instructions, which carefully guarded the rights of the defendants, the jury, by their verdict, must have found that the postal cards were issued and the letter written in the usual course of business, and by the authority of the defendants.

Exceptions overruled.

(184 Mass. 373)

CITY OF BOSTON v. DOYLE et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. Nov. 25, 1903.)

PUBLIC TRUSTS—CREATION BY WILL—CONSTRUCTION—TRUSTEES—FAILURE OF TRUSTEES—APPOINTMENT BY COURT—ACTION BY ILLEGAL TRUSTEES—VALIDITY—ACQUIESCENCE—EFFECT—POWERS OF TRUSTEES.

1. The provisions of a will in regard to the management of a trust fund must be given effect, so far as possible, according to the testator's purpose and intention.

2. Under the provisions of Benjamin Franklin's will, providing for the accumulation of a trust fund for the town of Boston, and naming the selectmen of the town and certain others as a board of managers, but containing no provision in regard to the persons who should act as managers if the office of selectmen should be abolished, the mayor and aldermen, who, under St. 1822, p. 734, c. 110, became the successors of the selectmen in most particulars as officers of the city, did not become their successors as managers of the Franklin fund.

3. Where it becomes impossible to administer a public charity precisely according to the directions of the founder, it is the duty of a court of equity to carry out his general purpose as nearly as possible.

4. Since the will of Benjamin Franklin was silent as to the persons who were to act as managers of the trust fund left to the town of Boston in case the office of selectmen should be abolished, a court of equity on application should appoint other managers by virtue of its general jurisdiction over the administration of a trust, but without such appointment no one was legally authorized to act in the place of the selectmen.

5. Long acquiescence, by the clerical managers of the trust fund left by Benjamin Franklin to the town of Boston, in the action as managers of members of the board of aldermen of the city of Boston, did not give members of that board a right to act in the disposition of the fund, and a vote passed by their action over

the negative vote of two rightful managers was without authority and void.

6. The provision in the will of Benjamin Franklin designating "the ministers of the oldest Episcopalian, Congregational, and Presbyterian churches in that town" as managers of the trust fund left to the town of Boston means three ministers in all, representing the three denominations mentioned, each one representing the oldest church of his denomination in Boston.

7. The provision of the will of Benjamin Franklin designating the minister of the oldest Congregational church in Boston as one of the board of managers of the trust fund bequeathed by the will referred to the oldest church of that kind well known in Boston and elsewhere in Massachusetts as "Congregational," chiefly from their form of government and polity, and did not have reference to any doctrinal tenets which an individual church might hold in reference to the Trinity.

8. The words "lay out," in the will of Benjamin Franklin, creating a trust fund for the town of Boston, do not mean merely the adoption of a plan for the use of the money in accordance with the will, but include the actual expenditure of it by the board of managers named in the will in the establishment of public works of the kind described.

9. The board of managers of the trust fund created by the will of Benjamin Franklin, being trustees of a public charity, may act by the concurrence of a majority of its members.

10. Under the provisions of the will of Benjamin Franklin creating a trust fund for the town of Boston, and designating as trustees a board of managers consisting of three clergymen and the selectmen of the town, and stating, "It is presumed that there will always be found virtuous and benevolent citizens willing to bestow a part of their time in doing good to the rising generation by superintending and managing this institution gratis," etc., the court should appoint managers in place of the selectmen, owing to the cessation of that office at the time of the incorporation of the city of Boston, from the class of citizens named in the quoted clause, chosen by reason of their qualifications, intellectual and moral, among whom the mayor of the city should *ex officio* be one, and the whole number of lay members should be the same as the number of selectmen at the time of the testator's death.

11. Rev. Laws, c. 149, § 1, relative to the giving of a bond by trustees appointed by the probate court under a will, is not applicable to the board of managers of the trust fund created by the will of Benjamin Franklin.

Case Reserved from Supreme Judicial Court, Suffolk County; Wm. Caleb Loring, Judge.

Bill for the construction of a will by the city of Boston against James H. Doyle and others. The bill was filed for the instructions of the court as to who were the proper parties to manage and dispose of a fund left to the "town of Boston" by Benjamin Franklin. Case reserved for the full court.

Thomas M. Babson, for complainants. Boyden, Bradlee & Twombly, for respondent Eells. F. H. Nash, Asst. Atty. Gen., Matthews, Thompson & Spring, and W. G. Thompson, for aldermen of Boston.

KNOWLTON, C. J. The legacy to the inhabitants of the town of Boston, given in the codicil of the will of Benjamin Franklin, with the provision for the disposition and management of it, constitutes a public char-

ity. It was the intention of the testator that within a year after his death benefits should begin to accrue from it to a large class of worthy young men in Boston through the creation of a fund from which they could borrow on easy terms small sums for their advancement. He provided that at the expiration of 100 years a large proportion of the accumulated fund should be expended in building or procuring public works of general utility which should promote the convenience and comfort of the people of Boston or of others temporarily abiding there. He provided for the investment and accumulation of the balance for 100 years more, at the end of which period a part of it is to be subject to the disposition of the people of Boston and a part to the disposition of the government of the state. The plan was stated by the testator with considerable elaboration, and the method of carrying it into effect appears in the codicil. This is by a board of managers, to consist of the selectmen of the town and the ministers of the oldest Episcopalian, Congregational, and Presbyterian churches in the town. The gift was in such a form as to raise a question whether the legal title to the fund was in the inhabitants of Boston or in the managers. Similar questions arose in *Drury v. Natick*, 10 Allen, 169, and *Cary Library v. Bliss*, 151 Mass. 364, 25 N. E. 92, 7 L. R. A. 765. In the first of these cases it was held that the legal title was in the town, while the entire management of the property was in a board of trustees provided by the will. In the other case it was said in the opinion that the legal title to the fund was in the trustees, and that, after the library was established, the title to the library was in the town; but in this, as in *Drury v. Natick*, the management of the property, both before and after the establishment of the library, was in the trustees created by the founder. In regard to the present case it was decided by a majority of this court that the legal title to the fund was in the town of Boston so long as Boston was a town, and is now in the city of Boston. *Higginson v. Turner*, 171 Mass. 586, 51 N. E. 172. But this decision was not intended to nullify and could not nullify the provisions of the codicil as to the management of the fund. *Cary Library v. Bliss*, 151 Mass. 364, 25 N. E. 92, 7 L. R. A. 765. In *Drury v. Natick*, *ubi supra*, where the title to the property was in the town, it was said that the authority given to the trustees was "not a mere naked power, but a power coupled with a trust." In *Cary Library v. Bliss* the same was held to be true of the power of the trustees after the establishment of the library as the property of the town. The provisions in regard to the management of the fund were doubtless deemed important by Dr. Franklin, and they must be given effect, so far as possible, according to his purpose and intention. The following language from the opinion in *Cary*

Library v. Bliss is applicable to the present case: "That part of the donor's scheme which relates to the management and control of the fund and of the library cannot be disregarded as unimportant. It prescribed the method of administering the charity which she thought best adapted to the accomplishment of her purpose. She chose to give her money to be used in that way. She did not authorize the use of it in any other way unless for some reason it should become impracticable to pursue the course which she prescribed. It is fair to presume that before founding this charity she carefully considered the subject of its administration, and thought it wise to select for her board of trustees those special officers who have in their charge the business interests of the town, and those whose duty it is to superintend the education of children, together with such reverend gentlemen as regularly minister in the churches, and are expected earnestly to desire the moral and religious welfare of all the people." It seems plain, therefore, that the board of managers created by the codicil, acting in a fiduciary relation under the instrument, are to have the charge and management of the fund, and are to lay out in public works that part of it which is so to be used. See, also, *Ex parte Blackburn*, 1 J. & W. 299; *Fellows v. Miner*, 119 Mass. 541; *Sohler v. Burr*, 127 Mass. 221; *Bullard v. Chandler*, 149 Mass. 532-541, 21 N. E. 951, 5 L. R. A. 104.

When the town of Boston became a city, its board of selectmen went out of existence, and for more than 80 years there has been no such board. At the time of Dr. Franklin's death the selectmen were nine in number, and until the change from a town to a city they constituted a large majority of the managers. This board, as constituted by the managers, ceased to exist in 1822, and only the two clerical members of it remained eligible to continuance in the administration of the trust. The selectmen, while in the performance of their duties as managers, were not acting as public officers of the town. They were acting as appointees under the codicil, precisely as the ministers were acting; their only official relation in that field being their relation to the trust. The testator selected his appointees from two classes, and the reference in the will to the public office of the lay members was only a mode of designating the persons appointed to act during their respective terms of office as selectmen. While, under St. 1822, p. 734, c. 110, the mayor and alderman became their successors in most particulars as officers of the city, they did not become their successors as managers of the Franklin fund. The will contained no provision in regard to the persons who should act as managers if the office of selectmen of Boston should be abolished. But the general purpose of the testator that the fund should be in charge of a board of managers remained unchanged, and

in such a case, when it becomes impossible to administer a public charity precisely according to the directions of the founder, it is the duty of a court of equity to carry out his general purpose as nearly as practicable. *American Academy v. Harvard College*, 12 Gray, 582; *Weeks v. Hobson*, 150 Mass. 377, 23 N. E. 215, 6 L. R. A. 147; *Darcy v. Kelley*, 153 Mass. 433, 26 N. E. 1110; *Sears v. Chapman*, 158 Mass. 400, 33 N. E. 604, 35 Am. St. Rep. 502; *Attorney General v. Briggs*, 164 Mass. 561, 42 N. E. 118; *Amory v. Attorney General*, 179 Mass. 89, 60 N. E. 391. The will being silent as to the persons who are to act as managers with the ministers when there are no longer selectmen, it is for a court of equity on application, by virtue of its general jurisdiction over the administration of trust, to appoint other managers. Without such an appointment, no one is legally authorized to act in the place of the selectmen. For many years the mayor and aldermen, and more lately the aldermen alone, acted as managers with the ministers without objection. It seems that until lately no controversies have arisen, nor any important differences of opinion as to the conduct of the business. It is only since the expiration of the first 100 years, when it is time to lay out money in public works, that it becomes important to look sharply at the legal rights of the persons assuming to act as managers.

From what we have already said it appears that, in the absence of any appointment by a court, no person succeeded to the powers and rights of the selectmen in the execution of this trust. Long acquiescence by the clerical managers and others in the action of members of the board of aldermen does not give members of that board a right to act in the disposition of this fund. It follows that the votes of May 21, 1902, passed by the affirmative action of 11 persons, all of whom were members of the board of aldermen, against the negative vote of 2 ministers, members of the board of managers, and 2 persons who were members of the board of aldermen, were without legal authority, and void.

We are asked for instructions upon the question whether the respondents Mr. Eells, Mr. Duane, and Mr. McLennan are authorized to act as managers under the codicil. Upon the facts stated this question should be answered in the affirmative as to each of them. The persons designated in this part of the will were "the ministers of the oldest Episcopalian, Congregational, and Presbyterian churches in that town." This means three ministers in all, representing the three denominations mentioned, each one representing the oldest church of his denomination in Boston. There seems to be little, if any, real dispute upon this part of the case. Upon the facts stated we are of opinion that King's Chapel ceased to be an Episcopalian church within the meaning of

the term used by the testator, and that Christ Church is the oldest Episcopalian church in Boston. The Reverend Doctor George A. Gordon, pastor of the Old South Congregational Church, averring that he was made a respondent against his will, declares that the church of which he is pastor is not the oldest Congregational church in Boston within the meaning of the words in the codicil, and disclaims any rights or interest in these proceedings, and in the matter to which they relate. The bill states that at the time of Dr. Franklin's death the church of which Mr. Bells is the pastor was the oldest Congregational church in Boston. It further states that the minister, and probably a majority of the members of this church, then entertained opinions about the doctrine of the Trinity and other matters of dogma which were substantially the same as the opinions which later became known under the distinctive name of "Unitarian," in contradistinction to "Congregational," or "Orthodox Congregational." It is stated that the line of demarcation between these two branches of the Congregational Church was distinctly drawn about the year 1815. Both branches of the church have continued Congregational in government since that date, and many, if not most of the churches in whose name the word "Congregational" appears, even if Unitarian in doctrine, have retained their name unchanged. The leading American lexicographers make the primary meaning of the word "Congregational" pertain to church government, although a secondary and popular meaning relates to doctrine. Doubtless many of the ministers and people of so-called "Orthodox Congregational" churches entertained doctrinal opinions very different from those most prevalent in the same churches 100 years ago. We are of opinion that the testator, in using this word, did not have in mind any nice shades of distinction in regard to the doctrine of the Trinity, or other kindred doctrines, but that he meant to include churches of a kind well known in Boston and elsewhere in Massachusetts, which were not exactly alike in their doctrines, but which, chiefly by reason of their polity, were called "Congregational." The case does not show that the so-called "First Church in Boston" has ceased to be a Congregational church within the meaning of the will. The Supreme Court of New Hampshire, in the Dublin Case, 38 N. H. 459, gave an elaborate decision, which fully covers the question before us, and which is in accordance with the view we have stated. Decisions in this commonwealth recognize the distinguishing features of Congregational churches. *Baker v. Fales*, 16 Mass. 488, 515; *Weld v. May*, 9 Cush. 181-184; *Attorney General v. Proprietors, etc., of Meeting House in Federal Street*, 3 Gray, 1-57.

The words "lay out" mean something more than the adoption of a plan for the use of the money in the way directed. They in-

clude the actual expenditure of it in the establishment of public works of the kind described, all of which is to be done by the board of managers.

It hardly could be contended that this board could compel the city of Boston to assume any burden of maintenance or otherwise, involving the use of money to be raised by taxation, whatever the city might do voluntarily under the authority of law. In view of our decision in regard to the invalidity of the votes, we do not deem it necessary to consider questions as to the details of the particular expenditure to which the votes relate.

The duties of the managers are not of a kind which require a unanimous vote of the board as a foundation for action. The concurrence of a majority is sufficient to authorize proper proceedings. This board is similar to a board of public officers, or a committee appointed by a public body to perform public duties. Such a board or committee may always act by a majority. *Damon v. Granby*, 2 Pick. 345; *Williams v. School District*, 21 Pick. 75, 32 Am. Dec. 243; *Fire District v. Commissioners*, 108 Mass. 142. It is a board appointed to act in a fiduciary capacity in the administration of the affairs of a public charity. A distinction is made between private agents, or agents or trustees of a private trust, and trustees managing business of a public charity like that intrusted to this board. In the performance of duties of this latter kind a board may act by a majority. *Morville v. Fowle*, 144 Mass. 109-113, 10 N. E. 766; *Ward v. Hipwell*, 3 Giff. 547; *King v. Breton*, 3 T. R. 592; *Witherell v. Gurtham*, 6 T. R. 388.

The final prayer of the bill for special relief is that, if the court takes the view of the law which we have taken, it will appoint some suitable person or persons to act as managers under the terms of the codicil, and will enjoin the respondent Doyle and the other 10 respondent aldermen, who acted affirmatively in the votes of May 21, 1902, from purchasing the land mentioned in the vote, and from doing anything concerning the laying out or expenditure of any part of the Franklin fund. We are of opinion that this prayer should be granted. Before appointing managers to act in the place of the selectmen, it is necessary to ascertain as nearly as possible the general purpose of the testator in selecting his board. Looking at the designation of persons who were to constitute from time to time the lay members of the board, and also at the designation of clerical members, it seems that they were chosen, not for any particular official qualification, or for the possession of any particular doctrinal opinions, but with a view to their representative character as men together combining the best general qualifications for the administration of such a trust. When the codicil was made, the three religious denominations mentioned in it were

leading denominations in this part of the United States, and the ministers in charge of leading churches of these denominations held a high place for influence in the community, not only in religious affairs, but in educational, charitable, and social matters. Boston was a town of a very small population in comparison with the present population of the city, and the nine persons chosen for selectmen would naturally represent a considerable proportion of the intelligence, integrity, strength, and business ability of the town at that time. In a city of the size of Boston to-day such a board necessarily includes only a comparatively small proportional part of the whole number of able and excellent men who would be willing to serve without pay in charitable work. If there were any peculiar duties pertaining to the official station of the selectmen which were considered by the testator as indicating fitness for service as managers, doubtless they were the important executive and administrative duties performed by these town officers. By the original city charter of Boston (St. 1822, p. 734, c. 110) these duties were imposed upon the mayor and aldermen, and by the amendatory statute of 1854 (page 363, c. 448) most of them were left to be performed by the board of aldermen alone, of which the mayor was no longer to be a member. By the later statute of 1885 (page 701, c. 266, § 6) the Legislature took from the board of aldermen all its executive power, and conferred it upon the mayor, and by section 12 forbade action by the board in any administrative or executive business of the city; putting all this power into the hands of the mayor and certain boards in charge of special departments. So far as the exercise of executive and administrative functions by the selectmen was evidence of their qualifications and a reason for their appointment as managers of this charity, the reason is not applicable to the aldermen of Boston under existing laws. The mayor is the official representative of executive power in the city, and, if the performance of executive duties in the city government should be considered in the selection of the managers of this charity, he is the only officer of distinction in this department. In regard to the administration of the charity the testator said in the codicil: "It is presumed that there will always be found in Boston virtuous and benevolent citizens willing to bestow a part of their time in doing good to the rising generation by superintending and managing this institution gratis," etc. We are of opinion that managers should be appointed by the court from this class of citizens, chosen by reason of their qualifications, intellectual and moral, for this important service. We deem it proper that the mayor ex officio should be a member of the board, and that the whole number of lay members to act with the clerical members should be the same as the

number of selectmen at the time of Dr. Franklin's death.

The provisions of Rev. Laws, c. 149, § 1, in relation to the giving of bond by trustees appointed by the probate court under a will, are not applicable to these managers. *Drury v. Natick*, 10 Allen, 169-176; *In re Lowell*, 22 Pick. 215. The case is to be heard before a single justice of this court, for the appointment of nine managers, of whom the mayor of the city shall be one, to act with the ministers in accordance with this opinion, and an injunction is to be issued as prayed for.

So ordered.

(176 N. Y. 441)

BECKER v. CITY OF NEW YORK.

(Court of Appeals of New York. Nov. 24, 1903.)

MUNICIPAL CORPORATIONS—CONTRACTS—CONSTRUCTION.

1. A contract executed by the commissioner of public works of the city of New York provided that a city surveyor should be employed by the city to see that the grading required by the contract was completed in conformity to the profile, and to ascertain the quantity of work done; that he should, at the request of the contractor, be directed to fix the grades during the progress of the work, without charge, provided that the city should not be liable for any delay or errors of the surveyor in giving such grades, who in so doing should be considered as the agent of the contractor. To this contract a profile was attached. *Held*, that the contractor was not entitled to recover for losses suffered by reason of the mistakes of the city surveyor in giving the grades to the contractor, though he did not request that they be furnished, and, on discovering the mistake, notified the superintendent of street improvements of such mistake, and proceeded only on his positive direction to conform to the grades given.

Parker, C. J., and Martin and Vann, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Jennie T. B. Becker, executrix of James Brady, against the city of New York. From a judgment of the Appellate Division (78 N. Y. Supp. 1064) affirming a judgment for plaintiff and denying a new trial, defendant appeals. Modified.

George L. Rives, Corp. Counsel (Theodore Connolly and Terence Farley, of counsel), for appellant. L. Lafin Kellogg and Alfred C. Petté, for respondent.

HAIGHT, J. The plaintiff's testator was the assignee of the claim of one Benjamin J. Carr, Jr., and brings this action to recover the damages suffered by him, arising out of his contract with the defendant for regulating and grading Claremont avenue from 122d street to 127th street, in the city of New York. There were various claims in controversy between the parties, but in our review of the case we shall discuss but one claim; and that arises out of the second count in the complaint, in which damages are

asked for the errors of the city surveyor in giving an incorrect grade of the street, by which the contractor was misled, and excavated a greater amount of rock than was required by the contract, and was then compelled to fill in the excavation so as to conform the grade to the specifications.

This case has been once previously considered in this court. 170 N. Y. 219, 63 N. E. 298. The judgment was then reversed, upon grounds not material to be now considered, but in the opinion then written it was stated that there could be no recovery for damages claimed by reason of the errors in the grade given by the surveyor. It is now claimed that upon the retrial further evidence was presented as to this claim, upon which the trial court, under the objection and exception of the defendant, submitted the same to the jury, and a verdict has been found thereon for the plaintiff amounting to the sum of \$8,520. The new evidence upon which the plaintiff relies for the purpose of establishing this claim is found in the testimony of the contractor, and is to the effect that he saw Mr. Dean, the superintendent of street improvements, after the work had been in progress from 15 to 17 months, in his carriage, at 122d street and Claremont avenue, and then requested him to go and look at the discrepancy in the grade lines; that Dean replied to the effect that he could do nothing in the matter; that his letter to him was specific; and that he would have to follow the grades and lines as given by Mr. Slator, the engineer in charge. The letter referred to had been written on the 18th of July, 1890, six or eight months before, and in that letter there appears a similar statement to the effect that he would have to follow the lines and grades given by the engineer in charge. This letter was written in answer to a letter by the contractor calling his attention to the error in the lines of the street as given by the surveyor before any error in the grade had been discovered. This letter was considered by the court on the former review, and we shall not discuss it further. We are thus brought to the consideration of the question as to whether the direction given by the superintendent of street improvements to follow the grade lines given by the engineer in charge justifies a recovery.

The contract, so far as material upon this branch of the case, provides that "a city surveyor will be employed by the parties of the first part to see that the work is completed in conformity to the profile, and to ascertain and certify the quantity of work done. Said surveyor, at the request of the contractor, will be directed to designate and fix grades for his guidance during the progress of the work without charge, provided that the said parties of the first part shall not be liable for any delay or for any errors of said surveyor in giving such grades, and said surveyor shall be considered as the agent of the contractor so

far as giving such grades is concerned and not the agent of the City of New York." A profile was attached to the contract, and the contract was executed by the commissioner of public works of the city and by the contractor, pursuant to an ordinance of the mayor, aldermen, and commonality of the city of New York, adopted on the 23d day of July, 1889, in which the regulating and grading of this avenue was directed, and sealed estimates were invited from bidders according to the plans and specifications which were attached to, and made a part of, the contract. As we understand this provision of the contract, it became the duty of the contractor to grade the street in accordance with the profile. He could employ his own surveyor, or, if he asked, the city surveyor would give him the grades, but upon the understanding that the city should not be liable for the errors of the surveyor, and that in giving such grades he should be considered to be the agent of the contractor. The evidence tends to show that the city surveyor did set stakes and mark the grades thereon, and that the grades so marked were erroneous, and that the contractor, in excavating to the depth required by the marks upon the stakes, excavated to a greater depth than required, which had to be refilled, and that he suffered damages in consequence thereof.

The contractor now claims that he was compelled to perform the work in accordance with the grades given by the surveyor, by the superintendent of street improvements, who, after the contractor had called his attention to errors in the grade, directed him to follow the lines and grades as given by the surveyor. As we have seen from the contract, the contractor was required to conform the street to the profile. He was not obliged to conform the grade to that given by the city surveyor, but could have ascertained the same through any other surveyor, and, if he saw fit to request the city surveyor to give him the grades, he made him his own agent, and agreed that the city should not be liable for his errors. The direction of the superintendent of street improvements to the contractor to proceed and conform the street to the grades given by the city surveyor is inconsistent with these provisions of the contract, and is a material variation of its terms. The question thus arises as to whether this officer had the power to modify or change the contract in this regard. He was a subordinate officer in the department of public works. His duties required him to watch the work of contractors, and see that their work was done in accordance with the requirements of the contract, and upon the completion of the work to give a certificate. We think he had no power to change or modify the contract, or to relieve the contractor from the provisions in question. This question was disposed of in this court as early as the case of *Bonesteel v. Mayor, etc.*, of N. Y., 22

N. Y. 162. In that case the common council of the city of New York had passed an ordinance directing the regulating and grading of 70th street from 10th avenue to the Hudson river, the work to be performed under the directions of the street commissioner and the city surveyor. The contract provided that the rock was to be excavated two feet below the line of the curbstone grade. The contractor excavated the rock only one foot below such grade, and claimed that this was done by the direction of the city surveyor. Davies, J., in delivering the opinion of the court, says with reference to this contention that "the ordinance under which the work was done provided that the street was to be regulated and graded under such directions as should be given by the street commissioner and one of the city surveyors. The first suggestion to be made in reference to this provision is that the ordinance would seem to contemplate joint directions by the street commissioner and the city surveyor. The direction to excavate the rock only to the depth of one foot would appear to have been given by the surveyor only, without the co-operation of the street commissioner. But a conclusive answer to this view of the case is that the provision of the ordinance that the work should be done under such directions as should be given by these officers conferred no authority upon them, or either of them, to change or modify in any essential particular the provisions of the contract made and entered into for the performance of the work. The ordinance of the defendants contemplated that the work was to be done under a written contract. The basis of that contract was the proposal or specification issued by the proper head of department, inviting estimates. When they were received, and the award made to the lowest bidder, and that award confirmed by the common council, all the materials for the written contract were provided. When the contract finally became perfected, signed, and executed, no officer of the defendants had any authority to change its provisions, unless expressly authorized by the common council. No such authority has been shown in this case, or any acquiescence by the defendants in the departure from the terms of the contract made by the plaintiff's assignor with the acquiescence and pursuant to the directions of the city surveyor. Such departure had therefore no legal justification, and the plaintiff has therefore himself shown a nonperformance on his part of what he claims was his contract with the defendants." Dillon, in his work upon *Municipal Corporations*, at section 451 (3d Ed.), says, with reference to the variance or modification of a contract, that, "where the contract is made by ordinance in the statutory mode, it can only be repealed or annulled in the same manner." In *City of Terre Haute v. Lake*, 43 Ind. 480, it was held that the common council of a city can only contract by

an order, resolution, or ordinance passed in the manner required by statute, and when thus made it can be repealed or annulled only by the vote of the common council. See, also, *Glacius v. Black*, 50 N. Y. 145, 10 Am. Rep. 449; *Fitzgerald v. Moran*, 141 N. Y. 419, 38 N. E. 508; *Woodruff v. Roch. & Pittsburgh R. Co.*, 108 N. Y. 39, 14 N. E. 832; *Hague v. City of Philadelphia*, 48 Pa. 527; and *North. Pac. L. & M. Co. v. East Portland*, 14 Or. 3. 12 Pac. 4.

The judgment should be reversed and a new trial ordered, with costs to abide the event, unless the plaintiff within 20 days stipulates that the judgment may be reduced in the sum of \$8,520, and, if such stipulation is given, then the judgment be modified accordingly, and, as so modified, affirmed, without costs of this appeal to either party.

MARTIN, J. (dissenting). The plaintiff's testator was the assignee of a claim of one Benjamin J. Carr, Jr., arising under a contract made between him and the city of New York in 1889 for regulating and grading Claremont avenue from 122d street to 127th street. This action has been several times tried, and was before this court on a former appeal. Although numerous questions were presented upon the argument and by the briefs of counsel, yet, in view of our previous decision in this case, but a single question is presented which we deem it necessary to consider at this time. The question we shall consider arises under the second cause of action stated in the complaint, by which the plaintiff seeks to recover the damages sustained by the original contractor by reason of his having been required by the defendant to perform a large amount of unnecessary work in the fulfillment of his contract.

The contention of the plaintiff is that this loss was occasioned by the action of the defendant's officers and employes in giving the contractor an incorrect grade of the street, and then compelling him to conform the street to the grade as thus given, although he at the time insisted that it was wrong, and objected to it as inaccurate. The provision of the contract relied upon by the defendant to exempt it from such liability in effect provides that a city surveyor, at the request of the contractor, will be directed to designate and fix grades for his guidance during the progress of the work without charge, provided that the city shall not be liable for any delay or any errors of such surveyor in giving such grades, and the surveyor shall be considered as the agent of the contractor, so far as the giving of such grade is concerned, and not as the agent of the city.

It is quite evident, under this provision of the contract, that, if the contractor requested the city surveyor to designate and fix the grades, the latter would be regarded as his agent, and the city would not be lia-

ble for any delays or errors of such surveyor. So, also, if, without objection, the contractor used the grades thus given, thereby acquiescing in and ratifying the surveyor's action, and accepting him as his agent, within the terms of the contract, the city would not be liable; and we so held in the former decision of this case. 170 N. Y. 219, 63 N. E. 298. But we also held that the contractor was entitled to recover for losses suffered in grading this street caused by the errors of the city surveyor in fixing the center line, where it was done by the city without the request or acquiescence of the contractor, and the contractor, afterwards distrusting its accuracy, sought to have it properly corrected, but failed, and finally proceeded with the work on that line, as he was directed to do by the superintendent of streets.

When our former decision was rendered there was evidence tending to show that that was the situation so far as the center line established by the city surveyor was concerned, and it was held that the loss sustained by the contractor, due to the inaccurate line, was a proper charge against the defendant, and might be recovered. It was then said: "It cannot be reasonably said that under this state of facts the contractor had, by acquiescence, made the city surveyor his agent. On the contrary, the contractor was reasonably alert to discover the correct center line, and followed the one furnished him, which he had been advised by his own surveyor was inaccurate, only when the superintendent of street improvements, after being fully advised as to all the facts, ordered him to do so." As the evidence then stood, the loss sustained by the contractor on account of the mistakes as to the grades, other than as to the center line, was not recoverable, as there was then no sufficient evidence to show that the contractor had, after objection by him, proceeded with the work in accordance with such grades under compulsion or the positive direction of the city authorities. Upon the last trial, however, the evidence in that respect was changed, as the contractor then not only testified that he did not request the city surveyor to give him either stakes, lines, or grades, but also that after discovering the inaccuracy of the grade furnished by the city surveyor in other respects, as well as to the center line, he saw the superintendent of street improvements, called his attention to it, and requested him to look at the discrepancies in those respects, and to the defects in the lines and grade. To this request the superintendent replied that he could do nothing in the matter, but that the letter he wrote, in which he said, "You will proceed with your work * * * in accordance with the grade lines and stakes as given by Mr. Slator, surveyor in charge," was specific, and that the plaintiff would have to follow the grades and lines as given by the engineer in charge. This evidence was corroborated by the wit-

ness Burke, who testified that he was present upon the work when the defendant's contract with the original contractor was discussed; that the contractor told the superintendent that there had been a mistake made by Slator, and the superintendent replied that he would not get out of his wagon and examine those things, but that he should obey the orders of Mr. Slator, the engineer in charge of the work, and work by his stakes only. With this evidence in the case, the jury was justified in finding that the contractor was reasonably alert to discover the correct grade, that he apprised the superintendent of the inaccuracy of that furnished by the surveyor, and that he performed the work in accordance with the lines and grades thus given only when the superintendent of street improvements, being advised of such inaccuracies, ordered him to do so. Under these circumstances, it seems quite clear that, upon the authority of our former decision in this case, the recovery on the last trial must be sustained, or the principle of that decision overruled.

It is to be observed that the provision in the contract upon which the defendant relies relates to grades as a whole, and not to lines or grades separately. Hence the term "designate and fix grades" is to be construed as involving all the essentials necessary to the complete designation and establishment of the entire grade, including the necessary lines, as well as the depth and height of the excavation or fill. Therefore, in considering the question of the defendant's liability for having furnished the contractor with an erroneous grade, and having, with notice of its inaccuracy, insisted upon and required him to construct the street upon and in accordance with it, the same principle as to the defendant's liability should be applied to the error relating to the required excavation or fill as was applied to the error as to the center line. While in our former decision we expressly declined to pass upon the construction of that term, it was, however, said: "It is to be observed that this clause of the contract does not in terms refer to lines, or center lines, but requires the surveyor to 'designate and fix grades.' It may be that the designation and fixing of grades includes the giving of lines and center lines." We now think that to hold that the term "designate and fix grades" does not include both lines and grades, and apply to required excavation and filling as well as to the center line, would be too narrow, and an incorrect construction of that term as used in and intended by this contract. Therefore we are of the opinion that, in view of the change in the evidence, the same rule applies to the furnishing of the grades by the city surveyor, and the requirement of the superintendent of street improvements that the work should be conformed thereto, as was applied in the former decision to the line so furnished; the facts as they now stand

being essentially the same as to each. Obviously it was upon the basis of our former decision that the case was tried and determined by the courts below, as upon the last trial the learned trial court expressly charged the jury that, before the plaintiff could recover, she must prove to its satisfaction that the contractor was directed to follow the grades and lines given by the surveyor, after the defendant's attention was called to the fact that they were incorrect.

But it is sought to be maintained that the superintendent of street improvements, who was the chief officer under the commissioner of public works having direct charge and control of the work upon contracts for the regulating and grading of streets, had no right to direct the contractor to follow any grade except such as was in accordance with the profile. It is also claimed that the grades as given were not according to the profile, and, consequently, although the contractor was required to perform the work under the direction of the bureau of which the superintendent was the head, yet that the contractor was bound, at his peril, to disregard any and all directions given him by such officer, and rely upon the profile alone. It does not seem possible that a city could, by its officers in charge of the work, compel the contractor to do work in a specified way, and then require him to expend large additional sums in doing it otherwise, without liability upon the part of the city to respond in damages for the extra work occasioned by its wrongful direction, especially where, as in this case, the trial court was justified in finding not only that the action of the city surveyor in giving the final certificate was false and made in bad faith, but also that the contractor was required by the superintendent to perform the work in accordance with the grade furnished by the city surveyor, against the protest of the contractor, and after notice by him to the superintendent that the grades thus given were erroneous. As sustaining the doctrine contended for by the defendant, it relies upon the cases of *Bonesteel v. Mayor*, etc., of N. Y., 22 N. Y. 162; *Glacius v. Black*, 50 N. Y. 145, 10 Am. Rep. 449; *Woodruff v. Roch. & Pittsburgh R. Co.*, 108 N. Y. 39, 14 N. E. 832; and *Fitzgerald v. Moran*, 141 N. Y. 419, 36 N. E. 508. An examination of those cases discloses that they are clearly distinguishable from the case at bar, and were decided upon principles which have no application here. In the *Bonesteel Case* it was held that where work was done under an ordinance for the grading of the street, and the contract under it provided in express terms the depth of the excavation and all the particulars of the work, to be done under the direction of the street commissioner, a change of depth from two feet to one could not be made by the officer having superintendence of the work; that, as the common council authorized the street commissioner to contract only

for the excavation of rock one foot below the grade, he had no right to enter into a contract for its excavation two feet below the line of the curbstone grade; and that, by assuming to make a contract different from that authorized by the common council, he acted without authority, and hence there could be no recovery. The *Glacius Case* merely holds that where one enters into a contract to furnish materials and perform work, and materials are furnished and work performed, but not done in the manner stipulated, no action will lie for the compensation, and that at least a substantial performance must be shown before a recovery can be had. In *Woodruff v. Roch. & P. R. Co.*, the plaintiff, as subcontractor, made a cut through an elevation, and after it was substantially completed the sides caved in, and the plaintiff removed the earth, upon the request of the engineer in charge, under an agreement that it should be taken out for a price specified; it, however, appearing that the work was under the supervision of the original contractors, and that they paid all the engineers, and entered into subcontracts for the performance of the work. In an action against the railroad company, it was held that the evidence failed to show any liability upon its part, as it did not disclose that the work was done under any express or implied agreement with it. The *Fitzgerald Case* was an action upon a contract for plastering, which provided that certain designated cement should be mixed with equal parts of good, sharp, and dry sand, while the mixture used was made of two parts of sand to one of cement, and it was held that neither the superintendent nor the architect had any right to thus change the contract. Clearly the principle of those cases has no application to the question under consideration.

When, however, we examine the cases of *Messenger v. City of Buffalo*, 21 N. Y. 196, 199, *Mulholland v. Mayor*, etc., of N. Y., 113 N. Y. 631, 632, 20 N. E. 856, *Brady v. Mayor*, etc., of N. Y., 132 N. Y. 415, 427, 30 N. E. 757, and *Horgan v. Mayor*, etc., of N. Y., 160 N. Y. 516, 523, 55 N. E. 204, we there find the principle applicable to the case at bar, and abundant authority to sustain the recovery in this action. In the *Messenger Case* the city of Buffalo employed the plaintiff to pave a street, and to furnish the sand for that purpose, under a contract by which it was to grade the street, and the work of paving was to be performed under the direction of the street commissioner. The street was so excavated that a quantity of sand beyond that specified in the contract was necessary. The plaintiff, by the direction of the street commissioner, furnished the excess required, and this court held that he was entitled to compensation therefor. In that case it was claimed that, when the plaintiff found he could not fulfill his contract in all particulars, he should have obtained the action of the common council before commencing or

continuing the work, but this court said: "This could not have been absolutely required to enable him to recover. The corporation had authorized the street commissioner to make the contract, and the contract made provided that the work should be done under the direction of such commissioner. This plainly intended that the street commissioner might direct in regard to variations rendered necessary by the action of the city authorities." In the Mulholland Case there was a contract between the plaintiff's assignor and the defendant for grading and flagging one of its streets. Through the erroneous action of the defendant's engineer, more work was required of the contractor than would have been necessary under the contract, and it was held that the plaintiff was entitled to recover. The court said: "The change was erroneous, and if in the correction of the error, or by reason of it, the plaintiff performed extra labor and incurred increased expense, he is entitled to recover according to its value and amount." In *Brady v. Mayor, etc., of N. Y., Parker, J.*, said: "It is quite clear that it was the intention of the parties under this contract that the contractor should, in its execution, be governed by the direction of such of defendant's officers as it declared in the contract should represent it. So if the grade should be mistakenly given to the contractor by the surveyor, and the work should be done in conformity therewith, and certificates of completion afterwards given, the defendant could not thereafter object that the plaintiff should not be compensated, because, as the result of a misdirection by its officers, the specifications had not been literally complied with." The Mulholland Case was there considered, and the principle established by it reaffirmed. These cases were again examined by this court in *Horgan v. Mayor, etc., of N. Y.*, where Judge Bartlett said: "It has been frequently held that if a municipal corporation, by its own act, causes the work to be done by a contractor to be more expensive than it otherwise would have been, according to the terms of the original contract, it is liable to him for the increased cost or extra expense." See, also, *Moore v. Mayor, etc., of N. Y.*, 73 N. Y. 238, 29 Am. Rep. 134; *Reilly v. City of Albany*, 112 N. Y. 30, 19 N. E. 508; and *Van Dolsen v. Bd. of Education*, 162 N. Y. 446, 452, 56 N. E. 990.

An examination of the foregoing authorities, and the consideration of the decision in this case upon a former appeal, render it quite obvious that, under the evidence as it appears in the record of the trial under review, the plaintiff was entitled to recover for the additional work he was compelled to perform by reason of the erroneous grade given him by the surveyor in charge, and according to which he was required by the superintendent of street improvements, with a full knowledge of the facts, to grade the street, and by whom he was subsequently required to change such grade at a large additional

outlay. These considerations lead to the conclusion that the judgment appealed from should be affirmed.

GRAY, CULLEN, and WERNER, JJ., concur with HAIGHT, J. PARKER, C. J., and VANN, J., concur with MARTIN, J.

Judgment accordingly.

(176 N. Y. 480)

KNOWLES v. CITY OF NEW YORK et al.

(Court of Appeals of New York. Nov. 10, 1903.)

FRAUD—PLEADING—ACTION BY TAXPAYER—MUNICIPAL CONTRACT—LIMITING COMPETITION.

1. In stating a cause of action based on fraud, the facts or intent must be so alleged that the court can see whether they were fraudulent or not.

2. Plaintiff sued to annul a contract by the commissioners of the new East River Bridge, in the city of New York, alleging that the commissioners fraudulently prescribed in their specifications that proposals would be received only from bidders possessing plants sufficient to do the work, and that there would be excluded steel containing more than a specified percentage of foreign elements; that these conditions were imposed for the purpose of limiting competition to a small class of bidders; and further charged that the cost of the work was thereby increased. There was no allegation of fraud, except a statement that their action was taken with the intent to limit the class of bidders. Laws 1895, c. 789, § 3, gave the commissioners power to perform the work by contract or by competition. *Held*, that their intent to limit competition, if true, both in the class of construction and the character of the material, was not illegal, under such act, nor fraudulent.

3. The fact that commissioners for the erection of the new East River Bridge, in the contract therefor, required the insertion of provisions of the labor law, which was subsequently held invalid, does not make the contract fraudulent, nor render it void, though it may have increased the cost of the work, especially as the commissioners might, without competition or advertisement, enter into a new contract with the same contractor, and therefore had power to waive the illegal conditions.

Appeal from Supreme Court, Appellate Division, First Department.

Action by William P. Knowles against the city of New York and others. From a judgment of the Appellate Division (77 N. Y. Supp. 1130) affirming an interlocutory judgment of the Special Term overruling a demurrer to the answer of defendants, and reversing an interlocutory judgment of the Special Term overruling a demurrer to the complaint, and directing that it be dismissed, plaintiff appeals. Affirmed.

L. Lafin Kellogg and Alfred C. Petté, for appellant. William C. Trull and Delos McCurdy, for respondent Pennsylvania Steel Co. George L. Rives, Corp. Counsel (James McKeen, of counsel), for respondents city of New York et al.

¶ 1. See *Fraud*, vol. 23, Cent. Dig. § 27; *Pleading*, vol. 39, Cent. Dig. § 28.

CULLEN, J. As to the practice in this case, it is sufficient to say that the judgment under review proceeded on the ground that the complaint did not state a good cause of action, and the only question presented to us is the sufficiency of that complaint. The action is brought by a taxpayer of the city of New York against the city, the commissioners of the East River Bridge, and the Pennsylvania Steel Company, to declare void a contract entered into between the said commissioners and the company for the construction of the approaches to the bridge; to enjoin the continued performance of said contract, and the further payment of any moneys on account thereof; and to recover the moneys thitherto paid thereon. The complaint sets forth the act of the Legislature authorizing the construction of the bridge (chapter 789, p. 1687, Laws 1895); the appointment of certain of the defendants as commissioners under the provisions of the act; the advertisement by said commissioners for sealed proposals or bids for the construction of the steel and masonry approaches to the suspended structure of the bridge; the specifications of the work to be done and the material to be furnished; the terms and conditions of the contract into which the successful bidder would be required to enter; the receipt of several proposals from various bidders, and the amounts of their respective bids; the award of the contract to the defendant the Pennsylvania Steel Company, and the execution of the contract in pursuance of such award; and the entry of such company upon the performance of said contract. The legality of the contract is assailed on several grounds stated in the complaint. First, it is alleged there were discrepancies in the notices furnished to the contractors. In some of the notices it was stated that a certified check for \$6,000 must accompany the proposals, and that the successful bidder would be required to execute a bond in the penalty of \$200,000 for the performance of the contract. In others the amount of the certified check was given as \$12,000, and that of the bond as \$400,000. Second. The notice contained the following provision: "As by far the greater part of this work can be executed only by bridge establishments of the first class, bids will be received only from such parties as have the requisite plant and facilities which have been in successful operation on work of similar character for at least one year. The bidders must be, in the opinion of the commissioners, fully qualified, both by experience and in appliances, to execute work of this character and importance according to the highest standard of such work at the present time." Third. The specifications prescribed that the finished steel to be furnished under the contract should not contain to exceed .06 of 1 per cent. of phosphorus, .04 of 1 per cent. of sulphur, .80 of 1 per cent. of manganese, and .35 of 1 per cent. of silicon. Fourth. That the specifica-

tions and contract required the contractor to comply with the provisions of the labor law (chapter 415, p. 461, Laws 1897), requiring the contractor to pay the prevailing rate of wages, to employ his laborers only eight hours a day, and to use only stone cut within the state of New York. The only allegation of fraud in the complaint is the following: "Fourteenth. Upon information and belief, that the said contracts and specifications, and the said advertisement for bids and proposals for the doing of said work, were fraudulently prepared and issued, and the said requirements of said advertisements that bids would be received only from parties having the requisite plant and facilities, which had been in successful operation on work of similar character for at least one year, and of the specification providing that the finished steel should not contain to exceed .06 of 1 per cent. of phosphorus, .04 of 1 per cent. of sulphur, .80 of 1 per cent. of manganese, and .35 of 1 per cent. of silicon, were unreasonable and unfair, and were fraudulently prepared and issued with the purpose and intent of limiting competition and confining the same to a small class of bidders, and did limit competition and confine the same to a small class of bidders, thereby increasing the cost of the work, as, by said requirements, although competent and reliable bidders, with the requisite plant and facilities, desired to submit bids and proposals for the doing of said work, they were prevented from so doing unless their plant and facilities had been in successful operation on work of a similar character for at least one year; that the requirement in the specification as to the elements of finished steel tended to, and actually did, increase the price of the work, because it prohibited the furnishing of steel by any other company than the Carbon Steel Company, whose steel alone meets the requirements and conditions of said specifications, although steel manufactured by other companies than said Carbon Steel Company is equally good, and well adapted for the purposes of said proposed work." It is also charged by the complaint that the provisions concerning the labor law increased the cost of the work.

The commissioners for building the bridge did not derive their powers, duties, and authority from the charter, but from the special act of the legislature which provided for the construction of the bridge. At the time of the commencement of the work, New York and Brooklyn were separate municipalities. The Greater New York charter of 1897, which consolidated the two cities, did not in any way repeal or modify the act of 1895 directing the construction of the bridge. The prosecution of the work still continued under the commissioners appointed for the purpose until by the revised charter of 1901 (section 595, subd. 5; Laws 1901, p. 252) the board of commissioners was abolished, and its powers and duties devolved upon the

commissioner of bridges of the city of New York. It was properly held by both the courts below that the power of the commissioners in the construction of the bridge was, under the statute, plenary, and not limited or qualified by charter provisions concerning the letting of contracts. This was necessarily so, for several reasons. At the time the work was commenced, the commissioners were not agents of a single municipality, but of two cities, whose charter provisions might conflict. Even after consolidation the provisions of the New York charter relating to the letting of contracts were such as could not be made applicable without subjecting the conduct of the trustees to review and control by other city authorities, while the intent of the statute was to vest power and discretion in the construction work exclusively in the trustees. This was rendered necessary by the exceptional character of the work. Its magnitude was such as to prevent the work being let in a single contract, and the unforeseen difficulties which might be encountered would equally preclude such a course. While some parts of the work and much material might be the subject of separate contracts, still it might be necessary to do other parts by day's work. Speed in the construction of the bridge was of the greatest importance, not only because of the pressing public need for its use, but in view of the enormous interest account continually increasing as the work progressed. These considerations were appreciated by this court in the case of *People ex rel. Murphy v. Kelly*, 76 N. Y. 475—a litigation which arose with reference to the New York and Brooklyn Bridge. Though the successful construction of the first bridge doubtless solved many doubtful problems, the considerations referred to by the court in the *Kelly* Case bear with almost equal force on the case now before us.

With this brief statement of the powers of the commissioners, we may now review the charges against them found in the complaint. There is no allegation that the discrepancy in the notices issued to contractors in any way affected the bidding; nor is it alleged that it was other than a blunder, and not the result of design; nor is there any allegation that the award of the contract to the steel company was made in bad faith. It is, however, charged that the commissioners fraudulently prescribed in their notices and specifications that proposals would be received from those bidders only who possessed plants requisite to the work, and whose plants had been in successful operation for at least one year, and that there would be excluded steel containing more than a specified percentage of foreign elements, "with the purpose and intent of limiting competition and confining the same to a small class of bidders"; and it is also charged that the cost of the work was increased thereby. While it is alleged that this action was had fraudulently, there

is no allegation of fact to support the charge, except the statement that it was made with the purpose and intent of limiting the class of bidders. "The mere general allegations of fraud or conspiracy are of no value as stating a cause of action." *Wood v. Amory*, 105 N. Y. 278; *Van Weel v. Winston*, 115 U. S. 228, 6 Sup. Ct. 22, 29 L. Ed. 384; *Cohn v. Goldman*, 76 N. Y. 284; *Knapp v. City of Brooklyn*, 97 N. Y. 520. The plaintiff must state what the facts or intent was, so that the court may see whether they were fraudulent or not, and his characterization of them as such is not sufficient. That the commissioners intended by the specifications to limit the class of bidders is unquestionable, and that they intended to limit the character of material to be furnished under the contract is equally unquestionable; but the imposition of such limitations, so far from being fraudulent, may have been dictated, and presumably were dictated, solely by regard for the advantage and interest of the municipality. As already said, the commissioners were not obliged to do the work or obtain the materials by contract; and, if they did see fit to contract, they were not bound to award the contract by competition. It was their duty to see that the material of which the structure was built was of such character as to secure safety and permanence, and this even though at an enhanced cost. It may be true, as stated in the complaint, that other steel, just as good as that called for by the specifications, could be secured at a less price; but the question of the kind of steel to be adopted was a question to be determined by the commissioners, not by the courts. So, also, the requirement that bidders should have a plant which had been in successful operation for at least a year might have been dictated by the wisest economy. Every one knows that delays are sure to occur in great public improvements. This very bridge, as well as its predecessor, is a particular example of that truth. The first bridge should have been finished long before it was, and the present bridge should have been finished long before now. A lawsuit against the sureties of a defaulting or incompetent contractor would be an insufficient compensation to the traveling public for the inconvenience, or to the municipality for its interest account, running on at the rate of hundreds of thousands of dollars a year. Therefore, as the commissioners were not limited by the statute to performance of the work by contract or by competition, their intent to limit the competition both in class of contractors and in character of material was in itself neither illegal nor fraudulent. If it had been charged that the commissioners, knowing and believing that the restrictions and limitations imposed would not be conducive to the successful prosecution of the work, and would be disadvantageous to the city of New York, had corruptly, with intent to benefit the steel company or some other favorite contractor,

imposed these limitations, a different question would be presented. It is to be observed, however, that the plaintiff has carefully abstained from any charge of that character. These views also dispose of the objection to the commissioners' action in that it failed to award the contract to the lowest bidder.

We are now brought to the effect of the incorporation of the provisions of the labor law into the contract between the commissioners and the steel company. The contract was made before this court had rendered its decision in the case of *People ex rel. Rodgers v. Coler*, 168 N. Y. 1, 59 N. E. 716, declaring the provisions of that statute unconstitutional. Before that decision both branches of the Supreme Court had upheld the validity of the law. *Meyers v. City of New York*, 32 Misc. Rep. 522, 66 N. Y. Supp. 755, affirmed on opinion below in 54 App. Div. 631, 66 N. Y. Supp. 755. It is doubtless true, as claimed by counsel for the respondent, that an unconstitutional statute is void and of no effect at the time of its enactment, not merely from the subsequent adjudication to that effect by the courts. It is also true that every one is presumed to know the law. But every one of sense knows that this presumption is not in strict accordance with the fact, that no one can know all the law, and that some apparently know almost no law. The presumption, however, obtains because it is necessary that it should obtain for government to exist, otherwise the greatest ignorance would confer the greatest license. But while mistakes in the law will not relieve one from liability for his act, in cases where intent or good faith is the issue the party's knowledge of the law may be material. *United States v. Realty Co.*, 163 U. S. 427, 11 Sup. Ct. 1120, 41 L. Ed. 215. It is not pretended that in inserting these conditions in the contract the commissioners acted in bad faith, or in the belief that the law was invalid. In the state of the judicial decisions at the time, prudence would seem to have dictated that the commissioners should comply with the statute. Therefore, though it may be that the commissioners' action in this respect was illegal, corrupt it was not, nor is it charged to have been. In the *Rodgers Case*, in which the provisions of the labor law, so far as they related to the action of municipalities, were declared unconstitutional, it was held, not that a contract imposing these conditions on the contractor was void, but that the contractor could violate them, and, notwithstanding such violation, recover his pay, not on a quantum meruit, the value of the work done, but the contract price. That decision controls the present case. The learned counsel for the appellant seeks to distinguish the cases in two respects. He contends, first, that in the *Rodgers Case* there was no proof that the labor law provisions of the contract enhanced the cost of the work, while in the present one that fact

is expressly charged in the complaint. The distinction is not well founded. The ground on which the decision in the *Rodgers Case* proceeded was that the provisions of the labor law necessarily increased the cost of the work to the municipality, and that the Legislature was without power to impose upon the municipality and its taxpayers such a burden. The second distinction sought to be drawn is that in the *Rodgers Case* the contract had been completed, while here it has not. It is, however, charged in the complaint that the contractor had entered on the performance of the work, and received payments on account of it from the city, which the plaintiff seeks to have returned. So far as the payments had been actually made, the *Rodgers Case* unquestionably governs, and the contractor cannot be required to restore them. But the principle of the *Rodgers Case* seems equally applicable to the further execution of the contract. The contract is an entire one. The contractor, naturally, in the ordinary course of business, has incurred expense in contemplation of performance of the whole contract. Payment only for the work done and materials furnished would not compensate it for the expenditures made or the obligations assumed. The difference in fact on which the counsel lays stress justifies no distinction in principle. We reiterate the language of Judge Haight in *People ex rel. North v. Featherstonbaugh*, 172 N. Y. 112, 64 N. E. 802, 60 L. R. A. 768: "But the contract in this case does not depend upon the labor law for its consideration. The provisions of that statute incorporated into the specifications are extraneous matters which have no material effect upon the main provisions of the contract, and cannot affect those provisions unless it may tend to increase the cost of the work. The contractors must be presumed to have known the law, and consequently to have known that the provision with reference to the rate of wages was unconstitutional. They are deemed, therefore, to have made their bid with this understanding, even independent of the notice which was given to them by the commissioners."

Though we rest our disposition of this branch of the case on the decision of *People ex rel. Rodgers v. Coler*, there is another ground on which the action of the courts below should be upheld. As already said, though the action of the commissioners in inserting in the contract the conditions of the labor law may have been illegal, it was not fraudulent or corrupt. If these provisions avoided the contract, still, as the commissioners might, immediately after the decision of this court declaring their illegality, have, without competition or advertisement, entered into a new contract with the steel company upon the same terms and conditions, except those required by the labor law (a course which is by no means certain it would not have been prudent to take, rather than to interrupt and delay the prosecution of the

work), it is clear that they could have waived the illegal conditions. Hence it is not within the power of the taxpayer to cancel or annul a contract which the commissioners determined to continue in force.

The judgment appealed from should be affirmed, with costs.

PARKER, C. J., and GRAY, HAIGHT, MARTIN, VANN, and WERNER, JJ., concur.

Judgment affirmed.

(176 N. Y. 408)

KNICKERBOCKER ICE CO. v. FORTY-SECOND ST. & GRAND ST. FERRY R. CO. et al.

(Court of Appeals of New York. Nov. 10, 1903.)

MUNICIPAL CORPORATIONS—TIDE-WATER AND SUBMERGED LANDS—TITLE—WHARFS.

1. The city of New York holds title within the tideway and submerged lands of the Hudson river, granted by the acts of the Legislature (Laws 1807, p. 125, c. 115; Laws 1826, p. 43, c. 58; Laws 1837, p. 166, c. 182) and the Dongan and Montgomerie charters, subject to the right of the public to use of the river as a water highway.

2. The city of New York holds title in the lands in its public streets in trust for the public use.

3. Where streets of the city of New York and navigable waters meet, the general public has a right of passage, and the highway is by operation of law extended over a wharf or bulkhead built at the end of a street.

4. The provision in Laws 1837, p. 166, c. 182, granting additional submerged lands to the city of New York, that such lands should be used to create an exterior street, to which the other streets of the city intersecting the Hudson river should be extended, was within the power of the Legislature.

5. Forty-third street, in the city of New York, was laid out under Laws 1807, p. 125, c. 115, to high-water mark on the Hudson river, and by Laws 1837, p. 166, c. 182, was extended to the exterior line of the city. In 1852 the city conveyed a pier situated in Hudson river, in Forty-Third street. Certain described property beginning at a point formed by the intersection of Forty-Third street with the easterly line of Twelfth avenue, "together with the extent of the present width of the street with the right of wharfage thereon and together with all and singular the tenements, hereditaments," etc., subject to the right of the city to order the pier extended into the river at the expense of the grantee, or with the right in the city to extend the pier at its expense, or grant the right to other parties to extend the pier if the grantee should fail to extend it when directed, in which event the right of wharfage at the portion of the pier extended was to belong to the parties at whose expense the extension was made. Held not to convey the absolute fee to the land covered by the pier, but only the right to maintain a pier and collect wharfage at the foot of Forty-Third street, in the Hudson river, whenever that point should be located by lawful authority; the city having no right to convey the land in contravention of the public trust under which it held it.

Appeal from Supreme Court, Appellate Division, First Department.

Action by the Knickerbocker Ice Company

against the Forty-Second Street & Grand Street Ferry Railroad Company and others. From a judgment of the Appellate Division (83 N. Y. Supp. 469) affirming a judgment for defendants (78 N. Y. Supp. 838), plaintiff appeals. Affirmed.

Albert Stickney and M. Edward Kelley, for appellant. James A. Deering and Henry A. Robinson, for respondent Forty-Second Street & Grand Street Ferry R. Co. George L. Rives, Corp. Counsel (Theodore Connolly and E. J. Freedman, of counsel), for respondents City of New York et al.

WERNER, J. Under claim of title to a pier, and the lands occupied by it, at Forty-Third street and the Hudson river, in the city of New York, the plaintiff herein commenced this action, and obtained an injunction pendente lite restraining the defendants from effecting certain harbor improvements projected, under legislative authority, by the city of New York. The decision of the trial court was in the short form, and was adverse to the plaintiff. The judgment entered upon that decision has been unanimously affirmed by the Appellate Division. 83 N. Y. Supp. 469. Many interesting questions have been most ably presented on both sides, but in its last analysis the case turns upon the nature and extent of the grant to the plaintiff. If, as the plaintiff contends, that grant purported to vest in it an absolute fee to the locus in quo, then numerous other questions affecting the validity of the grant remain to be considered. If, on the other hand, the plaintiff never had a title in fee to the lands in controversy, then this action must fail, for the plaintiff's claim to the relief asked for in the complaint can only be predicated upon the title which he asserts. A short recital of a few salient facts will suffice to show why we think the judgment of the courts below must be affirmed.

Under the Dongan and Montgomerie charters the city of New York acquired title to the tideway surrounding the island of Manhattan. In 1807 the state granted to the city a strip of land under water along the westerly side of the island, which extended from low-water mark westerly into the Hudson river a distance of 400 feet. On the Hudson river side of the island the city was therefore the owner of the lands between high-water mark and low-water mark and for a distance into the river of 400 feet beyond low-water mark. This was the situation when, under the act of 1807 (Laws 1807, p. 125, c. 115), the street commissioners' map of 1811 was filed, laying out Forty-Second and Forty-Third streets from high-water mark on the East river to high-water mark on the Hudson (or North) river. The next chapter in historical progression is the act of the Legislature of 1837 (page 166, c. 182) entitled "An act to establish a permanent exterior street or avenue in the city of New

York, along the easterly shore of the North or Hudson's river, and for other purposes." Section 1 of that act approved of the map made by George B. Smith in 1837 pursuant to a resolution of the board of aldermen, upon which Thirteenth avenue was laid out as the permanent exterior line along the easterly shore of the Hudson river between Hammond (West Eleventh) street and 135th street. Section 2 provided that the streets southerly of and including 135th street, as laid out under the act of 1807, "shall be continued and extended westerly along the present lines thereof, from their present terminations, on the said map or plan respectively to the said Thirteenth avenue." Section 3 granted to the city the lands under the waters of the Hudson river between Hammond (Eleventh) street on the south and 135th street on the north, and between the westerly boundary of the 400-foot strip, above referred to, on the east, and the westerly boundary of Thirteenth avenue on the west. Section 4 gave to the owners of adjoining uplands certain pre-emptive rights in the lands under water. In 1837 the city was therefore the owner of the lands extending from high-water mark to Thirteenth avenue, subject to the legislative command that the streets enumerated in the statute, among which were Forty-Second and Forty-Third streets, "shall be continued and extended westerly along the present lines thereof from their present terminations * * * to the said Thirteenth avenue." Pursuant to the plans outlined in the act of 1837, the city in 1837 and 1838 acquired the uplands necessary to open Forty-Third street from high water at the East river to high water at the Hudson river. In 1844 an ordinance was passed providing for the creation of a sinking fund for the redemption of the city debt, and regulating the powers of the commissioners of the sinking fund. It authorized the sale by the commissioners of such corporate lands only as were not reserved for the public use (section 17), and directed that all grants thereof should contain the usual covenants in relation to streets and avenues passing through them, and for the building and maintenance of bulkheads and wharves, and the collection of wharfage, etc. This ordinance was confirmed by the Legislature in the enactment of chapter 225, p. 247, Laws 1845. In 1848, 1849, and 1850 Caleb F. Lindsley became the owner of the uplands east of high-water mark on the Hudson river between Forty-Second and Forty-Third streets.

The foregoing chronological recital of events now brings us to the deeds upon the construction and effect of which the rights of the parties directly depend. In 1850 the city of New York, by two separate grants, conveyed to Lindsley the lands under water between Forty-Second and Forty-Third streets, subject to the covenants expressed in the deeds. The city reserved out of the premises granted so much thereof as formed parts

of Twelfth and Thirteenth avenues and Forty-Third street. The lines and boundaries of the lands granted were referred to as particularly described and designated on a map which was attached to, and made a part of, the deeds. This map shows the avenues and streets mentioned in the deeds as laid out under the plan of 1807 as amended in 1837. The grantee covenanted, upon request or direction of the grantor, to construct bulkheads and streets, to make pavements and sidewalks, and to keep them in repair for the use of the general public. The grantee further covenanted that said streets and avenues should forever remain public streets for the use of the public, the same as other streets in the city. The grants of 1850 to Lindsley were followed by another grant to him in November, 1852, of the pier in controversy. This last grant was made pursuant to a resolution of the board of aldermen and the commissioners of the sinking fund, to the effect that the pier at the foot of Forty-Third street, with the extent of the present width of the street, be sold to Lindsley for the consideration of \$8,000, and the description in the deed was as follows: "Beginning at the point formed by the intersection of the northerly side of 43rd street with the easterly line or side of 12th avenue; running thence southerly along the easterly side of 12th avenue to the northerly side of said pier; thence westerly 211 feet three inches; thence southerly 40 feet five inches; thence easterly 212 feet two inches, to the easterly side of the 12th avenue, and thence southerly to a point where the southerly side of 43rd street intersects the said 12th avenue. Together with the extent of the present width of the street with the right of wharfage thereon, and together with all and singular the tenements, hereditaments," etc., subject, however, to the right of the city to order the pier extended into the river at the expense of Lindsley, or to extend the pier at the city's expense, or to grant the right to do so to other parties if Lindsley should fail to make such extension when directed so to do, "in which case the right to wharfage," etc., "at the portion of the pier extended shall belong to the parties at whose expense the extension shall be made." The grants above referred to were followed by the creation of the department of docks in 1870 with authority to adopt a system of water-front improvements, and in 1871 that department adopted a plan which was thereafter approved and adopted by the commissioners of the sinking fund. Under this plan a new bulkhead or exterior line was established considerably east of Thirteenth avenue, and 150 feet west of the westerly side of Twelfth avenue. In 1873 the city granted to the plaintiff, which by various mesne conveyances had acquired Lindsley's title to the pier in 43d street, a permit to extend and widen the pier. Under this permit the plaintiff agreed to pay an annual rental of \$100 for the land occupied by

the extension, and to waive all claims for damages in case the city should take the land covered by the extension for permanent water-front improvement. Pursuant to the plan adopted by the city authorities, the pier was in 1873 widened and extended outward about 300 feet beyond the westerly end of the old pier. In December, 1890, the department of docks adopted a resolution directing the defendant, the Forty-Second Street Railroad Company, which by various mesne conveyances had acquired title to the land below high-water mark, next south of the pier, to construct a bulkhead or sea wall between the middle line of Forty-Third street and the middle line of Forty-Second street on the North (or Hudson) river, and to do the necessary filling in, according to the plan adopted by the city authorities in 1871. Thereupon, in 1891, this action was commenced. This event was followed by a number of others of historical interest, but of no important bearing upon the disposition which we think must be made of this case. We proceed at once, therefore, to consider the effect of the conveyance under which the plaintiff claims title, and this necessitates an occasional reference to some of the proceedings above enumerated.

There are several fundamental facts which must be kept in view in the effort to adjust the rights of the parties to this litigation. First. The title of the city of New York in the tideway and the submerged lands of the Hudson river granted under the Dongan and Montgomerie charters and the acts of the Legislatures of 1807, 1826, and 1837 was not absolute and unqualified, but was and is held subject to the right of the public to the use of the river as a water highway. *Sage v. Mayor, etc., of N. Y.*, 154 N. Y. 70, 47 N. E. 1096, 38 L. R. A. 606, 61 Am. St. Rep. 592; *Matter of City of New York*, 168 N. Y. 139, 61 N. E. 158, 56 L. R. A. 500. Second. The title of the city of New York in and to the lands within its public streets is held in trust for the public use. *Story v. N. Y. El. R. Co.*, 90 N. Y. 122, 43 Am. Rep. 146; *Kane v. N. Y. El. R. Co.*, 125 N. Y. 165, 26 N. E. 278. Third. The general public has a right of passage over the places where land highways and navigable waters meet, and, when a wharf or bulkhead is built at the end of a land highway and into the adjacent waters, the highway is by operation of law extended by the length of the added structure. *People v. Lambier*, 5 Denio, 9, 47 Am. Dec. 273; *Matter of City of Brooklyn*, 73 N. Y. 179. Fourth. It was competent for the Legislature in granting additional submerged lands to the city of New York in 1837, to prescribe that such lands should be used for the purposes of an exterior street, to which other streets then intersecting the river should be extended.

In the light of these observations, let us consider again the situation as it was in 1850 and 1852, when the grants to Lindsley

were made. By the act of 1837 the Legislature had directed that Forty-Third street "shall be" extended to Thirteenth avenue. The title to the lands within the lines of Forty-Third street and below high-water mark being then in the city of New York, this legislative command was in effect an immediate application of such lands to the purpose for which the grant of 1837 was made. The almost immediate institution of condemnation proceedings to acquire the uplands necessary to actually open Forty-Third street to high-water mark was a distinct recognition of the city's duty in the premises, and when those proceedings were completed in 1838 they carried with them the public right of access to the river, either at high-water mark, or at the end of the pier, if it was then in existence. If the pier was not then in existence, the same result was, of course, accomplished when it was built. *People v. Lambier and Matter of City of Brooklyn, supra*. The deeds of 1850 were taken by Lindsley under covenants which expressly provided for the continuance of the streets and avenues laid out on the Smith map of 1837, and under constructive knowledge of the limitations which the ordinance of 1844, as confirmed by the act of 1845, had placed upon the powers and duties of the commissioners of the sinking fund. What, then, was the effect of the deed of 1852? The grantee therein named was the same as in the deeds of 1850. He had actual knowledge of the covenants expressed in those deeds, and was chargeable with constructive notice of the public character of the property described in the deed of 1852, the public trusts upon which it was held by the city, and the limitations upon the powers of municipal officers in respect of such property. *Donovan v. Mayor, etc., of N. Y.*, 33 N. Y. 291; *Lyddy v. Long Island City*, 104 N. Y. 219, 10 N. E. 155. In addition to this, the description in the grant did not inclose the interior or shore end of the pier. The city expressly reserved the right to order the pier extended by the grantee, or, in case of his failure to comply with such order, to make the extension itself, or through others to whom it might grant the right; and, in the latter event the rights of wharfage, etc., were to belong to those who made the extension. These things are not only inconsistent with the idea that the grant of 1852 conveyed an absolute fee, but they speak with most persuasive force of the real purpose and effect of the grant, which was to convey to the grantee the right to maintain a pier, and to collect wharfage, etc., at the foot of Forty-Third street, in the Hudson river, wherever that point should be located by lawful authority. It was the incorporeal hereditament attached to the fee, and not the fee itself, that was conveyed. Under this construction of the grant the rights of all concerned are recognized and preserved. The city holds the title which it never had the right to alienate. The plain-

tiff, as the grantee's successor in title, has the right to follow the lawful extension of Forty-Third street for the purpose of maintaining a pier and collecting its revenues. The Forty-Second Street Railroad Company, as successor to the title, rights, and obligations of the grantee under the deeds of 1850, can perform the covenants of these deeds, and reap the benefits which may accrue therefrom.

This construction of the grant of 1852 is, moreover, in harmony with our decision in the case of *Langdon v. Mayor, etc.*, of N. Y., 93 N. Y. 129, to the effect that a grant of the right of wharfage is property, the possession of which can only be resumed by the state or municipality by due process of law and upon proper compensation. Thus it will be seen that, whatever the rights of the plaintiff may be in matters of substance or procedure, it cannot maintain this action, for it is predicated upon an alleged title in fee that does not exist, and ignores the covenants which effectually bar the relief herein prayed for. Having arrived at this conclusion, it is neither necessary nor pertinent to suggest what other proceedings may or should be instituted by the plaintiff, for such other proceedings may be affected or controlled by some of the events which have transpired since 1873, but which have no legitimate bearing upon the case now before us.

The judgment of the court below should be affirmed, with costs.

PARKER, C. J., and GRAY, HAIGHT, MARTIN, VANN, and CULLEN, JJ., concur.

Judgment affirmed.

(176 N. Y. 495)

SUNDHEIMER v. CITY OF NEW YORK.

(Court of Appeals of New York. Nov. 24, 1903.)

DIRECTING VERDICT—MUNICIPAL CORPORATIONS—DEFECTIVE SEWERS.

1. Where the evidence presents a question of fact, it is reversible error to direct a verdict, if the right to a jury trial exists.

2. In an action against a city to recover damages sustained by a flood caused by the alleged negligence of defendant in the construction and maintenance of a sewer, where plaintiff proved that the sewers were stopped by foreign material, and that the manholes were not in working order just prior to the storm which occasioned the flooding, a question of fact was presented, which should have been submitted to the jury.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Henry Sundheimer against the city of New York. From a judgment of the Appellate Division (79 N. Y. Supp. 278) affirming a judgment for defendant, plaintiff appeals. Reversed.

Augustus Van Wyck and Jacob Friedman, for appellant. George L. Rives, Corp. Counsel (Theodore Connolly and Terence Farley, of counsel), for respondent.

BARTLETT, J. This action was brought to recover for injury to personal property caused by the flooding of the premises No. 716 East 169th street, between Washington and Park avenues, in the borough of the Bronx, city of New York, on the 24th day of August, 1901. The sole question presented by this appeal is whether the plaintiff offered any evidence that should have been submitted to the jury. The plaintiff, in attacking the judgment dismissing the complaint, is entitled to the most favorable inferences deducible from the evidence, and all disputed facts are to be treated as established in his favor. *Ladd v. Aetna Ins. Co.*, 147 N. Y. 478, 482, 42 N. E. 197; *Higgins v. Eagleton*, 155 N. Y. 466, 50 N. E. 287; *Ten Eyck v. Whitbeck*, 156 N. Y. 341, 349, 50 N. E. 963; *Bank of Monongahela Valley v. Weston*, 159 N. Y. 201, 208, 54 N. E. 40, 45 L. R. A. 547; *McDonald v. Metropolitan Street Railway Co.*, 167 N. Y. 66, 60 N. E. 282; *Place v. N. Y. C. & H. R. R. Co.*, 167 N. Y. 345, 347, 60 N. E. 632. In the latter case the court said: "The defendant, in its effort to sustain the judgment, is confronted by the rule so frequently laid down in this court that we have nothing to do with the weight of evidence; that, if a question of fact is fairly presented, it should have been submitted to the jury. In a very recent case (*McDonald v. Metropolitan Street Railway Co.*, 167 N. Y. 66 [60 N. E. 282]) this court reviewed the authorities and approved the rule laid down in *Colt v. Sixth Ave. R. R. Co.*, 49 N. Y. 671, as follows: 'It is not enough to justify a nonsuit that a court on a case-made might, in the exercise of its discretion, grant a new trial. It is only where there is no evidence in law, which, if believed, will sustain a verdict, that the court is called upon to nonsuit, and the evidence may be sufficient in law to sustain a verdict, although so greatly against the apparent weight of evidence as to justify the granting of a new trial.' In *Bagley v. Bowe*, 105 N. Y. 171, 179 [11 N. E. 386, 59 Am. Rep. 488], the rule is thus stated by Judge Andrews: 'The trial court or the General Term is authorized to set aside a verdict and direct the issue to be retried before another jury, if, in its judgment, the verdict is against the weight or preponderance of evidence; but in a case which of right is triable by a jury the court cannot take from that tribunal the ultimate decision of the fact, unless the fact is either contradicted or the contradiction is illusory, or where, to use a current word, the answering evidence is a "scintilla" merely.'" Stated in brief, the plaintiff sought to recover upon three principal grounds: (1) That the whole sewer system involved in this action, which is known as the "Mill Brook Watershed," containing from 1,500 to 2,000 acres, was inadequate both in original construction and also in maintenance; (2) that the catch-basins were insufficient in number and size; (3) that

the catch-basins and sewers were negligently allowed to remain in an improper condition, by reason of being clogged with earth, sand, and other foreign matter to such an extent that they were incapable of carrying off the water in heavy rain storms. The contents of the sewer in East 169th street flows westwardly into what is known as the "Webster avenue trunk sewer," which runs southerly for six miles, and empties into the Bronx Kills at the east mouth of the Harlem river. The Webster avenue trunk sewer terminates some two miles north of the Harlem river, at which point it discharges into the Brook avenue sewer. The trunk sewers were constructed in sections, and at different times. The Brook avenue was completed to 165th street in 1879; the Webster avenue to 184th street in 1885, and to 205th street, the northerly limit of the watershed, in 1899. In the spring or summer of 1900 the Williamsbridge sewer system, covering several hundred acres, and not being a part of the Mill Brook watershed, was connected with the Webster avenue trunk sewer. The Webster and Brook avenue sewers aggregated some six miles in length, and, with the lateral sewers of the watershed, represented a sewer system of about 178 miles. It appears that on the 24th day of August, 1901, it commenced raining at midday and at 6 p. m. there had been a rainfall of 2.47 inches. Between 1 and 2 o'clock there fell an inch and eight-hundredths. Another rainstorm is involved in this action, which occurred on the 5th day of July, 1901. It commenced raining at 1:45 p. m., and at 5 p. m. 2.94 inches of water fell. It continued to rain moderately until 10:30 p. m., during which time .13 of an inch more fell. It is a conceded fact that the portion of East 169th street, in which the flooded premises are located, is much lower than the surrounding territory. There is a very considerable decline in 169th street from the east, and also a descending grade from the west, making this locality unusually subject to inundation unless a proper sewer system is furnished and maintained.

The contention of the plaintiff is that the flooding on the day in question was not only due to accumulated surface water that the catch-basins, by reason of previous clogging, failed to conduct into the sewer, but also to the backing up of the sewer through sinks and water-closets into the house. The defense interposed by the city in its answer reads as follows: "That, if any damage arose to the plaintiff, it was occasioned in consequence of a storm of unusual severity, in which a very large and unusual quantity of rain fell, and other conditions intervened, arising from those circumstances which the defendant had no reason to anticipate and was helpless to guard against." According to the proofs introduced by the city, it was insisted that the flooding of the premises in question was due wholly to the inability of

the catch-basins, even if in perfect working order, to carry off the constantly accumulating surface water during a sudden storm, and that the question of the sufficiency of the sewers was in no way involved. The city also introduced evidence bearing upon the original construction of the sewer system in the Mill Brook watershed.

A careful perusal of the record satisfies us that the plaintiff's evidence was sufficient to carry the case to the jury. There was evidence as to previous overflows in this locality, and numerous complaints served on the proper city authorities. The earliest of these was in 1896. Several witnesses testified to the fact that at the time of floodings waters set back through the closets and sinks in the houses, as well as flowed over the curb from the street; that the covers of manholes in Webster avenue and 169th street were blown into the air from two to four feet, and a large stream of water followed. The plaintiff also proved by a civil engineer that the forcing off of the manhole covers was evidence of stoppage in one or more sewers by foreign material and a backing up of the water therein. The plaintiff also introduced evidence as to the condition of the catch-basins just prior to this storm, tending to show that they were not in working order; also other evidence not necessary to examine in detail. We express no opinion as to the merits of this controversy, or the weight of the evidence, desiring that the new trial shall proceed under all the issues without prejudice to the rights of either party. It is clear that, under the rule of law already adverted to, the learned trial judge was in error when he refused to submit this case to the jury.

The judgments of the Trial Term and the Appellate Division should be reversed, and a new trial granted, with costs to the plaintiff in all the courts to abide the event.

HAIGHT, J. I concur for reversal upon the ground that the evidence presented a question of fact for the determination of the jury, as to whether the defendant was guilty of negligence in failing to exercise reasonable care to keep the sewer and catch-basins free from obstruction.

PARKER, C. J., and O'BRIEN, VANN, CULLEN, and WERNER, JJ., concur.

Judgment reversed, etc.

(176 N. Y. 513)

PEOPLE ex rel. LESTER v. ENO et al.,
Town Board.

(Court of Appeals of New York. Nov. 24,
1903.)

CERTIORARI TO TOWN BOARD—RETURNS.

1. Where a writ of certiorari is issued to review the determination of a town board in disallowing a claim presented thereto, where the only question in dispute was the employment of relator to render services as physician, and the

return made by a majority of the board denied the employment, such return is conclusive on the Appellate Division, and a separate return by a minority of the board cannot be considered.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Certiorari by the people, on the relation of Garra K. Lester, against Joseph H. Eno and others, constituting the town board of Hamburg. From an order of the Appellate Division (82 N. Y. Supp. 520) sustaining a writ reviewing the proceedings of defendants in disallowing a portion of a claim of relator against the town, and directing an audit of such claim in full, defendants appeal. Reversed.

In August, 1902, the relator, a practicing physician of the village of Blasdell, town of Hamburg, Erie county, presented to the town board of that town a claim for services performed by him in caring for certain persons afflicted with the disease of smallpox. The claim was for services running from April 29, 1902, to and including May 29, 1902, and amounting to \$318.95. The town board deducted from the claim as presented the sum of \$110, and audited the same at \$208.95. That part of the claim which was disallowed represented the first 11 days of relator's services, at \$10 a day, ranging from April 29 to May 9, 1902, during which time, it was claimed, the relator had not been employed by the town, and that therefore the town was not liable. The relator thereupon sued out a writ of certiorari to review the determination of the town board in respect to the part of the claim which had been disallowed. The Appellate Division annulled the determination of the town board, and remitted the matter to that body, with directions to audit the relator's claim as presented in his account.

The relator's petition for the writ sets forth, in substance, that on or about the 29th of April, 1902, he discovered that two persons residing in the town of Hamburg were afflicted with smallpox, and that on that day he reported the matter to the health physician of the town, who requested him to remain in attendance upon such persons until he could call a meeting of the health board to take action in the matter; that a meeting of that board was called for and held on the following day, April 30th; that at this meeting the health board authorized the relator to take care of such persons and all other persons in the town who should contract the disease, and promised to pay him the reasonable value of his services therein; that the relator continued in attendance upon these persons and other persons stricken with the disease, and performed the necessary vaccination, fumigation, and quarantining; that, the relator's compensation not having been fixed on May 7th, he then wrote a letter to the health board, stating that his services were worth \$10 a day, and unless that

amount was agreed to be paid him he would be unable to continue his services, and asked the board to inform him at once whether they desired to retain his services; that on May 9th the town board duly passed a resolution employing the relator to take charge of the persons suffering from smallpox in the town, and fixing his compensation at \$10 per day.

Attached to the relator's petition are extracts from the minutes of the health board and the town board referring to the matter of caring for the smallpox patients of the town, and the employment of the relator in that behalf. The minutes of the health board disclose: That Dr. Bourne, the health physician, reported that he was called by the relator to see two smallpox patients on April 30, 1902, and that a quarantine should be established over the houses occupied by these persons. A resolution was thereupon adopted directing the removal of the two persons to the pesthouse, and the establishment of a quarantine upon the houses occupied by them. That on May 3, 1902, the health board held another meeting at which it was decided to pay to the health department of the city of Buffalo the sum of \$15 per week for each person sent to the Buffalo pesthouse from the town of Hamburg under the order of B. S. Bourne, the health officer of that town. That on the 9th of May, 1902, the health board again met, and adopted a resolution which, after rectifying the establishment of a provisional pesthouse in the town, provided for the employment of the relator in the following language: "Resolved, that we employ Garra K. Lester as physician to care for all patients sent to said pesthouse by the health physician of said town, and also to attend all persons quarantined in or near Blasdell, N. Y., until such quarantine shall be raised by the health physician. The said Garra K. Lester shall receive the sum of ten dollars per day for such services and for such time as the health physician shall deem proper. Said Garra K. Lester to furnish all medicines and ointments required by such patients." The minutes of the meeting of the town board on May 9th disclose that the relator's communication of May 7th to the health board was read, and an adjournment taken until 3 o'clock in the afternoon of that day. At the adjourned meeting there was some talk as to the employment of a physician, and, the members of the board not being able to agree upon the matter, a recess was taken until 8 o'clock. At this adjourned meeting the town board adopted a resolution identical in language with the resolution of the health board previously adopted on the same day.

The relator's petition is corroborated by the affidavits of Oliver C. Salisbury, a member of both the town and health boards, and Henry J. Danser, a resident of the town.

Five members of the town board, constituting a majority thereof, made a return to the

writ issued herein, denying specifically, on information and belief, all the allegations of the petition relating to the relator's employment by the health board previous to May 9, 1902. There is no denial as to the rendition of relator's services prior to that date, but the return puts in issue the relator's employment and his right to compensation previous to the adoption of the resolution of the town board engaging him to take care of the smallpox patients of the town.

The defendant Salisbury also made a separate return to the writ, in which he stated, in substance, that, at a meeting of the health board called to consider the matter of caring for the smallpox patients of the town and preventing the spread of the disease, the relator was authorized to care for such patients and others who might contract the disease, and that it was agreed on behalf of the town to compensate him therefor; that the health board authorized him (Salisbury) and the health physician to take all necessary steps to check the disease; and that the services of the relator were rendered with the sanction and under the direction of Salisbury and the health physician. The health physician, however, made an affidavit, which was attached to the majority return of the town board, in which he denied that he or Salisbury employed the relator, on behalf of the town, to care for smallpox patients, and further denied all the allegations of the petition and Salisbury's return relating to the employment of the relator prior to May 9th.

The court, upon motion, granted leave to the defendants to file a supplemental return controverting the allegations of the separate return made by Salisbury, and also permitted the filing of the affidavit of the health physician attached to the original return.

Charles Diebold, Jr., for appellants. Levant D. Lester, for respondent.

WERNER, J. (after stating the facts). In reversing the action of the town board disallowing the relator's claim for services rendered prior to May 9, 1902, the learned Appellate Division evidently failed to give effect to the rule that the denials and allegations of a return to a writ of certiorari must be taken as true, so far as they put in issue the material allegations of the petition for the writ. This is clearly shown by the statement in the opinion that "while the return of a majority of the town board to the relator's petition, in form, denies many of the allegations thereof, we are impressed with the idea that such denial is merely formal, and designed mainly for the purpose of raising an issue."

The Code of Civil Procedure (section 2138) provides that proceedings upon certiorari "must be heard upon the writ and return and the papers upon which the writ was granted," and this court has held that this "does not mean that the court is at liberty

to look beyond the return, and consider the facts stated in the petition and accompanying papers, unless the return is an admission of those facts, or the equivalent of an admission." *People ex rel. Miller v. Wurster*, 149 N. Y. 549, 44 N. E. 298. The return must be taken as conclusive, and acted on as true. If false in fact, the remedy is in an action for false return; if insufficient in form, by compelling a further and more specific return. *People ex rel. Sims v. Bd. Fire Com'rs*, 73 N. Y. 437. From this brief statement of the law relating to certiorari proceedings, it is apparent that, if the denials of the return put in issue the material allegations of the papers upon which the writ was granted, the court below had no power to look beyond the return for the supposed equities of the case.

The foregoing recital of the proceedings herein discloses that the only matter in issue is the employment of the relator by the town of Hamburg to render services in the case of smallpox patients in that town during the period between the 29th of April and the 9th of May, 1902. The return made by a majority of the town board specifically denies such employment, and distinctly traverses every allegation of the relator's petition in that behalf. This was conclusive upon the Appellate Division, and the writ should have been dismissed.

Upon the argument before us, counsel for the relator contended that as the return of the town board was made by only a majority of its members, and not by all of them, the Appellate Division had the right to consider the separate return of Salisbury, one of the members of the town board, which tended to corroborate the allegations of the relator's petition. We think this contention is not well founded. There can be only one return to a writ of certiorari, unless a second return is directed or permitted by the court because the first one was defective or insufficient in form. If the original return is false in fact, the remedy, as we have seen, is an action for a false return. When a writ of certiorari is issued to review the determination of a board or body composed of two or more persons, the return to the writ is to be made in the name of the board or body, and may be executed by a majority of the members thereof. *People ex rel. Gambling v. Cholwell*, 6 Abb. Prac. 151; *Plymouth v. County Com'rs*, 16 Gray, 341; *People v. Webb* (Sup.) 21 N. Y. Supp. 298. The provisions of section 2134, Code Civ. Proc., directing that "each person upon whom a writ of certiorari is served * * * must make a return," etc., is not in conflict with the view that the return of a body or board may be made by a majority of its members, because the noun "person" is clearly used to denote any person or legal entity to whom a writ is directed. The return of the majority of the members of the town board was therefore the only return which the court be-

low had the right to consider, and the separate return made by Salisbury, one of its members, should have been disregarded.

For these reasons the order of the Appellate Division must be reversed, and the writ herein dismissed, with costs.

PARKER, C. J., and O'BRIEN, BARTLETT, HAIGHT, VANN, and CULLEN, JJ., concur.

Order reversed, etc.

(176 N. Y. 486)

IN RE DELANO'S ESTATE.

STATE COMPTROLLER v. CAREY.

(Court of Appeals of New York. Nov. 24, 1903.)

CONSTITUTIONAL LAW—TRANSFER TAX—APPOINTMENT UNDER WILL.

1. Laws 1896, p. 868, c. 908, § 220, amended by Laws 1897, p. 150, c. 284, imposes a tax on the transfer of any property by will or intestate law, and also whenever any person shall exercise a power of appointment, which appointment, when made, shall be deemed a transfer taxable under the act. *Held* not a violation of the state or federal Constitution.

2. The fact that there was no statute imposing a succession tax when a power of appointment was created by will does not affect the liability of the estate to a transfer tax on the exercise of the power of appointment after the passage of an act imposing a charge or tax on the exercise of such appointment.

O'Brien and Werner, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, First Department.

In the matter of the appraisal under the transfer tax act of the estate of Laura A. Delano. From an order of the Appellate Division (81 N. Y. Supp. 762) which reversed an order of the surrogate's court denying a motion to dismiss a transfer tax proceeding as to certain property appointed to Arthur A. Carey, the Comptroller of the state of New York appeals. Reversed.

George M. Judd and Edward H. Fallows, for appellant. Lucius H. Beers, for respondent.

VANN, J. This appeal presents the question whether the Legislature is prohibited by the Constitution, state or federal, from passing an act to impose a transfer tax upon the exercise by a last will and testament of a power of appointment derived from a deed executed before the passage of any statute imposing a tax upon the right of succession to the property of a decedent. The facts out of which this question arose are as follows: On the 30th of September, 1848, William B. Astor owned a house and lot on Lafayette Place, in the city of New York, and on that day he conveyed the same to his daughter Mrs. Laura Delano for life, and upon her death without issue to her brothers and her sister Alida, or their issue, as they might then survive, per stirpes. By the same deed

he conferred upon Mrs. Delano a power of appointment, to be exercised, in her discretion, by an instrument, "in its nature testamentary," in such a manner as "to give the said land and premises, or any share or part thereof, to and amongst her said * * * brothers and sister Alida, or their issue, in such manner and proportions as she may appoint." On the 6th of September, 1849, said William B. Astor transferred certificates of the public debt of the state of Ohio, amounting to \$50,000, to James Gallatin and another, in trust to receive the income and apply it to the use of his daughter Laura during her life, and upon her death without issue to transfer "the capital of the said stock * * * to her surviving brothers and sister Alida," or their issue then surviving. This gift was also subject to a power of appointment created by the trust deed, whereby the said Laura was authorized "by any instrument duly executed as a will of personal estate to dispose of said capital into and amongst her * * * brothers, sister and their issue in such shares and proportions as she may think fit and upon such limitations, by way of trust or otherwise, as in her discretion may be lawfully devised." William B. Astor died on the 24th of November, 1875, about 26 years after the date of the last deed, and neither of said instruments was made by him in contemplation of death. Mrs. Delano, his daughter, died June 15, 1902, without issue, leaving a last will and testament, which has been duly admitted to probate, whereby she exercised the power of appointment contained in said deeds in favor of Arthur Astor Carey, her nephew. A proceeding was commenced before the proper surrogate to make the usual appraisal for the purpose of assessing a transfer tax upon the property transferred and appointed by the last will and testament of Mrs. Delano, and Mr. Carey was notified to appear. He appeared only for the purpose of objecting to the jurisdiction of the surrogate, from whom he procured an order requiring the executors of Mrs. Delano and the Comptroller of the state to show cause why the proceeding should not be dismissed as to him for the want of jurisdiction. The surrogate denied the motion, but upon appeal to the Appellate Division his order was reversed, and the proceeding was dismissed as to Mr. Carey. The Comptroller appealed to this court.

Article 10 of the tax law relates to taxable transfers, and embraces sections 220 to 242, inclusive (Laws 1896, pp. 868-881, c. 908). Section 220, as amended in 1897, imposes a tax upon the transfer of any property, real or personal, not only by will or intestate law, but also "whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this act, such appointment when made shall be deemed a transfer taxable under the provisions of this act in the same

manner as though the property to which such appointment relates belonged absolutely to the donee of such power, and had been bequeathed or devised by such donee by will. * * * Laws 1897, p. 150, c. 284, § 220, subd. 5. The learned Appellate Division held that the statute, as amended, applied to the property in question, but that the appointee took under the deeds, and not under the will, and the attempt of the act to impose a tax upon the property under the guise of a tax upon succession was retroactive and unconstitutional.

The statute, as we read it, does not attempt to impose a tax upon property, but upon the exercise of a power of appointment. The power in this case was exercised by will, in such a way that the appointee became entitled to all the property, instead of an aliquot part. While the property came to him by deed from his grandfather, only a part of it could have reached him, but for the will of his aunt. His title to the most of it depended on the will, as well as upon the deed. He is compelled to resort to the will in order to establish his right, for the deed alone will not suffice. The privilege of making a will is not a natural or inherent right, but one which the state can grant or withhold in its discretion. If granted, it may be upon such conditions and with such limitations as the Legislature sees fit to create. The payment of a sum in gross, or of an amount measured by the value of the property affected, may be exacted, or the right may be limited to one or more kinds of property, and withdrawn as to all others. The Legislature could provide that no power of appointment should be exercised by will, or that it should be exercised only upon the payment of a gross or ratable sum for the privilege. It could exact this condition independent of the date or origin of the power. All this necessarily flows from the absolute control by the Legislature of the right to make a will. *Matter of Sherman*, 153 N. Y. 1, 4, 46 N. E. 1032; *Matter of Dows*, 167 N. Y. 227, 231, 60 N. E. 439, 52 L. R. A. 433, 88 Am. St. Rep. 508; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 18 Sup. Ct. 594, 42 L. Ed. 1037; *United States v. Perkins*, 163 U. S. 625, 628, 16 Sup. Ct. 1073, 41 L. Ed. 287; *Mager v. Grima*, 8 How. 490, 493, 12 L. Ed. 1168.

We do not regard the question presented as open in this court, for we have recently passed upon it in two cases, each of which arose under the statute as amended in 1897. In the earlier case a testator, who died in 1885, created a trust fund, and gave the income thereof to his son during life, but directed that upon his death the principal should be paid to his issue in such shares or proportions as he should by will appoint, with a gift directly to such issue if the power of appointment was not exercised. The son died in 1899, leaving a will by which he exercised the power. We held, adopting

the opinion of the court below, that, although the ultimate right of succession to the fund was not taxable under the statute in force when the father died, still the shares of the appointees under the son's will were subject to a transfer tax under the act of 1897. *Matter of Vanderbilt*, 50 App. Div. 246, 63 N. Y. Supp. 1079; *Id.*, 163 N. Y. 597, 57 N. E. 1127. In the second case the testator died in 1880, after devising certain real property in trust to pay the income to his son during life, and upon his death said realty was to vest absolutely and at once in such of his children and the issue of his deceased children as he should by will appoint. If, however, the son should die intestate, the realty was to vest absolutely and at once in his children then living, and the issue of his deceased children. The son exercised the power by his last will, and died in 1899. We held that the property was subject to the tax imposed by the act of 1897; that such tax was on the right of succession, and not on the property; that, whatever may be the technical source of title of a grantee under a power of appointment, in reality and substance it is the execution of the power that gives to the grantee the property passing under it; and that, when the father devised the property to the appointees under the will of his son, he necessarily subjected it to the charge that the state might impose on the privilege accorded to the son of making a will. *Matter of Dows*, 167 N. Y. 227, 60 N. E. 439, 52 L. R. A. 433, 88 Am. St. Rep. 508, affirmed, sub nom. *Orr v. Gilman*, 183 U. S. 278, 22 Sup. Ct. 213, 46 L. Ed. 196. The Supreme Court of the United States reviewed our decision, and, after due consideration of the statute in question, was unable to see that, as construed by us, it infringed any provision of the federal Constitution.

The learned judges below did not consider the *Dows* Case in their opinion, but they attempted to distinguish the *Vanderbilt* Case from the one in hand upon the ground that the power of appointment was created by will, and that the will was made after the enactment of the collateral inheritance tax law. The latter distinction did not exist in the *Dows* Case, where the power was created before any act was passed in this state providing for the imposition of a succession or transfer tax. We think neither distinction is well founded. As the tax is imposed upon the exercise of the power, it is unimportant how the power was created. The existence of the power is the important fact, for what may be done under it is not affected by its origin. If created by deed, its efficiency is the same as if it had been created in the same form by will. No more and no less could be done by virtue of it in the one case than in the other. Its effective agency to produce the result intended is neither strengthened nor weakened by the nature of the instrument used by the donor of the power to create it. The power, however

or whenever created, authorized the donee, by her will, to divest certain defeasible estates, and to vest them absolutely in one person. If this authority had been conferred by will, instead of by deed, the right to act would have been precisely the same, and the power would have neither gained nor lost in force. The statute applies to all powers alike, without distinction on account of the method of creation or the date of creation, and provides that the exercise of the power shall be deemed a taxable transfer of the property affected, the same as if it had belonged absolutely to the donee of the power, and had been bequeathed or devised by such donee. As we said through Judge Cullen in the Dows Case: "Whatever be the technical source of title of a grantee under a power of appointment, it cannot be denied that in reality and substance it is the execution of the power that gives to the grantee the property passing under it." This accords with the statutory definition of a power as applied to real estate, for it includes authority to create or revoke an estate therein. Real Property Law, § 111 (Laws 1896, p. 577, c. 547). Such was the effect of the exercise of the power under consideration, for it both revoked and created estates in the real property and interests in the personal property. No tax is laid on the power, or on the property, or on the original disposition by deed, but simply upon the exercise of the power by will, as an effective transfer for the purposes of the act. If the power had been exercised by deed, a different question would have arisen, but it was exercised by will, and owing to the full and complete control by the Legislature of the making, the form, and the substance of wills, it can impose a charge or tax for doing anything by will.

It is quite immaterial that there was no statute imposing a succession tax of any kind in force when the original disposition of the property was made and the power was created. That transfer is not taxed, and the statute makes no effort to reach it. It is the practical transfer through the exercise of the power by will that is taxed, and nothing else. The right of the Legislature to impose a tax on the privilege of exercising a power by will is not affected by the fact that no such tax was imposed when the power was created. When the creator of the power granted the property to the appointees of his daughter, as Judge Cullen said in the Dows Case, "he necessarily subjected it to the charge that the state might impose on the privilege accorded to the" daughter "of making a will. That charge is the same in character as if it had been laid on the inheritance of the estate by the" daughter herself; "that is, for the privilege of succeeding to property under a will." If the power had not been exercised, the question would have resembled that presented by the Pell Case, relied upon below, where we held that a statute was unconstitutional

which imposed a tax upon such remainders, already vested and nondefeasible, as should result in an absolute title after the passage of the act. Matter of Pell, 171 N. Y. 48, 63 N. E. 789, 57 L. R. A. 540, 89 Am. St. Rep. 791. In that case the transfer was completed without the aid of a will, and the effect was the same as a deed inter vivos. There was no foundation for a succession tax, which is a charge upon the right to make a will, or on the right to inherit without a will.

We think that the surrogate had jurisdiction, and that his order denying the motion to dismiss the proceedings as to the respondent was proper. It follows that the order of the Appellate Division should be reversed, and that of the surrogate affirmed, with costs.

PARKER, C. J., and BARTLETT, HAIGHT, and CULLEN, JJ., concur. O'BRIEN and WERNER, JJ., dissent.

Order reversed, etc.

(176 N. Y. 456)

DE GARMO v. PHELPS et al.

(Court of Appeals of New York. Nov. 24, 1903.)

CHAMPERTY—JUDICIAL SALES—ADVERSE POSSESSION—MORTGAGE.

1. 1 Rev. St. (1st Ed.) p. 739, pt. 2, c. 1, tit. 2, §§ 147, 148, and Real Property Law, Laws 1896, p. 603, c. 547, § 225, which provide that every grant of land shall be absolutely void if at the time of delivery such land shall be in actual possession of a person claiming under an adverse title, but that every person having a just title to lands of which there shall be an adverse possession may execute a mortgage thereon, do not apply to judicial sales, and a purchaser of land sold in foreclosure acquires a perfect title, though at the time the premises are in the actual possession of one claiming title thereto under a tax deed.

2. As judicial sales are not within the condemnation of the statute of champerty, a mortgage executed by the purchaser at such a sale on the same day he obtains a deed to secure a part of the purchase price is not void under the statute, since the deed and the mortgage constitute but one act, and the mortgagee must be regarded as much a purchaser at the judicial sale as the mortgagor.

Gray and Werner, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by E. May De Garmo against George W. Phelps and others. From a judgment of the Appellate Division (72 N. Y. Supp. 773) affirming a judgment for defendants, plaintiff appeals. Reversed.

Charles F. Tabor, for appellant. John F. Connor, for respondents.

CULLEN, J. The action is in ejectment for the recovery of a piece of land in the village of Nunda, county of Livingston. Under

¶ 1. See Champerty and Maintenance, vol. 9, Cent. Dig. § 107.

the findings of the trial court there is but a single question presented to us on this appeal. The plaintiff traced her title from one Robert Girven, concededly the owner and in possession of the premises, who, on April 25, 1889, mortgaged the premises to one James H. Carmichael. The mortgage was subsequently assigned to Annie E. Volger, and, default having been made in its payment, it was foreclosed by action. At the sale made under the judgment in said action the lands were sold and conveyed to Fred. M. Inglehart, who on the same day executed to said Volger a mortgage to secure \$1,000 of the purchase money. Mrs. Volger subsequently assigned her mortgage to the plaintiff, who, default having been made in its payment, brought an action to foreclose the same. Under the judgment in that action Mrs. De Garmo, the plaintiff therein, purchased the mortgaged lands. In October, 1892, intermediate the execution of the mortgage from Girven to Carmichael and the sale under the judgment for the foreclosure of said mortgage, the defendant entered into possession of the premises, claiming title under deed executed by the county treasurer of Livingston county for nonpayment of taxes, and has remained ever since in possession, claiming in hostility to the plaintiff and her predecessors in title. The trial court held that such adverse possession defeated the plaintiff's title under the provisions of the statute (1 Rev. St. [1st Ed.] p. 739, pt. 2, c. 1, tit. 2, §§ 147, 148; Real Property Law, Laws 1896, p. 603, c. 547, § 225), which provide that: "Every grant of lands shall be absolutely void, if at the time of the delivery thereof, such lands shall be in the actual possession of a person claiming under a title adverse to that of the grantor. But every person having a just title to lands, of which there shall be an adverse possession, may execute a mortgage on such lands; and such mortgage, if duly recorded, shall bind the lands from the time the possession thereof shall be recovered by the mortgagor or his representatives." That judicial sales do not fall within the condemnation of these statutory provisions has been settled law from a very early time in the history of this state. *Tuttle v. Jackson*, 6 Wend. 213, 21 Am. Dec. 306; *Hoyt v. Thompson*, 5 N. Y. 320; *Stevens v. Hauser*, 39 N. Y. 302; *Coleman v. Manhattan Beach Impr. Co.*, 94 N. Y. 229. Therefore neither of the deeds made in pursuance of the judgments of foreclosure and sale was void. The statute does not assume to deal with assignment of mortgages, and in the only case that I can find in which the question was presented a similar statute was held inapplicable to such transfers. *Converse v. Searls*, 10 Vt. 578. Inglehart, therefore, by his purchase at the sale in the first foreclosure suit, acquired a perfect title, and the only doubtful link in the plaintiff's chain of title is the mortgage which Inglehart gave back to the plaintiff in the foreclosure suit to secure part of the purchase money. I con-

cede that, though Inglehart's title was perfect, the statute rendered any voluntary conveyance by him, while the lands were in adverse possession by another party, void; and, while the statute authorized him to mortgage his lands, I assume that the effect of the provision that the mortgage shall bind the lands from the time the possession thereof is recovered by the mortgagor excludes such operation until possession is so recovered, which in this case never occurred. Hence, if the mortgage from Inglehart to Mrs. Volger, under the foreclosure of which the present plaintiff claims, had been given for any other purpose than to secure the purchase money, I am inclined to the view that the plaintiff's title would fail. But there is a marked distinction between a purchase-money mortgage and any other. In the case of such a mortgage dower does not attach as against the mortgage, nor do existing judgments or claims against the mortgagee obtain priority over it. This is the rule in this state by statute; but the statute is only declaratory of the rule of law existing before it was enacted (*Mills v. Van Voorhies*, 20 N. Y. 412), and the same rule obtains in states where there are no statutes on the subject (1 *Jones on Mortgages*, § 468). Now, the ground on which this rule rests is not the superior equity of the holder of a lien for the purchase money, but the theory that the conveyance and mortgage, whether the latter be to the grantor or to a third party, are but separate parts of a single entire contract. In *Holbrook v. Finney*, 4 Mass. 566, 3 Am. Dec. 243, a wife was held not entitled to dower in lands conveyed to her husband by his father and simultaneously mortgaged by the son to the father. It was there said: "In the case at bar the execution of the two deeds, they being of even date, was done at the same instant, and constitutes but one act." This dictum was quoted with approval by Chief Justice Spencer in *Stow v. Tift*, 15 Johns. 458, 8 Am. Dec. 266, saying: "Where a deed is given by the vendor of an estate, who takes back a mortgage to secure the purchase money at the same time that he executes the deed, the deed and the mortgage are to be considered as parts of the same contract, as taking effect at the same instant, and as constituting but one act." In *Clark v. Munroe*, 14 Mass. 351, the doctrine of *Holbrook v. Finney* was applied in favor of a third party who advanced a portion of the purchase money, to secure which he received a mortgage. "A deed and purchase-money mortgage, given at the same time, are to be construed together as forming one instrument or contract." *Rawson v. Lampman*, 5 N. Y. 456. In *Curtis v. Root*, 20 Ill. 53, Chief Judge Caton said: "The execution of the deed and of the mortgage being simultaneous acts, the title to the land does not for a single moment rest in the purchaser, but merely passes through his hands and vests in the mortgagee without stopping at all in the purchaser, and during

such instantaneous passage the judgment lien cannot attach to the title. This is the reason assigned by the books why the mortgage takes precedence of the judgment, rather than any supposed equity which the vendor might be supposed to have for the purchase money." In that case the mortgagee was not the grantor, but a third party. If the doctrine of these cases be sound, it seems to me that Mrs. Volger, to the extent of her mortgage interest, whether it be considered a lien or a conditional estate, was just as much a purchaser at the judicial sale had under the decree as was Inglehart, the mortgagor, and that she acquired her title from the court on such sale, not from Inglehart, but merely through Inglehart as a mere conduit. It was her moneys that went to satisfy the decree, and she was the plaintiff in the foreclosure suit; and, if necessary, it might be well held that the new mortgage was a mere extension pro tanto of the old mortgage under foreclosure. Her mortgage therefore did not fall within the statute.

The judgment appealed from should be reversed, and a new trial granted; costs to abide the event.

GRAY, J. (dissenting). I think that the judgment below is right, and that it should be affirmed by us. The effect of the unanimous affirmance is to establish conclusively upon this review the fact that prior to and at the time of Inglehart's purchase at the judicial sale the defendant Phelps was in actual possession of the land, and that he was claiming it under a title adverse to that of Inglehart, or of his predecessor in title. The validity of the county treasurer's deed, through which he claims, is not an issue to be tried. Whether a party, who claims by right of adverse possession, has a rightful title, is not an essential fact. That fact is not the issue in such an action, where the defense is that the plaintiff's title rests upon a champertous conveyance. The very object of the statute, which was founded on a common-law principle, was to prevent a party out of possession from transferring his right to litigate for the recovery of possession. *Sands v. Hughes*, 53 N. Y. 295, 297. Under the statute, an adverse possession of a single day, whether known or unknown to the grantor, had been held to avoid the conveyance. *Crary v. Goodman*, 22 N. Y. 170. Indeed, so strict was the application of the law that the purchaser of land in the possession of a third party only escaped a penalty imposed in the early legislation of this state upon establishing that he had no knowledge of the fact. *Teele v. Fonda*, 7 Johns. 251; *Preston v. Hunt*, 7 Wend. 53. If the inhibition of the statute applies to plaintiff's case, then it is only necessary that the defendant should have had color of title with an actual possession. The Revised Statutes in force at the time of Inglehart's transaction provided that "every grant of lands shall be absolute-

ly void, if, at the time of the delivery thereof, such lands shall be in the actual possession of a person claiming under a title adverse to that of the grantor," and that "every person having a just title to lands, of which there shall be an adverse possession, may execute a mortgage on such lands; and such mortgage, if duly recorded, shall bind the lands from the time the possession thereof shall be recovered by the mortgagor or his representatives." 1 Rev. St. (1st Ed.) p. 739, pt. 2, c. 1, tit. 2, §§ 147, 148. The present real property law preserves a similar provision. Laws 1896, p. 608, c. 547, § 225. The conveyance to Inglehart by the judicial officer upon his purchase at the judicial sale was not within the inhibition of the statute, because, being a judicial sale, the statute could have no application, and this was always so held. See 4 Kent's Com. 447; *Coke's Litt.* 214a; *Tuttle v. Jackson*, 6 Wend. 224, 21 Am. Dec. 306; *Truax v. Thorn*, 2 Barb. 156; *Stevens v. Hauser*, 39 N. Y. 302; *Coleman v. Manhattan Beach Impr. Co.*, 94 N. Y. 229.

While, therefore, the deed to Inglehart was not within the purview of the statute, the mortgage which he executed to a third person in order to procure a portion of the purchase money which he was to pay came clearly within the statutory inhibition, and that was the position taken by the respondent Phelps upon his motion to dismiss the complaint at the close of plaintiff's case. The mortgage by Inglehart was a grant of land, then in Phelps' actual possession, to secure the performance of the promise to pay a sum of money. A mortgage is a deed with a condition (*Canandarqua Academy v. McKechnie*, 90 N. Y. 618), and it is evident that the legislature thus regarded a mortgage; for in the statute it was made the subject of an exception, and allowed effect, but only upon the mortgagor's recovering the possession of the land. It makes no difference that this mortgage is regarded as a purchase-money mortgage, which, upon an equitable doctrine, is given a certain priority of lien. It was, nevertheless, a grant of land with a defeasance clause, made at a time when the land affected was in the actual possession of one who held adversely under color of title. The statute is imperative in its declaration as to the invalidity of such grants, and the exception in favor of mortgages only makes them binding upon the land when its possession is recovered by the mortgagor, or his representatives. That was Inglehart's position. Such was that of his mortgagee, and, of course, such is that of the plaintiff, who foreclosed the mortgage and purchased at the sale. If Inglehart had simply deeded the land purchased, no doubt could arise as to its being void; and may we hold that a mortgage given to a third person to procure a portion of the money payable upon the mortgagor's purchase of the premises is excepted? That the statute was not aimed at judicial sales is evident enough, for

It would only be a transaction between private persons that could involve the sale and purchase of a pretended title and a transfer of a right to sue for the recovery of land. It was not any judicial legislation by which purchasers at judicial sales were excepted from the operation of the statute. It was because the facts would not permit of it. But it is judicial legislation for the court to hold, in the face of the statutory provisions, that a purchase-money mortgage, made to a third person, was excepted. In my opinion, Inglehart's mortgagee obtained no title, nor interest in or to nor lien upon the land then held by Phelps in actual adverse possession, and consequently the foreclosure proceedings, through which this plaintiff became a purchaser thereof, and to which Phelps was a stranger, were without effect upon his interests.

PARKER, C. J., and O'BRIEN and MARTIN, JJ., concur with CULLEN, J. WERNER, J., concurs with GRAY, J. HAIGHT, J., not voting.

Judgment reversed, etc.

(176 N. Y. 500)

PEOPLE ex rel. DINSMORE v. VANDEWATER et al.

(Court of Appeals of New York. Nov. 24, 1903.)

HIGHWAYS—ALTERATION AND IMPROVEMENT—POWERS OF HIGHWAY COMMISSIONERS.

1. Under colonial laws and state statutes prior to the enactment of Laws 1896, p. 386, c. 423, the town board and commissioners of highways of Hyde Park, Dutchess county, had power to alter and improve the New York and Albany Post Road running through that town. *Held*, that such power was not taken away by the latter act, as there was nothing in its provisions limiting their jurisdiction over the highway, except in so far as it prohibited them from authorizing the laying of any railroad track on the highway, unless when it crossed the same, so that they have power to alter and improve a part of said road on petition of a taxpayer, within the premises of the petitioner, the improvement to be made by him and at his expense.

2. Under Colonial Laws 1703, p. 532, c. 131; Colonial Laws 1772, p. 324, c. 1536; Colonial Laws 1779, p. 127, c. 31; Laws 1797, p. 51, c. 43; and 2 Rev. Laws 1813, p. 270, c. 33—relating to the laying out and maintenance of the New York and Albany Post Road and other public highways established before 1813, commissioners of highways were empowered to alter highways that were deemed inconvenient, and this power was continued by the State Legislature in 1779, and by General Laws 1797 and 1813, and up to the present day, so that at the time of the passage of the county law (Laws 1892, p. 1765, c. 686, § 77), providing that the supervisors of any county may authorize commissioners of highways of any county to alter or discontinue any road or highway therein which shall have been laid out by the state, the commissioners of highways of towns had jurisdiction over existing colonial highways, with the power to make needed alterations, which power was not taken from them by the county law.

Bartlett, J., dissenting.

Appeal from Supreme Court, Appellate Term, Second Department.

Application by the people, on the relation of Clarence G. Dinsmore, for writ of certiorari to H. Fremont Vandewater and others. From an order of the Appellate Division (82 N. Y. Supp. 626, 627) annulling a determination of the town board and highway commissioners of the town of Hyde Park altering and closing a part of the New York and Albany Post Road in that town, respondents appeal. Reversed.

Harry C. Barker and Henry B. Anderson, for appellants. Egerton L. Winthrop, Jr., William Jay, and Flamen B. Candler, for respondent.

HAIGHT, J. These proceedings were instituted by a petition on behalf of the relator, a resident taxpayer of the town of Hyde Park, for a writ of certiorari to review the action of the town board and highway commissioners of that town in altering a part of the New York and Albany Post Road. On the 11th day of October, 1900, one Ogden Mills, a taxpayer of the town, presented an application to the commissioners of highways for an alteration in the New York and Albany Post Road for a distance of about 1,500 feet, running through his premises. It was represented that the proposed change would do away with a bad curve in the old road, avoid a hill, and eliminate the danger to horsemen owing to the close proximity of the old road to the railroad. The town board consented to the proposed change, and the highway commissioners made an order therefor in accordance with the application, providing that the land forming the bed of the old highway should, upon the completion of the proposed alteration, revert, and become the property of the petitioner. Thereupon the new highway was constructed in a substantial manner, trees set upon the sides, and the same was accepted by the commissioners of highways, and permit granted to the petitioner to close the old highway.

The learned Appellate Division appears to have reached the conclusion that the action of the local authorities in permitting the alteration was void and unauthorized, by reason of the provisions of chapter 423, p. 386, of the Laws of 1896. That act is entitled "An act to preserve forever the New York and Albany Post Road as a state public highway." The provisions are as follows:

"Section 1. The old established road along the valley of the Hudson river from the city of New York to the city of Albany, known as the Albany Post Road, shall be a public highway for the use of the traveling public forever.

"Sec. 2. The said highway shall be kept open and free to all travelers, and shall not be obstructed in any way by any obstacle to free travel.

"Sec. 3. No trustees of any village or corporation of any city upon its route, or board

of commissioners of highways of towns, or any other person or board whatever, shall have any power or authority to authorize or license the laying of any railroad track upon said highway, except to cross the same, and any such action shall be void and of no effect.

"Sec. 4. This act shall not apply to any portion of said road within the city of New York, nor shall it apply to the road of the president, directors and company of the Rensselaer and Columbia turnpike, nor to the villages of Sing Sing or Peekskill, in Westchester county."

In construing statutes we should have in mind the legislative intent and the purpose sought to be accomplished. It will be observed that there is nothing in the provisions of the statute that in any manner limits the jurisdiction or powers of local officers over the highway except in one particular. By its first and second sections it is provided that it "shall be a public highway for the use of the traveling public forever," and that it "shall be kept open and free to all travelers, and shall not be obstructed in any way." These provisions are but the repetition of the law as it exists with reference to all of the public highways of the state. They are all under the control of the Legislature, and are required to be kept open and free to the traveling public forever, unless they are discontinued in such manner as the Legislature directs. But by the provisions of section 3 of the act we find express limitations placed upon the board of commissioners of highways of towns or other local officers thereof prohibiting them from authorizing or licensing the laying of any railroad track upon the highway except to cross the same. Here we have, in clear, concise language, disclosed the purpose and evident intent of the Legislature. It was not to change the jurisdiction of officers over the care and management of the highway except to prohibit them from permitting the laying of railroad tracks therein, and this is emphasized by the provisions of section 4 of the act, wherein there is excepted from the operation of the statute (doubtless for the purpose of permitting the operation of existing or contemplated street railroads) that portion of the highway lying in the city of New York, in certain villages mentioned, and the Rensselaer and Columbia turnpike. With this exception the powers of the town board and of the commissioners of highways of the town of Hyde Park remain unimpaired, and therefore, if they had the power to alter and improve the road prior to the passage of this act, then such power still exists, and may be exercised by them.

It is now contended on the part of the respondent that the highway in question was a state road, and that the town authorities had no power to alter the same unless authorized by the board of supervisors of the county in accordance with the provisions of

section 77 of the county law (Laws 1892, p. 1765, c. 686). That statute provides as follows: "The board [referring to the board of supervisors] may authorize the commissioners of highways of any town in their county to alter or discontinue any road or highway therein, which shall have been laid out by the state under the same conditions that would govern their actions in relation to highways that have been laid out by local authorities." This is a substantial re-enactment of chapter 317, p. 381, of the Laws of 1882, which was evidently intended to take the place of chapter 83, p. 74, of the Laws of 1817, which is as follows: "Whereas, great inconvenience has arisen from the want of authority in the commissioners of highways of the several towns in the state to alter and amend such highways as are laid out by special acts of the Legislature, commonly called state roads; and in order to prevent application being made to the Legislature for every alteration in said roads as are supposed to be necessary—Therefore be it enacted by the people of the state of New York, represented in Senate and Assembly, that it shall be lawful for the commissioners of highways of any town in this state, through which a state road passes, on being applied to by twelve freeholders of such town and with the consent of the commissioners of highways of the adjoining towns through which said road passes, to regulate and alter such road, in the said town, if in their opinion the public good and convenience shall require the same: provided, however, that no such alteration shall alter the general route of the road: and, also, that the provisions of the act, entitled 'An act to regulate highways,' relative to the alteration and amendment of public roads, shall be held to extend to such alteration, as aforesaid, of any state road." The recitals preceding the enactment indicate very clearly the purpose sought to be accomplished by the legislation. Numerous special acts of the Legislature had been passed, after the organization of the state, laying out what were called "state roads." Many of these roads were located and constructed through the agency of state officers with state aid, and not by the officers of the locality through which the road was laid out. It was with reference to these highways that the inconvenience arose with reference to needed alterations, and the purpose of the act was to avoid application to the Legislature for leave to make every change deemed necessary by giving the power to make such alterations to the commissioners of highways of the towns upon application of 12 freeholders, etc. But it will be observed that there is nothing in this legislation, or that of chapter 317, p. 381, of the Laws of 1882, or of section 77 of the county law, that in any particular purports to limit or deprive commissioners of highways of any of the powers that they theretofore possessed with reference to the alter-

ing of highways. It is doubtless true that as to highways that have been laid out by special statutes the power of the commissioners of highways to change and alter the same is dependent upon the legislation to which we have referred, and that under the county law their power is now dependent upon the consent of the board of supervisors of the county; but these highways are limited to those authorized by the special acts of the Legislature, and do not include such highways as had before been given over to the care of the commissioners of highways of towns, with power on the part of the local officers thereof to make needed alterations. This brings us to a consideration of the history of the road in question and the legislation bearing thereon.

The New York and Albany Post Road was constructed under the provisions of chapter 131, p. 532, of the Colonial Laws of 1703. It was a general statute entitled "An act for the laying out, regulating, cleaning and preserving public common highways throughout this colony." It provides as follows: "For the better laying out, ascertaining, repairing and preserving the publick comon and general highways within this Colony. Be it enacted by the Govr. council and General Assembly of this Colony and by the Authority of the same. That there be laid out preserved and kept for ever in good and sufficient repair one publick comon & general highway to extend from the now scite of the City of New York thro' the City and County of New York and the county of West Chester of the breadth of four rod English measure at the least, to be continue and remain forever the publick comon general road and highway from the said City of New York to the adjacent Collony of Connecticut. * * * And one other publick comon general highway to extend from Kings Bridge in the county of West Chester thro' the same county of West Chester Dutchess county and the county of Albany of the breadth of four rod English measure at the least to be continue and remain for ever the publick comon general road and highway from King Bridge aforesaid to the ferry at Crawlew over against the City of Albany." It also contained provisions for the laying out of other roads connecting towns and villages to one another and to such convenient landing places as their situations will afford, "for the better and easier transportation of goods and the commodious passing of travelers as direct and convenient as the circumstances of place will admit of." Commissioners were appointed in the different localities to carry out the provisions of the act, including New York, Dutchess, and Westchester counties, thus laying the foundation upon which our highway laws have been constructed and perfected. Numerous amendments were made from time to time from which the growth of the law is disclosed, which may be interesting as history, but are not essential to be

here considered. As early as 1772 we find that in Dutchess county the freeholders and inhabitants of each precinct at their annual town meetings were required to elect three highway commissioners to regulate highways in their precinct. The provision of the law, as far as material, is as follows: "That the commissioners, or the major part of them, in their respective precincts for which they shall be chosen commissioners, are hereby empowered and authorized to regulate the roads already laid out, and if any of them shall appear inconvenient, and an alteration absolutely necessary, and the same be certified upon the oath by twelve principal freeholders of the said county, the commissioners may, provided they all judge it necessary, alter the same, and lay out such other public highways and roads as they, or the major part of them shall think most convenient." Colonial Laws 1772, p. 324, c. 1536. The next statute to which we call attention is chapter 31, p. 127, of the Laws of 1779, after the organization of the state government, entitled "An act for the better laying out, regulating and keeping in repair, all common public highways, and private roads, in the counties of Ulster, Orange, Dutchess, Charlotte and West Chester." This statute contains a similar provision to that found in the colonial laws already referred to. It gives to the commissioners of highways the power and authority "to regulate the roads already laid out, and if any of them shall appear inconvenient and an alteration necessary, * * * they may be required to alter the same in such manner as a majority of the commissioners in such town, manor, district or precinct shall judge meet and convenient." This act was followed by chapter 43, p. 51, of the Laws of 1797, a general act covering all of the state except the counties of New York, Suffolk, Queens, and Kings. In this act the commissioners of highways are given the power "to regulate the roads already laid out and to alter such as they or a majority of them shall conceive inconvenient." This statute, with some amendments, was continued in force until 1813, when it was superseded by the general highway act (chapter 33 of that year; 2 Rev. Laws 1813, p. 270), containing the same provisions; and this, with some amendments, was carried into the Revised Statutes, and is now incorporated into our highway law. It is thus apparent that under the colonial laws as early as 1772, especially in Dutchess county, where the alteration in question was made, commissioners of highways were empowered to alter highways that were deemed inconvenient, and that this power was continued by the State Legislature in 1779 and by general laws in 1797 and 1813, and that the same power has been continued until the present day. It therefore follows that at the time of the passage of the county law, or of chapter 317, p. 381, of the Laws of 1882, or even of chapter 83, p. 74,

of the Laws of 1817, the commissioners of highways of towns had been given jurisdiction over the existing colonial highways, with the power to make such needed alterations therein as should be deemed necessary, and that that power has not been taken from them by the county law.

The New York and Albany Post Road appears to have been authorized by colonial legislation 200 years ago. It was constructed and kept in repair by commissioners appointed in the localities, and for over 130 years in Dutchess county it has been under the jurisdiction and control of the local highway officers of that locality, who have had the power to make such alterations as a majority of them should conceive to be convenient for the public. These authorities, in making the alteration complained of, appear to have conformed to the requirements of the statute. The improvement is one that they had the power to make, and it does not appear to us that the relator is concerned with reference to the validity of the title of Mills to the bed of the old highway. We consequently do not deem it important to discuss that question at this time.

The order of the Appellate Division should be reversed, and the writ of certiorari dismissed, with costs.

BARTLETT, J. (dissenting). The single question is presented by this appeal whether the members of the town board and the highway commissioners of the town of Hyde Park, in the county of Dutchess, had jurisdiction to alter the route of the New York and Albany Post Road in that town. The post road was created by chapter 131, Colonial Laws 1703, and has remained a public highway ever since, a period of 200 years. The county law (section 77, c. 686, p. 1765, Laws 1892), contained in article 4, defining the duties of boards of supervisors relating to highways and bridges, which is a revision, without material change, of the Laws of 1882 (page 381, c. 317), provides that "the board of supervisors of any county may authorize and empower the highway commissioners of any town to alter, discontinue, widen, or narrow, any road or public highway which shall have been laid out by the state within its boundaries, under the same conditions as would govern their action in relation to public highways that have been laid out by local authorities." 1 Birdseye's Rev. St. (3d Ed.) p. 839. It is conceded that in the case before us no power was conferred upon the town board and commissioners of highways by the board of supervisors of Dutchess county, but it is argued that the section quoted does not include the post road, for the reason that it was not laid out by the state as now existing. The act of 1703, laying out the post road and other public highways, starts out with the declaration, "That there be laid out and kept forever," etc. We thus have the post road, a public highway, in

the colony of New York, and when the latter achieved its independence the former continued a state public highway under the jurisdiction of the state of New York, and is clearly within the provisions of section 77 of the county law as properly construed. It is doubtless true that since the existence of public state roads in the early days the colonial assembly did, from time to time, confer the power upon the local authorities of towns to alter, repair, and keep in proper condition that portion of a state road lying within the boundaries of a town. In 1817 (page 74, c. 83) the policy was changed, and the local authorities could only alter a state public highway in a particular town with the consent of the commissioners of highways of the adjoining towns through which it passed. It is manifest that the legislation of 1882 (page 381, c. 317), perpetuated in section 77 of the county law, was a clear expression of the legislative intention to change still further its policy, and to delegate to a certain extent its powers in relation to state roads to the board of supervisors in each county, thus placing under the control of the latter all alterations thereof. It follows that the town board and highway commissioners of the town of Hyde Park were without jurisdiction in the premises until authorized to act by the board of supervisors of Dutchess county.

An evidence of the supervising care of the Legislature over state public highways is found in chapter 423, p. 386, Laws 1896, entitled "An act to preserve forever the New York and Albany Post Road as a state public highway." The material portions of this act read as follows:

"Section 1. The old established road along the valley of the Hudson river from the city of New York to the city of Albany, known as the Albany Post Road, shall be a public highway for the use of the traveling public forever.

"Sec. 2. The said highway shall be kept open and free to all travelers, and shall not be obstructed in any way by any obstacle to free travel.

"Sec. 3. No trustees of any village or corporation of any city upon its route, or board of commissioners of highways of towns, or any other person or board whatever, shall have any power or authority to authorize or license the laying of any railroad track upon said highway, except to cross the same, and any such action shall be void and of no effect. * * *

It is argued that sections 1 and 2 are but a repetition of the law as it exists, and that the sole object of this act was to prevent the laying of any railroad track upon the post road. In my opinion, the act is very unfortunately worded, including the title, if its sole object was as suggested. The title should have been, "An act to prevent the laying of any railroad track upon the New York and Albany Post Road," and section 3 would have sufficed in carrying out this alleged sole ob-

ject of the act. The fact is that the title of the act is used with entire accuracy—"An act to preserve forever the New York and Albany Post Road as a state public highway." Section 1 makes the post road a state public highway if in law it had not theretofore existed as such. This act clearly brings the post road within section 77 of the county law, and renders the authorization of the board of supervisors necessary before the local authorities can alter the route of the same. I have already stated the reason why the post road has always been a state public highway since the Revolutionary War, but, if any legal doubt existed, it is set at rest by the act of 1896. Sections 2 and 3 of this act disclose the legislative intention to prevent all interference with the post road as a state public highway, except as the board of supervisors may act under the powers delegated to them under section 77 of the county law.

I vote for the affirmance of the order of the Appellate Division annulling the action of the town board and highway commissioners of the town of Hyde Park.

PARKER, C. J., and O'BRIEN, VANN, CULLEN, and WERNER, JJ., concur with HAIGHT, J. BARTLETT, J., reads dissenting opinion.

Order reversed, etc.

(176 N. Y. 475)

DESHONG v. CITY OF NEW YORK.

(Court of Appeals of New York. Nov. 24, 1903.)

MUNICIPAL CORPORATIONS—VAULT UNDER SIDEWALK—PRESUMPTION AS TO RIGHT—PAYMENT—DURESS—RECOVERY BACK.

1. The presumption that a vault under a sidewalk was constructed with the assent of the public authorities arises where the vault has existed for more than 20 years without objection, both as between the owner and a third person, and also as between the owner and the municipality, if there is no proof to overcome it.

2. An abutting owner obtained a permit to reconstruct a vault under a sidewalk in the city of New York on a payment to the municipal authorities, enforced by threats of arrest and by taking possession of his property. Held not so far voluntary as to prevent him from suing to recover the same if the authorities had no right to exact it.

3. Where an abutting owner has obtained a proper permit for the construction of a vault under a sidewalk, he has the right to repair the vault without an additional permit or further compensation, provided its continuance will not affect the use of the street by the public.

4. Where an abutting owner sues to recover a sum paid to the city for permission to repair his vault under a sidewalk, but fails to show that a requisite written permit for the construction of such vault was ever obtained, but relies upon the fact that it has been in existence since 1876 without any interference from the city authorities, whereby a presumption is created that he had obtained such a permit, yet such presumption is overcome by proof that records of such

permits were kept, and that there was no record of any such permit in the proper office, which fact it was necessary for plaintiff to establish in order to maintain his action.

Vann, J., dissenting.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Maurice W. Deshong against the city of New York. From a judgment of the Appellate Division (77 N. Y. Supp. 563) affirming a judgment for defendant, plaintiff appeals. Affirmed.

Charles G. Cronin and Thomas O'Callaghan, Jr., for appellant. George L. Rives, Corp. Counsel (Theodore Connolly and W. B. Crowell, of counsel), for respondent.

MARTIN, J. This controversy relates to the right of the plaintiff to build and maintain a vault under the sidewalk in front of lots Nos. 54 and 56 West Third street, in the city of New York. In 1898, the buildings which had been previously erected thereon were torn down, and a new building was in process of construction. When the old buildings were removed, there was a vault under the sidewalk in front. It had existed there from the year 1876, and from a time between 1860 and 1870 there had been a small one under the sidewalk, used for storing coal, which was not connected with the building. When the plaintiff commenced to rebuild the vault by constructing new walls inside the old ones, and putting in iron beams upon which the sidewalk was to rest, the public authorities of the city refused to allow him to proceed until he had procured a written permit. The commissioner of highways, having charge of the streets, including vaults therein, decided that the plaintiff was required to procure a permit for the erection of such vault, and to pay the city therefor the sum of \$914. This he paid under protest, and brought this action to recover the amount. The defendant relied upon two defenses: First, that there was no coercion or duress by the city in obtaining such payment, and therefore it was voluntary; and, second, that no permit was ever issued for the old vault, and consequently the plaintiff had no right to build a new one without a proper permit, and paying the usual compensation therefor.

The first question is whether the payment sought to be recovered was voluntary, or whether it was made under circumstances entitling the plaintiff to recover. The undisputed proof was that while the new vault was being constructed a deputy or inspector of the department of highways came to the place, stated to the plaintiff that his men must stop work, and declared that if they continued he would have the plaintiff and all the men who were at work arrested. He then called two men to guard the place, and stationed a policeman there to stop the work upon the ground that the plaintiff had no permit, and would not be allowed to pro-

¶ 1. See *Municipal Corporations*, vol. 36, Cent. Dig. § 1444.

ceed until one was obtained. To avoid arrest, and to retain possession of the property, so that the building and its appurtenances might be completed and occupied, the plaintiff was required to pay the sum of \$914, which he did under protest. Payments coerced by duress or unlawful compulsion may be recovered back. The coercion, however, must be illegal, unjust, or oppressive. One of the several and perhaps most common instances of duress is by threats of actual imprisonment unless the required act shall be performed. While there may be a diversity of opinion in some of the reported cases as to what circumstances are sufficient to constitute such coercion as will enable a party paying under protest to recover, still, under the facts in this case, we think it is quite apparent that the amount demanded of the plaintiff was paid under such circumstances as would enable him to recover if neither the city nor its officers had authority to charge or demand it. If the city made the charge and demanded its payment without authority of law, it was void, and the action of its officers in enforcing it by threats of arrest and by taking unlawful possession of the plaintiff's property was illegal, and payment by him was not so far voluntary as to prevent a recovery in this action. *Briggs v. Boyd*, 56 N. Y. 289; *Scholey v. Mumford*, 60 N. Y. 498; *Newman v. Bd. Supervisors Livingston Co.*, 45 N. Y. 673; *Strusburgh v. Mayor, etc.*, of N. Y., 87 N. Y. 452; *Horn v. Town of New Lots*, 83 N. Y. 100, 38 Am. Rep. 402; *Matter of Home P. S. F. Ass'n*, 129 N. Y. 288, 29 N. E. 323; *Freeman v. Grant*, 132 N. Y. 22, 28, 30 N. E. 247; *Talmage v. Third Nat. Bk.*, 91 N. Y. 531, 536; *Peyser v. Mayor, etc.*, of N. Y., 70 N. Y. 497, 26 Am. Rep. 624; *Ætna Ins. Co. v. Mayor, etc.*, of N. Y., 153 N. Y. 331, 47 N. E. 593. Therefore we are of the opinion that the contention of the defendant that the judgment can be upheld upon the ground that the payment by the plaintiff was voluntary cannot be sustained.

It seems to have been assumed by both parties that, if a proper permit had been previously granted, the plaintiff had a right to continue his new vault in place of the old one without an additional permit or further compensation. With this assumption we are disposed to agree, subject, however, to the condition that its continuance would not interfere with the street, or impair its use by the public. Whenever the existence of a vault would interfere with the public use of the street, the right to maintain it must be held to terminate, as the rights of individuals under such permits must be regarded as subordinate to the necessities or requirements of the public. Before entering upon the discussion of the question whether a permit had been issued for the old vaults, a brief history of the statutes and ordinances relating to the subject seems necessary, to ascertain the powers of the city and the

rights of the plaintiff, so far as they are controlled by either.

So far as appears, the first legislative permission for the use of public streets in the city of New York for vaults was given by chapter 446, p. 881, of the Laws of 1857, which conferred upon the Croton Aqueduct board charge of issuing permits for street vaults. Section 24. After the passage of that act it was provided by the revised ordinances of 1859 that no person should cause or procure any vault to be constructed or made in any of the streets in the city without the permission of the Croton Aqueduct board, and that every application for such permission should be in writing, and signed by the person making the same. In 1866 the same ordinances were continued. The Croton Aqueduct board had control of this subject until the adoption of the charter of 1870 (Laws 1870, p. 366, c. 137). The latter act gave the common council power to make ordinances in relation to the construction, repairs, and use of vaults, conferred upon the department of public works the power theretofore vested in the Croton Aqueduct board, and provided that such department should have cognizance and control of street vaults. Section 21, subd. 20; sections 77, 78. In 1873 (Laws 1873, p. 484, c. 335) the common council was given power to make, continue, modify, and repeal such ordinances, regulations, and resolutions as might be necessary to carry into effect all powers then vested in, or by that act conferred upon, the corporation in relation to the construction, repairs, and use of vaults; and that act declared that the chief officer of the department should be known as the commissioner of public works, and should have cognizance and control of street vaults. Section 17, subd. 18; section 70; section 71, subd. 8. In 1880 the ordinances of the city were again revised or compiled, and provided that the commissioner of public works, on application, was empowered to give permission to construct any vaults or cisterns in the streets, provided, in the opinion of the commissioner, no injury would come to the public thereby. They forbade the building or construction of any vault or cistern without the written permission of the commissioner of public works, and then declared that every application for such permission should be in writing, signed by the person making the same, stating the number of feet of ground required, and the intended length and width thereof. In 1882 the consolidation act was enacted, and conferred upon the common council the power to make ordinances in relation to the construction, repairs, and use of vaults, etc., and provided that the department of public works should have cognizance and control of street vaults and openings in sidewalks. Laws 1882, pp. 24, 83, c. 410, section 86, subd. 17; section 316, subd. 8. Then followed the charter of Greater New York (Laws 1897, c. 378), which provides that the municipal assembly

shall have power to make, establish, publish, and modify, amend, or repeal, ordinances, rules, and regulations not inconsistent with that act or the Constitution, in relation to the construction, repair, and use of vaults, and gives the commissioner of highways cognizance and control of licensing vaults under sidewalks. Section 49, subd. 17; section 524, subd. 5. The revised ordinances of March, 1897, contained the same provisions in regard to vaults as were contained in the ordinances of 1880.

Thus we find that from 1857 to the commencement of this action there has been continuous authority in the boards and officers mentioned to give permits for building and repairing vaults, and since 1859 every application for such permission has been required to be in writing, and signed by the person making the same. Hence, as the old vaults were not shown to have been built before 1876, it is to be borne in mind that these statutes and ordinances were adopted and in force before the old vaults were constructed, and required a written application and permit, which were to be kept in the proper office. Moreover, it does not appear that there was any officer of the city authorized to verbally consent to the erection or maintenance of such vaults, and the statutes and ordinances requiring such application and permit to be in writing, by implication, at least, forbade such verbal consent or permission. There is no claim that the plaintiff or any former owner of the property had the right to build vaults under the sidewalk in the street without permission from the public authorities, and payment for the privilege. Nor is there any direct proof that the permit required was ever granted for the construction of any previous vault. The single claim of the plaintiff is that there being evidence that a vault or vaults had been in existence at that place for at least 21 years, without protest or interference from the city authorities, it is to be presumed that a permit had been obtained, and that the existence of the old vault was lawful. To sustain this proposition, he relies upon the following cases in this court: *Jennings v. Van Schaick*, 108 N. Y. 530, 532, 15 N. E. 424, 2 Am. St. Rep. 459; *Babbage v. Powers*, 130 N. Y. 281, 29 N. E. 132, 14 L. R. A. 398; and *Jorgensen v. Squires*, 144 N. Y. 280, 39 N. E. 373. In discussing a somewhat similar question in the *Jennings* Case, it was said: "It does not appear that the defendant, who owned the premises, had ever obtained from the municipal authorities any formal license or permission to construct the opening in the sidewalk, but such authority was a reasonable inference from an acquiescence of eighteen years without objection from the city." In the *Babbage* Case it was, in effect, held that while the public is entitled to have a street remain in the condition in which it was placed, and whoever, without special authority, materially obstructs it or renders its use

hazardous by doing anything upon, above, or below the surface is guilty of a nuisance, yet, when it appears that the act was done with the consent of the proper officials, the rule of liability is relaxed, and that where a vault had been constructed under the sidewalk, and used for nine years, consent to its construction was to be inferred from the acquiescence of the city officials having charge of the city street, and power to give such consent, and that, in the absence of a statute regulating the subject, a written consent was not requisite. So, in *Jorgensen v. Squires*, it was held that the Legislature might authorize a limited use of sidewalks for cellar openings or vaults, and might delegate this power to the municipal authorities, and that, where such use had continued for 20 years without objection, it was presumptive evidence of consent upon their part, and, in the absence of affirmative proof of permission, it should be implied, if there was nothing to disprove it. In *People ex rel. Ziegler v. Collis*, 17 App. Div. 448, 45 N. Y. Supp. 282, the same doctrine was held. It was there determined that where a vault had been maintained under a sidewalk for 30 years, and there was no proof to the contrary, it would be presumed that it was originally constructed with the assent of the public authorities; that, where the commissioner of public works had decided that a permit to open the street to repair the same should be granted, he had no right to charge for the privilege; and that the relator was entitled to a mandamus compelling him to grant the permit without such payment.

Where a vault has existed under a sidewalk for more than 20 years, and no objection has been made, the doctrine of these authorities seems to justify the conclusion that, as between the owner and a third person, it will be presumed that it was originally constructed with the assent of the public authorities, and that the same presumption will obtain as against the city if there is no proof to overcome it. This presumption is not that the plaintiff or his grantors acquired any right to the use of the street by prescription or without the consent of the proper authorities, but that from such use it might be presumed that the proper consent was given. It is, however, a presumption only, which may be dispelled by proof. It is not a presumption of a grant of the title or of a permanent right in the street, as no power exists in the authorities to make such a grant or to confer any such right. The title to the streets being in the city as trustee for the public, no grant or permission can be legally given which will interfere with their public use. The right of the public to the use of the streets is absolute and paramount to any other. A presumption of consent or even an actual consent by the authorities to their use for private purposes is always subject and subordinate to the right of the public whenever required for public purposes, and such a grant or right cannot be presumed when it

would have been unlawful. *Donahue v. State of N. Y.*, 112 N. Y. 142, 19 N. E. 419, 2 L. R. A. 576. Moreover, in the cases in this court which are cited, the question arose not between the owner of the adjacent premises and the municipality, but between the owner and a third person, where the latter claimed to recover for personal injuries caused by the negligent or wrongful act of the former. It seems quite evident that the principle which is applicable in such a case is not necessarily controlling or even applicable where the question is between the owner and the city, and the former claims a right to the use of the street, for which no permit has been given. In other words, there can be no rightful, permanent possession of any part of a public street for private purposes, unless by virtue of an authorized permission of the city, and no length of time will render legal a private interference with a street which is a nuisance, or give the person maintaining it any right to continue it as against the municipality. If, however, we assume that proof that the original vault had been used more than 20 years created a presumption, even against the city, that it was originally constructed with the assent of the public authorities, we are still required to consider and give effect to the evidence tending to show that no such consent was given. The evidence disclosed that there was an office in which records of all such applications and permits were filed and indexed as required by the statutes and ordinances of the city, and that a diligent examination was made of such records from a time anterior to the erection of the old vault, and that no permit for building it had been granted or existed. The right to grant such permit was conferred by the Legislature in 1837, and that act and the subsequent statutes and ordinances enacted in pursuance thereof require that the application and permit should be in writing; and therefore, if any such permit had been granted, the presumption is that it would have been entered or filed in the proper office. *Lawson's Presumptive Evidence*, 67; *Leland v. Cameron*, 31 N. Y. 115; *People v. Snyder*, 41 N. Y. 397. The law presumes that all officers intrusted with the custody of public files and records will perform their official duty by keeping the same safely in their offices, and if a paper is not found where, if in existence, it ought to be deposited or recorded, the presumption thereupon arises that no such document has ever been in existence, and until this presumption is rebutted it must stand as proof of such nonexistence. *Hall v. Kellogg*, 16 Mich. 135; *Lawson's Presumptive Evidence*, 75; *Buck v. Barker*, 5 N. Y. St. Rep. 826; *Brown v. Torrey*, 42 N. Y. Super. Ct. 1, 4; *Code Civ. Proc.* §§ 921, 961. Therefore, as neither the plaintiff nor his grantor could acquire any title or interest in the street except in the manner provided by the statutes and ordinances passed in pursuance thereof,

it seems quite clear that when the defendant proved that such records were kept, and that there was no record or index of any such permit in the proper office, it dispelled the presumption of such consent arising from the previous acquiescence of the officials having the matter in charge, or at least presented a question of fact upon which the evidence was conflicting, and which has been conclusively settled by the decisions of the courts below. If these conclusions are correct, it follows that there was no sufficient evidence that a consent to build the old vault had ever been obtained, and consequently the plaintiff was required to procure a permit and pay the usual compensation before he could legally construct such new vault.

The judgment should be affirmed, with costs.

PARKER, C. J., and HAIGHT, CULLEN, and WERNER, JJ, concur. GRAY, J., concurs in result. VANN, J., dissents.

Judgment affirmed.

(176 N. Y. 462)

PEOPLE ex rel. RYAN v. WELLS et al.

(Court of Appeals of New York. Nov. 24, 1903.)

MUNICIPAL CORPORATIONS—DEPUTY TAX COMMISSIONER—DISMISSAL—CERTIORARI.

1. Civil Service Law (Laws 1899, p. 809, c. 370, § 21, as amended by Laws 1902, p. 805, c. 270), prohibiting the removal of an honorably discharged soldier or volunteer fireman from any position by appointment or employment in the state or any of the cities thereof, except for incompetency or misconduct, excepts from its provisions the office of deputy tax commissioner of the city of New York, and therefore an honorably discharged volunteer fireman removed from such office by the board of tax commissioners without a trial and an opportunity to make an explanation under provisions of Charter, § 1543 (Laws 1901, p. 636, c. 466), is not entitled to a hearing on stated charges, so that certiorari to review his removal will not lie.

Appeal from Supreme Court, Appellate Division, Second Department.

Certiorari by the people, on the relation of Michael Ryan, against James L. Wells and others, composing the board of taxes and assessments of the city of New York. From an order of the Appellate Division (83 N. Y. Supp. 789), annulling a determination of defendants removing the relator from the position of deputy tax commissioner of the city of New York, they appeal. Reversed.

George L. Rives, Corp. Counsel (James McKeen and Walter S. Brewster, of counsel), for appellants. Robert H. Elder, for respondent.

PER CURIAM. The relator was a deputy tax commissioner of the city of New York,

and a veteran volunteer fireman. It cannot be doubted that under the provisions of section 1543 of the Greater New York Charter (Laws 1901, p. 636, c. 466) he might have been removed by the board of tax commissioners without a trial, having been first given an opportunity of making an explanation, unless his case is taken without that section by section 21 of the Civil Service Law (chapter 370, p. 809, Laws 1896, as amended by chapter 270, p. 805, Laws 1902). The last statute provides that an honorably discharged soldier or volunteer fireman holding any position by appointment or employment in the state or any of the cities thereof shall not be removed from such position or employment except for incompetency or misconduct after a hearing upon stated charges. It, however, contained this qualification as originally enacted: "Nothing in this section shall be construed to apply to the positions of private secretary or deputy of any official or department, or to any other person holding a strictly confidential relation to the appointing officer." As amended in 1902, the qualification reads: "Nothing in this section shall be construed to apply to the position of private secretary, cashier or deputy of any official or department." The office of the relator is declared by the charter to be that of deputy tax commissioner, which would bring him within the language of the exception or qualification in the civil service statute. The learned court below, however, was of opinion that because the statute as originally enacted contained the language, "or to any other person holding a strictly confidential relation to the appointing officer," only such deputies were to be excepted from the provisions of the section as bore confidential relations to the appointing officers. It was further of opinion that the relation of deputy tax commissioner to the board of commissioners was not confidential, and that, therefore, the relator could be removed only upon charges. We are by no means clear that the language of the civil service statute in its original form justified such a qualification or limitation of the term "deputy." However that may be, since the amendment of 1902, by which the provision as to "any other person holding a strictly confidential relation to the appointing officer" has been stricken out, and the position of cashier, which is not necessarily confidential (*People ex rel. Tate v. Dalton*, 41 App. Div. 458, 58 N. Y. Supp. 929, affirmed on opinion below, 160 N. Y. 636, 55 N. E. 1099), added to the exceptions, such an interpretation we think no longer admissible, and that the statute excepts all deputies in the various city departments. As the relator was not entitled to a hearing on charges, certiorari to review his removal would not lie. *People ex rel. Kennedy v. Brady*, 168 N. Y. 44, 59 N. E. 701.

It follows that the order of the Appellate Division should be reversed, and the proceeding dismissed, with costs.

PARKER, C. J., and O'BRIEN, BARTLETT, HAIGHT, VANN, CULLEN, and WERNER, JJ., concur.

Order reversed, etc.

(176 N. Y. 465)

PEOPLE ex rel. CLARK v. KEEPER OF NEW YORK STATE REFORMATORY FOR WOMEN AT BEDFORD et al.

(Court of Appeals of New York. Nov. 24, 1903.)

CRIMINAL LAW—SENTENCE—REFORMATORIES FOR WOMEN—DISORDERLY CONDUCT—MISDEMEANOR.

1. State Charities Law, § 146 (Laws 1896, p. 550, c. 546, as amended by Laws 1899, p. 1397, c. 632), provides that a female convicted by any magistrate of certain offenses or of a misdemeanor, and who is not insane or physically incapable of being benefited by the discipline, may be sentenced to the New York State Reformatory for Women at Bedford. Held to give no magistrate of the city of New York jurisdiction, unless she is convicted of one or more of the offenses enumerated therein, and a conviction thereunder is improper where the court cannot determine from the papers returned on writs of habeas corpus and certiorari whether she was convicted of being either a public or common prostitute or on the charge of disorderly conduct.

2. A conviction of disorderly conduct is not a valid conviction for a misdemeanor, and therefore within the purview of the state charities law, unless the offense constitutes a misdemeanor as defined by other statutes; and where the record fails to show that the disorderly conduct came within the meaning of the Consolidation Act, § 1458, Laws 1882, p. 366, c. 410, or that of the Penal Code, § 676, relating to the offense of disorderly conduct as therein defined, and therefore a misdemeanor, the person so convicted is properly discharged from custody on habeas corpus.

Gray, J., dissenting.

Appeal from Supreme Court, Appellate Division, Second Department.

Application by the people, on the relation of May Clark, for a writ of habeas corpus to the keeper of the New York State Reformatory for Women at Bedford and others. From an order of the Appellate Division (80 N. Y. Supp. 872) affirming an order of the Special Term sustaining the writ and discharging the relator, the people appeal. Affirmed.

William Travers Jerome, Dist. Atty., and John Cunneen, Atty. Gen. (Robert C. Taylor and Henry G. Gray, of counsel), for appellants. Amos H. Evans, for respondent.

WERNER, J. On the 31st day of May, 1902, the relator was sentenced by a New York City magistrate to the State Reformatory at Bedford, N. Y., under the authority of section 146 of the state charities law (chapter 28, p. 2100, Gen. Laws), which provides, in substance, that a female between the ages of 15 and 30 years, who has been convicted by a magistrate of petit larceny, habitual drunkenness, of being a common prostitute, of frequenting disorderly houses or houses of prostitution, or of a misdemeanor, and who

is not insane nor mentally or physically incapable of being benefited by disciplinary treatment, may be sentenced to the several reformatory institutions for women therein mentioned. The learned district attorney has favored us with a most elaborate and instructive brief on the constitutionality of the section of the state charities law, above referred to, but, as that question is not distinctly raised by the respondent's counsel, and as there are other obvious infirmities in the record which require the affirmance of the order discharging the relator, we shall not now discuss or decide the constitutional question, for that may be of sufficient gravity and importance to merit the most serious consideration when presented by a record that is not so fatally defective as the one before us.

The complaint made by the officer who arrested the relator charges her with importuning and soliciting men for the purpose of prostitution, and with having been repeatedly arrested and convicted of the charge of disorderly conduct, in that she was in the habit of soliciting and importuning men for the purpose of prostitution upon the street at all hours of the night, and with being "a public prostitute." The record of conviction recites that the relator was brought before the magistrate, and charged with "disorderly conduct" in importuning and soliciting men upon the street for the purpose of prostitution. The warrant of commitment states that the relator was charged with "being a public prostitute," and that she was convicted upon that charge. The magistrate's return to the writs of habeas corpus and certiorari issued herein sets forth that the relator was convicted "of such disorderly conduct charged in said complaint, and as, in my opinion, tended to and might provoke a breach of the public peace." The relator demurred to this return, and upon the issue thus joined the Supreme Court at Special Term sustained the demurrer and the writs, and discharged the relator from custody. At the Appellate Division this order was affirmed.

There are several reasons why this decision should be sustained. To begin with, the magistrate had no jurisdiction to sentence the relator to the reformatory at Bedford, because she was not convicted of any of the offenses enumerated in the statute which confers upon magistrates the power to sentence convicted women to that institution. The relator was not convicted of petit larceny, habitual drunkenness, of being a common prostitute, of frequenting disorderly houses or houses of prostitution; and those are the only offenses specified by name in section 146 of the state charities law (Laws 1896, p. 550, c. 546). It is urged that the terms "public prostitute" and "common prostitute" are practically synonymous, so that a conviction under either designation amounts to one and the same thing; but, even if that be conceded for the purposes of the argument, there

still remains the practical difficulty of determining whether the relator was convicted of being a prostitute or for disorderly conduct. In the complaint the substance of the charge is that the relator was a "public prostitute," and her previous arrests and convictions for disorderly conduct are recited apparently as matter aggravating the charge. In the record of conviction the offense named is "disorderly conduct," and the reference to the soliciting of men for immoral purposes seems to be purely explanatory and incidental. The only offense referred to in the warrant of commitment is that of being a "public prostitute," but the magistrate's return to the writs ignores that charge and asseverates that the relator's conviction was had on the charge of "disorderly conduct." So palpable and confusing are these contradictions of the magistrate's record that it is impossible to say that any offense has been charged and set forth with the convenient certainty which the law requires. While it is not necessary that the offense should be charged with the precision required in an indictment, the record should show that the relator is charged with some offense known to the law by some statutory or legal definition (*People ex rei. Allen v. Hagan*, 170 N. Y. 52, 62 N. E. 1086), and this is particularly true in cases where an alleged offender may, by a single act, lay himself liable to either one of several charges.

We have referred to the offenses mentioned by name in section 146 of the state charities law upon conviction of either of which a woman of the prescribed age and condition may be sentenced to a state reformatory. To this category should be added the general designation of "misdemeanor," which appears at the end of the enumeration. We mention this because it is argued for the appellant that, if there is no such offense as that of being "a public prostitute," the conviction herein should be upheld on the ground that "disorderly conduct" is a misdemeanor, which brings the relator within the class of women who may be committed to state reformatories. Upon this point it is enough to say that, even if it were reasonably certain that the magistrate intended to convict the relator of "disorderly conduct," it would not necessarily follow that the conviction would be valid, for the case would then turn upon the question whether the charge of "disorderly conduct," as recited in the complaint, record of conviction, and warrant of commitment is one which, under other statutes, is defined as an offense or a misdemeanor. In the abstract there is no such offense as "disorderly conduct," but by section 1458 of the consolidation act (Laws 1882, p. 366, c. 410), which seems to have been incorporated into the charter of the Greater New York City, "every person in said city and county shall be deemed guilty of disorderly conduct that tends to a breach of the peace, who shall in any thoroughfare or public place in said city and county commit any of the following of-

fenses, that is to say: (2) Every common prostitute or night walker loitering or being in any thoroughfare or public place for the purpose of prostitution or solicitation, to the annoyance of the inhabitants or passers-by"; and by section 675 of the Penal Code "any person who shall, by any offensive or disorderly act or language, annoy or interfere with any person or persons in any place, * * * shall be deemed guilty of a misdemeanor." The most cursory comparison of the language of these statutes with the verblage of the magistrate's record herein will disclose the essential insufficiency of the latter in the very particulars which go to make up the statutory offense of disorderly conduct. Taken as a whole, this record gave the magistrate no jurisdiction to render the judgment which is here the subject of inquiry. The writs of habeas corpus and certiorari were therefore the proper remedy (*People ex rel. Tweed v. Liscomb*, 60 N. Y. 559, 19 Am. Rep. 211; *People ex rel. Van Riper v. N. Y. C. Protectory*, 106 N. Y. 605, 13 N. E. 435), and we think the case has been correctly disposed of by the courts below. We quite agree with the learned district attorney that there is no more important branch of our criminal jurisprudence than that which relates to the reformatory treatment of offenders who are not to be classed as criminals; but, since the jurisdiction to administer such treatment is purely statutory, it is equally clear that in its exercise the forms of law should be observed at least with reasonable approximation, for otherwise the rights of such offenders would be subject to invasions that will not be tolerated even in dealing with hardened criminals.

The errors of record in this case are not mere matters of form, but go to the very substance of right, and therefore the order herein must be affirmed.

GRAY, J. (dissenting). Upon the appeal to this court, the relator, as respondent, in the first place, insists that the returns to the writs show upon their face that "the proceedings before the committing magistrate were conducted in such a loose, careless, and indefinite manner that it is impossible to determine the nature of the charge against her," or the basis of the magistrate's decision. In the second place, she says there is "no offense known to the law of the state as that of public prostitute." And further she insists that the magistrate was without jurisdiction, that he had no power to commit her for the period of three years, and that the proceedings before him were void, because of the failure to keep a written record of the evidence upon which the judgment was based. Such was also her demurrer to the returns to the writs, in substance.

The return of the magistrate is open to the charge that he was slovenly in his records and careless in his proceedings; but, in my opinion, the proceedings exhibited in the re-

turn to the writs were not fatally affected thereby, and they disclose a case of the valid exercise of jurisdiction over the person of the relator. If it was made to appear to the Supreme Court, upon the return to the writ, that the relator was held under a valid commitment, it had the force of a final judgment of a competent tribunal, and it was the duty of the court to remand her. *Code Civ. Proc. § 2032; People ex rel. Kuhn v. P. E. House of Mercy*, 133 N. Y. 207, 30 N. E. 853. The proceeding upon the return to a writ of habeas corpus is instituted to determine whether a person detained in custody was so detained under legal authority, and is not for the purpose of reviewing the determination of the subordinate tribunal. *People ex rel. Danziger v. P. E. House of Mercy*, 128 N. Y. 180, 28 N. E. 473. Section 146 of the state charities law (*Laws 1896*, p. 550, c. 546, as amended by chapter 632, p. 1397, *Laws 1899*) provides that "a female, between the ages of fifteen and thirty years, convicted by any magistrate of petit larceny, habitual drunkenness, of being a common prostitute, of frequenting disorderly houses or houses of prostitution, or of a misdemeanor, and who is not insane, nor mentally or physically incapable of being substantially benefited by the discipline of either of such institutions, may be sentenced and committed to * * * the New York State Reformatory for Women, at Bedford"; the term of the commitment being for a period of three years, or until discharged by the board of managers. The complaint upon which the relator was arrested and brought before the magistrate charged her with being "a public prostitute," who was soliciting men for the purposes of prostitution at a certain time and place, and who had been repeatedly arrested and convicted of the charge of disorderly conduct in committing such acts upon the streets. The complaint charged the offense defined by the statute, and gave jurisdiction, if it existed. The examination of the relator exhibits her confession of being guilty of the charge which had been made against her. The warrant of commitment of the magistrate recited the charge made; the proceedings had before him upon her arrest and trial; the conviction upon the charge; that she was "not insane, nor mentally or physically incapable of being substantially benefited by the discipline" of the New York State Reformatory for Women at Bedford; and that she was committed to that institution "for the term of three years, unless sooner discharged therefrom by the managers."

I think that there was sufficient before the court, upon the returns to the writs, to demonstrate the jurisdiction of the magistrate over the person of the relator and the subject-matter of the complaint, and that the commitment, in substance and form, was correct, and sufficient to show such jurisdiction and the legality of the proceedings. *People ex rel. Danziger v. P. E. House of Mercy*,

supra. The loose statements of the magistrate that the conviction of the relator was for disorderly conduct cannot alter the facts, nor affect the validity of the relator's commitment, unless the charge of being "a public prostitute" constitutes no offense under the law, or unless the committing magistrate was without power to try and to commit the relator. No other question is raised by the relator upon this appeal, and no other question is to be considered. However advisable and right that in such cases the committing magistrate should reduce and preserve all of the evidence in writing (*People v. Giles*, 152 N. Y. 136, 46 N. E. 326), under the present circumstances it is not material error, inasmuch as the evidence given by the relator herself is returned, showing that she confessed to being guilty of the charge made in the complaint. The affidavit upon which the writs issued contains no allegation that the judgment was unsupported by evidence, and the demurrer does not raise such a question; nor were the material facts appearing in the return controverted. The questions solely raised and to be considered in this case are, first, whether the omission to state in the complaint and commitment, in the words of the statute, that the relator was "a common prostitute," was fatal to the validity of the warrant; and, second, whether an offense was charged, upon which the committing magistrate had power to try and to commit.

As to the first question, I entertain no doubt but that the words "a public prostitute" are the legal equivalents of "a common prostitute." The word "public," in its common acceptance and use, has all the significance of, and is synonymous with, "common." A woman who prostitutes her person to the public use prostitutes it to the common use. While the precise language of a penal statute should be employed, it is not necessarily substantial error when other words happen to be used, which have the same accepted and popular sense as those used in the statute. No different meaning can be imported into the term "public prostitute" than attaches to that of "common prostitute."

Was there an offense charged, and did the committing magistrate have the power to commit upon proof thereof? I think that to be "a common prostitute" was made a new offense by this statute. It created a new offense, because it provided that, upon conviction of the female for committing the act specified, she might be deprived of her liberty, and might be detained in the custody of one of certain state institutions for a period of three years; the sentence being indeterminate, in the sense that she might

be sooner discharged by the board of managers. Prior thereto, under section 887 of the Code of Criminal Procedure, a common prostitute was classified with vagrants. In this statute the Legislature has exercised its wide police powers, undoubtedly, with the intent of promoting the public health and morals; and this state charities law is a scheme for the correction of an evil, whose further aim is the reformation of the offender. It was competent, to that end, to make it an offense to be a public or common prostitute, and to provide that, where a female was convicted thereof, she should be punished, not in a strictly penal sense, but through a restraint of her person, by being delivered into the custody of one of the reformatory institutions of the state, if she appeared to be morally and physically capable of being benefited by discipline, for a reasonable period of time. The operation of the act was clearly not intended to be so much punitive as preventive in its aims. The offender was to be withdrawn from the community, and confined where she would not only be unable to continue her vile conduct to the detriment of the public morals, and possibly of the public health, but where she might be herself reformed and made a fit member of society. The proceeding for her commitment upon conviction of the offense was not criminal in its nature. It was preventive and reformatory, in the interests of organized society. It is plain to my mind that, in the enactment of these provisions of the state charities law, the Legislature has made that an offense against the law which was not such before, and that it has conferred upon "any magistrate," which includes, of course, a city magistrate, jurisdiction to convict a female charged with the offense, and, in a proper case, having regard to her mental and physical conditions, to commit her to one of the institutions mentioned, for the prescribed period of three years, or until discharged by the board of managers. The earlier acts, of which this general law is a codification and extension, expressly authorized "all justices of the peace, police justices, and other magistrates and courts," to sentence and commit. Chapter 187, p. 285, Laws 1881 (chapter 238, p. 451, Laws 1890).

For these reasons I dissent, and I think there should be a reversal of the orders below.

PARKER, C. J., and BARTLETT, HAIGHT, VANN, and CULLEN, JJ., concur with WERNER, J. GRAY, J., reads dissenting opinion. MARTIN, J., absent.

Order affirmed.

(176 N. Y. 531)

PEOPLE v. THAMES & MERSEY MARINE INS. CO., Limited.

(Court of Appeals of New York. Dec. 1, 1903.)

MARINE INSURANCE COMPANY—TAXATION—FRANCHISE TAX.

1. A foreign marine insurance company, doing business in the state, is liable, under Laws 1901, p. 297, c. 118, amending Laws 1896, p. 859, c. 908, § 187, for an annual tax of five-tenths of 1 per cent. on the gross amount of premiums received for business done during the calendar year within the state, "in addition to all other fees, licenses, or taxes imposed by this or any other act," and is not entitled to have deducted therefrom all other taxes paid by the company, under Laws 1892, p. 1947, c. 690, as amended by Laws 1893, p. 1801, c. 725, providing that the Superintendent of Insurance, in collecting the tax of 2 per cent. imposed on the amount of all premiums on marine insurance received by any foreign insurance company, shall deduct all other taxes paid by such corporation under the laws of the state.

Appeal from Supreme Court, Appellate Division, Third Department.

Action by the people against the Thames & Mersey Marine Insurance Company, Limited. From a judgment of the Appellate Division affirming a judgment for plaintiff (83 N. Y. Supp. 1113), defendant appeals. Affirmed.

James F. Tracey, for appellant. John Cunneneen, Atty. Gen., and George F. Slocum, for the People.

HAIGHT, J. This action was brought to recover the amount of the annual tax payable to the Superintendent of Insurance by the defendant, a foreign marine insurance company, pursuant to section 34 of the insurance law, amounting to the sum of \$8,334.24. The defendant, in its answer, alleged that it had been assessed a franchise tax, pursuant to section 187 of the tax law, of \$1,191.72, which it had paid to the Comptroller, and demanded that this amount should be deducted from the amount claimed by the Superintendent of Insurance. The defendant further alleged that it had tendered payment of the balance due the Superintendent of Insurance after the deduction of the franchise tax as aforesaid. The demurrer interposed was to the effect that the partial defense alleged in the answer was insufficient in law. The demurrer was sustained, and final judgment has been entered in favor of the state.

The statute under which this controversy arises, so far as is material to the question involved, is as follows: "The agent of every corporation, association or individual not incorporated by the laws of this state to effect insurances against marine risks, shall annually, on or before the first day of February, pay to the Superintendent of Insurance a tax of two per centum upon the amount of all premiums upon insurances against marine risks which have been received by such agent or any person for him

or have been agreed to be paid for any such insurance effected or agreed to be effected or procured by him, within this state, for the year ending the thirty-first day of December preceding; but in collecting such tax from a foreign marine insurance corporation, the Superintendent of Insurance shall deduct therefrom all other taxes paid by such corporation under the laws of this state." Insurance Law, § 34, being chapter 690, p. 1947, of the Laws of 1892, as amended by chapter 725, p. 1801, of the Laws of 1893. By chapter 542, p. 763, of the Laws of 1880, as amended by chapter 361, p. 481, of the Laws of 1881, there was imposed a franchise tax on every corporation or association organized under the laws of other states or countries doing business in this state, and these provisions were subsequently incorporated into chapter 908, p. 859, of the Laws of 1896, § 187. Under these provisions the defendant had the right to have the amount of the franchise tax assessed to and paid by it deducted from the amount which was payable to the Superintendent of Insurance; but, in the year 1901, by chapter 118, p. 297, the provisions of section 187 of the tax law were amended, and, so far as material, provide as follows: "An annual state tax for the privilege of exercising corporate franchises or for carrying on business in their corporate or organized capacity within this state equal to one per centum on the gross amount of premiums received during the preceding calendar year for business done in this state whether such premiums were in the form of money, notes, credits, or any other substitute for money, shall be paid annually into the treasury of the state, on or before the first day of June, by the following corporations: (1) Every domestic insurance corporation, incorporated, organized or formed under, by, or pursuant to a general or special law. (2) Every insurance corporation, incorporated, organized or formed under, by, or pursuant to the laws of any other state of the United States, and doing business in this state, except a corporation doing a fire insurance business or a marine insurance business. (3) Every insurance corporation, incorporated, organized or formed under, by, or pursuant to the laws of any state without the United States, or of any foreign country, except such a corporation doing a life, health or casualty insurance business, and doing business in this state; but the tax on gross premiums of a corporation so incorporated, organized or formed and doing a fire or marine insurance business within the state shall be equal to five-tenths of one per centum. * * * The taxes imposed by this section shall be in addition to all other fees, licenses or taxes imposed by this or any other law." The provisions of this amendment increased the franchise tax as to domestic and foreign insurance corporations, with the exceptions specified in the act; but, as to foreign corporations organ-

ized for fire and marine insurance, their franchise tax remained unchanged at five-tenths of 1 per centum. It is thus apparent that the legislative purpose was to effect a general increase in the franchise tax upon insurance corporations which had theretofore been taxable, and this was accomplished by increasing the tax from five-tenths of 1 per centum to 1 per centum. True, foreign corporations doing a marine insurance business did not, in terms, have their taxes increased, but instead thereof we have the provision that the tax imposed by this section shall be in addition to those imposed by any other law. Under the law as it had theretofore existed, the defendant corporation, as we have seen, was assessed a franchise tax of five-tenths of 1 per centum, which it deducted from the 2 per centum tax payable, under the insurance law, to the Superintendent of Insurance. It therefore was required to pay a tax of 2 per centum upon the amount of all its premiums upon insurance collected or agreed to be paid in this state. By making the five-tenths of 1 per centum in addition to the tax authorized by other statutes, the effect was to increase the defendant's tax in the amount of one-half of 1 per centum, which is the amount that other corporations, domestic and foreign, have had their taxes increased by the provisions of this act. While we recognize the correctness of the rule invoked by the appellant with reference to the interpretation of statutes, and that repeals by implication are not favored in the law, yet the legislative intent in this case is so clearly apparent that we think the provision of the insurance law providing for a deduction of such taxes must be deemed to have been repealed by implication by the latter statute, and that the franchise tax imposed upon the defendant was intended to be "in addition to all other fees, licenses or taxes imposed by this or any other law."

The judgment should be affirmed, with costs.

PARKER, G. J., and GRAY, BARTLETT, VANN, CULLEN, and WERNER, JJ., concur.

Judgment affirmed.

(176 N. Y. 520)

HOLLY v. GIBBONS et al.

(Court of Appeals of New York. Dec. 1, 1903.)

EXECUTOR-SALE TO PAY DEBTS-ACTION BY CREDITOR-PARTIES-LIMITATIONS-RES JUDICATA.

1. A creditor of a decedent's estate, where the personality is insufficient to satisfy the debts, may sue in equity to establish his claim, and compel an executor having a testamentary power of sale to pay debts to sell the real estate and apply the proceeds to the debt.

2. Where an executor makes payment from time to time on the debt due by the estate,

such payments prevent the running of limitations.

3. Dismissal by the Surrogate's Court of a creditor's petition for an accounting with the statement that the proceeding was barred by limitations is not a bar to the maintenance of an action by the creditor to compel the executor to sell real estate to pay the debt.

4. In an action by a creditor of the estate to compel the executor to sell real estate to pay debts, the devisee of the real estate is a necessary party, and where he was a nonresident, and was made a party defendant, but was never legally served with process by reason of non-compliance with Code Civ. Proc. § 439, and did not appear, a judgment in plaintiff's favor must be reversed.

5. In a suit to compel an executor to sell real estate to pay debts, a direction in the judgment that the real estate be sold through the referee is improper where there was no finding that the executor was unfit or incapable of executing the power of sale.

Appeal from Supreme Court, Appellate Division, Third Department.

Action by Sally Maria Holly, executrix of George Holly, against Edward Gibbons and another. From a judgment of the Appellate Division modifying and affirming a judgment for plaintiff, defendant Gibbons appeals. Reversed.

The plaintiff's testator was the administrator of Betsy Ann Gibbons, who was the widow of Ransom H. Gibbons, and as a creditor of the latter's estate upon a promissory note given to his intestate by her husband in his lifetime for the sum of \$2,800, payable one year after date, and carrying interest at 5 per cent., and in his capacity as administrator, he brought this action, with the object of procuring the payment of the claim. He joined as defendants with Edward Gibbons, the executor of Ransom H. Gibbons, the said Edward Gibbons individually, and Sally Maria Peck, who were the only children of the testator; and the demand of the complaint, variously, is that the executor render an account of his proceedings, that the individual defendants shall be jointly charged with the amount of the testator's debt, that the executor be compelled to exercise the power of sale in the testator's will, that the court shall order a sale of the real estate left by the testator, and that the proceeds of the sale shall be applied in payment of the debt. The answer, admitting that the personal estate was exhausted, and is not available for the payment of debts, puts in issue the liability upon the note, and sets up in various ways the bar of the statute of limitations. The answer also pleads in bar of the action a previous adjudication in the Surrogate's Court. The plaintiff's testator recovered judgment, by which it was, in substance, adjudged that the note was a valid and existing claim against the estate of the testator; that the amount due upon it was recoverable against Edward Gibbons as executor and individually; that a sale of the real estate of the testator should be made at public auction, under the direction of a referee therein appointed for the

¶ 2. See Limitation of Actions, vol. 33, Cent. Dig. § 628.

purpose; that from the proceeds of such sale the debt should be paid, and that any deficiency should be made good by the defendant Edward Gibbons individually. Upon appeal to the Appellate Division in the Third Department, the judgment was modified "by striking therefrom that part thereof relating to the collection of any deficiency after the sale of the real estate from Edward Gibbons, individually, and, as so modified, affirmed." The defendant Edward Gibbons individually and as executor appealed to this court. After the determination by the Appellate Division, the original plaintiff died, and the present plaintiff and respondent, as his executrix, was substituted in his place and stead by order.

Testator's will, after making provision for his wife during her life, by the third clause gave to his son, Edward, a certain farm called the "Huyck Farm," "to have and hold forever, unless said Edward shall die without legal issue, and in that case the same property to my daughter, Sally Maria, and her heirs." By the fourth clause he authorizes his executor to sell a certain farm, called the "Jay Gibbons Farm," "to the best advantage, for the purpose of paying debts and for the interest of my daughter," and, further authorizing his executor to sell the house and lot on which he resided, continues by saying, "And after the real estate is sold and the debts paid and if there is not over \$4,000, I give to my daughter the said \$4,000, but if there is over \$4,000 I direct that my son and daughter to each share alike in the overplus and in case of my daughter's death to go to her heirs." He then appoints his son, Edward, as the executor of his will. The trial judge made findings, in which he found that the testator paid the interest upon the note which he had given to his wife down to the time of his death in 1885; that his executor acknowledged the validity of the note, and paid the interest thereon, until the death of the testator's widow in 1893; that when the original plaintiff, her administrator, presented the note to the executor, the latter admitted the validity of the note, promised to pay the same, and requested, rather than to have a sale of the real estate, that it should remain as it was; that in such request the plaintiff acquiesced, and that the executor paid the interest upon the note down to March, 1897. He found that the testator left no personal property, except about \$200, which had been expended in paying funeral expenses and some small debts of the estate; that the executor had sold the house and lot in which the testator resided, and which were referred to in the fourth clause of the will, and had applied the proceeds, in 1895, upon the principal and interest of the note; and that in September, 1899, he informed the original plaintiff that he was forbidden to make further payments upon the note, and therefore should decline to pay

the same, or any part of it. Thereupon, as it is further found, this original plaintiff instituted a proceeding before the surrogate of Albany county, in which, as a creditor of Ransom Gibbons' estate, he sought to compel the executor to account as such; that the executor, in his answer in that proceeding, denied that the petitioner was a creditor, and set up the bar of the statute of limitations, whereupon the surrogate made a decree adjudging as follows: "That, more than six years and eighteen months having elapsed since the appointment of said Edward Gibbons as executor, this proceeding to compel the executor to account is barred by the statute of limitations," and ordering "that the petition should be dismissed." Upon these facts the conclusions of law followed upon which the judgment was entered in favor of the plaintiff.

The further fact is to be noticed that Mrs. Peck, the daughter of the testator, and who was joined as a defendant, did not appear in the action, and that she was a nonresident of the state, upon whom service of the summons and complaint had been made without the state, pursuant to an order to that effect.

Walter E. Ward, for appellant. John H. Gleason, for respondent.

GRAY, J. (after stating the facts). The judgment which the plaintiff now has validates the claim against the testator's estate, and authorizes the disposition of the real estate devised by the will by a sale for the purpose of satisfying the amount found to be due. In so far as the plaintiff seeks the equitable intervention of the court to compel the exercise by the executor of the power of sale contained in the will, the action is clearly maintainable, assuming that the debt has been conclusively established. The testator expressly empowered his executor to sell the "Jay Gibbons Farm" "for the purpose of paying debts and for the interest of his daughter," in order that, the debts being thus paid, the residue of the proceeds of sale of that and of the other real estate mentioned in the clause might be given to the latter. The power of sale thus given was imperative, and imposed a duty on the executor, the performance of which might be compelled in equity for the benefit of the creditors or the daughter. 2 Rev. St. (9th Ed.) p. 1807, § 96. The debts were not made a charge upon the testator's real estate, but a power to sell certain portions of it for their payment was given, the execution of which in no wise depended upon the will of the grantee of the power. Hence the remedy of the creditor upon the failure to exercise the power of sale was by application to a court of equity. *Matter of Gantert*, 138 N. Y. 106, 32 N. E. 551. The sale of the real estate for the payment of the debts is not, as it is argued, to be effected solely through proceedings provided for in

the Code of Civil Procedure. Section 2759 provides that a decree directing the disposition of real property in a case where, under section 2750, the creditor of the decedent has instituted a proceeding for that purpose, can be made only where the property directed to be disposed of is not subject to a valid power of sale for the payment of the debts. Subdivision 4. The action therefore was maintainable, if the claim of the creditor was an enforceable one, and as to that the appellant argues that the executor could not, by the acknowledgment of the debt, prevent the statute of limitations from running. He argues, in effect, that the principle of the rule which prevents an executor from reviving a debt against the estate of his testator which is barred by the statute applies equally to his right to keep a debt alive. I perceive no force in such an argument, nor am I aware of any authority in reported cases which would support it. The demand of the plaintiff was upon an obligation of the testator subsisting at the time of his death, and for which his estate was concededly liable. It was the right and it was the duty of the executor to discharge the indebtedness upon the obligation, either from the personal estate, or, if that was insufficient, by the exercise of the power of sale given to him by the will. There is a plain distinction between the right of an executor to revive an indebtedness against his testator's estate which had been extinguished by law and his right to acknowledge and to keep in force a subsisting obligation by making payments from time to time upon the principal of the debt or by way of keeping down the interest. *McLaren v. McMartin*, 36 N. Y. 88; *Butler v. Johnson*, 111 N. Y. 204, 18 N. E. 643. In the one case he, in effect, creates an indebtedness; while in the other he is performing a moral obligation, and is executing a duty recognized by law.

It is further objected by the appellant that a former adjudication in the Surrogate's Court was a bar to the maintenance of this action. In my opinion, that is not the effect of the surrogate's decree referred to. All that decree effected was, as it states, the dismissal of the creditor's petition. The statement which it contained that "the proceeding to compel the executor to account is barred by the statute of limitations" was not a final adjudication upon the validity of the petitioner's claim. It was the conclusion of the surrogate that by reason of the lapse of time the executor could not be compelled to account in such a proceeding. Whether the surrogate was correct or not in that respect is not material. He, in effect, consulted the petitioner by dismissing his petition, and in so doing has complied with certain provisions of the Code of Civil Procedure. By section 1822 it is provided that, where an executor rejects a claim against the estate, "unless a written consent shall be filed by the respective parties with the surrogate

that said claim may be heard and determined by him upon the judicial settlement of the accounts of said executor, * * * the claimant must commence an action for the recovery thereof," etc. By section 2722, if a petition is presented to the Surrogate's Court by a creditor praying for a decree directing the executor to pay his claim, it is provided that the surrogate must dismiss the petition, "without prejudice to an action or an accounting," where the latter files a written answer setting forth facts which show "that it is doubtful whether the petitioner's claim is valid and legal and denying its validity or legality." Obviously, if the proceeding were one in which the executor was called upon to render his account by a creditor, the validity of whose claim is either expressly denied or is shown to be doubtful, the result must be the same as to the surrogate's jurisdiction. I do not think we can say that the filing of a petition by a creditor, and of an answer thereto by the executor denying the validity of a claim, was equivalent to the filing of the written consent required by the statute. The fact that the claim was disputed deprived the surrogate of jurisdiction to determine its validity and to decree its payment. *Matter of Callahan*, 152 N. Y. 320, 46 N. E. 486.

It is further argued that this action cannot be maintained against the devisees individually. The order of the Appellate Division struck out any recovery against the executor individually of any deficiency judgment, and there was no judgment at all against Mrs. Peck. Whether the judgment is maintainable for the sale of the real estate devised to Edward Gibbons is somewhat doubtful, inasmuch as the averments of the complaint and the proofs do not seem in sufficient compliance with the provisions of the Code with reference to an action against devisees, and Mrs. Peck was not brought into the action. Code Civ. Proc. §§ 1843, 1846, 1849, 1851. But, as the judgment must be reversed, and a new trial ordered, for the failure to bring in Mrs. Peck, we will not discuss this question.

The serious feature of this case, and one which requires the reversal of the judgment, is that Mrs. Peck, though made a defendant by name, was never brought into the litigation by a legal service upon her of the summons. The order for the service of the summons upon her was not founded upon the affidavit which section 439 of the Code requires to be made. Indeed; the respondent conceded in open court that there was no such legal service; but he says that Mrs. Peck has "no interest, vested or contingent, in the land devised, or in that directed to be sold, and that, therefore, she is not a necessary party to the action." This contention seems rather extraordinary in view of the allegations of the complaint to the effect not only that Mrs. Peck is a devisee under the will, and holds as such, but that the pay-

ments made by the executor upon the note, and the delay by him in the sale of the real estate, were with her knowledge and consent; and in view of the findings, which recited the facts of a personal service upon her of the summons and complaint, and of her knowledge of and consent to the executor's acts. If we might disregard these matters as not necessarily conclusive upon the respondent, we still are confronted with the fact that Mrs. Peck did have an interest in the estate of the testator and in the enforcement of the power of sale contained in the will, which made her a necessary party to the action, without whose presence the court would acquire no jurisdiction to render any decree which would affect her legal or equitable interests. Under the third clause, by which the Huyck farm was given to the testator's son, "unless he should die without legal issue," in which case it was to go to his daughter, Mrs. Peck, she took no interest, because the son survived the testator, and the estate had vested in him. Under the fourth clause, however, which empowered the executor to sell the Jay Gibbons farm and the residence for the purpose of paying debts and applying the surplus to the testator's daughter, her interests are very clear and substantial. As one of the two heirs at law of the testator, she had an interest in such real estate, which was subject, of course, to the exercise of the power of sale. Having such, her interest in any legal proceeding wherein it was sought to compel a sale for the purpose of paying claims against the testator's estate was very substantial. She was very much concerned, by reason of her legal and equitable interests, that such claims should be satisfactorily and legally established as obligations of the testator which were actually subsisting against his estate. It cannot truthfully be said that Mrs. Peck had no interest, which could be injuriously affected by the result of this litigation, and therefore, within those rules which govern the judgment of a court of equity, she should have been brought into the litigation. Courts of equity observe a fundamental principle concerning parties that all persons who are interested, directly or indirectly, in the subject-matter and in the relief to be granted by decree, should be brought into the suit. When it appears that their rights might be affected thereby, and they are capable of being made parties, a court of equity should not proceed to decide the case without them. Story's Equity Jurisprudence, § 1526; Pomeroy's Equity Jurisprudence, § 114. In the absence of Mrs. Peck as a party to the action, the court did not obtain jurisdiction to render a judgment for the sale of the testator's real estate.

It was also quite unnecessary to the judgment to direct a sale of the real estate through a referee. I am not aware of any authority in the law for such procedure. It not having been charged or found that the

executor was unfit, or without capacity to execute the power of sale, the judgment of the court should have directed him to effect the sale.

For the reasons I have given, I advise that the judgment appealed from should be reversed, and that a new trial should be ordered, with costs to abide the event.

HAIGHT, VANN, CULLEN, and WERNER, JJ., concur. BARTLETT, J., votes for reversal on the ground that Mrs. Peck had such an interest in the Jay Gibbons farm as rendered her a necessary party defendant. PARKER, C. J., not sitting.

Judgment reversed, etc.

(181 Ind. 406)

HALL v. CAMPBELL

(Supreme Court of Indiana. Nov. 17, 1903.)

ELECTIONS—CONTESTS—SPECIFICATIONS—SUFFICIENCY.

1. Granting a motion to dismiss the assignments of grounds of an election contest without assigning as a reason therefor that the petition failed to state a cause of action was not prejudicial to contestant where the right result was reached, though the only method of questioning the sufficiency of the petition was by demurrer.

2. The specifications in an election contest, which alleged that contestant and contestee were opposing candidates for a county office, that in many of the precincts certain illegal ballots cast were counted for the contestee, and that certain legal ballots cast for the contestant were not counted for him, and that there were protested and preserved ballots sealed up and returned to the clerk of the circuit court, did not charge that the illegal ballots counted for the contestee or the legal ballots not counted for the contestant were protested and preserved and returned to the clerk of the circuit court.

3. As the statute relating to the right to contest an election excludes grounds of contest relative to destroyed ballots, the specifications of contestant in an election contest must show that the contested ballots were protested, so as to be preserved and returned to the clerk of the circuit court.

Appeal from Circuit Court, Monroe County; J. B. Wilson, Judge.

Election contest by Edward F. Hall against Joseph H. Campbell. From a judgment for the contestee, the contestant appeals. Affirmed.

Edwin Corr and East & East, for appellant. Duncan & Batman, Miller & Hadley, and Joseph E. Henley, for appellee.

GILLETT, J. Appellant instituted this proceeding, as an elector, before the board of commissioners of the county of Monroe, to contest the election of appellee to the office of clerk of said county. Appellant was defeated before said board, and appealed to the court below. In said court appellee filed a motion to dismiss each of the assignments of grounds of contest for the reason that none of the specifications thereof stated facts sufficient for a contest. The record shows

that the court sustained the motion, and that it dismissed the proceeding.

Although not mentioned in the statement of points in appellant's brief, his counsel suggest in argument that the motion, if well based, should have assigned as a reason therefor that the petition failed to state a cause of action. If the right result was reached in disposing of the specifications which constituted the grounds of contest, it is not available error, even if the only method of questioning the sufficiency of said specifications were by demurrer. *Wray v. Fry*, 158 Ind. 92, 62 N. E. 1004.

The above point settled, we are brought to the remaining claim of ground of reversal—that the statement, in at least some of its specifications, stated sufficient facts upon which to base a contest. So far as material to exhibit the point on which the case must turn, it may be stated that the first specification of the statement alleges, in substance, that appellant and appellee were the opposing candidates for the office of clerk of Monroe county at the last general election; that a canvass of the vote for said office by the county board of canvassers showed, and that said board certified, that appellee had received 2,320 votes, and that appellant had received 2,296 votes; that in many of the precincts of said county (naming them) there were certain illegal ballots cast that were counted for appellee, and that certain legal ballots were cast for appellant in certain of said precincts (naming them) that were not counted for appellant, the averments generally as to said alleged illegal ballots being that they were so marked, mutilated, or defective as to render them, and each of them, void, and that said alleged legal ballots were not counted for appellant on the ground that they were marked, mutilated, or defective, although they were not so marked, mutilated, or defective as to render them, or any of them, void. It is further alleged in said specification "that there were protested and preserved in the twenty-six voting precincts of Monroe county from one hundred to two hundred local ballots, all of which were sealed up and returned to the office of the clerk of the Monroe circuit court, as required by law, and have been preserved so sealed to this date." The second specification of said statement is as follows: "And this contestor states that he contests the election of said contestee on account of the illegal ballots counted for said Campbell, and each of them, as set forth specifically above, in the different precincts of Monroe county, and for the failure and refusal of the board of election judges in the different precincts to count the legal votes cast for the said contestor, and each of them, as specifically set forth above; and he alleges that, had said illegal votes not been counted, this contestor would have received a plurality of the votes cast for the office of clerk of the Monroe circuit court; and he further states that, had said legal

votes been counted for him as cast, he would have received a plurality of the votes cast for said office. He further states that the package purporting to contain the protested or disputed ballots are, some of them, marked on the outside, giving the number of such ballots, while some of them are not so marked, and some state that 'all' are protested, and therefore he is unable to give the exact number of said ballots."

It is objected, *inter alia*, by counsel for appellee, that it is not charged in either specification that the illegal ballots counted for appellee or the legal ballots not counted for appellant were protested, and it is further objected that it is not alleged that any of said ballots were preserved and returned to the clerk of the circuit court. In *Weakley v. Wolf*, 148 Ind. 208, 47 N. E. 466, it was said by this court, speaking by Howard, J.: "The intention of the law is here clearly manifested, as we think. It is that all undisputed, unprotested ballots shall be destroyed before the adjournment of the election board. The words relating to their destruction are most emphatic—that they shall be destroyed 'by totally consuming by fire'—as if it were the determination of the lawmaking body that no vestige whatever of such ballots or of their appearance should by any possibility be left, but that the record of them made by the election board should be conclusive as to their legal form and as to the candidates for whom they had been voted and counted. As to protested ballots, however, the very best evidence is provided by the Legislature to show both for whom they were voted and what were the mutilations or distinguishing marks, if any, upon them, and that evidence is the ballots themselves. As the judge of the trial court well said, if it had been the intention of the Legislature that any evidence should ever be given as to those ballots which have been counted without protest from any member of the election board, it would never have been provided that such ballots, showing on their face, and without the possibility of a doubt, how they had been voted, and what marks, if any, were upon them, should be destroyed." In *Tombaugh v. Grogg*, 156 Ind. 355, 59 N. E. 1060, there was a determination as to what amounted to a protest of a ballot, but there is not found in that case any recognition of the view that parol evidence as to the character of ballots destroyed by the election boards can be substituted for the evidence of the ballots themselves. We regard it as settled that, whatever may be the mistakes of election boards in counting or rejecting voted ballots, there can be no correction of such mistakes if such ballots have been destroyed as stated.

We have before us a case in which the grounds of contest rest wholly upon the claims that there were certain legal ballots that were cast for appellant which were not counted, and that there were certain ballots

counted for appellee that were so marked, mutilated, or defective as to render them void. All of this could make no difference if the ballots on which the contest rests were destroyed by the election boards pursuant to law. It is contended by appellant's counsel in their reply brief that this point is covered by averment, but we deem it plain that the protested and preserved ballots referred to in the statement of the grounds of contest are in no wise identified as the ballots the counting or rejection of which is made the basis of this proceeding.

It but remains to determine whether a statement of contest should show that the contested ballots were protested. The so-called "Australian Ballot Law" did not operate to repeal the provisions of statute theretofore existing relative to a contest, but, as we have seen above, the act mentioned narrowed the right of contest so as to exclude grounds of contest relative to destroyed ballots. As the law now stands, every fact averred in appellant's specifications might be admitted by appellee, and there would still be lacking a sufficient reason for overthrowing the result that was had before the board of canvassers. Of actions at common law, Mr. Chitty says: "The declaration must allege all of the circumstances necessary for the support of the action." 1 Chitty on Pleading, p. *255. So it has been said that, where any fact is necessary to be proved on the trial in order to sustain the plaintiff's right of recovery, the declaration must contain an averment, substantially, of such fact, in order to let in the proof (*United States Bank v. Smith*, 11 Wheat. 172, 6 L. Ed. 443), and also that a declaration is good if it contains all that would be necessary for the plaintiff to prove under the plea of the general issue. *Beardsley v. Southmayd*, 14 N. J. Law, 534. The general doctrine of these authorities has been applied to an election contest. *Loomis v. Jackson*, 6 W. Va. 673. And see, *Borders v. Williams*, 155 Ind. 36, 57 N. E. 527. While it might perhaps be held, in view of the case of *Nickols v. Ragsdale*, 28 Ind. 131, that a statement of the grounds of contest in somewhat general terms would suffice, yet it is not sufficient if the statement omits an allegation concerning a matter of fact the existence of which is essential to a successful contest. We deem it clear that both of appellant's specifications of grounds of contest were insufficient for the reason stated.

We entertain some doubt as to the propriety of dismissing such a contest as this if the contestor, upon the quashing of his grounds of contest, interposes a motion to amend by averring facts as to the protesting of the ballots on which the contest is based; but, as no such motion was made in this case, an order of dismissal properly followed the adjudication that the grounds of contest were insufficient.

Judgment affirmed.

(161 Ind. 412)

DAVIS v. KENDALL et al.

(Supreme Court of Indiana. Nov. 18, 1903.)

DECEDENT'S ESTATE—SALE OF REAL ESTATE—BOND FOR DEBTS—OFFER TO PAY DEBTS—PLEADING—APPEAL—RECORD OF EVIDENCE—MOTION FOR NEW TRIAL.

1. The requirements of *Burns' Rev. St. 1901, § 2527* (*Rev. St. 1881, § 2371*; *Horner's Rev. St. 1901, § 2371*), providing that an order for sale of a decedent's real estate shall not be granted if any person interested in the estate shall give bond for all liabilities of the estate, are not met by an offer, in a pleading, of judgment that the pleader give such a bond.

2. An offer in a pleading to pay the personal debts of a decedent is not equivalent to the payment of all the debts and cost of administration of the estate, and is insufficient to prevent a sale of the real estate to pay the debts.

3. An offer in a pleading to pay the debts of a decedent's estate, made before the time for filing claims has expired or the total indebtedness determined, is insufficient to prevent the sale of the real estate to pay the debts.

4. Where a praecipe directed the clerk to certify a transcript of the proceedings, and he included the original bill of exceptions, embracing the evidence, the evidence was not in the record, and could not be considered.

5. No question is presented by a motion for a new trial as a matter of right, made and decided before the rendition of judgment on the verdict.

Appeal from Circuit Court, Tipton County; W. W. Mount, Judge.

Proceeding by Willis A. Kendall, as executor, against Isabelle A. Davis and others. From a judgment in favor of the plaintiff, defendant Isabelle A. Davis appeals. Affirmed.

Geo. H. Gifford, Glenn Gifford, Carl H. Gifford, and L. B. Nash, for appellant. Edward Daniels, Dan Waugh, and Jno. P. Kemp, for appellee.

MONKS, C. J. This proceeding was brought by appellee, Kendall, as executor of the last will of Silas I. Davis, deceased, against appellant, the widow, and others, to sell the real estate of the decedent to pay debts and legacies. Appellant filed an answer in two paragraphs. The executor's demurrer to each paragraph of said answer for want of facts was sustained. Appellant filed a verified cross-complaint alleging that the testator was of unsound mind when he executed said will, and also alleged therein the same facts contained in said paragraphs of answer. A trial of said cause resulted in a verdict and judgment against appellant on the issues joined in her cross-complaint, and a finding and order to sell the real estate described in the petition. The errors assigned call in question the action of the court in sustaining the demurrer to each paragraph of appellant's answer to the petition and the action of the court in overruling appellant's motion for a new trial and her motion for a new trial as a matter of right.

It was alleged, in effect, in the first paragraph of answer, that said testator died in

¶ 5. See *New Trial*, vol. 37, Cent. Dig. §§ 361, 362.

March, 1901, intestate as to the real estate sought to be sold, leaving neither father nor mother, child nor children, nor their descendants, surviving him; that appellant is his only heir, and that she, after his death, elected, in the manner required by law, not to take under the will of said testator; that said executor has no right to sell said real estate except for the payment of debts. And said appellant offered in said paragraph of answer "to pay over to said executor any deficiency in the assets of the personal estate of said Davis that may be required to discharge the personal indebtedness of said deceased. Wherefore the defendant asks, upon the facts set forth in this answer, that the executor be not allowed to sell the real estate described in the petition, and that the defendant be ordered to pay over any deficiency in the assets of the personal estate of Silas I. Davis that may be required to discharge the personal debts of said Davis, deceased, and that the defendant be required to give bond as required by law for the payment of such deficiency that may be found into the hands of said executor." In the second paragraph of answer it is alleged that the testator was of unsound mind when he executed said will, and an offer to pay the personal indebtedness was made in the same language as in the first paragraph of answer.

Section 2527, Burns' Rev. St. 1901 (section 2371, Rev. St. 1881, and section 2371, Horner's Rev. St. 1901), provides that "an order for the sale, lease or mortgage of such real estate shall not be granted if any of the persons interested in such estate shall give bond to the executor or administrator in a sum and with sureties to be approved by the court, conditioned to pay all liabilities eventually due from the estate, with charges of administration, so far as the personal estate is insufficient." It is evident that said first paragraph of answer was not sufficient under said section 2527 (2371), supra, to prevent the sale of said real estate to pay the indebtedness of said estate. If appellant desired the benefit of said section, she should have presented a bond, with sureties, in conformity with said section, to the court, for approval, and, when approved, pleaded the same in bar of the action. The court had no power to compel her to give such bond. It is such bond, approved by the court, that prevents the sale of the land, and not the offer to give such bond. It may be true that the court will not order the sale of real estate to pay debts over the objection of the heirs if they pay the same and the costs of administration, but here it was not alleged in said first paragraph of answer that all the debts of said estate and costs of administration had been paid by appellant. She merely offered to pay the personal debts of said estate. The testator died in March, 1901. The petition to sell was filed July 15, 1901. It was alleged in the petition to sell that the claims filed against the estate at that time, including the widow's \$500, she having elected to take under the law, were

\$5,514.61; that the value of the personal estate was \$4,588.38; that the probable value of the real estate was \$5,325. Appellant's answer was filed October 5, 1903, long before the expiration of a year from the time of giving notice by the executor of his appointment, as provided in section 2465, Burns' Rev. St. 1901 (section 2310, Horner's Rev. St. 1901). Moreover, under said section last cited claims against estates are not barred if not filed within the year after said notice, but may be filed after the expiration thereof 30 days before the filing of the final settlement report of said estate. *Roberts v. Spencer*, 112 Ind. 81, 85, 13 N. E. 127; *State ex rel. v. Edwards*, 11 Ind. App. 226, 231, 38 N. E. 544, and cases cited. It was not alleged in said first paragraph of answer that all the claims against said estate had been filed, or what the actual indebtedness of said estate was. It is clear that there was no issue made by said answer on the trial of which the amount of said indebtedness could have been authoritatively determined by the court. The court, not being able to determine the actual indebtedness of said estate so as to bind all creditors and the estate, was not in position to fix the amount necessary to be paid into court or to the executor on account of the insufficiency of the personal property to pay the indebtedness of said estate and cost of administration. The Legislature, no doubt recognizing the impossibility of fixing the correct amount of the indebtedness of an estate so as to bind the creditors of the estate on the trial of a petition to sell land, provided for the execution of a bond in section 2527 (2371), supra, instead of the payment of money. It follows that the court did not err in sustaining the demurrer to the first paragraph of appellant's answer.

The second paragraph of answer was insufficient for the same reasons.

It is next insisted by appellant that the court erred in overruling her motion for a new trial. Appellees insist that no question is presented by this assignment of error, for the reason that the causes for a new trial depend for their determination upon the evidence, which is not in the record, under the rule declared in *Chestnut v. Southern*, etc., 157 Ind. 509, 512, 513, 62 N. E. 32, and cases cited; *Johnson v. Johnson*, 156 Ind. 592-594, 60 N. E. 451; *Drew v. Town of Geneva*, 159 Ind. 364, 65 N. E. 9; *Chappell v. Jasper*, etc., Co. (Ind. App.) 66 N. E. 515-517, and cases cited. Appellees are correct in this contention, and on the authority of the cases cited we hold that the evidence is not in the record.

As the motion for a new trial as a matter of right was filed and overruled before judgment was rendered upon the verdict, no question is presented thereby, for the reason that said motion, if a proper one in this case, should have been made after the rendition of judgment on the verdict, and not before. *Personette v. Cronkhite*, 140 Ind. 586, 590, 40 N. E. 59.

Judgment affirmed.

(161 Ind. 416)

BURKE et al. v. BARRETI et al.*

(Supreme Court of Indiana. Nov. 18, 1903.)
APPEAL FROM APPELLATE COURT—AMOUNT INVOLVED—SUIT FOR PARTITION.

1. Under Burns' Rev. St. 1901, § 1337j, cl. 3, declaring that in any case decided by the Appellate Court, any losing party shall have the right to appeal to the Supreme Court only when the amount in controversy exceeds \$8,000, no appeal lies from a suit simply involving the partition of real estate between tenants in common, in which no money judgment was demanded or rendered.

Appeal from Circuit Court, Vigo County; J. E. Piety, Judge.

Action by Richard Barrett and others against Mary Burke and others. From a judgment of the Appellate Court (87 N. E. 552) reversing a judgment for plaintiffs, the latter appeal. Appeal dismissed.

L. D. Leveque and H. J. Baker, for appellants. Henry, Crane, Miller & Miller, for appellees.

HADLEY, J. This is an appeal from the Second Division of the Appellate Court, under clause 3, § 1337j, Burns' Rev. St. 1901, which reads as follows: "In any case decided by either of said divisions of the Appellate Court any losing party shall have the right to appeal to the Supreme Court, only when the amount in controversy, exclusive of costs and interests on the judgment of the trial court exceeds six thousand dollars (\$6,000). * * * "This action is by appellees against appellants for the partition of real estate. The suit involved simply the parting of real estate between tenants in common, and the controversy rested upon the proper construction to be given to the will of John Barrett, deceased. There was no money demanded, or money judgment in the case. The judgment appealed from to the Appellate Court is one decreeing partition between the parties as made and reported by the commissioners appointed for that purpose. This court has held that the "amount in controversy," as used in the above statute, relates only to money demands and money judgments. *Smith v. Monument Company*, 160 Ind. 141, 65 N. E. 524.

The appeal therefore cannot be entertained. Appeal dismissed.

(161 Ind. 417)

MOSS et al. v. SUGAR RIDGE TP., CLAY COUNTY.†

(Supreme Court of Indiana. Nov. 19, 1903.)
TOWNSHIP—CONTRACT WITH TRUSTEE—ADVISORY BOARD—ENFORCEMENT—RATIFICATION—APPLICATION OF LAW—JUDICIAL NOTICE.

1. Township Reform Law (Acts 1899, pp. 150, 154, c. 105) in sections 1 and 6 creates an advisory board of three members for each township, with power to fix the rate of taxation and to authorize the trustee to borrow to meet an emergency, and prohibits the creation of a debt

by the trustee without their authority; and in section 11, p. 157, provides that all contracts made in violation of the act shall be null and void. *Held*, that there can be no recovery whatever for work done under a contract with the trustee without the authority of the board, though the contract was made in ignorance of the law, after taking legal advice, and though the work was accepted and used by the township.

2. Township Reform Law (Acts 1899, p. 157, c. 105) § 12, provides that the circuit court of each county should, at the next term after the taking effect of the law, appoint the members of the advisory board in each township. *Held*, that the court will take judicial notice that the law went into effect, and the next term of the circuit court convened and must have closed, prior to the execution of the contract in suit, and that the law therefore applied to it.

Appeal from Circuit Court, Clay County; P. O. Colliver, Judge.

Action by John C. Moss and others against Sugar Ridge township of Clay county. From a judgment sustaining a demurrer to the complaint, plaintiffs appeal. Transferred from the Appellate Court, under section 1337j, Burns' Rev. St. 1901. Affirmed.

Coffey & McGregor and James A. McNutt, for appellants. G. A. Knight and G. S. Payne, for appellee.

JORDAN, J. Action by appellants upon a written contract to recover against Sugar Ridge township, Clay county, the sum of \$1,200 for work and labor performed in repairing and improving a certain public highway in said township. A copy of the contract is filed with the complaint and made a part thereof. The following facts are disclosed by the pleading: On August 17, 1899, appellants and one Samuel Butt, the proper trustee of said Sugar Ridge township, entered into the written contract in suit for the repairing and improving of a certain public highway therein. This highway, at the time the contract was made, was in need of repair and improvement, it being unfit for travel by the public thereover. Before entering into the contract in question, the township trustee, together with appellants, consulted an attorney at law, who at the time was the legal adviser of the trustee in regard to matters pertaining to his office. This attorney informed appellants and the trustee that the latter had the legal right to bind his township by making said contract. Appellants, as averred, were ignorant of the law governing the power of the trustee in such cases, and they in good faith relied upon the advice of the attorney, and thereupon entered into said contract for repairing and improving the highway in question, and thereunder repaired and improved it. The work or labor performed by them in making said improvement, it is alleged, was reasonably worth \$1,219.22. The character of the work, etc., is specified and the charges itemized. It is further averred that the work performed upon the highway was necessary in order to render it safe and suitable for the travel

*Rehearing denied October 9, 1903.

†Rehearing denied October 7, 1903.

of the public thereon, and that after the completion of said improvement the township trustee and the public accepted it, and have received the benefits thereof. It is alleged that appellants, after they had finished the work in question, for the first time were informed that the township trustee had no power, under the law, to make said contract, and thereby bind his township, and that he had acted without authority. It is charged that, although the township has received the benefit of the work performed by appellants upon the highway, it nevertheless refuses to pay therefor. A demurrer for want of facts was sustained to the complaint, and its sufficiency to withstand a demurrer is the only question presented.

The contention of appellants' learned counsel is that the contract set out in the complaint was within the general scope of the legal authority with which the township trustee was invested in respect to the repair and improvement of public highways within his township. They admit, however, that the contract is impressed with an infirmity or invalidity because of the failure of the trustee to receive bids for the improvement of the highway, and let the work, upon notice, to the lowest bidder, as provided by the road law pertaining to the expenditure of road taxes. Sections 6835, 6836, Burns' Rev. St. 1901. This failure, it is conceded, rendered the contract void; but the argument is advanced that the omission upon the part of the trustee to let the contract for the improvement of the highway to the lowest bidder, as provided by section 6836, supra, was due to the mistake of appellants' attorney, and that the mistake is of such a technical character that a court of equity will nevertheless award appellants the necessary relief. Under the facts it is further contended that, inasmuch as the township has received the benefit of appellants' labor, which was necessary in improving the public road, therefore the law created an implied contract upon its part to pay the reasonable worth of the labor performed. In support of the contention counsel cite *Boyd v. Black School Tp.*, 123 Ind. 1, 23 N. E. 862, and cases of like character. Counsel for appellee, however, insist that the contract in question is null and void, because the trustee, under the facts, is not shown to have had any authority whatever to create a debt against his township for improving the highway in controversy, in the absence of funds on hand, or to be derived from an existing levy, which he could legally have used in the payment for the improvement. Or, in other words, their contention is that the contract in suit is void for the reason that it was entered into in violation of the provisions of an act of the Legislature approved February 27, 1899, known as the "Township Reform Law" (Acts 1899, p. 150, c. 105). We are of the opinion that this contention must be sustained. By section 1 of this act an advisory board is

created for each township in this state, to be composed of three resident freeholders and qualified voters of the township, and it is required to meet annually on the first Tuesday in September, notice of which meeting shall be given as provided by section 3 of the act. The law provides that at such meeting this board shall consider the various estimates of township expenditures proposed by the trustee, and shall have the power to concur in such estimates in whole or in part, or to reject the same or any part thereof, or to reject any proposed item in whole or in part. It is authorized to fix and determine the rate of taxes to be levied for the ensuing year upon the property and polls of the township subject to taxation. By section 3, p. 152, the township trustee is required, not less than 30 nor more than 40 days before the annual meeting of the board, to post at or near the doors of all the post offices in the township a notice and statement of the "several estimates and amounts of the proposed annual expenditures and the rate of taxation proposed for levy against the property within such township during the calendar year. * * * Copies of such notices shall be published one time in the issue printed in the first week of August of any year in the two leading newspapers published in the county, representing the two political parties casting the highest number of votes in such county at the last preceding general election, and one publication in a newspaper in the township interested, if there be a newspaper published therein. * * * And he shall furnish within like periods to each of the members of the advisory board, a statement of such estimates and amounts. Such statement shall contain a notice of the place of meeting of the advisory board, and shall be substantially in the following form." Clauses 1, 4, and 5 of the statement prescribed are as follows: "(1) Township expenditures, \$—, and township tax, — cents on the hundred dollars." "(4) Road tax expenditures, \$—, and tax, — cents on the hundred dollars. (5) Additional road tax expenditures, \$—, and tax, — cents on the hundred dollars." Section 6, p. 154, of this act, among other things, authorizes the township trustee to convene this board in special session, and it may at such meeting determine whether an emergency exists for the expenditure of any sums of money not included in the existing estimates and levies. It is provided in said section that: "In the event that such an emergency is found to exist, said board may authorize the trustee to borrow a sum of money, to be named, sufficient to meet such emergency; and at the next annual session of the board a levy shall be made, to the credit of the fund for which the expenditure is made, to cover and pay the debt so created. In no event shall a debt of the township, not embraced in the annual estimates fixed and allowed, be created without such special authority, and any

payment of such unauthorized debt from the public funds shall be recoverable upon the bond of the trustee in a suit." Section 11, p. 157, expressly declares that all contracts made in violation of the act shall be null and void, and section 12, p. 157, repeals all laws and parts of laws inconsistent therewith. This statute has made a radical change in the authority or power with which township trustees were invested by former laws.

Counsel for appellants, however, contend that this act was not in force on the 17th day of August, 1899, the time the contract in controversy was made, and consequently the trustee was not controlled thereby in making the contract, and the latter is not affected by its provisions. By section 12 of this law the circuit court of each county, at its next term after the taking effect thereof, was empowered to appoint the members of the advisory board in and for the several townships of the county. It was provided that such appointees should constitute the advisory board of the township until their successors were elected and qualified. We judicially know that this law went into effect on the 27th day of April, 1899, by virtue of the proclamation of the Governor. We in like manner know that the next term of the circuit court of Clay county after the act took effect commenced on the 29th day of May, 1899, which term did not, under the law, necessarily close until July 1st next following. We must assume, therefore, that the judge of the Clay circuit court complied with the requirements of the statute, and appointed persons to constitute this board in the several townships of Clay county at some time during said term. These boards, as we have seen, were authorized to meet in regular session on the first Tuesday in September. It must be admitted, therefore, nothing to the contrary appearing, that the members of the advisory board of Sugar Ridge township of said county had been duly appointed, and that said board was virtually in existence for over 40 days prior to the making of the contract in this action. The 17th of August, 1899, was less than 20 days before the time fixed by the law for the annual meeting of this board. It will be further observed that the township trustee of each township is required by section 3 of the act to make out and post, as therein provided, a statement of the estimates and amounts of the expenditures, etc., of the township for the year. This statement, which includes the notice of the annual meeting, is required to be posted not less than 30 days before said meeting of the board, and copies thereof are required to be published in two leading newspapers in the county in the issue thereof printed in the first week of August of each year. We may presume that the trustee of appellee township had discharged his duty as provided by these provisions of the statute, and had already made out, posted, and caused to be

published the required statement prior to the time he entered into the contract with appellants. It is manifest that the argument of their counsel to the effect that the trustee was not governed by this particular statute is wholly without support. He was certainly under the control of the statute at the time he made the contract in controversy. This contract, being in violation of the act, consequently was impressed or affected by the provision thereof which declared it to be null and void. By this contract an indebtedness was attempted to be created against the township without authority from said advisory board. The statute, as we have seen, was at the time in force; and, although the execution of the instrument preceded the time fixed for the annual meeting of said board, it was nevertheless subject to and controlled by the provisions of the law. If the trustee was confronted with an emergency requiring the immediate repair or improvement of the highway, and had no funds on hand which he could legally have appropriated for that purpose, there is no reason assigned why he could not have convened the advisory board of his township in a special session, in order to give him authority to borrow money, if necessary, to be used in paying for improving the highway. The mere facts that the highway was in bad repair and unsafe for public travel, and that the labor performed by the appellants was necessary and beneficial, and that the improvement or work, after being completed, was accepted by the trustee and the public, will not avail in this action to sustain a recovery. The contract in dispute being in violation of the statute, was, as therein declared, absolutely null and void, and is wholly without substance; consequently appellants have nothing, under the facts, upon which to base either an expressed or an implied right to recover against appellee.

Cases like *Boyd v. Black School Tp.*, *supra*, and others of like character, cited by counsel for appellants, are distinguishable from the case at bar. These hold, in effect, that where a municipal corporation under a contract not prohibited by statute or public policy, but under one merely invalid by reason of want of due formality or noncompliance with law, has received the benefit of any money, property, or labor of another, where the same was actually necessary for the use of the corporation, it will be liable to the extent of the reasonable value of that which it has received and used. *Vide Wrought Iron Bridge Co. v. Board*, etc., 19 Ind. App. 672, 48 N. E. 1050, and authorities there cited. In the *Boyd Case*, *supra*, this court, following its decision in other cases of like import, held that the right to recover under the circumstances therein did not rest upon the promissory note executed by the trustee on behalf of the school township, but upon the fact that said township had received and enjoyed the benefit of property

suitable and necessary for the use of its public schools. In *Clements v. Lee*, 114 Ind. 397, 16 N. E. 799, it is affirmed that a person about to enter into a contract with a city must at least examine the records so far as to enable him to ascertain whether the common council has taken the steps necessary to authorize the particular contract. In fact, it is a familiar and well-settled principle of law that all persons contracting with a municipal or public corporation must at their peril inquire into its powers or that of its officers under the law to make the contemplated contract. This principle, the authorities affirm, is more strictly applied in public corporations than in the law governing private corporations. *Dillon on Mun. Corp.* (4th Ed.) §§ 447, 381. Under the facts, the case at bar, in view of the positive statutory prohibition, is not one which is open to the implied contract rule, for which counsel for appellants contend. The contract in question was not only made without authority of law, but was a positive violation of the township reform act of 1899, and, as a consequence of such violation, it is condemned by that statute to be null and void. In truth, the insistence of appellants' counsel that the facts in this case create an implied liability against appellee is not supported by any decisions of this court. Under our previous holdings it has been universally affirmed that contracts by municipal corporations which were either prohibited by statute, as in the case at bar, or which were in violation of public policy, could not result in creating an implied liability against such corporations. *Schipper v. City of Aurora*, 121 Ind. 154, 22 N. E. 878, 6 L. R. A. 318, and cases cited; *Wrought Iron Bridge Co. v. Board*, etc., 19 Ind. App. 672, 48 N. E. 1050, and cases there cited. See, also, *Franklin*, etc., *Bank v. Whitehead*, 149 Ind., on page 579, 49 N. E. 592, 39 L. R. A. 725, 63 Am. St. Rep. 302. Township trustees are the creatures of the Legislature, and they must pursue and exercise their powers in strict compliance with the statutes by which they are governed, and their authority does not extend beyond that which is either expressly or impliedly granted by law. The unfortunate condition of appellants is to be regretted, and the claim which they present, although not legally binding against the township, is doubtless just. A court, however, under the facts disclosed, must be controlled by the imperative demands of the law applicable thereto, and has no power to grant either legal or equitable relief. In entering into the contract appellants were bound to know at their peril whether the trustee had the power to legally bind his township, and neither their ignorance of the law nor the mistake of the attorney by whose advice they apparently were influenced will, in the eye of the law, excuse or relieve them.

The demurrer to the complaint was properly sustained. Judgment affirmed.

(161 Ind. 431)

STATE ex rel. MAXWELL, Coroner, v.
DUDLEY.

(Supreme Court of Indiana. Nov. 20, 1903.)

QUO WARRANTO—SHERIFF—LYNCHING—VACATION OF OFFICE—CORONER—STATUTES.

1. Acts 1899, p. 500, c. 218, as amended by Acts 1901, p. 311, c. 146, pertaining to the suppression of mob violence, vacates the office of sheriff on the lynching of a prisoner, and requires the coroner to exercise the duties of the office until a sheriff is elected or appointed, or the former sheriff reinstated. *Held*, that quo warranto by the coroner will not lie to oust the sheriff, under a claim of right to exercise the duties of the office under such act, since Burns' Rev. St. 1901, §§ 1145, 1146, limits that action to the prosecuting attorney or a person who claims "an interest in the office," and not merely an interest in the duties pertaining to the office.

Monks, C. J., and Dowling, J., dissenting.

Appeal from Circuit Court, Sullivan County; O. B. Harris, Judge.

Action of quo warranto by William P. Maxwell, as coroner, to oust John S. Dudley from the office of sheriff. From a judgment for defendant, plaintiff appeals. Affirmed.

C. W. Miller, L. G. Rothschild, W. C. Geake, C. C. Hadley, Jno. T. Hays, and Will H. Hays, for appellant. Jno. S. Bays, W. S. Douthitt, C. D. Hunt, and L. F. Bays, for appellee.

HADLEY, J. This action, being a quo warranto information, was brought by appellant, as coroner of Sullivan county, to oust appellee from the office of sheriff of said county. It is grounded upon the act approved March 6, 1899 (Acts 1899, p. 500, c. 218), as amended by the act approved March 9, 1901 (Acts 1901, p. 311, c. 140), pertaining to the suppression of mob violence. The case comes here on the action of the circuit court in sustaining appellee's demurrer to the information. No objection is made to the form of the information, and only such facts will be stated as will exhibit the controlling question of law presented.

Maxwell, the relator, during the period and events embraced, was the duly elected, qualified, and acting coroner of Sullivan county. Dudley, the respondent, was the duly elected, qualified, and acting sheriff of Sullivan county during the same period. On November 20, 1902, a mob took James Dillard, a prisoner, from the custody of Dudley, and lynched him by hanging until dead. The relator immediately, as coroner of the county, demanded of Dudley that he surrender to him, as coroner, possession of the office of sheriff of said county, which was refused. Within 10 days after said lynching the respondent filed with the Governor his verified petition for reinstatement to the office of sheriff, and gave due notice thereof to the prosecuting attorney and Attorney General. The Governor, after a hearing, denied Dudley's petition, and refused to reinstate him in said office of sheriff. The board of com-

missioners of said county has not at any time appointed a person as sheriff to fill said vacancy, and to succeed the respondent in the office of sheriff, and no one has been elected thereto and qualified.

At the very opening of the discussion we are met with the question, does the relator exhibit such an interest in the office of sheriff as entitles him to the extraordinary remedy of quo warranto? All the interest he claims is derived from the amendatory act of 1901, *supra*, which is in these words:

"Sec. 5. If any person shall be taken from the hands of a sheriff or his deputy having such person in custody, and shall be lynched, it shall be conclusive evidence of failure on the part of such sheriff to do his duty, and his office shall thereby and thereat immediately be vacated, and the coroner shall immediately succeed to and perform the duties of sheriff until the successor of such sheriff shall have been duly appointed, pursuant to existing law providing for the filling of vacancies in such office, and such sheriff shall not thereafter be eligible to either election or reappointment to the office of sheriff: provided, however, that such former sheriff may, within ten days after such lynching occurs, file with the Governor his petition for reinstatement to the office of sheriff, and shall give ten days' notice of the filing of such petition to the prosecuting attorney of the county in which such lynching occurred and also to the Attorney General. If the Governor upon hearing the evidence and argument, if any presented, shall find that such sheriff has done all in his power to protect the life of such prisoner and performed the duties required of him by existing laws respecting the protection of prisoners, then such Governor may reinstate such sheriff in his office and shall issue to him a certificate of reinstatement, the same to be effective on the day of such order of reinstatement, and the decision of such Governor shall be final."

The relator's only claim of right to quo warranto is derived from sections 1145, 1146, Burns' Rev. St. 1901, which read as follows:

"Sec. 1145. An information may be filed against any person or corporation in the following cases: * * * Second. Whenever any public officer shall have done, or suffered any act which, by the provisions of law, shall work a forfeiture of his office.

"Sec. 1146. The information may be filed by the prosecuting attorney in the circuit court of the proper county, upon his own relation, whenever he shall deem it his duty to do so, or shall be directed by the court or other competent authority, or by any other person on his own relation, whenever he claims an interest in the office, franchise, or corporation which is the subject of the information."

The exercise of a public office affects the whole body of the public, and hence it is that the government assumes to regulate and restrain it, leaving to the individual citizen

only the exceptional right to question it when he is able to show that he has an interest in the particular office different in kind from that of the citizens generally. It will be noted from the above statute that, when an information is brought on private account, the claim of the relator must be in the office itself, and not in its duties; and, under the decisions of this court, it is essential to such an information that it contain not simply the statement required in an information filed by the prosecuting attorney, but averments showing the relator's special and particular interest, setting forth all the facts necessary to establish the conclusion of law that he is entitled to the office, or some interest therein. *Reynolds v. State*, 61 Ind. 392; *Jones v. State*, 112 Ind. 193, 13 N. E. 416; *State v. Ireland*, 130 Ind. 77, 29 N. E. 396; *State v. Wheatley* (Ind. Sup. March 10, 1903) 66 N. E. 684.

It is said in the *Ireland Case*, at page 88, 113 Ind., and page 396, 29 N. E.: "One of the facts to be plainly stated in the information is in the nature of the interest claimed by the relator in the office." This leads us to inquire, does the relator show in his complaint any interest at all in the office of sheriff of Sullivan county? He alleges that on November 20, 1902, a mob took James Dillard, a prisoner, from the custody of the defendant, who was then and there the duly elected, qualified, and acting sheriff of Sullivan county, and hanged him; that the relator immediately after said hanging demanded of the defendant that he surrender to him, as coroner of said county, possession of the office of sheriff of said county, and the books, papers, and all appurtenances thereof; that ever since the said 20th day of November the defendant has unlawfully and wrongfully usurped the office of sheriff of said county, and kept the relator therefrom, and still excludes him from said office, and deprives him of the fees and emoluments thereof, and kept him from performing the duties thereof, contrary, etc. The complaint clearly counts upon an interest in the office of sheriff; that is, in the official franchise acquired solely through the action of the mob in lynching appellee's prisoner. Assuming the view most favorable to the relator that the statute of 1901 permits us to take, it must be said that the enactment has not attempted to cast upon the coroner the office of sheriff in such a case, but has merely attempted to provide that the coroner shall perform *pro tempore*, until a successor to the sheriff is appointed, the ordinary duties of the sheriff—perform them, not as acting sheriff, but as coroner. The relator, therefore, cannot recover, because the quo warranto statute was only intended to give a remedy, where a person other than the prosecuting attorney is the relator, in cases where such person has an interest in the office itself. The statute does not extend to a case where the claim is that such relator has

merely an interest in duties that pertain to the office.

The constitutionality of the amendatory act of 1901, supra, has been called in question and ably discussed, but the conclusion we have reached above makes it unnecessary for us to consider it.

Judgment affirmed.

MONKS, C. J., and DOWLING, J., dissent.

(161 Ind. 393)

REPUBLIC IRON & STEEL CO. v. OHLER.

(Supreme Court of Indiana. Nov. 17, 1903.)

MASTER AND SERVANT—NEGLIGENCE—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY.

1. Where a servant employed in a rolling mill was required by the master to assist in holding a steel rod while other workmen hammered the end of the rod so as to swell it, and a sliver of steel flew from the rod and into his eye, and it appeared that the safe way to have conducted the work would have been to have constructed a rack of lumber in order to hold the rod while the end was being pounded, and that the master knew of the danger, the master was guilty of negligence.

2. Where a servant, employed as an ordinary laborer in a rolling mill, was holding a steel rod while other servants were hammering the end thereof in order to fashion it into a piston rod for an engine, and a splinter of steel flew from the rod and entered his eye, the risk was not one assumed by him.

3. It is not error to refuse an instruction the substance of which is fully covered by other instructions.

4. In an action against a master for injuries to a servant caused by a splinter of steel flying from a steel rod which he was holding while other servants hammered the end so as to swell it, evidence that the servant had worked continuously for 48 hours without any sleep, and that at the end of 36 hours he had stated that he did not think he could endure the strain, was competent, as bearing on the question whether he was in a condition to apprehend and appreciate the danger to which he was subjected.

Appeal from Superior Court, Madison County; H. C. Ryan, Judge.

Action by William M. Ohler against the Republic Iron & Steel Company. From a judgment in favor of plaintiff, defendant appeals. Transferred from the Appellate Court under section 1337u, Burns' Rev. St. 1901. Affirmed.

W. H. Miller, Jno. B. Elam, Jas. W. Fessler, and S. D. Miller, for appellant. Kittinger & Diven, for appellee.

JORDAN, J. Action by appellee to recover damages for personal injuries sustained by him while in the employ of appellant, which injuries are alleged to be due to the negligence of the latter. The answer was a general denial, and a trial before a jury resulted in a general verdict in favor of appellee, awarding him damages in the sum of \$2,500. Answers to a series of interrogatories were also returned by the jury along with their general verdict. Appellant company unsuccessfully moved for a new trial,

and judgment was rendered against it upon the verdict. The points discussed by its counsel and relied upon for a reversal are all based upon the action of the court in denying the motion for a new trial.

The following, among others, are substantially the facts alleged and set out in the complaint: The Republic Iron & Steel Company is a corporation operating a manufacturing plant near the town of Frankton, in Madison county, Ind., and is engaged in making iron bars and rods by means of machinery propelled by steam. The factory is a large plant, and the company hires for service therein a large number of men. On and prior to the 20th day of December, 1899, plaintiff (appellee herein) was in the employ of said company, and was classed in and was at work in what was known as the "floating gang," engaged in doing first one kind of labor, and then another." About 4 o'clock in the morning of said 20th day of December, 1899, after he had finished what is denominated as "his night turn," one Kelly, who was "foreman of the defendant's said factory, and foreman over its men and employees of the department in which the plaintiff was then at work," ordered him to hold a piston rod; and, while he was holding said rod, Kelly, as such foreman and agent, ordered two workmen to strike the end of said rod for the purpose of swelling the same in order to fasten a head thereon. Said piston rod was made of steel, and, while the plaintiff was holding it in obedience to the order and direction of the foreman, the two men and workmen by order of said foreman struck the end thereof with large hammers; and while they were so striking the rod a piece of steel flew off from the said head or end and struck the plaintiff in the left eye, thereby destroying the sight thereof, rendering him totally blind in said eye. At the time this sliver of steel struck plaintiff's eye, his head was about two feet from the end of the piston rod, and was at said distance from the rod by reason of the fact that the foreman had directed him to hold and place himself in that position. The plaintiff was not warned by the defendant or by said foreman of any danger that might result by reason of the end of said piston rod being hammered and knocked off, or of any danger that might result therefrom. It appears that he had no knowledge of any danger which might attend the holding of said rod when pounded as it was under the circumstances. It is averred that the place where plaintiff was ordered to hold the rod was made dangerous and unsafe for workmen who were wholly unacquainted and inexperienced to work in such a position, and that it was negligence on the part of the defendant to have him hold the rod while said workmen hammered and pounded the same for the purpose of driving or fastening a head thereon. The defendant was aware of and knew of the danger or peril which, under the cir-

cumstances, attended the holding of the rod when a head was being hammered thereon; and the defendant also knew that the only proper and safe way to work upon said rod, in order to hammer a head thereon, was to place it in an upright position, without the aid of any person holding it, by fastening it in such a manner as to hold it in position so as to drive thereon the piston head, and the defendant knew that no one should hold the said rod with his hands when said work was being performed. The plaintiff, it is averred, did not learn these facts until after he was injured. At the time the plaintiff sustained the injury alleged, he had been working continuously, at the instance and request of the defendant, in the said factory, for a period of 48 hours, without any sleep, and when he was ordered by said foreman to hold the rod, by reason of his continuous work without sleep, he did not realize or appreciate the danger to which he was being subjected, and had no knowledge that it was unsafe or dangerous to hold the rod in the manner as ordered by the foreman. It is charged generally that the injury was caused by the negligence and carelessness of the defendant as aforesaid, and by reason of its carelessness and negligence in ordering the plaintiff into said place without warning him of said danger. The expenses incurred by the plaintiff in and about having his eye treated are shown, which medical bill, it is charged, the defendant refused to pay; and it is further alleged that the sight of the left eye is totally destroyed, and that the blindness thereof is permanent.

The sufficiency of the complaint is not discussed by appellant's counsel, but they contend that the evidence given upon the trial is not sufficient to entitle the plaintiff to recover upon his complaint. The infirmity, however, of the argument advanced upon this question, is that counsel seemingly request that we disregard the well-settled rule and assume the task of attempting to weigh the evidence, or, in other words, that we consider only the evidence most favorable to appellant, and thereby reverse the rule of appellate procedure which requires that we, in reviewing the sufficiency of evidence in cases upon appeal, must consider the evidence only which is most favorable to the verdict of the jury or finding of the court, as the case may be. There is evidence in the record which may be said to fully sustain appellee's right to recover upon the action set up in his complaint.

The following are some of the material facts which there is evidence in the record to establish: At and prior to the time of the accident in question, which occurred on the morning of December 20, 1899, appellee was in the employ of appellant company, and had been in its employ for about six months. Appellant is a corporation, and at the time of the accident operated a rolling mill or manufacturing plant in Madison county, Ind., and

was engaged therein in manufacturing iron bars, rods, etc., by the means of machinery operated by steam. Appellee was not a skilled workman, and was employed by appellant as a common laborer, and received wages as such, and was classed in and worked with what was known as the "floating gang" in the rolling mill, doing first one kind of work, and then another. On December 18, 1899, it seems that the piston rod of the engine which propelled the machinery of the mill broke, and this caused the work in the mill to be suspended until the rod could be repaired. After the breaking of this rod, one Kelly, appellant's foreman, who was in the control and management of its mill, and in the control and management of its employes in the department where appellee worked, went with appellee to what is known as the "scrap heap." Kelly, it appears, selected a piece of scrap steel from this heap. The metal selected was soft steel, of which fact Kelly had knowledge. He and appellee carried the piece of steel to a turning lathe in the mill, and the foreman then directed him to turn out, by means of the lathe, a new piston rod for the engine, to be used in the place and stead of the one which had been broken. Appellee, as ordered by the foreman, performed the work of turning the rod, but he did it under the directions of the foreman in respect to the manner in which it should be performed. It is disclosed that the foreman was in a hurry to have the new rod completed, in order that the work in the mill might not be delayed any longer than possible. At his instance and directions, appellee was required to work continuously at the job of turning the rod for 48 hours, without any sleep, and did not finish it until 4 o'clock on the morning of December 20, 1899. His regular turn of work consisted generally of a period of 10 hours. The new rod, when turned, was round, and about 5 feet long and 3 inches in diameter, and, with its head, weighed 250 pounds. What is termed a "follower head," to be used on the rod, was circular, and about 20 inches in diameter. Through the center of this head there was an opening, the diameter of which was, to a small extent, greater than the diameter of the rod, and into this opening the end of the rod was to be inserted. After the rod had been inserted, it was necessary to fasten or clinch the head so as to hold it in place by pounding down the end of the rod which projects through the follower head. Appellant's mill had the necessary blacksmith shops, forges, lathes, drill press, anvils, and the ordinary repairing appliances belonging to such a mill, but it did not have machinery for building or rebuilding engines. After the turning of the piston rod had been completed, at 4 o'clock in the morning, Kelly, the foreman, then proceeded, according to his own methods, to have the end of the rod riveted or fastened in the follower head; and, to carry out this purpose, he ordered appellee, togeth-

er with two other men, to place the new rod in an upright position, with one end thereof on the floor, and directed appellee and the other two men to hold it in that position. He then ordered two men, who were elevated above the rod by standing on barrels, and who each had a heavy sledge hammer, to rivet or fasten the end of the rod by means of hammering the end thereof into the cavity in the upper side of the follower head. Appellee, in obedience to the orders of the foreman, was engaged in holding the rod, and was in the exercise of due care, when, by force of the hammering, a sliver from the rod flew off and struck him in the left eye, destroying the sight, and rendering said organ totally and permanently blind. The rod in question is shown to have been constructed out of soft steel, but the head was of cast iron. The physician who removed the sliver from the eye testified that it was as large as a dime. The piston rod, when it was being hammered, was warm, but not hot. Appellee had no warning whatever that it was dangerous or unsafe for him to hold the rod as he did at the time when the rod thereof was being hammered in the manner it was, and had no notice or knowledge whatever that a sliver of the rod was likely to fly off and injure him, and he did not apprehend or appreciate the danger or peril of the situation in which he had been placed at work in holding the rod by the orders of the foreman. There is evidence to establish that the method employed by appellant to rivet or fasten the head of the rod was unsafe or dangerous, and that its foreman, when he ordered appellee to hold the rod, placed him in a position of danger, of which fact he had knowledge, but of which appellee had no knowledge or warning. It is shown that the foreman knew that slivers were liable to fly off of the rod and injure the men who were holding it. There is also evidence going to prove that the safe way to have riveted the head on the rod with sledge hammers was first to have constructed a rack out of lumber for the purpose of holding the rod when the end was being pounded, and that such appliance could have been constructed within a half day. Appellee, before the accident, had no knowledge that such appliance for holding the rod was the proper and safe one to be employed. He, at the time of the accident, was 33 years old, and it appears that before his employment he virtually had no experience in working in iron or rolling mills. It is disclosed that, after he had worked continuously some 36 hours in turning the rod, he informed Kelly, the foreman, that he did not believe he could endure the labor any longer; but the latter informed him that he must continue at the work until the rod was finished, as he desired to have the rolling mill ready for operation by 6 o'clock the next morning. It is shown that, some months previous to the accident, Kelly, the foreman, had discharged appellee from the employ of

appellant for the reason that he refused to work on Sunday, but subsequently he was re-employed.

Appellant's counsel, in discussing the evidence, contended, first, that the facts do not show actionable negligence, for the reason that it does not appear that the accident by which appellee was injured was one which ordinary foresight and prudence could have anticipated and prevented; second, that there are no facts proven tending to show that appellant, the master, and appellee, the servant, were not on equal footing with each other in regard to notice or knowledge of the danger to which the latter was subjected or exposed; third, that he, under the circumstances, must be held to have assumed the risk. That each of these contentions is inconsistent and wholly at variance with the facts in this case is certainly apparent. We are not unmindful of the rule that the master is not an insurer of the safety of his servants, and that reasonable or ordinary care, and not the highest efficiency which skill and foresight can produce, is the legal standard by which the liability of the master is tested. The inquiry in this case is not whether the accident might have been avoided if appellant had anticipated its occurrence, but whether, under the circumstances, it was guilty of negligence in failing to anticipate it and provide against its occurrence. It is true that, in cases like the one at bar, in order to authorize a recovery, the evidence must show that the master neglected to discharge a duty which he owed to the injured servant. This court has repeatedly asserted that the law interprets ordinary or reasonable care to be of that degree which a person of ordinary prudence, under the particular circumstances, is presumed to exercise to avoid injury. Such care, however, is required to be in proportion to the danger to be avoided or prevented, and the consequences which may result from the neglect. Louisville, etc., R. Co. v. Schmidt, 147 Ind. 638, 46 N. E. 344, and cases cited. That the master, under the law, owes the duty to his servants of providing a safe place for them to work, and safe appliances with which to perform the labor required, is elementary. This duty is not only temporary, but it is a continuing one; and the master must exercise reasonable or ordinary care to keep such places, and such appliances, tools, or machinery, safe. In Jenney Electric Co. v. Murphy, 115 Ind. 566, 18 N. E. 30, it is affirmed that the master especially engages "that he will not expose the employé to danger which is not obvious, or of which the latter has no knowledge or adequate comprehension, and which is not reasonably and fairly incident to, and within the ordinary risks of, the service which he has undertaken. There is another equally well settled principle, correlative to the rules which define the duties of the employer, which holds the employé to the assumption of all risks naturally and reasonably incident

to the service in which he embarks, so far as the hazards of the service are obvious and within the apprehension of a person of his experience and understanding." One of the duties which the law casts upon the master is not to expose an inexperienced servant, whom he requires to perform dangerous services, to such danger without giving him warning thereof. He is required to give such servant such instructions as will enable him to avoid the injury, unless while performing the required service both the peril and the means of avoiding it are apparent. Of course, the duty to warn and instruct in such cases naturally arises out of the ignorance or inexperience of the employé, and does not extend to employés who are of mature age, and familiar with the employment in which they engage and the risks incident thereto. *The Atlas Engine Works v. Randall*, 100 Ind. 293, 50 Am. Rep. 798; *Pittsburgh, etc., R. Co. v. Adams*, 105 Ind. 151, 5 N. E. 187; *Bailey's Personal Injuries*, §§ 2604, 2667. There is another well-recognized principle of the law governing the relation of master and servant, which affirms that "the servant's implied assumption of risks, which accompanies and is a part of the contract of hiring, is confined to the particular work and class of work for which he is employed; and if the master orders him to work temporarily in another department of the general business, where the work is of such a different nature and character that it cannot be said to be within the scope of the employment, and where he is associated with a different class of employés, he will not, by obeying such orders, necessarily thereby assume the risks incident to the work." *Pittsburgh, etc., R. Co. v. Adams*, supra.

In the case at bar it appears that appellee was employed and paid as a common laborer. It does not appear that his services as such extended to the construction of a piston rod for the engine in appellant's mill. While it is true he was a man of mature years, still, as the evidence tends to prove, he was inexperienced as an iron worker in rolling mills prior to his employment. He received no warning whatever, and had no knowledge of the danger to which, under the circumstances, he was exposed. While, upon the other hand, appellant is shown to have had notice thereof, and knew that the place or position in which it ordered appellee to work on the occasion in question was unsafe. It knew that, under the method or means employed to rivet or fasten the head upon the piston rod, slivers from the metal were liable to fly from the force of the hammering, and injure those engaged at the time in holding the rod with their hands. Considering all of the circumstances as they existed, the jury was justified in finding that appellant company was negligent, and that, under the facts, it ought to have anticipated the accident, and provided against its occurrence. In fact, it may be said that there is sufficient evidence

to authorize the jury to find in favor of appellee upon every material issuable fact in the case.

Appellant next complains of certain instructions given and refused by the court. We have carefully examined and considered the charge given by the learned judge presiding at the trial, and are of the opinion that, when it is considered as a whole, as it must be, it is in entire harmony with the law, and covers every material phase of the case. In truth, it may be said that the charge is as favorable to appellant as, under the circumstances, it could demand.

It appears that the ruling of the court in refusing instructions requested by appellant was due to the fact that they either did not correctly state the law applicable to the case, or were substantially covered by others given by the court.

It is not necessary in this case that we should specifically refer to or set out all of the instructions upon which counsel for appellant predicate error. It is urged that instruction No. 2 given by the court is faulty for the alleged reasons (1) that it assumes that the acts of appellant were negligent; and (2) because it omits the question of the assumption of risk by appellee. There certainly is no substantial ground for asserting that the instruction in question is open to the first objection, while in regard to the second the court by other instructions fully advised the jury relative to the law governing the assumption of risk on the part of appellee. Certainly the court was not required to advise or inform the jury in any one instruction upon all of the principles of law applicable to the case. In fact, upon the question of the assumption of risk, the court, upon its own motion, and at the request of appellant, fully advised the jury in regard to that feature.

The court, at appellant's request, refused to broadly charge that the fact that the plaintiff was working beyond the usual time could have no bearing upon the case in any way whatever. As hereinbefore stated, there was evidence introduced in behalf of appellee going to show that before the accident occurred he had been required to work continuously in turning the rod for 48 hours, without any sleep; that at the end of 36 hours he informed the foreman to the effect that he could no longer endure the strain to which he was being subjected. The foreman, however, refused to relieve him, but required him to continue at the work until the rod was completed. This evidence, so far as we have observed, was introduced without any objections on the part of appellant. If it was properly admitted, it was before the jury for all legitimate purposes. If, as counsel for appellant contend, opposing counsel may, in their argument, have pictured their client as a "ruthless corporate taskmaster" and a "merciless and greedy corporation," they should have requested the trial court to have limited the jury to a proper consideration of

the evidence in question. The object of the instruction, as requested, was to entirely withdraw this particular feature of the case from the consideration of the jury for any purpose whatever, and, in the form presented, it was properly denied. Appellant, in view of the contention of its counsel that the danger to which appellee was exposed was, under the circumstances, just as open and apparent to appellee as it was to the former, and that he should have known and appreciated the danger, is not in a position to complain of the refusal of the charge as requested. Appellee ought to have known, it is insisted, that slivers were liable to fly from the rod when it was being hammered. It is not reasonable to assert that a man who has labored continuously for a period of 48 hours without sleep, or for even a much shorter time, is in his normal condition, or that he, under the circumstances, can properly exercise all of the faculties or senses with which he is endowed. The law of nature is inexorable in its demands. The cravings of hunger and nature's demand for sleep or rest must have consideration. A human being deprived of sleep for the period which appellee was becomes dull in intellect and apprehension, and necessarily must be more or less unmindful of his surroundings. This court, in *Pennsylvania Co. v. McCaffrey*, 139 Ind. 430, 438, 38 N. E. 67, 70, 29 L. R. A. 104, said: "The laws of humanity declare that every man fit to be a member of a train crew must have three meals, some rest, and eight hours' sleep a day." The jury had the right, at least, to consider this feature of the case, as bearing upon the question whether, under all of the circumstances, appellee apprehended and appreciated the danger to which he was subjected. This was a question presented, and one to be determined by the jury under all of the facts bearing thereon.

After giving a careful consideration to all of the propositions urged by counsel for a reversal, we are constrained to conclude that there is no error in the record. Judgment affirmed.

(161 Ind. 426)

BOARD OF COM'RS OF MADISON COUNTY v. MOORE.

(Supreme Court of Indiana. Nov. 20, 1903.)

CONSTITUTIONAL LAW—COUNTIES—CARE OF INSANE—COMPENSATION—LIABILITY—STATUTES—JUSTICES OF THE PEACE.

1. Burns' Rev. St. 1901, § 6990 (Rev. St. 1881, § 5145; Horner's Rev. St. 1901), authorizing a justice of the peace to appoint some resident of the county to take charge of and confine insane persons committed by such justice under Acts 1855, p. 133 (Burns' Rev. St. 1901, §§ 6987-6995; Rev. St. 1881, §§ 5142-5150; Horner's Rev. St. 1901), does not confer ministerial powers on a judicial officer in violation of Const. art. 3, dividing the government into separate departments—legislative, executive (including administrative), and judicial—and forbidding the exercise by an officer of one department of any of the functions of another, except as provided in the Constitution.

2. The liability of the county for the compensation provided under Burns' Rev. St. 1901, § 6990 (Rev. St. 1881, § 5145; Horner's Rev. St. 1901), for a person taking charge of and confining a person committed by a justice of the peace as insane, under Acts 1855, p. 133 (Burns' Rev. St. 1901, §§ 6987-6995; Rev. St. 1881, §§ 5142-5150; Horner's Rev. St. 1901), is created by the statute, and not by any contract of the justice of the peace.

3. Acts 1855, p. 133 (Burns' Rev. St. 1901, §§ 6987-6995; Rev. St. 1881, §§ 5142-5150; Horner's Rev. St. 1901), providing for proceedings before justices of the peace to commit insane persons, does not repeal or conflict with Act May 6, 1853, § 12 (Burns' Rev. St. 1901, § 2725; Rev. St. 1881, § 2555; Horner's Rev. St. 1901), providing for such proceedings in a court having probate jurisdiction.

Appeal from Circuit Court, Madison County; John F. McClure, Judge.

Action by Charles W. Moore against the board of commissioners of Madison county. From a judgment for plaintiff, defendant appeals. Affirmed.

Chipman, Keltner & Hendee, for appellant. Bagot & Bagot, for appellee.

MONKS, C. J. It appears from the record that one Milton Ring on January 1, 1898, was adjudged to be "insane, and dangerous to the community if suffered to remain at large," by a justice of the peace of Anderson township, Madison county, Ind., in a proceeding brought under sections 6987-6995, Burns' Rev. St. 1901 (sections 5142-5150, Rev. St. 1881; Horner's Rev. St. 1901; Acts 1855, p. 133); and said justice of the peace, under the provisions of said sections, appointed appellee, a resident of said county, to take charge of and confine said Ring. Appellee, by virtue of said appointment, took charge of said Ring, and confined him under said judgment from January 1, 1898, to February 8, 1898, a period of 39 days. At the March term, 1898, of the board of commissioners of said county, appellee presented a claim for his services in taking care of and confining said Ring under the judgment of said justice of the peace, which claim was disallowed by said board of commissioners. Afterwards, in March, 1898, appellee brought this action against appellant in the court below to recover for said services, and a trial of said cause resulted in a finding, and, over a motion for a new trial, judgment, for appellee.

It will be observed that appellee was appointed by said justice of the peace and rendered the services sued for before the passage of the act of 1899 (Acts 1899, pp. 343-364, c. 154, being sections 5594g-5594e, 2 Burns' Rev. St. 1901) known as the "County Reform Law," and that said act, therefore, has no application to this case. This action, being within the jurisdiction of a justice of the peace, was, before the taking effect of the act of 1903 (Acts 1903, pp. 280, 281, c. 156), appealed to this court under the provisions of section 8 of the act of 1901 (Acts 1901, p. 566, c. 247, being section 1337h, Burns' Rev. St. 1901), for the purpose of pre-

senting the question of the constitutionality of that part of said section 6990 (5145), *supra*, which authorizes the justice of the peace to appoint some resident of the county to take charge of and confine such insane person, and which provides that the person appointed "shall receive a reasonable compensation" for such services "from the board of commissioners of the county at its next term thereafter, to be paid out of the county treasury."

Appellant insists that the appointment of a person to take charge of said insane person under the provisions of section 6990 (5145), *supra*, was the exercise of a ministerial power by a judicial officer, and was in effect a contract made by said justice of the peace with such person; that the part of said section which attempts to confer this power upon a justice of the peace is in violation of article 3 of the Constitution of this state, and therefore void. Article 3 of the Constitution provides that "the powers of the government are divided into three separate departments; the legislative, the executive, including the administrative, and the judicial; and no person charged with official duties under one of these departments shall exercise any of the functions of another, except as in this Constitution expressly provided." Said appointment is only temporary. Said section 6990 (5145), *supra*, authorizes the board of commissioners to appoint some other person to take charge of such insane person at any time, in their discretion. Section 6991 (5146), *supra*, requires the justice of the peace, when the finding is against the insane person, to certify his proceedings to the circuit court of the county, and provides that "at the next term of such court, after the filing of the transcript of such proceedings in the clerk's office thereof, such court shall cause said issue to be again tried by a jury of twelve persons, under like instructions and conditions as to the manner of impaneling the jury, administering oaths, peremptory challenges, verdict of jury, judgments for costs, as hereinbefore provided; and if the finding of such jury shall be against such insane person, such court shall confirm the appointment of such person to take charge of such insane person, or may appoint some other suitable person for that purpose." Section 6992 (5147), *supra*, provides in what cases the property of such insane person shall be subject to the payment of the costs of such proceeding and the expense of his keeping, and when the amount paid out of the county treasury shall be refunded out of such insane person's estate. Appellee was appointed by the justice of the peace to execute the judgment of said justice of the peace by caring for and confining such insane person. Power to commit an insane person to the custody of some person or officer was necessary to accomplish the purpose of the act of 1855, which was to protect the public from such insane person. Without such authority, a court could not

properly enforce its judgment in such a case. It is true the Legislature might have named an officer to whose custody the insane person should be committed, but it clearly had the power to authorize the court to appoint some person not an officer for that purpose. Powers of like character have frequently been given courts. Section 1506, Burns' Rev. St. 1901 (section 1439, Rev. St. 1881; Horner's Rev. St. 1901), authorizes a justice of the peace, whenever there is no constable convenient, to appoint a special constable, when, in his opinion, an emergency exists for the immediate use of one. Courts are authorized, when there is no sheriff or coroner, to attend, or, if they are both incapacitated, from serving, to appoint an elisor to serve during the pendency of the matter in which the officer may be disabled from serving. Sections 1380, 1381, Burns' Rev. St. 1901 (sections 1328, 1329, Rev. St. 1881; Horner's Rev. St. 1901). Our attention has not been called to any case, and we know of none, in which the right to vest such power in the court has been questioned. The liability of the county is for reasonable compensation for the services rendered by the person appointed, and such liability is created, not by any contract of the justice of the peace, but by the statute. Moreover, it is not a function of the executive or legislative department of the state government to appoint persons to take charge of and confine insane persons who are dangerous to the community when suffered to remain at large; and when a justice of the peace—a judicial officer—appoints such person under section 6990 (5145), *supra*, he is not exercising any function of either of said departments. *City of Terre Haute v. Evansville, etc., R. Co.*, 149 Ind. 174, 181-186, 46 N. E. 77, 37 L. R. A. 189, and cases cited; *Baltimore, etc., R. Co. v. Town of Whiting* (this term) 68 N. E. 266, and cases cited. Such person, when appointed, does not belong to either the legislative or the executive department of the state government, nor does he exercise any of the functions of either of said departments. In *City of Terre Haute v. Evansville, etc., R. Co.*, 149 Ind. 174, 46 N. E. 77, 37 L. R. A. 189, this court said at page 185, 149 Ind., and page 80, 46 N. E., 37 L. R. A. 189, "While the powers conferred by the foregoing acts of the Legislature upon judges in this state are not strictly judicial, yet they are not such as belong to either the executive or the legislative departments of the state government, and are therefore not within the inhibition of article 3 of the Constitution." See, also, *Baltimore, etc., R. Co. v. Town of Whiting* (this term) 68 N. E. 266, and cases cited.

It is claimed by appellant that there seems to be a conflict between sections 6987-6995 (5142-5150), *supra*, which were enacted in 1855, and section 12 of an act in force May 6, 1853, being section 2725, Burns' Rev. St. 1901 (section 2555, Rev. St. 1881, and Horner's Rev. St. 1901), enacted in 1852. Repeals

by implication are not favored. Said section 12 (section 2725), *supra*, applies in proceedings commenced in a court having probate jurisdiction, while said act of 1855 provides for the commencement of proceedings before a justice of the peace. Each of said acts is applicable only to proceedings brought thereunder, and it is clear that there is no conflict between them. *Sefton v. Board*, etc. (Ind. Sup.) 66 N. E. 891.

Judgment affirmed.

(31 Ind. App. 648)

CITY OF FRANKLIN v. DAVENPORT.

(Appellate Court of Indiana, Division No. 2.
Nov. 20, 1903.)

**MUNICIPAL CORPORATION—SIDEWALK—NEG-
LIGENCE—PLEADING.**

1. A complaint alleging that a footman attempting to pass over a footbridge forming a part of a sidewalk was injured because of its defective condition, which the city, having notice thereof, had negligently permitted to continue, is sufficient though it is not expressly stated that the negligence was the proximate cause of the injury, and though a motion to require the pleading to be made more specific as to the defects in the bridge would have been well taken.

Appeal from Circuit Court, Johnson County; W. J. Buckingham, Judge.

Action by Emelia Davenport against the city of Franklin. From a judgment in favor of the plaintiff, defendant appeals. Affirmed.

Will Featherngill and Miller & Barnett, for appellant. Deupree & Slack, for appellee.

ROBY, J. The averments of appellee's complaint, so far as material at this time, were to the effect that on October 26, 1901, at the intersection of Johnson avenue and Ohio street, in the city of Franklin, there was a footbridge for foot passengers over a ditch called "Roaring Run," which it was the duty of said city to maintain and keep in repair, it being a part of the sidewalk along Ohio street, and under the control of said city; that for a long time prior to said day said bridge had been dangerous to persons passing over the same, in that its timbers had become rotten, decayed, and sunk in the earth, of which condition the city had notice prior to said day, and negligently permitted said bridge to remain in said dangerous condition; that on said day, and while the bridge was in the dangerous condition aforesaid, plaintiff attempted to pass over said bridge, and by reason of said defective condition, caused by the neglect of said city to repair the same, she fell, broke her arm, and otherwise bruised and hurt herself. The issue was made by a general denial. A verdict was returned and judgment rendered in favor of appellee for \$450. The assignments of error which have not been waived go to the sufficiency of the complaint. The specific objection urged against it under different

assignments is that it does not therein appear that the negligence of the city was the proximate cause of the injury. The particulars of the alleged defect in the bridge are not detailed, and a motion to require the pleading to be made more specific in that regard would have been well taken, but it has been long settled that a general allegation of negligence is sufficient to withstand a demurrer to the complaint for want of facts, and that under such allegation the facts constituting negligence may be given in evidence. *Railroad v. Wynant*, 100 Ind. 163. The averment is, in effect, that a footman attempting to pass over a footbridge forming a part of a sidewalk of a city was injured because of the defective condition of such bridge, which the city, having notice thereof, had negligently permitted to continue. If the fact thus stated is true, the cause of the accident was the negligence of the city. It is not necessary to use the term "proximate cause" in the complaint. The averment that the defect complained of caused the injury is sufficient. The complaint under consideration does not leave the cause of the accident to conjecture, although it fails to set out the details connected therewith so fully as might have been done.

Judgment affirmed.

(31 Ind. App. 648)

STOY v. BLEDSOE et al.

(Appellate Court of Indiana, Division No. 2.
Nov. 19, 1903.)

**NOTES—ANSWER—ALLEGATIONS OF FAILURE
OF CONSIDERATION—SUFFICIENCY—PUR-
CHASE OF NOTES AFTER MATURITY—ASSIGN-
MENT OF ERRORS—SUFFICIENCY—WAIVER.**

1. An assignment of error that the court erred in overruling objections to the admission of evidence, to be available on appeal, must have been assigned as a reason for a new trial.

2. The sufficiency of an answer cannot be raised for the first time in the Appellate Court by an assignment of error.

3. An assignment of error challenging the sufficiency of two paragraphs of a pleading jointly is not available if one of them is sufficient on demurrer.

4. The answer of defendant in an action on notes and to foreclose a mortgage securing them, which alleged that he gave the notes for personal property purchased from the payee, and at the time of the sale and execution of the notes the payee did not have the legal title to the property because of the existence of an unpaid mortgage thereon in favor of a third person, of which defendant had then no knowledge; that the property was taken from defendant and sold under an execution against the payee before any of the notes for the purchase price became due; that defendant appealed to the payee for the restoration of the property, which he assured him he would do; and that plaintiff, as assignee of the notes and mortgage, knew these facts when he took the assignment of the same—was sufficient to bar a recovery.

5. A purchaser of notes, one of which is past due and wholly unpaid, together with the mortgage securing them, which stipulates that a failure to pay any of the notes at maturity shall make all of the notes due and collectible, is merely a purchaser of past-due and dishonored negotiable paper.

6. Findings that plaintiff suing on notes and to foreclose a mortgage securing them did not know, when taking an assignment of them, what the consideration was for the execution of the notes, but that when he took the notes and mortgage all the notes were past due under the terms of the mortgage, justified the conclusion that plaintiff was not entitled to recover, where the court also found that there was a failure of the consideration of the notes.

7. An assignment of error not discussed by appellant on appeal will be deemed waived.

Appeal from Circuit Court, Martin County; C. B. Rogers, Special Judge.

Action by William L. Stoy against Anthony Bledsoe and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Marshall & Carrico, for appellant. McCormick & Gilkison, for appellees.

WILEY, J. November 28, 1900, appellee Anthony Bledsoe executed to one Hughs two notes for \$100 each, payable at a bank within this state, one of which notes was due August 28, 1901, and the other one year from date. To secure their payment Bledsoe executed a mortgage on certain real estate, in which his wife, his coappellee, joined. The mortgage was duly recorded. December 6, 1900, Hughs assigned the notes and mortgage to Houghton and Moser, who, on September 2, 1901, assigned the same to said Hughs, who, on September 11th following, assigned said notes and mortgage to appellant without recourse. The several assignments of mortgage were duly acknowledged and recorded. Appellee Anthony Bledsoe at the same time executed a chattel mortgage to said Hughs upon a span of mules, wagon, etc., which he had purchased of Hughs, to secure the payment of the notes sued on, and this mortgage was also assigned to Houghton and Moser. Appellant, as assignee, sued on the notes and to foreclose the mortgage covering the real estate. The cause was put at issue by answer and reply. Trial by the court, and upon proper request the court made a special finding of facts and stated its conclusions of law thereon. The conclusions of law were to the effect that appellant was not entitled to recover, etc.

There are five specifications in appellant's assignment of errors, viz.: (1) That the court erred in overruling the demurrer to the second and third paragraphs of answer; (2) the court erred in its conclusions of law; (3) the court erred in overruling appellant's objection to the admission of certain evidence; (4) that appellee's answer, nor either paragraph, does not state facts sufficient to constitute a defense, etc.; and (5) the court erred in overruling appellant's motion for a new trial.

The third and fourth specifications do not present any question for review. The only way the question was attempted to be raised by the third was to assign it as a reason for a new trial. As to the fourth, it has

many times been ruled that the sufficiency of an answer cannot be raised for the first time in an appellate tribunal by an assignment of error. *Elwood, etc., Co. v. Harting*, 21 Ind. App. 408, 52 N. E. 621; *Austin v. McMains*, 14 Ind. App. 514, 43 N. E. 141. *Stephens v. Smith*, 27 Ind. App. 507, 61 N. E. 745; *City of Evansville v. Martin*, 103 Ind. 208, 2 N. E. 596; *State ex rel. v. Curry*, 134 Ind. 33, 33 N. E. 685.

The first specification challenges the sufficiency of the second and third paragraphs of answer jointly. It follows that, if either of them is sufficient to withstand a demurrer, the assignment is not available, even though the other might be bad. *American Tin-Plate Co. v. Guy*, 25 Ind. App. 588, 53 N. E. 738; *Kahn v. Gavit*, 23 Ind. App. 274, 55 N. E. 268; *Colles v. Lake City, etc., Co.*, 22 Ind. App. 86, 53 N. E. 256; *Town of Thorntown v. Fugate*, 21 Ind. App. 537, 52 N. E. 763; *Boots v. Ristine*, 146 Ind. 75, 44 N. E. 15; *City of South Bend v. Turner*, 156 Ind. 418, 60 N. E. 271, 54 L. R. A. 396, 83 Am. St. Rep. 200. We will first consider the second paragraph of answer. This paragraph attempts to set up facts showing that the consideration for which the notes in suit were given had wholly failed before they were assigned to appellant, and that he took them with knowledge of that fact. It is averred that the notes were given for a span of mules and other personal property purchased of Hughs by appellee Anthony, and that the mortgage was given to secure their payment; that at the time of said sale and the execution of the notes, appellant's assignor did not have a legal title to said property, in that there was an unpaid mortgage upon said property in favor of Houghton and Moser for \$250, and that appellees had no knowledge thereof; that at the time said notes were executed appellees also executed a chattel mortgage on the property purchased of said Hughs as an additional security; that immediately after appellees got possession of said property it was levied upon by the sheriff of Martin county by virtue of an execution issued from the Martin circuit court in favor of one Baker against said Hughs; that immediately thereafter they called upon appellant's assignor to secure said property for them, and were informed by said Hughs that said property belonged to Houghton and Moser by virtue of a mortgage executed to them by said Hughs prior to the sale of the property to appellee Anthony, and told said Anthony to give himself no further trouble concerning said property; that said Houghton and Moser would take the property under their mortgage. It is further alleged that immediately thereafter said Houghton and Moser filed a suit in the Martin circuit court to recover possession of said property, and claimed in the trial of the cause that they held the notes and mortgage of appellees upon which this suit was brought, and the chattel mortgage covering said prop-

erty, executed by said Anthony, as collateral security for the payment of their debt against Hughs, secured by a chattel mortgage on the property, given by said Hughs, which mortgage was unpaid and unsatisfied, and obtained possession of said property before said Hughs sold it to appellee Anthony; that said court upon trial awarded said property to Houghton and Moser, and thereupon appellee Anthony immediately demanded of Houghton and Moser a return to him thereof, which they refused; that when said property was taken from appellee, and when said cause was tried in the Martin circuit court, none of the notes sued on were due, and that the notes and mortgage sued on were due before they were assigned to appellant. The facts stated in this paragraph of answer are sufficient to bar a recovery. The answer avers facts showing that the consideration for the notes and mortgage had wholly failed, and that the appellant knew thereof when he took an assignment of them. The property was taken from him upon an execution against his vendor, and he appealed to him to protect him, and restore to him his property. He received an assurance that this would be done. The property was finally taken possession of by the persons to whom Hughs assigned the notes and the chattel mortgage, and was sold by virtue of the mortgage to pay a debt for which the original mortgagee was liable, and sold before any of the notes secured by the mortgage became due. The loss of the property was without any fault on the part of the appellee, and he had a right to look to Hughs and Houghton and Moser to protect his interest. Again, the mortgage sued on shows that the notes secured by it were due when they were assigned to appellant. The notes sued on were dated November 28, 1900, and were due in 9 and 12 months from date. They were assigned to appellant September 11, 1901. The nine-months note matured August 28, 1901, and on its face was past due at the date of the assignment, and was wholly unpaid. The mortgage contained a clause to the effect that, on a failure to pay any one of said notes at maturity, all of them were to be due and collectible. Appellant took an assignment of the notes and mortgage chargeable with a knowledge of that provision of the mortgage, and he was bound to know that by the terms of the mortgage both of the notes were past due. *Marion Bond Co. v. Blakely* (Ind. App.) 65 N. E. 291; *Indiana Bond Co. v. Bruce*, 13 Ind. App. 550, 41 N. E. 958; *Moore v. Sargent*, 112 Ind. 484, 14 N. E. 466; *Jones v. Schulmeyer*, 39 Ind. 119; *Buchanan v. Berkshire Life Ins. Co.*, 98 Ind. 510. Although the notes are negotiable instruments, appellant cannot be regarded as an innocent purchaser without notice, for one of the instruments he purchased by its very terms showed that he was purchasing past-due and dishonored paper, and by the terms of the

mortgage both were past due; and appellee has the same defense as though the action was being prosecuted in the name of the original payee and mortgagee. *Green et al. v. Louthain*, 49 Ind. 189; *Norton on Bills and Notes*, pp. 199, 200; 1 *Ames, Bills and Notes*, 743.

The demurrer to the second paragraph of answer was properly overruled. Under the authorities above cited appellant is not entitled, under his assignment of error, to have considered the objections he urges to the sufficiency of the third paragraph of answer.

This leaves for consideration the conclusions of law and the overruling of the motion for a new trial. The facts specially found by the court are in substantial harmony with those pleaded in the second paragraph of answer, except it is found that appellant, when he took an assignment of the notes and mortgage, did not know what the consideration was for the execution of the notes. The court also found that said notes and mortgage were assigned September 11, 1901, and that by the terms of the mortgage both notes were due. The court's conclusions of law were that appellant was not entitled to recover, and that appellees should have judgment for costs. Under the facts found and the authorities above cited the court correctly applied the law in the conclusions stated. Appellant has waived his right to have considered his fifth specification of the assignment of error by failing to discuss it. The case was decided on its merits, and the rights of the parties were equitably and correctly determined.

Judgment affirmed.

(31 Ind. App. 606)

INDIANAPOLIS ST. RY. CO. v. DAWSON.
(Appellate Court of Indiana, Division No. 2.
Nov. 17, 1903.)

CARRIERS—NEGLIGENCE—DANGEROUS PREMISES—INVITATION—OWNER'S KNOWLEDGE OF DANGER—LIABILITY—EVIDENCE.

1. Where a street railway owning a park reached by its lines, and maintaining attractions for the public there, has knowledge that there is a conspiracy on the part of certain persons to assault any colored persons visiting the park, and knows of acts of violence committed pursuant to such design, but it transports colored persons there without warning them of the danger, and they are assaulted, pursuant to the conspiracy, the company's employees making no attempt to interfere, the railway company is liable for the injuries.

2. In an action for such injuries, evidence of prior assaults committed on colored persons at the park, and articles published in daily papers describing the occurrences, were admissible.

Appeal from Superior Court, Marion County; Vincent G. Clifford, Special Judge.

Action by George J. Dawson against the Indianapolis Street Railway Company. From a judgment in favor of plaintiff for the sum of \$500, defendant appeals. Affirmed.

Winter & Winter and Will H. Latta, for appellant. I. D. Blair and O. V. Royall, for appellee.

ROBY, J. Action by appellee. Verdict and judgment for \$500. Demurrers to first and second paragraphs of complaint overruled. Motion for a new trial overruled.

It is averred in the first paragraph of complaint, in substance, as extracted from a multitude of words: That appellant was, on August 25, 1901, a corporation operating a street railway system in Indianapolis and was a common carrier for hire. That it owned a park near said city, and maintained certain attractions thereon to induce persons to ride on its cars inviting them to said park. On the day named it gave a free band concert therein, the same having been extensively advertised prior thereto. That on said day appellee, accompanied by a lady, took passage upon one of its regular cars, and was conveyed to said park. That a large number of persons were daily transported thereto, among them a large number of lawless persons who were hostile to colored people, of whom appellee was one, their names being unknown to plaintiff, and who had long before said day entered into a conspiracy "to suppress, molest, assault, and insult colored people generally who might visit said park." That in pursuance of such conspiracy said persons assaulted and beat appellee, and drove him from the park. That he and his companion demeaned themselves in a lady-like and gentlemanly manner, but upon arriving at the park were set upon by a large number of white boys and young men, appellee being assaulted and beaten by them. That appellant had, and had had for a long time prior to said day, full notice and knowledge of said conditions, and of the unlawful purposes aforesaid, and of acts of violence committed thereunder, but took no steps to prevent such conduct. That early in the afternoon of said day said lawless men and boys began marching and drilling openly in said park preparatory to an attack upon any colored male person who should be found there later, appellant taking no steps to prevent such conduct or to notify colored people of the danger, although it had knowledge thereof. That neither appellant nor its officers made any objection to the open and notorious gathering of white men and boys for the unlawful purpose stated. That it was negligent and indifferent in not employing and using a sufficient number of guards and policemen to maintain the peace. That two of its guards or policemen aided and abetted the wrong done appellee by standing by while he was being unmercifully beaten by said crowd of lawless white men and boys, and offering him no assistance, although they were able to do so, and could have prevented injury to him. "Wherefore, by reason of the matters therein stated, the plaintiff has been damaged," etc. The second paragraph of complaint is somewhat more extended than the first one, but for the purpose of this opinion the statement made is sufficient.

The pleading charges appellant with notice

of the alleged conspiracy, with acquiescence therein, and, by its guards or policemen, with passive participation in the actual assault made upon appellee. "When one expressly or by implication invites others to come upon his premises, whether for business or any other purpose, it is his duty to be reasonably sure that he is not inviting them into danger, and to that end he must exercise ordinary care and prudence to render the place reasonably safe for the visit." Cooley, Torts (2d Ed.) 718; *Howe v. Ohmart*, 7 Ind. App. 33, 38, 33 N. E. 466; *Richmond v. Moore's Adm'r* (Va.) 27 S. E. 70, 37 L. R. A. 258; *North Manchester v. Wilcox*, 4 Ind. App. 141, 30 N. E. 202; *Penso v. McCormick*, 125 Ind. 116, 25 N. E. 156, 9 L. R. A. 313, 21 Am. St. Rep. 211. No case has been cited or found where the premises upon which the injury complained of occurred, and to which the complainant came by invitation, were made unsafe through a conspiracy of the nature set up herein. Danger usually has been attributed to some defect in the premises themselves. But as a matter of principle it is quite as reprehensible to invite one knowing that an enemy is awaiting him with intent to assault and beat him as it would be to invite him without having made the floor or the stairway secure. One attending an agricultural fair in response to a general invitation extended to the public has been awarded damages against the association where his horse was killed by target shooting upon a part of the ground allowed for such purpose. *Conrad v. Clauve*, 93 Ind. 476, 47 Am. Rep. 388. Judgments have also been sustained: When spectators rushed upon a race track, causing a collision between horses being driven thereon. *North Manchester, etc., v. Wilcox*, 4 Ind. App. 141, 30 N. E. 202. When an opening was left in a fence surrounding a race track, through which one of the horses running went among the spectators. *Windeler v. Rush Co. Association*, 27 Ind. App. 92, 59 N. E. 209, 60 N. E. 954. Where horses were started on a race track in opposite directions at the same time, causing collision. *Fairmount v. Downey*, 146 Ind. 503, 45 N. E. 696. Where a horse with a vicious habit of track bolting was permitted to run in a race, such horse bolting the track, causing injury. *Lane v. Minn. St. Ag. Society* (Minn.) 64 N. W. 382, 29 L. R. A. 708. Recognizing the rule of reasonable care to make the premises safe, a recovery was denied in the absence of any evidence of the immediate cause of a horse running through the crowds. *Hart v. Washington Park Club*, 157 Ill. 9, 41 N. E. 620, 29 L. R. A. 492, 48 Am. St. Rep. 298. Where a street car company maintained a park as a place of attraction for passengers over its line, and the falling of a pole used by one making a balloon ascension under a contract injured a bystander, recovery was allowed, the rule being announced that the company must use proper care to protect its patrons from danger while on its grounds. *Richmond Ry. Co.*

v. Moore's Adm'r (Va.) 27 S. E. 70, 37 L. R. A. 258. Where a street car company maintained a large stage for exhibitions, in a pleasure resort owned by it, and made a written contract with a manager, by which the latter furnished various entertainments, among which was target shooting, one injured by a split bullet was allowed to recover, it being held that he might safely rely on those who provided the exhibition and invited his attendance to take due care to make the place safe from such injury as he received; the question of due care being one for the jury. *Thompson v. Lowell*, 170 Mass. 577, 49 N. E. 913, 40 L. R. A. 345, 64 Am. St. Rep. 323; *Curtis v. Kiley*, 153 Mass. 123, 26 N. E. 421. The duty of common carriers to protect their passengers from injury on account of unlawful violence by persons not connected with their service has frequently furnished material for judicial consideration. The New Jersey Court of Errors and Appeals approved of an exhaustive and carefully considered opinion delivered by the Supreme Court of that state to the effect that a passenger who, while attempting to have her baggage checked, was knocked down and injured by cabmen, in no sense servants of the carrier, scuffling on a passageway under its control, might recover against it. *Exton v. Railroad Co.*, 63 N. J. Law, 356, 46 Atl. 1099, 56 L. R. A. 508. In what seems to have been a pioneer case, it was held by the Supreme Court of Pennsylvania in 1866 that it was the duty of the trainmen on a passenger train to exert the forces at their disposal to prevent injury to passengers by others fighting in the car. *Pittsburgh v. Hinds*, 53 Pa. 512, 91 Am. Dec. 224. Ten years later the Supreme Court of Mississippi, after very exhaustive arguments by eminent counsel of national reputation, reached the same conclusion. *N. O., etc., Ry. Co. v. Burke*, 53 Miss. 200, 24 Am. Rep. 689. Without further elaboration, it may safely be said that the unusual character of an alleged peril, from which it is averred the appellant did not use due care to protect its visitors, does not affect the right of recovery, it being otherwise justified. The demurrers were therefore correctly overruled.

Evidence was introduced of other prior assaults at said park upon colored persons, and articles previously published by daily newspapers in the city describing such occurrences were also admitted. In order to determine whether appellant used due care, it was essential to show its knowledge or means of information relative to the conditions alleged to exist rendering it dangerous for appellee to visit the park. The evidence of similar occurrences was competent as tending to show notice of the conditions. *Toledo, etc., v. Milligan*, 2 Ind. App. 278, 28 N. E. 1019; *Delphi v. Lowery*, 74 Ind. 520, 39 Am. Rep. 98; *Goshen v. England*, 119 Ind. 368, 375, 21 N. E. 977, 5 L. R. A. 253. The facts upon which appellant's liability depends other-

wise than heretofore considered were questions for the determination of the jury. There was evidence tending to establish, and from which the jury might properly find, the existence of such facts. Appellant and its officers appear to have displayed indifference to the conditions existing which it and they could not well help knowing. This may have been due to the idea, sometimes entertained, that as to acts of lawlessness it is a sufficient duty of citizenship to be indifferent. Such idea is entirely erroneous.

Judgment affirmed.

FIELD v. CAMPBELL.¹

(Appellate Court of Indiana. Nov. 20, 1903.)

HUSBAND AND WIFE—SEPARATE PROPERTY OF WIFE—MORTGAGES—VALIDITY.

1. Under Burns' Rev. St. 1901, § 6964, declaring that a married woman shall not enter into any contract of suretyship, and such contracts as to her shall be void, a mortgage executed by a married woman on her separate estate to indemnify her husband's sureties is not absolutely void, but voidable merely, and is therefore valid until avoided by her by some affirmative action.

2. Where a married woman executed a mortgage on her separate estate to indemnify her husband's sureties, and subsequently obtained a new loan on that and other separate property to pay the mortgage debt, she could not defeat the subsequent mortgage on the ground that it was executed as surety merely.

Robinson, C. J., and Comstock, J., dissenting.

On petition for rehearing. Petition denied.

For former opinion, see 67 N. E. 1040.

ROBY, J. "A married woman shall not enter into any contract of suretyship, * * * and such contracts, as to her, shall be void." Section 6964, Burns' Rev. St. 1901. The use of the word "void" in this section of the statute is responsible for some apparent confusion as to what constitutes a valid lien, within the meaning of *Fitzpatrick v. Papa*, 89 Ind. 17, and other cases heretofore cited. The late and well-considered cases all treat such contracts as voidable at the election of the married woman. It follows that the mortgage executed by appellant to indemnify her husband's sureties might have been avoided by her. If it were void, her failure to repudiate would infuse no vitality into it. The contention of appellee's counsel on this petition would be correct if the mortgage were void. *Shirk v. Stafford* (Ind. App.) 67 N. E. 542; *Austin v. Davis*, 128 Ind. 472, 26 N. E. 890, 12 L. R. A. 120, 25 Am. St. Rep. 456. However, the indemnifying mortgage, as it stood, was a lien upon her land, and until some affirmative action avoiding it was taken by her it was as valid as any mortgage. She secured the discharge of the lien, not by legal proceedings and an election to disaffirm, but by payment. Had she simply renewed her obligation, the mere change in form of the evidence of indebted-

¹ Superseded by opinion, 72 N. E. 260. Rehearing denied.

ness would in no wise affect her right to invoke the aid of the statute. *Wolf v. Zimmerman*, 127 Ind. 486, 26 N. E. 173. She did not renew. The sureties to whom the first mortgage was made are no longer concerned. There is no connection or sameness between the indemnifying mortgage and the one in suit. Mrs. Field paid the debt because of which the indemnifying mortgage was made possible. For the payment of that debt she was in no wise bound. She was not in default to the county. The validity of the mortgage in suit does not rest on the hypothesis that the debt paid was her debt. She desired to release her land from the lien of a mortgage which she had given. She could accomplish the end desired in various ways. She was under no obligation to select any one of them. She was under no obligation to release the land at all. If she did not choose to do so, no one could choose for her. Payment having been made, the indemnifying mortgage became functus officio. The money thus expended inured to the benefit of her estate. Neither is it material as to where she procured money. She might have had it in the bank. She might have sold her real estate, and applied the proceeds. *Rogers v. Shewmaker* (Ind. App.) 60 N. E. 462, 87 Am. St. Rep. 274. A portion of the lands covered by the first mortgage are not included in the one in suit. By the payment made, even considering the mortgage in suit as connected with the prior one, her estate was therefore benefited by such payment. If a valid lien means an "enforceable lien," as argued, then the wife could not discharge any mortgage by payment to which a defense might successfully be interposed upon any ground whatever, necessitating, upon the trial of a foreclosure proceeding against a married woman, the decision of other possible prior suits without limit. Men frequently, in the exercise of business sagacity, prefer to pay doubtful claims, rather than litigate, and, when the moral obligation accords with such choice, it is not one the courts are concerned to defeat. What the equities as between the husband and wife were, they absolutely knew. She may have procured her estate from the investment of the moneys for the nonpayment of which her husband was in default. A married woman, her disabilities having been removed, has as much freedom of choice as a man. She may be bound by an estoppel, and the privilege of repudiating suretyship mortgages is expressly given to her. She was the sole judge as to whether it was to her interest to discharge the indemnifying mortgage without suit by paying the original indebtedness. The statute should be treated as any other statute. The disabilities of a married woman have, in accordance with enlightened policy, been removed. The provision as to contracts of suretyship by her cannot be extended by construction so as to abrogate in whole or in part the act

removing her disabilities, nor should it be transformed into a weapon of offense. The conclusion heretofore announced is still believed to be in accordance with the facts and the law.

The petition for a rehearing is overruled.

HENLEY and WILEY, JJ., concur. BLACK, J., concurs in result. ROBINSON, C. J., and COMSTOCK, J., dissent.

(31 Ind. App. 650)

PARKER v. STATE.

(Appellate Court of Indiana, Division No. 2
Nov. 20, 1903.)

INTOXICATING LIQUORS—UNLAWFUL SALE— MEDICINAL PURPOSES—BEVERAGE —DEFINITION.

1. Though Act March 17, 1875 (Burns' Rev. St. 1901, § 7276; Horner's Rev. St. 1901, § 5312), makes it unlawful for any one to sell any liquor less than a quart at a time without procuring a license, bona fide sales for medicinal purposes are to be excepted from the letter of the statute.

2. Burns' Rev. St. 1901, § 7277, and Horner's Rev. St. 1901, § 5313, defines an intoxicating liquor as one which is used or may be used as a beverage. *Held*, that a sale of whisky mixed with gum galicum, for medicinal purposes, was not unlawful because of the fact that, on standing for a time, the whisky might be separated from the other ingredient.

Appeal from Circuit Court, Sullivan County; O. B. Harris, Judge.

John J. Parker was convicted of selling whisky without a license, and he appeals. Transferred from the Supreme Court. Reversed.

J. W. Lindley, for appellant. O. W. Miller, L. G. Rothschild, W. C. Geake, and C. C. Hadley, for the State.

COMSTOCK, P. J. Appellant was convicted by the circuit court of Sullivan county of selling one-half pint of whisky without having license to sell intoxicating liquors under the statute. The prosecution was based upon section 7276, Burns' Rev. St. 1901, or section 5312, Horner's Rev. St. 1901. Appellant assigns as error the action of the court in overruling his motion for a new trial. The reasons stated in said motion are that the decision of the court is not sustained by sufficient evidence; that it is contrary to the evidence, and that it is contrary to law; newly discovered evidence.

There is no conflict in the evidence. It shows the following facts: Appellant is a regular practicing physician and a licensed pharmacist, and resides at Merom, Sullivan county, Ind. He is the owner and proprietor of a drug store at said town. Near to Merom one Almarena Daniels, an old lady, lives, who is afflicted with rheumatism. The name of the physician who waits on her is Dr. Myles. Dr. Myles had prescribed whis-

¶ 1. See *Intoxicating Liquors*, vol. 29, Cent. Dig. §§ 161, 165, 167.

ky and gum guaiacum to be used by Mrs. Daniels as a remedy for her rheumatism. The mixture of whisky and gum guaiacum recommended by Dr. Myles for use for Mrs. Daniels was to be composed of two ounces of gum guaiacum to four ounces of whisky. She often purchased said mixture and compound of appellant. This mixture is a powerful remedy for rheumatism. It must be taken one teaspoonful in milk. If more than that amount is taken, or if it is not taken in milk, it produces extreme sickness and congestion of the stomach. Mrs. Daniels had a son, David Daniels, who is the prosecuting and only witness in the case. On the 10th day of August, 1902, she sent her son to the drug store to buy a bottle of the mixture of whisky and gum guaiacum for her. David Daniels bought of appellant a six-ounce vial of said mixture, there being two ounces of gum and four ounces of whisky in the bottle. Appellant knew that said David Daniels was buying said mixture for his said mother at the time he sold it to him. Appellant powdered two ounces of the gum, and placed it in the bottle, and then poured four ounces of the whisky on the gum, and thoroughly shook the mixture, and gave it to said David. At the time appellant sold and delivered said mixture and compound to the prosecuting witness the particles of gum guaiacum were thoroughly mixed with the whisky, and could not be drunk as a beverage. Daniels immediately took said compound of whisky and gum home, and delivered it to his mother. He bought said mixture in good faith to be used by his mother, and for her. He did not buy said mixture to be drunk as a beverage, and he did not drink any of it. When delivered by appellant to said David Daniels, it would take a few days for the whisky to thoroughly dissolve the gum, and, if the mixture were allowed to stand for a short time, the particles of gum would sink to the bottom, and some of the whisky might be poured off and drunk as a beverage. After the mixture was allowed to stand for a few days, the whisky would thoroughly dissolve the gum, and the mixture could not be drunk at all, and could only be taken in milk. The mixture could not be drunk as a beverage at all if the mixture was shaken. Mrs. Daniels, mother of the prosecuting witness, had often purchased said mixture of appellant before that time to be used as medicine. Daniels had no prescription upon which he purchased said mixture of appellant.

Section 7276 was amended in 1897 (Acts 1897, p. 253). The section before the amendment was as follows: "It shall be unlawful for any person, directly or indirectly, to sell, barter or give away, for any purpose of gain, any spirituous, vinous or malt liquor, in any less quantity than a quart at a time, without first procuring, from the board of commissioners of the county in which such liquor is to be sold, a license as hereinafter pro-

vided; nor shall any person, without having first procured such license, sell or barter any intoxicating liquor to be drunk, in his house, outhouse, yard, garden or the appurtenances thereto belonging." By the amendment the sale of less than five gallons at a time was forbidden. The amendment made no other changes. The construction, therefore, given to the statute prior to the amendment, must control.

Criminal statutes are not always strictly construed. In *Hooper v. The State*, 56 Ind., in which the defendant was indicted for the unlawful sale of intoxicating liquor, the court, on page 156, says: "It is true that the act of March 17, 1875, *supra*, to regulate and license the sale of intoxicating liquors, contains no exceptions authorizing sales for medicinal or sacramental purposes. But it has been repeatedly held by this court, in construing similar statutes, that the courts will except from the prohibition of the statute bona fide sales for medicinal purposes. *Donnell v. The State*, 2 Ind. 658; *Thomasson v. The State*, 15 Ind. 449; *Jakes v. The State*, 42 Ind. 473; *Ball v. The State*, 50 Ind. 595."

In *Jakes v. The State*, *supra*, the defendant was a druggist, and as such sold to the prosecuting witness one pint of whisky. The witness testified that the whisky was bought for medicinal purposes, and was so used. When called for, the appellant inquired for what purpose it was wanted, and was informed that it was wanted for medicinal purposes. It was held that the conviction could not be maintained, citing *Donnell v. The State*, *supra*; *Thomasson v. The State*, *supra*. See, also, *Elrod v. The State*, 72 Ind. 292; *Nixon v. The State*, 76 Ind. 524. Intoxicating liquors are defined by the statute (section 7277, *Burns' Rev. St. 1901*, section 5313, *Horner's Rev. St. 1901*) as any intoxicating liquor which is used or may be used as a beverage. The fact that when it stood for a time the whisky might have been separated from the other ingredient of the mixture does not make the sale unlawful. The combination was sold as a medicine, and so taken. The good faith of the parties to the transaction is apparent and unquestioned. These facts bring the case within the foregoing decisions. The evidence is not sufficient.

Judgment reversed, with instructions to sustain appellant's motion for a new trial.

(32 Ind. App. 333)

ALDEN v. WHITE et al.

(Appellate Court of Indiana, Division No. 1.
Nov. 18, 1903.)

ATTORNEY AND CLIENT—LIEN.

1. An attorney performing services after the rendition of a judgment under an employment from holders of fractional parts of the judgment, and thereby defeating prior tax liens on land subject to a lien of the judgment, and preserving the same for the judgment, acquires no lien on the judgment as against a subsequent purchaser thereof.

Appeal from Circuit Court, Allen County; W. J. Vesey, Special Judge.

Action by John W. White, as administrator of James B. White, deceased, and others, against Samuel R. Alden and others, in which defendant Alden filed a cross-complaint. From a judgment against defendant Alden on his cross-complaint, he appeals. Affirmed.

See 67 N. E. 949, 66 N. E. 509.

S. R. Alden, for appellant. W. G. Colerick, K. C. Larwill, and Guy Colerick, for appellees.

HENLEY, J. James B. White, now deceased, and represented in this proceeding by his administrator, John W. White, on the 25th day of October, 1876, recovered a judgment against James R. Godfrey and his wife, Archange Godfrey, for \$7,242.23, and the foreclosure of several mortgages, and an order of sale of about 300 acres of land to satisfy the judgment. In the year 1882 the said James B. White sold twelve-fifteenths of this judgment to 12 of the grandchildren of said Godfrey, each of said 12 children receiving one-fifteenth thereof. This action was commenced by James B. White on the 8th day of January, 1890, to revive said judgment decree and mortgage lien against the said James R. Godfrey, the children of his deceased wife, and said grandchildren, in which complaint the sale and assignment of said twelve-fifteenths is set forth, and it alleged that he is the owner of three-fifteenths of said judgment. On the 6th day of November, 1897, the said James B. White having died, his administrator was substituted as the plaintiff in said action. The appellant, Alden, was made a defendant to this action, the complaint alleging that he was claiming an interest in the judgment in the shares thereof, which in 1882 had been sold to Ella Cass, William Cass, Henry Albert Cass, and Mary Godfrey. He appeared to the action, and on the 24th day of May, 1900, filed his amended cross-complaint, asserting an interest in the four-fifteenths of said decree and mortgage lien assigned by the said James B. White to Ella Cass, William Cass, Henry Albert Cass, and Mary Godfrey in 1882. The only question raised by this appeal is the sufficiency of appellant's amended cross-complaint. He asks, upon the facts stated in his cross-complaint, that the court declare his claim for attorney's fees a lien upon the four-fifteenths of the judgment, which, at the time the services were rendered, was owned by the Cass children and Mary Godfrey.

The cross-complaint shows the recovery in favor of appellee White's intestate of a judgment for \$7,242.23 against the husband, James R. Godfrey, and a decree and order of sale against him and his wife, Archange Godfrey, of 300 acres of land, of the value of \$12,000, on October 25, 1876, and stay of execution thereon by agreement. That the

unpaid taxes regularly assessed on said real estate that had become delinquent in January, 1879, amounted to \$4,612.60, and said land was on the 13th day of February, 1879, sold for said delinquent tax by the treasurer of said county, and thereafter, on August 17, 1882, the auditor of said county conveyed the same to the purchaser, Charles H. Aldrich, in obedience to the mandate of the superior court of said county, and the purchaser paid, subsequently, accruing taxes thereon, and claimed a lien on the premises therefor, and for the amount of the tax sale, with 25 per cent. interest thereon, amounting to half the value of the premises, and also purchased in like manner at tax sale other lands of said minors. That after said tax sales, to wit, in 1882, through the attorneys of said White in said foreclosure, the parents of said minors were appointed as guardians, respectively, for their said minor children, and petitioned the court below for permission, with moneys by them received as such guardians from the United States for each of said minors, to purchase, and did purchase and take an assignment by said White of one-twelfth of said decree to each of said minors for \$635.07, being par and accrued interest for such shares, on the statement that such decree constituted the most certain and absolute security for such investment. At the price paid by each of said minors said decree constituted an apparent lien of \$9,526.05 upon said premises, worth \$12,000, and an apparent prior tax lien burdened the same at the time of over \$6,000, amounting by 1890 to more than the entire value of said premises. That under such status of said 300 acres appellant was employed by the guardians of appellees, said William Cass, Henry Albert Cass, and Mary Godfrey, and of Ella Cass, deceased, prior to the filing of the amended cross-complaint, to defend various suits and prosecute other suits, all for the purpose of defeating said apparent tax liens, and preserving their lands and the lien of said decree, and freeing their lands from taxation, and also to preserve and recover the shares of said minors in said decree and mortgage liens to them assigned by said White, and said claims were placed in appellant's hands as attorney for such purpose, on the understanding and agreement with said guardians that he should first pay himself from the proceeds thereof for his services and outlay in their behalf in such matters, and pay over the balance to his clients. That appellant rendered services and expended money under such employment of the value of \$500 for each of said minors during a term of years, including the preparation and filing of cross-complaints in this action for the enforcement of their shares in said decree and mortgage liens as prior and superior to any interest appellee White's intestate had therein. That such services resulted in freeing said premises and the lands of said minors from

said tax liens and declaring the same not subject to taxation. That thereafter, in July, 1892, appellee Louisa Neeb, as guardian for her daughter, said Ella Cass, since deceased, with said daughter, requested appellant to purchase the share of said Ella in said decree for \$400 and a receipt in full for his services and money paid in said Ella's behalf, and to pay them at once \$25 for use in purchasing clothing immediately needed for said Ella, agreeing to formally assign such share at the subsequent session of the Allen circuit court; and appellant then paid said guardian \$25 on such purchase, taking a memorandum, executed by said guardian, showing the receipt of such sum and the terms of such proposed sale. That appellee White's intestate, with knowledge of appellant's accrued claims and equities, thereafter took an assignment of the shares of said Ella Cass and of the appellees William Cass, Henry Albert Cass, and Mary Godfrey, and paid \$500 for the assignment of each of said four shares. That appellant offered to said J. B. White and said guardian to conclude the purchase of the share of said Ella, and pay the balance thereof, as provided in said memorandum thereof, but both said White and said guardian refused to accept such payment, or take any steps for transfer of record of such share to appellant, or repay him said \$25 thereon advanced. That neither of said minors nor their guardians have ever paid appellant any part of the value of his said services, or of the money by him so expended in their behalf. That said Ella Cass died after such transfer to appellee White's intestate, and appellee Louisa Neeb, her guardian, used for herself and said Ella all funds by her received, and also used for said appellees William and Henry Albert the funds received by her for them, and that the only property of said Ella, William, and Henry Albert, other than said shares of said decree, is 295 acres, subject to a life estate in their mother and father, which, by the terms of the conveyance to them, vests in such of them as survive their parents. Appellant did not have, nor does he contend that he had, any connection whatever with the suit in which the judgment was entered. He could not therefore have had, and did not have, any statutory lien for attorney's fees.

The cross-complaint shows that appellant was regularly employed by persons having the legal right to contract for his services, and that his services rendered under each employment were of great value to his clients. He contends that the court should declare an equitable lien in his favor, for the value of his services and money expended by him, upon the shares held by his clients in the White judgment; that it was through his services, rendered under the employment, that the fund was created which he asks the court to impress with the lien. It was held in *Justice v. Justice*, 115 Ind. 201, 16 N. E.

615, that equity supplied a lien, independent of the statute, for the security of the attorney who rendered services beneficial to his client. And it was held in *Puett v. Beard*, 86 Ind. 172, 44 Am. Rep. 280, that an attorney has a lien for his fees upon a fund recovered by his aid which is paramount to that of persons interested in the fund, or those claiming as their creditors. These cases were cited with approval in the case of *Koons, Administrator, et al. v. Beach*, 147 Ind. 137, 45 N. E. 601, 46 N. E. 587, where the court said: "From the rules stated it follows that the fund acquired by the aid of the employed attorney is burdened by the agreed fee, and cannot be relieved by any act of the client." But we cannot see how, under these decisions, appellant can hope to hold any part of the judgment lien in the hands of the purchaser. His services were not in the procurement of the judgment. He did not, by his labor, create the judgment lien. If he did in fact cause the lien already created to become valuable, when, without his services, it was worthless, his lien, if any, was upon the funds created by the discharge of the lien either by its enforcement or sale. The fund, if any, created by appellant's services, is not in the hands of appellee, and appellant's cross-complaint does not state facts which create a liability of any kind against the estate of James B. White.

The judgment is affirmed.

(31 Ind. App. 640)

BURNS et al. v. TRUSTEES OF HUNTERTOWN CEMETERY CHURCH et al.

(Appellate Court of Indiana, Division No. 1.
Nov. 19, 1903.)

APPEAL—JOINT ASSIGNMENT OF ERROR—VACATION APPEAL—JOINDER OF CO-PARTIES AS APPELLANTS.

1. A joint assignment of error made by several persons to the ruling of the court on a motion made by one of them separately, and to which the latter alone excepted, raises no question on appeal.

2. An appeal prayed separately by one of several co-parties, and granted in term time, but not then perfected, must be treated as a vacation appeal, and is governed by Burns' Rev. St. 1901, § 647, providing that a part of several co-parties may appeal, but in such case they must serve notice of the appeal on all other co-parties; and not by section 647a, governing term-time appeals alone.

3. Several persons instituted separate actions to enforce their respective mechanics' liens. The actions were consolidated, and the court found against all the plaintiffs, and rendered judgment against them jointly for costs. *Held*, that on a vacation appeal by one plaintiff the other plaintiffs should have been named and notified as appellants, and not as appellees.

Appeal from Superior Court, Allen County; John H. Alken, Judge.

Consolidated actions by Arthur Burns and others against the trustees of Huntertown Cemetery Church and others. From judgments for defendants, plaintiffs appeal. Appeal dismissed.

¶ 1. See Appeal and Error, vol. 2, Cent. Dig. § 2989.

Thos. E. Ellison and Hugh G. Keegan, for appellants. Geake & Ballou, for appellees.

BLACK, J. Six causes were pending in the court below to foreclose mechanics' liens against certain real estate of the Hometown Cemetery Church, each brought by a single plaintiff. After the filing of the complaints the causes were consolidated, and, the issues in the consolidated case having been made up and tried, the court rendered personal judgments in favor of Arthur Burns, John Masson, Frank L. Holmes, and Leonard Brockerman, in a certain sum for each separately, against W. Chester Scarlet, a subcontractor, and rendered judgment in favor of Nathaniel Glazier, Hezekiah Hillegass, and Solomon Simons, trustees of Hometown Cemetery Church, and Mathias Fitch, Ellis Dunton, James Ballou, and Nathaniel Glazier, building committee of the church, and Edward Wickliff and Andrew Craig, principal contractors, against Frank L. Holmes, Leonard Brockerman, John Masson, W. Chester Scarlet, and Arthur Burns, jointly, for costs.

There have been filed in this court two assignments of error. In one Frank L. Holmes, Leonard Brockerman, Charles Ransbottom, John Masson, W. Chester Scarlet, and Arthur Burns are named the appellants, and the church and its trustees and its building committee and the principal contractors, by their several names and designations as set forth in the judgment, with some others not named in the judgment, are named as the appellees. The six persons thus named as appellants in this assignment jointly assign that the court erred in overruling the motion of the appellant Burns for a new trial. The parties thus made appellants, and who thus jointly assign error, cannot invoke the judgment of this court upon a ruling on a motion made by one of them separately, to which action of the court he alone excepted.

In the other assignment of error Arthur Burns is named as sole appellant, and the church and the persons who were its trustees, the principal contractors, the trustees of the church as such, the members of its building committee as such, and Holmes, Brockerman, Ransbottom, Masson, and Scarlet are named as appellees, and Burns alone has assigned as error the overruling of his motion for a new trial. No appearance has been made here for any of the parties so named as appellees except by counsel representing the church, and no appearance has been made for any party except Burns as appellant. There was no error in overruling this separate motion of Burns for which he could complain in this court against the other plaintiffs, against whom and himself jointly the court rendered judgment for costs in favor of the other appellees. An appeal was prayed by Burns separately, and was granted in term, but it was not perfected, and

the case is to be treated as a vacation appeal.

The act of 1895 (section 647a, Burns' Rev. St. 1901) concerning appeal by part of co-parties relates by its terms to term-time appeals alone, and has, therefore, no application in the case now before us. In case of an appeal by a part of several co-parties in vacation there must be compliance with the provisions of section 647, Burns' Rev. St. 1901; and all the other co-parties should be named as appellants, and notice to them as such of the appeal should be given, and they should not be named as appellees and notified as such. *Gregory v. Smith*, 139 Ind. 48, 38 N. E. 395; *Wood v. Clites*, 140 Ind. 472, 39 N. E. 160; *Ledbetter v. Winchel*, 142 Ind. 109, 40 N. E. 1065; *Lee v. Mozingo*, 143 Ind. 667, 41 N. E. 454; *Shuman v. Collis*, 144 Ind. 333, 43 N. E. 257; *Perry v. Botken*, 15 Ind. App. 83, 42 N. E. 964; *Walsh v. Brockway*, 13 Ind. App. 70, 40 N. E. 29, 41 N. E. 76. If, for the purpose of ascertaining the character of the proposed appeal of Burns, we may properly look to his motion for a new trial, the overruling of which is assigned as error, we do not find it to have been intended to relate merely to the finding in favor of Burns against Scarlet. It purports to be made by Arthur Burns alone in a case of "*Frank Holmes v. Trustees of Hometown Cemetery Church*"; the consolidated proceedings, no doubt, being intended; and the chief purpose of the appellant appears to have been to subject the property of the church to his mechanic's lien. The court found against all the plaintiffs on this branch of their several demands, and rendered judgment against them jointly for costs. The other plaintiffs were interested in the appeal, and should have been named and notified as appellants, and not as appellees.

The appeal as to both assignments of error is dismissed at the costs of the appellant Arthur Burns.

(31 Ind. pp. 613)

WEBB v. HAMMOND.

(Appellate Court of Indiana, Division No. 2.
Nov. 17, 1903.)

CONTRACTS—REFORMATION—COMPLAINT— SUFFICIENCY—EVIDENCE.

1. A complaint in an action to reform a contract, which contains a clear statement of the contract as actually made and intended by the parties, and of the agreement actually reduced to writing and signed by them, and pointing out material differences between the two, and alleges that the written contract was executed by mistake, states a cause of action.

2. Equity will reform a written contract whenever, through mutual mistake, it does not, as reduced to writing, correctly express the agreement of the parties.

3. Under Acts 1903, p. 341, c. 193, the Appellate Court will in all cases not triable by a jury consider the evidence, and determine its sufficiency.

¶ 1. See *Reformation of Instruments*, vol. 42, Cent. Dig. §§ 69, 74.

4. In a suit to reform a written contract the contract must be proven either by being introduced in evidence or otherwise, and where there is no evidence of its contents there is a failure of proof.

Appeal from Superior Court, Marion County; Vinson Carter, Judge.

Action by Catherine J. Hammond against Mary A. Webb. From a judgment for plaintiff, defendant appeals. Reversed.

Gavin & Davis, for appellant. W. N. Pick-erill, for appellee.

WILEY, J. Action by appellee against appellant to reform a contract and to recover a sum of money alleged to have been paid under such contract. Demurrer to the complaint overruled, and answer in denial. Appellant filed a cross-complaint asking affirmative relief, upon which issues were joined by answer. Trial by the court, finding and judgment for appellee, motion for new trial overruled. Overruling the demurrer to the complaint and the motion for a new trial are assigned as errors.

The complaint avers: That the appellant and appellee are sisters, being daughters of Robert Roe, deceased. By the will of the deceased, appellant and appellee were each devised 26% acres of land in the northeast quarter of section 18, township 16, range 4, in Marion county, Ind. That deceased had three daughters and two sons, to the latter of which he devised 40 acres of land to each, and to his three daughters 26% acres each. This division of land by will was made upon the basis that there was only 160 acres in the quarter section. That upon a survey of the land it was ascertained that there were 160.04 acres, and that the actual area of and devised to appellee and her two sisters was 27.44 acres. That said division of land under the will was made into strips running entirely across said quarter section east and west. That the several tracts of land so devised were surveyed at the instance of all the parties in interest, and that each of the devisees thereupon went into possession of their respective tracts. The complaint avers that, appellee being desirous of acquiring the interest of appellant in the partition of the real estate devised to her lying east of the Allisonville gravel road, upon which were located the buildings of the "Home Farm," she entered into a written contract with appellant, by the terms of which appellee was to deed to appellant the land which had been devised to her west of said gravel road, and appellant was to deed to appellee that portion of the land devised to her lying east of said road; that it was further agreed that both of said tracts were to be surveyed, their differences in area ascertained, if any, and the one having the greater area was to receive from the other for such excess payment therefor at the rate of \$150 per acre; that appellee was also to pay the appellant the sum of \$250 for the

buildings which were then known to be located upon that portion of the land devised to appellant lying east of said road; that thereupon they signed a written contract, which they both believed to express what they had mutually agreed upon; that pursuant to the agreement, as they understood it, they had the two tracts of land surveyed—i. e., appellee's tract west of said road and appellant's tract east of said road—and the difference given them was 3.97 acres which appellant's land exceeded in acreage that of appellee's; that upon said survey as reported to them by the surveyor appellee paid to appellant \$595.50 for said supposed excess, and also paid to her \$250 for the buildings located on that part of the real estate owned by appellant lying east of said gravel road; and thereupon they exchanged deeds in carrying out the supposed terms of the contract between them. It is then averred that the actual difference between said two tracts of land was 2.74 acres, instead of 3.97 acres, as was learned from the surveyor who had surveyed the same, and that appellee paid to appellant for 1.23 acres more than was actually conveyed to her, being the sum of \$184.50 too much money; that said error was the result of a miscalculation of said surveyor; that appellee thereupon demanded of appellant that she rectify said error, and refund to her said sum of \$184.50, which she refused to do. The complaint further avers that the contract as written provides that appellant and appellee agreed to convey lands as follows: That appellant was to convey to appellee the land which the former owned on the east side of the Allisonville gravel road, as well as the land which the latter herself owned on the east side of said road, and which she held by devise under the will of her father, and that appellee was to convey to appellant not only the land which appellee owned on the west side of said road, but also the land which appellant owned on the west side of said road, which she already owned by devise from her father; that said contract as written required of the parties thereto to pay to the other the difference between said tracts of land at the rate of \$150 per acre, thus causing appellee to pay to appellant for land which she (appellee) already owned at the rate of \$150 per acre. It is also alleged that the contract as written was and is not what the parties thereto had agreed upon and intended it should be, and that the signing of said contract was done under a misapprehension of what it really was and what was really set out therein, and was a mistake of fact, and not of law, and was the mutual mistake of all the parties thereto; that all of the negotiations prior to the signing of said contract were as to what amount appellee should pay appellant for the buildings on that portion of the land east of said road which appellant was to convey to appellee, and the price per acre that should be paid for the differ-

ence in the acreage; that in the settlement which they entered into appellant and appellee acted under the belief that such was their agreement and understanding; that the contract, as appellee claims it should be, was attempted to be carried out in good faith by each of the parties; that appellee did not know of the mistake the surveyor had made in determining the difference in the acreage of said tract of land until a settlement had been made and the money paid as hereinafter stated. The contract as written is made an exhibit to the complaint. The prayer of the complaint is that the contract be reformed so as to express the agreement between the parties, and for judgment for the amount claimed to have been overpaid by appellee.

The theory of the complaint is that, as each of the parties owned land on both sides of the road, the appellee agreed to deed to appellant her part on the west side in consideration that appellant should deed to appellee her tract on the east side, and one party should pay to the other \$150 an acre for the excess, if any, in the acreage; while it is the theory of the cross-complaint that one party should pay to the other \$150 an acre for the excess in area of the entire acreage on either side of the road, and that the excess in acreage now owned by appellee under the contract and conveyance is 5.43 acres, and that appellee has failed to pay the amount due by \$219.

If appellant's theory is correct, the terms of the contract required appellee to pay to appellant \$150 per acre for the excess in acreage of her tract on the east side of the road, which she already owned under the will.

The first question for decision is, are the facts pleaded in the complaint sufficient to warrant a reformation of the contract? A complaint to reform a contract, to be good as against a demurrer, must set forth the terms of the original agreement, and also the agreement as reduced to writing, and point out with clearness wherein the mistake was made. It must also aver that the mistake was mutual. *Smelser v. Pugh*, 29 Ind. App. 614, 64 N. E. 943; *Citizens' National Bank v. Judy*, 146 Ind. 322, 43 N. E. 259. The complaint before us contains a clear and succinct statement of the contract as actually made, understood, and intended by the parties to be reduced to writing, and the agreement actually reduced to writing and signed by them. The material differences between the contract as actually made and agreed upon and the one signed by the parties are clearly and specifically stated, and, as the demurrer admits the facts pleaded, the conclusion necessarily follows that the mistake was mutual. *Smelser v. Pugh*, supra; *Kelster v. Myers*, 115 Ind. 312, 17 N. E. 161; *Baker v. Pyatt*, 108 Ind. 61, 19 N. E. 112. The established rule is that equity will reform a written contract whenever, through mutual mistake, or the mistake of one of the parties accompa-

nied by fraud of the other, it does not, as reduced to writing, correctly express the agreement of the parties. *Smelser v. Pugh*, supra; *Citizens' National Bank v. Judy*, supra. There is no element of fraud in this case. Equity requires an amendment to a contract in writing that will make the instrument what the parties supposed and intended it should be. *Eastman, Adm'r, v. Provident Mutual Relief Ass'n*, 65 N. H. 176, 18 Atl. 745, 5 L. R. A. 712, 23 Am. St. Rep. 29. In *Bank v. Judy*, supra, the court quotes with approval from *Walden v. Skinner*, 101 U. S. 577, 25 L. Ed. 963, the following: "That, where an instrument is drawn and executed that professes or is intended to carry into execution an agreement which, in writing, by mistake of the draftsman, either as to fact or law, does not fulfill or which violates the manifest intention of the parties to the agreement, equity will correct the mistake so as to produce a conformity of the instrument to the agreement; the reason of the rule being that the execution of the agreement fairly and legally made is one of the peculiar branches of equity jurisdiction, and, if the instrument intended to execute the agreement be from any cause insufficient for that purpose, the agreement remains as much unexecuted as if the party had refused altogether to comply with his engagement; and a court of equity will, in the exercise of its acknowledged equity jurisdiction, afford relief in the one case as well as the other by compelling the delinquent party to perform his undertaking according to the terms of it and the manifest intention of the parties." That which is reduced to writing is not the whole and sole agreement, but the stipulations between competent contracting parties constitutes the contract, while the writing is only evidence of the agreement or the coming together of minds. *Sparta School Tp. v. Mendell*, 138 Ind. 192, 37 N. E. 604. The basis upon which appellee seeks to have the contract reformed is that it does not express the agreement entered into, and the complaint plainly and specifically states what the agreement between the parties was, and avers that the written contract was made and signed by mutual mistake. The complaint also shows how appellee's rights were prejudiced by that mistake. In addition to the above authorities as to what facts a complaint to reform a contract must state to be good, we cite the following: 20 Am. & Eng. Encyc. of L. p. 720; *Phoenix Ins. Co. v. Rogers*, 11 Ind. App. 81, 38 N. E. 865; *Wood v. Deutchman*, 75 Ind. 148; *Nelson v. Davis*, 40 Ind. 266; *Easter v. Severin*, 78 Ind. 540; *Thompsonville Scale Mfg. Co. v. Osgood*, 28 Conn. 16; *Pingrey on Mortgages*, § 270.

Counsel for appellant urge some objections to the complaint which, in the light of the authorities, we do not deem necessary to consider. The complaint states a cause of action, and the demurrer to it was rightfully overruled.

Appellant's motion for a new trial was based upon the ground that the finding of the court was contrary to law, and not sustained by sufficient evidence, and that the court erred in admitting and excluding certain evidence. In all cases not triable by a jury, the appellate tribunal, under the act approved March 9, 1903, will consider and weigh the evidence, under a proper assignment of error. Acts 1903, p. 341, c. 193. It is also the province of the court to consider and determine the sufficiency of the evidence. *Habbe v. Viele*, 148 Ind. 113, 45 N. E. 783, 47 N. E. 1; *Lake Erie, etc., R. Co. v. Stick*, 143 Ind. 449, 41 N. E. 385; *Wabash Paper Co. v. Webb*, 148 Ind. 303, 45 N. E. 474. One of the essential requisites to a complaint to reform a written instrument is that it should set out the instrument as written. This is a necessity, for without the written contract the court would have nothing before it as a basis of reformation. It being necessary to set out in the complaint the contract for which a reformation is sought, it is equally necessary that such contract must be proven by competent evidence; and, in the absence of a showing that it has been lost or cannot be produced, or some other legitimate reason, the best evidence is the contract itself. The general rule is that a party must introduce the best evidence in support of his case that is at his command. Every fact pleaded which is essential to a recovery by the party upon whom rests the burden must be proven, otherwise he fails to make out his case. In this case appellee failed to prove the provisions of the written instrument which she asks to be reformed. Such written instrument was not introduced in evidence, does not appear in the bill of exceptions, and no proof of its loss or destruction was made. There is no evidence as to its contents. Counsel for appellee concede this, but seek to avoid its absence from the record by the assertion that the pleadings of a case are always in evidence. It has time and again been held in this jurisdiction that courts of appeal can only consider such facts as are properly certified as evidence. If the proposition relied upon by appellee is correct, then in an action upon a promissory note, where such note or a copy has been filed with the complaint, a recovery could be had without introducing the note in evidence. This is not the law. In an action against the maker of a promissory note alleged to have been assigned by written indorsement there can be no recovery, if the general denial is in, without proof of such indorsement. *Shonkwiler v. Dunavin*, 1 Ind. App. 505, 27 N. E. 991; *Moore v. Hubbard*, 15 Ind. App. 84, 42 N. E. 962. In an action upon an official bond the bond itself is an indispensable part of the plaintiff's evidence. If the bond is not put in evidence, nor its absence accounted for, nor any cause, reason, or excuse shown for the omission to put it in evidence, its omission is fatal to the party having the burden.

Bowers et al. v. State ex rel., etc., 69 Ind. 60. See, also, *Highman v. Hood et al.*, 3 Ind. App. 456, 29 N. E. 1141; *Lucas v. Smith*, 42 Ind. 103. In *Citizens' Bank v. Judy*, supra, it was held that in an action to reform a written contract the party alleging the mistake holds the affirmative, must satisfy the court beyond a reasonable doubt that the agreement he claims to have been made was in fact made between the parties, and that a mistake has occurred in reducing such agreement to writing. See, also, *Bro. C. C. 94*; *Martin v. Bennett*, 26 Wend. 169; *Koen v. Kerns (W. Va.)* 35 S. E. 902; *Boyerton Nat. Bank v. Hartman (Pa.)* 23 Atl. 842, 30 Am. St. Rep. 759; *N. W. Mut. Life Ins. Co. v. Nelson*, 103 U. S. 549, 26 L. Ed. 436. We are asked to affirm a judgment reforming a contract, when the instrument to be reformed is not before us, and, so far as the record shows, was not before the trial court. This we cannot do. The evidence, as certified to us, and which we must accept as being correct, and all the evidence given at the trial, is insufficient to support the finding and judgment, in that there is a total absence of any evidence as to what the contract, as written, was.

This conclusion makes it unnecessary to consider other questions presented by the motion for a new trial.

Judgment reversed, and the court below is directed to sustain appellant's motion for a new trial.

MITCHELLTREE SCHOOL TP. OF MARTIN COUNTY v. HALL¹

(Appellate Court of Indiana, Division No. 2.
Nov. 17, 1903.)

SCHOOL TOWNSHIP—WARRANT—STATUTORY REQUIREMENT—BOARD OF AUDIT—ACTION—COMPLAINT—SUFFICIENCY.

1. Where, in an action against a school township, the complaint alleges the date on which the warrant sued on was audited and executed, it is to be presumed that it was audited by the board of county commissioners before delivery, as required by Acts 1897, p. 222, c. 144.

2. Acts 1897, p. 222, c. 144, provides that the board of county commissioners acting as a board of audits shall audit every warrant drawn by the trustees of a school township, save for the payment of teachers, and that it shall determine the questions on which the validity of warrants have been held to depend, except the question of delivery of consideration. *Held* that, in the absence of fraud or mistake, the determination of the board is conclusive of all questions passed on until set aside by direct proceedings.

3. A complaint in an action based on a warrant showed the organization of the board as required by law, and that it took each step it was authorized to take in respect to the warrant, and made the proper record, and that the board had stamped the warrant as required, and that the goods for which it was given had been delivered. *Held*, that a motion that the complaint be made more definite and certain was properly denied, though the complaint did not state that the goods sold were necessary and suitable, and their reasonable value.

4. In an action against a township on a warrant it was not error to refuse a continuance on the ground of surprise because of the amendment of the complaint, where the suit was on

¹ Rehearing denied. Superseded by opinion, 73 N. E. 641.

the same warrant, and defendant was notified of the character of the action and the parties thereto.

5. Where, in an action against a township on a warrant, it is apparent that the date of audit was a clerical error, the fact that such date preceded the incurring of the liability was of no avail to defendant.

6. Where, in an action against a school township on a warrant, proof is made of the persons composing the board of audit, and the stamp on the warrant bears the name of one of them as president and one as secretary, it will be presumed that the board performed its duty or indorsement by the proper members.

7. In an action against a school township on a warrant, it was proper to receive in evidence a copy of the registration of the warrant by the auditor, the registration book being in his custody, and he being the proper officer to sign the certificate.

Appeal from Circuit Court, Lawrence County; W. H. Martin, Judge.

Action by James K. Hall against the Mitchelltree School Township of Martin County. From a judgment for plaintiff, defendant appeals. Affirmed.

Rogers & Rogers and Brooks & Brooks, for appellant. W. R. Gardiner, C. G. Gardiner, and T. D. Slimp, for appellee.

COMSTOCK, J. This action upon a township warrant was commenced by the appellee against the appellant in the Martin circuit court, and upon change of venue was tried in the Lawrence circuit court, where appellee recovered a judgment against the appellant for \$543.66. The amended complaint, which was in one paragraph, and upon which the case was tried, sets forth, in substance, that on the 6th day of December, 1898, the defendant, being indebted to M. J. Carnahan & Co. in the sum of \$425 for goods theretofore sold to it by the said Carnahan & Co., and by said firm delivered to and received by defendant, one Isaac T. Carothers, trustee of the defendant, as evidence of said indebtedness, executed to said M. J. Carnahan & Co. the warrant of defendant for said sum in the name and style of "I. T. Carothers, Trustee of Mitchelltree Township, Martin County." It is further averred that through the mutual mistake of the parties the trustee omitted to insert the word "School" as a prefix to the word "Township," and omitted to insert the word "of" between the words "Township" and "Martin," as a part of his descriptive character; that that warrant was assigned to plaintiff by proper indorsement before maturity. Further averments allege that this warrant was audited by the board of audits of Martin county on the 6th day of December, 1899, and as evidence of their approval of it indorsed the same after the investigation as to the propriety of authorizing its issue. A copy of the warrant was filed as an exhibit with the complaint. Appellee answered in three paragraphs, the first being a general denial; the second, that the material for which the warrant was given did not exceed in value \$200, and was purchased before the warrant was presented and

audited by the board of audits, and that there was a failure of consideration for said warrant for said amount; the third, that the warrant was audited at the mere request of Carothers, the trustee, and that there was no sufficient investigation by the board as to the necessity of the purchase, the value of the materials, or whether it was a proper debt to incur. The errors assigned are the action of the court in overruling appellant's demurrer to the complaint; second, in sustaining appellee's demurrer to the second paragraph of answer.

The objection made to the complaint is that it does not contain the averment that the goods sold were necessary, were suitable, were delivered to and accepted by the township, and their reasonable value. Whether these objections are well founded must depend upon the construction of the act approved March 8, 1897, providing for the appointment and compensation of an auditing board, prescribing its duties, and declaring an emergency. Acts 1897, p. 222, c. 144. This act was in force December 6, 1898, when the warrant in suit was executed. Before it went into effect, the averments which it is claimed are wanting would have been necessary. The act imposed upon the board of county commissioners acting as a board of audits the following among other duties: "Shall proceed to audit each and every warrant drawn by the several trustees of said (county) except for the payment of teachers. And it shall be the duty of said board to investigate and learn for what purpose said warrant is drawn, whether or not it is a proper and reasonable charge against any of the funds of said township, whether or not the article for which any such warrant is drawn is a proper and legitimate purchase of said township, or whether or not said township had use therefor, and whether or not the amount named in any warrant is a reasonable compensation for the article furnished or labor or service performed, or whether or not there was any occasion for the purchase of or contracting for said article, for the procurement of said labor and services, and said board shall audit said amounts and determine what warrants shall be issued by said several trustees and for what amounts and shall write or stamp on the face of each warrant that it audited and approved the amount for which allowed, and which shall be signed by the president and secretary of said board." The complaint shows by averments that the commissioners had organized as an auditing board, as required by the statute; that said board took each step it was authorized to take in respect to said warrant; that it made the record required to be made. It alleges what the record contains, and that the board had written and stamped the warrant as required, and that the goods for which the warrant was given were delivered to the appellant. Copies of the warrant with the indorsement of

the assignment of the payee and the stamp by the auditing board are made parts of the complaint. The act provides for the determination of all questions declared by the appellate courts of this state involved in the question of the validity of township warrants before the passage of the act in question, except the delivery of the consideration. As we have seen, the complaint alleged the delivery. The statement of the appellant that the act does not require the board to examine as to the truthfulness or necessity of purchase is not sustained. It is stated by appellant that the warrant was delivered by the trustee to the payee before auditing; that its audit was therefore illegal; that it was delivered contrary to law. The complaint shows that it was audited and executed upon December 6, 1898. The presumption is that it was audited before delivery. It does not appear from the complaint that the warrant was delivered to the payee before it was audited.

Said act and the purpose of the Legislature may fairly be interpreted to have intended to have the validity of township warrants as evidencing just debts against the township, determined by the board of audit, and that the stamp of the auditing board should be evidence that such validity had been determined. It provides that the board of audit shall determine the questions upon which the validity of warrants has been held to depend, except as to the question of the delivery of the consideration. Any taxpayer may appear before the board and except to any warrants drawn by the trustee being audited and issued in whole or in part. In the absence of fraud or mistake—and neither is averred in this case—the determination of the board is conclusive of all questions passed upon until set aside by direct proceedings. From what we have said as to the act, it follows that there was no error in overruling appellant's motion to make the complaint more specific, nor in sustaining the demurrer to the second and third paragraphs of answer.

Complaint is made of the action of the trial court in refusing appellant's motion for a continuance, which was asked upon the ground of surprise because of the amendment of the complaint. The suit was originally against the township on the same warrant, and appellant was notified of the character of the action and the parties thereto, and there was no error in overruling the motion.

It is claimed that the proof shows that the warrant was audited two years before the liability was incurred and before the board of audits was established. It is apparent from the record that the date (1896) upon which this claim was based was a clerical error. It is also urged that there is no evidence that the indorsement of the warrant was executed or authorized by the president and secretary of the board of audits. Proof

was made of the persons composing the board. The stamp on the warrant bears the name of one of them as president and one as secretary. The presumption is that the board performed its duty by its proper members. The copy of the registration of the warrant was certified by the auditor, and was admitted in evidence. It is argued that, inasmuch as the auditor had no connection with the board, this copy was not properly certified. Upon the repeal of the statute the board went out of existence. The registration book was in the custody of the auditor, and he was the proper officer, therefore, to sign the certificate.

Judgment affirmed.

(31 Ind. App. 621)

WIENEKE et al. v. DEPUTY.

(Appellate Court of Indiana, Division No. 2.
Nov. 18, 1903.)

EJECTMENT—PLEADING—GENERAL DENIAL—DEFENSES ADMISSIBLE—MISTAKEN DESCRIPTION—CONDITIONS OF RELIEF—OFFER TO DO EQUITY—EXCUSE.

1. Under Burns' Rev. St. 1901, § 1067, providing that in ejectment defendant may, under the general denial, give in evidence every defense that he may have, either legal or equitable, defendant may show a mistake of description in the deed under which he claims, though he cannot make it the basis of affirmative relief.

2. A mistake in a deed, describing the "middle" instead of the "west" acre as the property conveyed, is a mistake, not of law, but of fact.

3. Parol evidence is admissible in suits for reformation of a deed to establish the fact of the mistake, in what it consists, and how the writing should be corrected to conform to the agreement made.

4. In ejectment, evidence examined, and held sufficient to sustain a finding that there was a mutual mistake in the description in the deed under which defendant claimed.

5. In ejectment, defendant, who seeks to obtain title to the west of three acres, of which he is in possession, relying on a mistake in the description in his deed which described the middle instead of the west of three acres as that conveyed—plaintiff's deed, subsequently executed by the same grantor, having described the west acre—should tender plaintiff a deed to the middle acre, or otherwise disclaim any interest therein, as a condition of relief.

6. The fact that plaintiff could bring an independent action for a reformation of his deed is no excuse for a failure to make such tender.

7. Nor is the absence of the representatives of his grantor's estate material where the grantor before her death had parted with all interest in all of the acres.

Appeal from Circuit Court, Jackson County; D. A. Kochenour, Special Judge.

Action by Albert J. H. Wieneke and others against Solomon Deputy. From a judgment for defendant, plaintiffs appeal. Reversed.

O. H. Montgomery, for appellants. Lewis & Swails, for appellee.

ROBY, J. Action by appellants in ejectment and to quiet title. Answer in general denial. Cross-complaint by appellee to quiet his title to the same real estate described in the complaint. Answer in general denial.

Other paragraphs of answer set up no matter not admissible under the general denial. Trial by the court. Finding and judgment for appellee. Error assigned upon the action of the court in overruling the appellant's motion for a new trial.

Appellee was permitted to introduce evidence tending to show a mistake in the description of the real estate contained in the conveyance under which he claims. Appellant contends that, in so much as there was no pleading filed by appellee setting up the mistake and praying for a reformation of the instrument, such evidence was inadmissible. The statute provides that under the general denial in cases of this class the defendant shall be permitted to give in evidence every defense to the action that he may have, either legal or equitable. Section 1067, Burns' Rev. St. 1901. The uniform holdings have been that under this statute the defendant may plead the general denial, "and introduce any facts upon the trial which, according to the principles of equity as applied by the courts of chancery, would defeat appellant in obtaining a decree quieting his title to the land in question." *Reed v. Kalfsbeck*, 147 Ind. 148, 151, 45 N. E. 476, 478; *Allen v. Oil Co.*, 27 Ind. App. 158, 60 N. E. 1003; *Watkins v. Lewis*, 153 Ind. 648, 653, 55 N. E. 83; *Ind. R. R. Co. v. Allen*, 113 Ind. 581, 15 N. E. 446. The cases of *Conger v. Parker*, 29 Ind. 380, and *King v. Insurance Co.*, 45 Ind. 43, 59, relied upon by appellants, are not in point. *East v. Peden*, 108 Ind. 92, 95, 8 N. E. 722. If *Cain v. Hunt*, 41 Ind. 466, can be considered as applicable, it must be regarded as overruled by the later and better considered cases before cited. The court did not, therefore, err in overruling the objections to evidence based upon the ground stated. The right thus conferred does not enable the defendant to avail himself of it for affirmative relief.

Mary Mooney, an unmarried woman, owned in 1897 a tract of land in Jackson county, containing three acres. On December 23d of that year she sold one acre to Jacob Shamback. The land owned by her is referred to in the evidence as the "east acre, middle acre, and west acre," said parcels lying side by side, each being 83 feet wide by 518 deep. The deed to Shamback contained a description of the middle acre. Thereafter, on June 10, 1892, he made his deed, containing the same description, to appellee. Shamback, upon receiving his deed, took possession of the west acre, and transferred said possession to appellee, who has since the date of his deed had possession of said west acre, which he continues to hold, insisting at the trial that a mutual mistake was made by Mary Mooney and Shamback in the description inserted in the first deed, and that such mistake was followed in the Shamback deed to him. Appellee asserts that the description inserted in the deed made by Mary Mooney correctly described the land sold,

but that Shamback took possession of the wrong land. Mary Mooney thereafter departed life, and such proceedings were had as resulted in the sale of her real estate and the execution of an executor's deed to Frank Roseberry for the west acre. Said Roseberry, however, took possession of the middle acre. In November, 1900, he conveyed to appellant, who, by virtue of such conveyance, has a clear record title to the west acre occupied and claimed by appellee. Appellant and his grantor had actual as well as constructive notice of appellee's equity when the Mooney title was acquired by them. The court found for appellee that the wrong description was by mistake inserted in the deeds under which he claimed.

The mistake was not a mistake of law, but one of fact. *Bank v. Judy*, 146 Ind. 322, 346, 43 N. E. 259. Parol evidence is admissible in suits for reformation to establish the fact of the mistake, in what it consists, and to show how the writing should be corrected in order to conform to the agreement already made. *Pomeroy's Eq. vol. 2, § 589*. "Equity will not interpose in such a case unless there is the clearest and most satisfactory proof of the mistake and of the agreement of the parties." *Gray v. Woods*, 4 Blackf. 432; *Oiler v. Gard*, 23 Ind. 212, 218; *Board v. Owens*, 138 Ind. 183, 187, 37 N. E. 602; *Pomeroy's Eq. § 859*. A witness was introduced by appellee, who testified that he was a civil engineer, and was employed by Mary Mooney to "lay off an acre" for Shamback, "it to be the third acre west"; that the east acre was already laid out; that he laid out the west acre; that she told him to stake off the west acre, and that he did so, and furnished her with a description, but did not know whether the description was followed in the deed or not, although it was made for that purpose. Another witness testified that he had a conversation with Mary Mooney relative to the purchase by him from her of the middle acre; that he paid her \$5 a year rent for two years for it; that she told him she had sold the third (west) acre to Shamback, who then took possession of it. That he did so take possession and hold it is undisputed. As a circumstance tending to show his understanding of the agreement, the effect is persuasive, and, in the absence of an explanation, it is difficult to believe that he did not suppose that it conveyed that portion to him. On the other hand, it is not probable he would have been allowed to continue his occupancy for so long a time without protest, except as the grantor had the same understanding. There was evidence tending to show that the appellant took the middle acre upon the supposition that it was the part conveyed to Roseberry. Appellee made improvements on the west acre. We are not able to say that the evidence is insufficient to sustain the finding that the mistake asserted was in fact made.

Appellee, by virtue of the conveyance above referred to, was vested with an apparent title to the middle acre of said land. He seeks to obtain in this action title to the west acre, and the judgment does quiet his title thereto. It destroys appellant's title thereto, and leaves him with nothing to take in its place, while appellee now has title to both the west and middle acres. The maxim that he who seeks equity must do equity is applicable. No offer was made by appellee to rectify on his part the mistake asserted. He neither conveyed, tendered conveyance, nor offered to convey to appellant. He should have tendered a deed, or taken such other action as would divest him of the appearance of holding that to which he admits he has no right. It is no answer to say that appellant may bring an action to obtain reformation of his deed. Neither is the absence of the representatives of the Mooney estate material. Appellee has title to, and, so far as shown by the record, proposes to hold, the land that, upon his own theory, belongs to appellant.

The judgment is reversed, and the case is remanded, with instructions to sustain motion for a new trial and for further proceedings.

(31 Ind. App. 597)

BALTIMORE & O. R. CO. v. RYAN.

(Appellate Court of Indiana, Division No. 1.
Nov. 17, 1903.)

REMOVAL OF CAUSES—AMOUNT IN CONTROVERSY—ACTION FOR DEATH—FOREIGN STATUTES—CAUSE OF ACTION—APPEAL—HARMLESS ERROR.

1. Where each of two paragraphs of a complaint seeks a recovery for the death of the same person, wrongfully caused by defendant's servants, and each relates to the same occurrence, and each seeks a recovery in the sum of \$2,000, the matter in dispute does not amount to \$4,000, so as to authorize a removal to the federal court.

2. Where a complaint in an action for death seeks damages in the sum of \$2,000, the amount in dispute is not modified by the formal prayer for "other and proper relief" so as to warrant removal to the federal court; there being no proper relief other than the pecuniary remedy demanded.

3. Where, in an action for death by wrongful act, based on a statute authorizing recovery of just compensation, not to exceed \$5,000, the complainant sought damages in the sum of \$2,000, a contention that the amount legally in issue was \$5,000, and that a removal to the federal court was therefore authorized, was untenable.

4. It is not necessary, in an action for death by wrongful act, to allege absence of contributory negligence, or state facts showing freedom therefrom.

5. In an action in Indiana against a railroad company for death by wrongful act, plaintiff was entitled to the benefit of a statute of Illinois, where the accident happened, relative to the use of whistles and bells on locomotive engines, and an ordinance of the city where the accident occurred concerning the maintenance of gates at street crossings, etc.

6. In an action in Indiana against a railroad company for death by wrongful act in the state of Illinois, statutes of Illinois relative to the warnings required to be given by railroads, in the way of bells, whistles, etc., which are relied on, must be pleaded and proved.

7. Where, in an action in Indiana for death by wrongful act, the complaint set up in one paragraph the ordinance of a city of a sister state, where the accident occurred, relative to safety gates at crossings, etc., an objection that plaintiff was not entitled to any benefit of such ordinance, because it could not have an extra-territorial effect, was not available to defendant under an assignment on appeal to the effect that the complaint was insufficient.

8. Defendant entered a special appearance objecting to jurisdiction, he having filed a petition for removal to the federal court; and on overruling of the objection he refused to appear further, and was defaulted, and the cause submitted to trial. After judgment he prayed a term-time appeal, which was denied, and he then brought a vacation appeal. *Held*, that it appearing that the court had jurisdiction, and that a term-time appeal would have resulted in no benefit to him, there was no ground for reversal.

9. It was not error to overrule a motion to set aside a default judgment on the ground that the attorney who had suffered the default had misunderstood his instructions, where no reason for such misunderstanding is apparent, and it merely appears that he inadvertently overlooked the instructions through forgetfulness or inattention.

Appeal from Circuit Court, Porter County; Willis C. McMahan, Judge.

Action of Mary E. Ryan, as administratrix of the estate of Thomas J. Ryan, against the Baltimore & Ohio Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Pam, Calhoun & Glennon and W. H. Dowdell, for appellant. N. L. Agnew, for appellee.

BLACK, J. The appellant has questioned in this court the jurisdiction of the court below, in which its application for the removal of the cause to the Circuit Court of the United States for the District of Indiana was denied. The appellee sued, as administratrix of the estate of Thomas J. Ryan, deceased, to recover damages for causing his death by negligently running a locomotive engine and tender against him on a street crossing in the city of Chicago, Ill. There were two paragraphs of complaint, in each of which the damages were laid in the sum of \$2,000; and at the close of each paragraph the appellee, in the same language, demanded judgment for that amount, and all other and proper relief in the premises. In the verified petition for removal the appellee was said to be a citizen and resident of this state, and the appellant was alleged to be a corporation duly incorporated under the laws of another state named, and a citizen thereof, having its principal office there; and it was claimed in the petition that the matter in dispute, exclusive of interest and costs, exceeded the sum or value of \$2,000. It is suggested as a reason why, upon the filing of the petition and bond, the cause should have been removed, that the aggregate of

¶ 2. See Removal of Causes, vol. 42, Cent. Dig. § 132.

the damages demanded in the complaint was \$4,000. We cannot accept this view. It is manifest that in each paragraph the same person, in the same right, seeks damages for the death of the same person wrongfully caused by the appellant's servants, and that each paragraph relates to the same time and place, and the same occurrence. While each paragraph purports to set up a cause of action independently, there could not be a recovery for the aggregate amount of the damages demanded in both paragraphs. There could be a recovery only for one death, the damages from which the appellee did not claim to be greater than \$2,000, to which amount her damages would necessarily be limited. "By 'matter in dispute' is meant the subject of litigation—the matter for which the suit is brought, and upon which issue is joined, and in relation to which jurors are called and witnesses are examined." *Lee v. Watson*, 1 Wall. 337, 17 L. Ed. 557. Where it thus affirmatively and clearly appears on the face of the complaint that all of the paragraphs of a complaint consisting of more than one paragraph are based upon one and the same occurrence, the statement being varied merely to meet the evidence as it may appear on the trial by alleging some other or additional negligent conduct, the amount of the one cause of action should be controlling; and, if damages be not claimed in excess of \$2,000 in any of such paragraphs, the cause should not be removed because of the amount in controversy. The amount in controversy was the amount demanded in the complaint. *Lake Erie, etc., R. Co. v. Juday*, 19 Ind. App. 436, 49 N. E. 843; *Western Union Tel. Co. v. Levi*, 47 Ind. 552. There were not several causes of action, arising out of one transaction or occurrence, but a single cause of action, though stated somewhat differently in the different paragraphs. *Brownell v. Pacific R. Co.*, 47 Mo. 239. If the plaintiff in such case should obtain in his favor either a general verdict, or a verdict on one count, this would bar a further recovery for the death of the intestate. The amount in dispute was not modified by the formal prayer for all other and proper relief in the premises, there being no proper relief other than the pecuniary remedy demanded. *Baltimore, etc., R. Co. v. Worman*, 12 Ind. App. 494, 40 N. E. 751. The appellant, in its brief, refers to a statute of Illinois, which is set out in each paragraph of the complaint, authorizing such suit brought by and in the name of the personal representatives of the deceased person, it being provided that the amount recovered shall be for the exclusive benefit of the widow and next of kin, and the jury may give such damages as they shall deem a fair and just compensation, with reference to the pecuniary injuries resulting from such death, to the wife and next of kin of the deceased person, not exceeding the sum of \$5,000; and thereupon it is contended upon behalf

of the appellant that the administratrix had no authority to sue for less than \$5,000 without the approbation of the court which appointed her, and that the amount legally in issue was that sum. Such an action is one for the recovery of unliquidated damages. The damages, by the terms of the statute, are to be such as the jury shall deem a fair and just compensation, having reference, in estimating and awarding them, to the pecuniary injuries resulting to the wife and next of kin. The statute does not designate the amount recoverable, but fixes the sum of \$5,000 as the limit which may not be exceeded by the jury. Of course, that amount cannot properly be awarded if it should be more than sufficient to compensate such resulting injuries. The court, in acting upon the petition for removal, cannot determine that in the particular case a greater amount might be recovered than that of the damages demanded, but, for the purposes of the application for removal, must conclude that no more can be recovered in the action than the amount laid and claimed as damages. The position thus taken by counsel may perhaps be regarded as not quite consistent with the claim that the matter in controversy was \$4,000, the sum of the amounts separately laid and claimed in each paragraph as damages. To be consistent, it should, perhaps, have been claimed that two distinct causes of action, each for the recovery of \$5,000, were declared upon.

Under an assignment of error assailing the complaint as insufficient, counsel for the appellant base the objection especially upon the absence of averments showing that the deceased exercised due care, and cite many decisions, the applicability of which as furnishing a rule of pleading has ceased because of our statute relieving the plaintiff in such case of the burden of showing want of contributory negligence on the part of the person injured or killed. It is no longer necessary in such cases to allege in the complaint the absence of contributory negligence, or to state facts showing freedom from contributory negligence.

In this connection it is claimed, also, that a statute of Illinois relating to the providing and using of whistles and bells on locomotive engines, set out in both paragraphs of the complaint, and an ordinance of the city of Chicago concerning the maintenance by railroad companies of gates at street crossings, set out in the second paragraph of complaint, relate only to the remedy in Illinois, and that to permit such statute or ordinance to affect the remedy in this case would be giving them extraterritorial effect, which they do not possess, as the law of Indiana governs the remedy; citing *Smith v. Wabash R. Co.*, 141 Ind. 92, 40 N. E. 270. Counsel perhaps misapprehended the decision cited, which is to the effect that a statute of another state concerning the presumption of negligence pertains to the remedy.

and cannot have extraterritorial force. "The quantity or degree of evidence requisite to sustain an action, or to change the burden of proof, is determined by the law of the forum, and not by the law of the place where the cause of action arose. It belongs, not to the law of rights, but to the law of remedy." *Richmond, etc., R. Co. v. Mitchell*, 92 Ga. 77, 18 S. E. 290; *Pennsylvania Co. v. McCann* (Ohio) 42 N. E. 768, 81 L. R. A. 651, 56 Am. St. Rep. 695; *Smith v. Wabash R. Co.*, supra; *Elliott on Railroads*, § 1365. The cause of action for the recovery of damages for pecuniary loss resulting from the death of the appellee's intestate by the negligence of the appellant, the right to recover having accrued in another state, under a statute similar in import and character to one in force in this state, was in the nature of a transitory cause of action, and the right to maintain the action was not confined to the state where the negligence complained of occurred, though in such an action instituted in this state such statutes of the sister state must be pleaded and proved, inasmuch as our courts cannot take judicial notice thereof. *Burns v. Grand Rapids, etc., R. Co.*, 113 Ind. 169, 15 N. E. 230; *Cincinnati, etc., R. Co. v. McMullen*, 117 Ind. 439, 20 N. E. 287, 10 Am. St. Rep. 67; *Stewart v. Baltimore & Ohio R. Co.*, 18 Sup. Ct. 105, 42 L. Ed. 537; *Dennick v. Railroad Co.*, 103 U. S. 11, 26 L. Ed. 439; *Law v. Western R. (C. O.)* 91 Fed. 817. The right of action was governed by the law of the state where the tort which caused the death was committed, though the action might be maintained by a personal representative appointed in this state. *Erickson v. Pacific, etc., Co. (C. C.)* 96 Fed. 80; *Van Doren v. Pennsylvania R. Co.*, 93 Fed. 260, 85 C. C. A. 282. If the objection were well taken as to the city ordinance, it could not be available to the appellant under an attack made by assignment in this court, which cannot prevail unless all the paragraphs were insufficient; but the statute and the ordinance in question did not relate to the remedy, but did enter into the right to bring and maintain an action for the tort in Illinois. That right having so arisen there, the cause of action was transitory, and might be asserted in this state, though the action here is governed, as to the rules of pleading and evidence, including presumptions and the burden of proof, by the rules of law of this state.

It is urged that the court erred in refusing to grant the appellant's prayer for an appeal in term time. The petition for the removal of the cause was filed in the same vacation in which the complaint was filed. At the term the appellant, as appears from the record, entered its special appearance for the purpose of objecting to the further taking of jurisdiction of the cause. The court having overruled the objection, and the appellant, still appearing specially, having excepted to this ruling, it then refused to ap-

pear further in the cause, or to enter any appearance therein, whereupon the appellant was defaulted, and the cause was submitted to the court for trial. On the same day, after finding and judgment, the appellant appeared for the purpose only of praying an appeal to the Supreme Court, and tendered an appeal bond; and, the prayer for an appeal being denied, the appellant excepted to the ruling. Thus the appellant, having refused to appear in the cause and having voluntarily submitted to a default for want of appearance, was denied a term-time appeal. But it has brought a vacation appeal, and has failed to establish that the court had in any respect erred in the proceedings and judgment from which it prayed an appeal. This is not an appeal in a proceeding to compel the acceptance of an appeal bond and grant an appeal, but it is an appeal involving the same questions that would have been involved in a term-time appeal. This court will not reverse a judgment for a ruling of the trial court which did not injure the appellant. There must be some indication that the ruling was injurious. Where in a vacation appeal it appears affirmatively that a term-time appeal could not have resulted in benefit to the appellant, we cannot set aside the judgment.

Some days after the rendition of judgment by default, the appellant moved the court to set aside the default and judgment on account of alleged inadvertence and mistake of one of the appellant's attorneys. In overruling this motion there was no error. The attorney refused to appear, and purposefully suffered a default, and, under well-settled practice, there was no sufficient reason set forth in his affidavit for opening up the case. If he failed to follow directions from his superiors, as seems to be claimed, no reason is given therefor, other than that he discovered after the rendition of the judgment that he had inadvertently overlooked or misunderstood instructions, which, as stated, required him to enter objections and appearance, and to pray an appeal and perfect the same, in case of necessity, and to do all such necessary acts to accomplish the defense of the company in the trial of the cause, and which, it is stated, did not authorize the attorney to enter a special appearance in the cause. No reason for misunderstanding such instructions is apparent, and to have inadvertently overlooked them, which could only be through forgetfulness or inattention, was not a sufficient ground for relief.

Judgment affirmed.

(32 Ind. App. 414)

INDIANA MFG. CO. v. BUSKIRK.¹

(Appellate Court of Indiana, Division No. 1.
Nov. 20, 1903.)

MASTER AND SERVANT—INJURY TO SERVANT
—COMPLAINT—SUFFICIENCY—LIA-
BILITY OF MASTER.

1. The complaint in an action for personal injuries alleged that a third person was in de-
to Supreme Court denied.

¹ Rehearing denied. Transfer

defendant's employ as chief of engineers in the engine room; that plaintiff was employed as fireman, and conformed to the orders and directions of the third person in the performance of duties as fireman; that plaintiff was under the authority of the third person, and subject to his orders; that on a day named, while engaged in the performance of his duties as fireman in pursuance to the orders of the third person, plaintiff was injured by reason of the negligence of the third person as therein described. *Held*, that the complaint asked for relief under Burns' Rev. St. 1901, § 7083, cl. 2, making corporations liable for damages for personal injuries to an employé where the injury resulted from the negligence of any person in the service of such corporation to whose order the injured employé was at the time of the injury bound to and did conform.

2. A complaint based on Burns' Rev. St. 1901, § 7083, cl. 2, declaring that corporations shall be liable for damages for personal injuries suffered by an employé where the injury resulted from the negligence of any person in the service of such corporation to whose order the injured employé was at the time of the injury bound to and did conform, which alleged that the employé was bound to and did conform to the orders of a third person in the performance of all his duties pertaining to the employment, and that when injured he was in the discharge of the duties of his employment, sufficiently charged as against a demurrer the giving of specific directions by the third person and their execution by plaintiff when he was injured.

3. Under Burns' Rev. St. 1901, § 7083, cl. 2, making corporations liable for damages for personal injuries to an employé where the injury resulted from the negligence of any person in the service of such corporation to whose order the injured employé, at the time of the injury, was bound to conform and did conform, there can be no recovery unless the injured employé was acting under some special order in respect to the particular service in which he was engaged when injured, as distinguished from general instructions as to duties connected with his employment generally.

4. It appeared that plaintiff had been in the employ of defendant as fireman; that a third person was in charge of the engine as engineer; that plaintiff was injured while in the discharge of his duties as fireman by reason of an iron plate propped up by another employé with plaintiff's assistance falling down on him; that it was plaintiff's duty to observe the steam gauge on the boiler he was tending for the purpose of ascertaining when to supply the furnace with coal; that he observed that coal was needed, and proceeded to put coal in the furnace, when he was injured; that the third person had said nothing to plaintiff about putting coal into the furnace after the plate was raised, and had given no instructions about putting coal in the furnace, nor as to where plaintiff should stand while performing his duties; that no officer or agent of defendant gave plaintiff any such instruction; and that the third person, on coming into the room, kicked the prop from under the plate, causing it to fall on plaintiff's foot. *Held*, that plaintiff could not recover, under Burns' Rev. St. 1901, § 7083, cl. 2, providing that corporations shall be liable for injuries suffered by an employé where the injury resulted from the negligence of any person in the service of the corporation to whose order or direction the injured employé when injured was bound to conform and did conform.

Appeal from Circuit Court, Miami County; Jabez T. Cox, Judge.

Action by William Buskirk against the Indiana Manufacturing Company. From a judgment for plaintiff, defendant appeals. Reversed.

Blacklidge, Shirley & Wolf and Loveland & Loveland, for appellant. W. E. Mowbray, for appellee.

ROBINSON, C. J. Suit by appellee for personal injuries. A demurrer to the complaint was overruled, and the case was tried upon issue formed by the complaint and answer in denial, resulting in a verdict and judgment for appellee. Overruling the demurrer and appellant's motions for a new trial and for judgment on the answers to interrogatories are assigned as errors.

The complaint avers that one Williamson was in appellant's employ as chief of engineers in the engine room, having charge and control of the room and all persons and things therein; that appellee was employed as fireman, and at certain times as subordinate engineer, "and as such fireman and subordinate engineer to conform, and did in fact conform, to the orders, direction, and control" of Williamson "in the performance of all his duties pertaining to his said employment"; that during all the time of his employment appellee was under the authority of Williamson, and "subject to his orders and directions in all matters pertaining to his said employment in and about said engine room"; that on a date named appellee, while engaged in the performance of his duties to appellant, and under and in pursuance of the orders and directions and under the control of Williamson, by reason of the fault and negligence of appellant, was injured in the following manner: One Koontz, in appellant's employ, had entered the engine room, and had stood on edge in the engine room a heavy iron plate, and had propped the same, so as to be safe if left undisturbed; that a few minutes thereafter Williamson, without any notice or warning to appellee, "willfully, purposely, and negligently kicked said prop from under said iron plate," causing the same to fall on appellee's foot; that at the time appellee was injured "he was engaged in the discharge of his usual duties as fireman and subordinate engineer for said defendant company in and about said engine room, under the control and acting under and in pursuance of the direction of" Williamson, who gave no warning that he was about to kick the prop from under the plate, nor did appellee know of the danger to which he was exposed until the plate fell; that the injury was caused wholly through the negligence of appellant, acting through Williamson, as aforesaid, and would not have occurred but for his wrongful and negligent act.

The complaint should be construed as one asking for relief under the second clause of the co-employés' liability act of 1893 (Burns' Rev. St. 1901, § 7083). From the language used in the pleading it was manifestly based upon that act. It is argued against the sufficiency of the complaint that it fails to charge the giving of any specific direction by Williamson and its execution by appellee at the

time he was injured. It appears from the pleading, however, that appellee was bound to conform and did conform to the orders of Williamson "in the performance of all his duties pertaining to his said employment," and that when injured he was in the discharge of the duties of his employment. While a motion to that effect would have required appellee to make his complaint more specific in this particular, yet we think the averment sufficient to admit proof of any particular order to which he was conforming at the time he was injured. The effect of the averment is that he was injured while in the discharge of the duties of his employment, and that he performed no duties pertaining to his employment except upon the orders of Williamson, and to these orders he was bound to and did conform. We think the complaint sufficient against a demurrer.

The jury answered interrogatories that appellee had been in the employ of the appellant as night fireman for five months. That Williamson, who was chief of engineers, was in charge of the engine as engineer, and worked on the day turn except when the machinery ran until 9 at night, and his duties required him to attend to the engine during the daytime except when the machinery ran until 9 at night. Appellee had charge of the engine on the night turn, except when machinery was running. Appellee received \$1.86 per night and Williamson \$60 or \$65 per month. The injury occurred in the boiler room, the place appellee usually worked in when on duty. In maintaining the fires under the boilers it was the practice of the appellee to stand in front of the same while feeding coal into the furnaces. Iron plates about 4 feet long and 2½ feet wide formed a part of the floor of the boiler room immediately in front of the boilers, and fit into openings in the floor, and were held down by their own weight. These plates covered certain water pipes used for feeding water to the boilers, and when the pipes were out of repair it was necessary to raise the plates to repair the same. The plate causing the injury had been raised by Michael Koontz, a pipe fitter in appellant's employ, to repair the pipes under the same. The plate had been lifted out of its position at its outer edge, and raised about 18 inches, so as to rest on the inner edge and a prop under the outer edge, from three to five minutes before the injury. Koontz asked and received permission from appellee to raise the plate, appellee assisted in raising it, and the prop was placed under by appellee. When the plate was raised it stood 8 or 10 inches from the front end of the boiler nearest thereto, and was in plain view of appellee when in the discharge of his duties at the time of his injury. It was appellee's duty to observe the steam gauge on the boiler he was tending for the purpose of ascertaining when to supply the furnaces

with coal. Immediately before his injury appellee observed that the gauge indicated the necessity for more coal, and upon observing such indication he proceeded to put coal into the furnace in front of which the iron plate stood. Appellee was caused to replenish the fire at the time of his injury by the indications of the steam gauge. Williamson was not in the boiler room when the plate was raised, had said nothing to appellee about putting coal in the furnace after the plate was raised, and had given appellee no instructions about putting coal in the furnace, or where he should stand while performing his duties on the day of his injury, nor had any officer or agent of appellant given appellee any such instructions. No one gave to appellee, on the day he was injured, any instructions with reference to feeding coal into the furnaces. The injury was caused by Williamson, immediately after coming into the boiler room, kicking the prop from under the plate, causing it to fall on appellee's foot. The plate was firmly and safely propped if the prop had not been so removed by Williamson, and would not have fallen, and appellee's injury would not have occurred, had he not knocked the prop from under it. Williamson acted upon the suggestion of no one in removing the prop, and first learned the plate had been raised when he came into the boiler room immediately before he removed the prop, and had no knowledge that the plate was to be raised.

The case made by the pleading and the evidence is not a liability for an injury resulting from appellant's negligence in the selection of a careless and incompetent fellow servant, nor from appellant's negligent failure to provide a safe working place. Even if it should be conceded that Williamson was a vice principal charged with the duty of keeping the working place in a safe condition, it appears from the record that the unsafe condition was created by appellee himself in conjunction with the pipe fitter, and without the knowledge or through the agency of Williamson. The case made by the record is that of negligence of a fellow servant, and it was for the purpose of creating a liability against a corporation for the negligence of a fellow servant that the act of 1893 was enacted. It had long been the rule that an injured employé could not recover damages for an injury received through the negligence of a fellow servant. No legislation was needed to give a right of action for an injury caused through the negligence of a vice principal. Section 7083, Burns' Rev. St. 1901 (Acts 1893, p. 294), provides that a railroad or other corporation, except municipal, shall be liable for injuries suffered by an employé, himself without fault: "(2) Where such injury resulted from the negligence of any person in the service of such corporation, to whose order or direction the injured employé, at the time of the injury, was bound to conform, and did con-

form." It seems from the facts specially found by the jury that appellee has failed to bring himself within the meaning of the above statute. The order or direction here referred to means something more than general instructions as to the duties of the employé. This court has held in a recent case that it must be made to appear that the employé was acting under some special order or direction of the person to whose order he was bound to conform when injured, and that it is not enough to show that he was performing his general duties. *Grand Rapids, etc., R. Co. v. Pettit*, 27 Ind. App. 120, 60 N. E. 1000. It may be that appellee had general instructions as to his duties, and that these instructions were given him by Williamson, and that he was at all times subject to the authority of Williamson; but this would not make his position different from that of every employé of a corporation engaged in the line of his duty. *Mobile, etc., R. Co. v. George*, 94 Ala. 199, 10 South. 145. Whether Williamson was a superintendent or vice principal or was an employé of the company of no higher rank than appellee may have nothing to do with liability under this subdivision of the statute. The question is not what position Williamson occupied in the factory. The question is, was he a person to whose order or direction, at the time of the injury, appellee was bound to conform? If he was, and by reason of Williamson's negligence appellee was injured while conforming to such order or direction, the statute is satisfied. *Dolan v. Anderson*, 12 Rettle, 804; *Beven, Empl. Liab.* p. 152. The matter of superior rank would go to the question of the injured employé's duty to obey the order when given, as he would probably be bound to obey any order given him by such superior if the order or direction was one which reasonably came within the scope of such authority. But the question is, were the relative positions of the parties such in fact "that one owed obedience to the other, and that the order was such as could not have been declined without contumacy?" *McManus v. Hay*, 19 Scot. Law R. 345, 9 Rettle, 425; *Postal Tel., etc., Co. v. Hulsey*, 115 Ala. 193, 22 South. 854. See *Fenwick v. Illinois Cent. R. Co.*, 100 Fed. 247, 40 C. C. A. 369. It is true an order or direction may be implied from circumstances. Thus, where a railway company employed a boy to assist one of their carmen in unloading from a large van iron frames, the frames were placed upright, and secured at each end by a string to the hoops of the van. The carmen untied the string at one end, and the boy, without any express orders, but in the usual course, untied the string at the other end. The carmen then drew away one of the frames, causing the injury. It was held the boy could recover under the statute. *Millward v. Midland Ry. Co.*, 14 Q. B. Div. 68. See, also, *Mobile, etc., R. Co. v. George*, 94 Ala. 199, 10 South. 145; *Dolan*

v. Anderson, supra; *Hatfield v. Enthvern*, 72 Law T. 157; *Dresser, Empl. Liab.* § 66. In *Louisville, etc., Co. v. Wagner*, 153 Ind. 420, 53 N. E. 927, it is held that three things must concur to give a right of action under this statute. "(1) Was the offending servant clothed by the employer with authority to give orders to the injured servant that the latter was bound to obey? (2) Did the injury result to the latter from the negligence of the former, while conforming to an order of the former that the injured servant was at the time bound to obey? (3) Was the injured party at the time of the injury in the exercise of due care and diligence?" See, also, *Beven, Empl. Liab.* (2d Ed.) pp. 153, 157; *Ruegg, Empl. Liab.* (5th Ed.) pp. 98-107; *Dresser, Empl. Liab.* §§ 64, 66, 67; *Wild v. Waygood*, 1 Q. B. 782, 8 T. L. R. 15, 61 L. J. Q. B. 391; *Snowden v. Bayrus*, 24 Q. B. Div. 568, 59 L. J. Q. B. 325; *Thacker v. Chicago, etc., R. Co.*, 159 Ind. 82, 64 N. E. 605, 59 L. R. A. 792; *Terre Haute, etc., R. Co. v. Rittenhouse*, 28 Ind. App. 633, 62 N. E. 295.

Counsel for appellee cite the case of *Indianapolis Gas Co. v. Shumack*, 23 Ind. App. 87, 54 N. E. 414. It was there held that it was not necessary that the injury should have happened immediately following some order, and that it is not to be presumed that it was intended that there should be orders from the superior concerning all the minor details of the work. The facts in that case are very different from the case at bar, and it is there held that the record showed that Shumack went back into the trench, and continued the work under the orders of the superintendent, and that soon thereafter, and while engaged in that particular work, he was injured. The facts in that case are quite different from facts showing an employé engaged in the line of his duty under general instructions as to what those duties are. In the case at bar appellee testified that he was employed by Williamson as fireman to work for appellant, and that Williamson put him to work in the room firing; that he gave appellee no particular orders in connection with the work; that he gave "no particular orders, only, of course, I had to attend to keeping up the steam"; did not tell appellee anything about what degree of steam to keep up; said nothing about that; that he directed appellee "to keep up steam and fire, and to take care of things around there generally." Appellee further testified that he had had about 25 years' experience firing, which Williamson knew; that Williamson just told him to keep up steam, which he did by shoveling coal into the fire box and keeping it hot, and when injured he was shoveling coal into the fire box. On cross-examination he testified that the steam gauge on the boiler governed him in putting in coal; that he did not have to be told, and was not told, by Williamson, when to put coal in; that Williamson had instructed him

to "keep up steam, keep the dry houses hot, and keep the building the right temperature, and get things ready for the next morning to start the engine"; that he gave appellee these instructions about every evening, but on the evening of the injury he had no talk with him about it. In the case at bar it is found that neither Williamson nor any other agent or officer of appellant had given appellee any instructions concerning the particular duty on the day of the injury. The findings not only show that Williamson had given appellee no order, but that appellee, when injured, was engaged in putting coal into the furnace because the steam gauge indicated that it was required. In considering this clause of the Alabama statute—the same as ours—the court, in *Mobile, etc., R. Co. v. George*, supra, said: "The clause under which these counts are framed evidently refers to special orders or directions in respect to the particular service in which the employé is engaged at the time of the injury, as distinguished from a general order or direction in reference to the discharge of his general service, growing out of the nature and scope of his employment." Moreover, in the case at bar, if it could be held that appellee, when injured, was obeying some order or direction previously given by Williamson, it is expressly found that appellee assisted in creating a changed and dangerous condition in his working place without the knowledge of Williamson, and that no order or direction was given appellee to go into this particular place in its then condition, and perform any work.

Judgment reversed, with instructions to sustain appellant's motion for judgment on the answers to interrogatories.

(33 Ind. App. 329)

SEXTON v. GOODWINE et al.¹

(Appellate Court of Indiana, Division No. 1.
Nov. 18, 1903.)

INTOXICATING LIQUORS—LICENSE—REMONSTRANCE—TIME OF FILING—WITHDRAWAL OF NAMES.

1. Where remonstrators against the granting of a liquor license have the right to file a remonstrance on a certain day, they have the whole of such day in which to file it, the word "day" in the statute meaning the entire 24 hours, and a remonstrance filed at 9 o'clock p. m. of said day is in time.

2. Where persons who have signed a remonstrance against the granting of a liquor license have, under the statute, until three days before the granting of such license to withdraw their names from the remonstrance, the right must be exercised prior to the beginning of the first day of this three-days period, or it will no longer exist.

Appeal from Circuit Court, Warren County; Joseph M. Rabb, Judge.

Application for a liquor license by John Sexton; John C. Goodwine and others, re-

monstrators. From a judgment denying the application, applicant appeals. Affirmed.

Eli Stansbury, for appellant. C. V. McAdams, for appellees.

ROBINSON, C. J. Application by appellant for a liquor license. The court found appellant to be a fit person to be intrusted with such license, and that he gave the required notice of his intention to apply for a license at the September term, 1901, of the board, commencing September 2, 1901. Prior to August 30, 1901, remonstrances had been circulated, and signed by 173 legal voters. The remonstrances were filed in the county auditor's office on August 30, 1901, at 9 o'clock p. m. The total number of votes cast in the township for the highest office at the November election in 1900 was 332. Prior to the 30th day of August, 1901, Victor White, Lewis Reynolds, Charles Lape, William P. Dowell, and James M. Tharp, who were legal voters, had signed the remonstrance. After attaching their names to the remonstrance and delivering the same into the custody of other remonstrators who were circulating the same, they signed, at the request of the applicant, a paper reading: "We, the undersigned legal voters of Pike township, Warren county, Indiana, hereby withdraw our names from the remonstrance against John Sexton for a license to sell intoxicating liquors in said township, and ask that our names be not counted as remonstrators against the granting of such license. Witness our hands this August 30, 1901." After signing this paper, it was delivered to appellant, the applicant, and was by his attorney filed in the auditor's office at 5:30 o'clock p. m., August 30, 1901. Appellant's application for a license was filed in the auditor's office August 31, 1901. Upon these facts the court denied the application.

The only question presented is whether the five names should have been counted as remonstrators. As the remonstrance was filed on Friday, August 30, 1901, before the meeting of the board on Monday, September 2, 1901, it was filed in time. Flynn v. Taylor, 145 Ind. 533, 44 N. E. 548. The remonstrators, having the right to file the remonstrance on Friday, had the right to file it at any time during that day; that is, they had the whole of Friday to file it. Adams v. Dale, 29 Ind. 273. The word "day" in a statute means the entire 24 hours. "It commences at 12 o'clock p. m. and ends at 12 o'clock p. m., running from midnight to midnight." Benson v. Adams, 69 Ind. 353, 35 Am. Rep. 220. As a general rule, the law knows no division of a day. But this rule is never allowed where it will promote injustice or wrong, and fractions of a day will be regarded when important in the settlement of conflicting interests, as in determining the priority of different mortgages, deeds, or other instruments executed by one person to different parties on the same day. Gibson v.

¹ 2. See Intoxicating Liquors, vol. 23, Cent. Dig. § 67.

Keyes, 112 Ind. 568, 14 N. E. 591; Pressley v. Board, etc., 80 Ind. 45. However, the question presented by this appeal is expressly decided by the Supreme Court. In State v. Gerhardt, 145 Ind. 439, 473, 44 N. E. 469, 480, 33 L. R. A. 313, the court, discussing this section of the statute, said: "Until the beginning of the three-days period, whether the remonstrance has been placed on file or not, any remonstrator must be deemed to have the absolute right by some affirmative act of his own to withdraw his name from such remonstrance. But, if this right is not exercised prior to the beginning of the first day of this three-days period, it no longer exists." And in White, etc., v. Prifogle et al., 146 Ind. 64, 44 N. E. 926, the court said: "It follows, therefore, that the preceding Friday is the first day of the three-days period, and we held in State v. Gerhardt, 145 Ind. 439, 44 N. E. 469, 33 L. R. A. 313, that, if the right to withdraw from a remonstrance was not exercised prior to the beginning of the first day of this period, that it no longer existed." See, also, Conwell v. Overmeyer, 145 Ind. 698, 44 N. E. 548; Sutherland v. McKinney, 146 Ind. 611, 45 N. E. 1048.

Judgment affirmed.

(205 Ill. 309)

DE KOVEN et al. v. ALSOP et al.*

(Supreme Court of Illinois. Oct. 26, 1903.)

TRUSTS—INCOME OF ESTATE—STOCK DIVIDENDS—INCREASE OF CAPITAL STOCK—RIGHTS OF LIFE TENANT.

1. Under a will giving a portion of testator's estate to trustees to pay the net income to the widow, an extraordinary cash dividend on stock owned by testator, declared after his death and received by the trustees, is payable to the widow as income.

2. Stock dividends giving the stockholder merely the evidences of additions made by the corporation to its own capital belong to the corpus of an estate devised to trustees with directions to pay the widow the net income, and are not payable to her as income.

3. Where trustees, holding a trust fund, with directions to pay the net income to the testator's widow, consisting of stock in corporations, are allowed to subscribe for a certain amount of new stock to be issued by the corporation proportionate to the number of shares held by the estate, such rights to subscribe, being incident to the ownership of the stock, are capital to be added to the trust fund, and not net income to go to the widow.

Appeal from Appellate Court, First District.

Bill by Annie L. De Koven and others against John De Koven Alsop and Louis De Koven and others. From a judgment of the Appellate Court reversing a decree for complainants, they appeal. Affirmed.

David Fales, for appellants. Otis & Graves (E. A. Otis, of counsel), for appellees.

WILKIN, J. This is an appeal from the Appellate Court for the First District in a proceeding in equity begun in the circuit

court of Cook county by the trustees of the estate of John De Koven, deceased, to construe certain provisions of his will, wherein the "rest and residue" of his estate is given to trustees, "to hold, invest, rent, manage and care for the same, and to pay the net income thereof" to the testator's widow "during her life, so long as she remains unmarried, and upon her death or re-marriage" to divide such residue between the appellants herein, if living at the expiration of the wife's life tenancy.

There is no controversy as to the facts. The testator died April 30, 1898, leaving as a part of his estate a number of shares of the capital stock of several corporations—railroads, telephone companies, etc. These corporations have since his death declared, in one case an extraordinary cash dividend, in another, stock dividends, and in others, stock dividends and rights to subscribe at par for certain shares of stock. The circuit court held the cash dividends and the stock dividends (including the right to subscribe belonging to each of the said stock dividends) to be a part of the net income of the estate belonging to testator's wife, and that the rights to subscribe to certain other stocks are a part of the capital or corpus of said estate, to be held by the trustees as a part thereof. That decree, upon appeal to the Appellate Court for the First District, was reversed by the branch of that court, in part, in a carefully considered opinion by Freeman, J. The reasoning and much of the language of that opinion will be adopted here.

The question for determination is whether any or all of these dividends and rights are to be considered "net income," within the meaning of the provision of the will above referred to, payable to the testator's wife as the life tenant, or whether they constitute a part of the capital or body of the estate, which by the will is, upon the expiration of the life tenancy, to be divided between appellants as remaindermen. These dividends and rights arrange themselves in three classes. The first of these is an extraordinary cash dividend of 20 per cent., declared July 1, 1898, upon the shares of stock in the Pullman Palace Car Company. The dividend amounted to \$6,000, and it is to be determined whether this is payable, under the will, to testator's wife as "net income," or to the remaindermen as a part of the corpus of the estate. The money out of which it was paid appears to have been earned, for the most part, at least, during the lifetime of the deceased, and was retained by the company as surplus assets remaining in the company's treasury as undistributed earnings. While thus in the company's treasury it was subject to such uses as the directors might see fit to make of it for corporation purposes, and its ownership was in the corporation. It had not, therefore, become the property of the testator during his life. In Gibbons

*Rehearing denied December 9, 1903.

v. Mahon, 136 U. S. 549, 10 Sup. Ct. 1057, 34 L. Ed. 525, the court, by Mr. Justice Gray, says: "The distinction between the title of a corporation and the interest of its members or stockholders in the property of the corporation is familiar and well settled. The ownership of that property is in the corporation, and not in the holders of shares of its stock. The interest of each stockholder consists in the right to appropriate part of the profits whenever dividends are declared by the corporation, during its existence, under its charter, and to a like proportion of the property remaining upon the termination or dissolution of the corporation, after payment of its debts." *Minot v. Paine*, 99 Mass. 101, 96 Am. Dec. 705; *Greeff v. Equitable Life Assurance Society*, 160 N. Y. 19, 54 N. E. 712, 46 L. R. A. 288, 73 Am. St. Rep. 659; *Hyatt v. Allen*, 56 N. Y. 553, 15 Am. Rep. 449. Applying the principle in the present case, no part of the earnings of the Pullman Palace Car Company out of which the extraordinary cash dividend under consideration was paid had become a part of the testator's estate at the time of his death, no matter when they had been earned by the company. If the dividend had been paid to the testator in his lifetime it would have been received by him as income from his stock investment. It did not become anything else when received by the trustees of his estate, in the form of an extra dividend, after his decease. It was still income, like other dividends, and as such it is payable to the life tenant under the provisions of the will.

The second class of so-called "dividends" consists of the issue of certificates of stock known as "stock dividends." Stock dividends were declared by four of the corporations in which the trust estate was the holder of capital stock. These stock dividends were all substantially of the same character, and in no case was the stockholder allowed an option to take a money dividend instead of stock. These dividends are claimed in behalf of the life tenant as "net income," and in behalf of the remaindermen as a part of the capital to be held in trust for their benefit.

It is urged in behalf of appellants that it was not the meaning and intent of the testator, ascertained, as it must be, from the whole will and all its parts (*Harrison v. Weatherby*, 180 Ill. 418, 54 N. E. 237), that the net income payable to the life tenant should include future stock dividends. This, however, must depend upon whether such dividends are, or not, "net income" of the trust estate. The life tenant is entitled to all such "net income," no matter in what form it may be received, but not to any portion of the capital. There is a wide and irreconcilable difference of opinion between courts whose opinions are entitled to respect, as to whether stock dividends, so-called, are to be regarded as income to

which a life tenant is entitled, or as merely representing capital to be held in trust for the remaindermen. Some of these cases seem, however, to have turned, in a measure, upon the intent of the testator, derived from the language used in creating the trust estate, or from the facts and circumstances of the particular case. This seems to be true of two leading cases in the Court of Appeals of New York, viz., *McLouth v. Hunt*, 154 N. Y. 179, 48 N. E. 548, 39 L. R. A. 230, and *Lowry v. Farmers' Loan & Trust Co.*, 172 N. Y. 137, 64 N. E. 796.

In *Cook on Corporations* (chapter 32, § 353 et seq.) it is pointed out that there are "three well-defined rules upon this subject, which may be denominated the American or Pennsylvania, the Massachusetts, and the English rule." The first of these is to the effect that, when the fund out of which an extraordinary stock or property dividend is to be paid was accumulated by the corporation before the life estate arose, it should be held to be principal belonging to the corpus of the estate, but if earned after the life estate arose then the dividend should be deemed income and go to the life tenant. The Massachusetts rule regards all cash dividends, large or small, as income, and stock dividends, whenever earned and however declared, as capital. The English rule, as it was originally stated, treated extraordinary cash or stock or property dividends as belonging to the corpus of the trust, but later English decisions are to the effect that extraordinary cash dividends may be decreed to the life tenant. The general subject and the authorities are well considered by the United States Supreme Court in *Gibbons v. Mahon*, supra, to which reference may be had. The conclusion reached in that case is that stock dividends declared, as in the case at bar, go to the remaindermen. This rule is, we think, supported by sound reasoning, and sustained upon principle by the greater weight of authority. *Spooner v. Phillips*, 62 Conn. 62, 24 Atl. 524, 16 L. R. A. 461; *Mills v. Britton*, 64 Conn. 4, 29 Atl. 231, 24 L. R. A. 536; *Brown & Larned, Petitioners*, 14 R. I. 371, 51 Am. Rep. 397; *Richardson v. Richardson*, 75 Me. 574, 46 Am. Rep. 428; *Millen v. Guerrard*, 67 Ga. 284, 44 Am. Rep. 720; *Bouch v. Sproule*, L. R. 12 App. Cas. 385.

A dividend is defined as "a corporate profit set aside, declared, and ordered by the directors to be paid to the stockholders on demand or at a fixed time. Until the dividend is declared, these corporate profits belong to the corporation—not to the stockholders—and are liable for corporate indebtedness." *Cook on Corporations*, c. 32, § 534. A stock dividend "is lawful when an amount of money or property equivalent in value to the full par value of the stock distributed as a dividend has been accumulated and is permanently added to the capital stock of the corporation. * * * In this country

these dividends are frequently made, and are constantly sustained by the courts." Id. § 563.

There is a clear distinction between an extraordinary cash dividend, no matter when earned, and stock dividends declared as in the case at bar. The one is a disbursement to the stockholder of accumulated earnings, and the corporation at once parts irrevocably with all interest therein. The other involves no disbursement by the corporation. It parts with nothing to the stockholder. The latter receives, not an actual dividend, but certificates of stock which evidence in a new proportion his interest in the entire capital, including such as by investment of accumulated profits has been added to the original capital. The difference of opinion as to whether this additional issue of stock is to be treated as income for the life tenant, or capital to be held in reserve for the remaindermen, grows out of the fact that such stock dividends undoubtedly represent additions to the original investment in the corporation. Hence they have been regarded, with what seems to us unsatisfactory reasoning, as income to the stockholder, whereas, in fact, they are not, as we view the matter, "income" to him, but represent additions to the source of his income, viz., his invested capital. The stockholder never receives these additions while the corporation continues its business. They do not go to him in any form, and hence the difficulty we find in regarding them as income to him. A stock dividend gives the stockholder merely the evidences of additions made by the corporation to its own capital. He can, it is true, still retain the old stock certificates and sell the new ones, but by so doing he parts with so much of his interest in the capital of the corporation. The profit he may so derive is of the same nature as he would receive if no earnings had been added to capital and no stock dividend had been declared, but the market value of his stock should have arisen above par by reason of increased earnings and larger cash dividends declared thereon, and he should sell so much of it as represents the rise above its original par value. He would thus diminish his capital, although the earning power of what he has left might afterward equal that of his original investment. It is capital that he parts with. Fluctuations in market values of stock, and in dividends therefrom, constantly occur, regardless of whether the original capital has been increased by addition of accumulated profits or not.

Stock dividends add nothing to the capital of the corporation nor to the capital of the stockholder. They may make it easier for the latter to dispose of a part of his interest. It was the addition made to the plant or capital of the concern out of earnings which increased the value of his shares, and the stock dividends merely represent, in a new form, a part of what the original stock

would otherwise represent. Income of a corporation is rarely, if ever, all of it income to the stockholder. Some of the earnings must go out for expenses of operation and for repairs. Without repairs a plant would naturally, in time, wear out and the corpus or capital invested cease to earn dividends. What goes into repairs and what goes into permanent improvements or enlargements are alike added to the invested capital to maintain it unimpaired or to increase its power to earn income for the stockholder. The life tenant, as well as the remainderman, profits by thus maintaining and improving the original investment. It would be as logical to award the life tenant a corresponding interest in the original shares, in proportion to whatever earnings or profits are expended for necessary repairs, as to award him or her the portion of such earnings or profits invested in permanent improvements or added to capital. Both repairs and such enlargements of capital come from the same source, and are generally made for the same purpose, viz., to maintain or increase the earning capacity of the original investment. It is, as has been said, within the power of a corporation acting within its charter powers, in good faith and with an honest purpose to protect the interests of all concerned, to determine for itself whether its earnings shall be applied to repairs or to betterments, or to a fund for use in its business, and this regardless of whether its action may diminish, for the time being, the income of a life tenant or increase the estate of a remainderman. "Profits on hand are valuable to the capital, and a right to share in them passes upon a sale or bequest; but they are the property of the corporation, and may be applied to such uses as it may lawfully make of them." In *Minot v. Paine*, supra, the court says (page 107, 99 Mass., 96 Am. Dec. 705): "It is obvious that if the directors had made no stock dividends, but had invested the income in permanent improvements, making no increase of the number of shares, the improvements would have been capital belonging to the legatees in remainder."

The question we are considering was discussed fully in the case of *Gibbons v. Mahon*, supra. We find no real distinction between the facts in that case and those in the case at bar. It is there said: "A stock dividend really takes nothing from the property of the corporation, and adds nothing to the interests of the shareholders. Its property is not diminished, and their interests are not increased. After such dividend, as before, the corporation has the title in all the corporate property. The aggregate interests therein of all the shareholders are represented by the whole number of shares, and the proportional interest of each shareholder remains the same. The only change is in the evidence which represents that interest, the new shares and the original shares together repre-

senting the same proportional interest that the original shares represented before the issue of the new ones."

It being within the powers of the directors of a corporation, acting, as we have said, in good faith, to determine in what manner accumulated earnings shall be applied, the nature of the interest of a life tenant and remainderman in such accumulated profits may be determined by such action, and, as is further said in the case last cited, "ordinarily a dividend declared in stock is to be deemed capital, and a dividend in money is to be deemed income, of each share."

The questions involved have been elaborately argued by counsel on both sides, and we have carefully considered the cases cited which do not accept the conclusion we are compelled to adopt. We need not review them at length. In *McLouth v. Hunt*, supra, the New York Court of Appeals says: "For all corporate purposes the corporation may doubtless convert earnings into capital when such power is conferred by its charter; but when a question arises between life tenants and remaindermen concerning the ownership of the earnings thus converted, the action of the corporation will not conclude the courts." Where, as in the case at bar, the corporation has thus converted earnings into capital, we know of no principle which can justify the courts in taking it away from the remaindermen, to whom the testator has left it by his will, and giving it to the life tenant, to whom the testator has left only the net income of such capital.

It is claimed in behalf of appellants herein that under the facts in this case these so-called "stock dividends" should still be considered a part of the trust fund for the benefit of the remaindermen, even though the Pennsylvania rule above referred to should be adopted, inasmuch as it is claimed that the earnings upon which the stock dividends were based had accumulated before the testator's death. However that may be, we regard the difficulty in the application of that rule by a trustee as an obstacle to its application which in many cases would be insuperable. If, however, the rule should be applied which is laid down in the case of *Lowry v. Farmers' Loan & Trust Co.*, 172 N. Y. 137, 64 N. E. 796, where the same dividend of the Pullman Palace Car Company in controversy here was under consideration, the result should still be that under the undisputed facts in the case at bar the stock dividends, so called, must be regarded as representing a part of the capital belonging to the trust estate, and not as income for the life tenant. In that case the New York court says: "That the value of the shares of stock has been lessened by a dividend is a fact of no relevancy in determining the question of whether the dividend is to be regarded as income to the life tenant or as capital to the remainderman. That question will be determined by the origin of the dividend. In this

case a fund had been created by an accumulation of the net earnings of the corporation, and it remained a part of the general assets until, in the judgment of the directors, the time came when it was proper and prudent to distribute it among the stockholders. That which the directors of the corporation distribute among the stockholders without in-trenching upon capital must be comprehended within the term 'profits,' and we should assume that the testator intended that what might be paid in that way should belong to the beneficiary. There is no question of increasing the capital for any corporate purpose or need. It was simply a mode of distributing the profits earned by the employment of capital."

While we are compelled to differ from the views expressed in the *Lowry* Case for reasons we have before indicated, yet if we should agree with the above quotation the result would still be that the stock dividend referred to therein must, in the case at bar, be regarded, not as an actual dividend, but merely as a distribution of evidences of capital which was already accumulated by the corporation in the lifetime of the deceased, and was represented by the shares outstanding in his name at the time of his death. In other words, it formed a part of the corpus of his estate, the income of which, only, was left to the life tenant. To give to the life tenant in the case at bar these stock dividends would be to reduce by so much the value of the original corpus of the estate devised to the remaindermen, and would in-trench upon the capital. We conclude that the court must treat as capital that which by the action of the corporations referred to has in fact become such, and that the stock dividends under consideration belong to the corpus of the trust estate.

The third of the sources from which the trustees of the estate have derived funds with reference to which they ask the instructions of the court is certain rights and privileges of subscribing to the stock of five of the corporations in which said trust estate is interested. By reason of their holding shares of the capital stock of such corporations, the said trustees were given rights to subscribe at par for a certain amount of the new stock to be issued by each of said corporations, respectively, proportioned to the number of shares before held by the estate. Inasmuch as such new stock, when issued, had a market value greater than par, these rights to subscribe were salable at a premium. Some of them were accordingly sold by the trustees in the exercise of the discretion vested in them, and they received therefor sums aggregating several thousand dollars. In the remaining two corporations the trustees availed themselves of the rights, and did subscribe for such additional stock, paying therefor out of funds belonging to the estate. Such rights to subscribe have been generally held to be incident to the ownership of

the stock, and therefore capital to be added to the trust fund held for the remaindermen, the income of which goes to the life tenant. This is said to be "equally true whether the trustee subscribes for the new stock for the benefit of the trust or sells the right to subscribe for a valuable consideration. In either event the income goes to the corpus." Cook on Corporations, c. 32, § 559; *Atkins v. Albree*, 12 Allen, 359; *Biddle's Appeal*, 99 Pa. 278; *Eldman v. Bowman*, 58 Ill. 444, 11 Am. Rep. 90. In the last case cited it is said (page 447, 58 Ill., 11 Am. Rep. 90): "When the company determines to increase their capital stock within the limits of their charter, each of the previous shareholders has the right to a proportionate number of the new shares or a proportionate amount of the new stock, if it should be added to the old shares." We agree with the circuit court that these rights to subscribe, and the proceeds of their sale, belong to the trust fund. We do not regard the case of *Waterman v. Alden*, 42 Ill. App. 294, as holding the contrary. In that case it is said, in the opinion of the Appellate Court [concurring in by this court on that question, 144 Ill. 90, 32 N. E. 972], that "a surplus equal to the amount of new stock had been earned at testator's death. The new stock was not issued as a stock dividend which stockholders were to take in that form, but these parties, as original stockholders, were permitted to subscribe for the new shares of stock to the amount of their interest in the accumulated earnings in lieu of a cash payment of that amount, so that they could take either stock or cash, at their election." There was, therefore, neither a stock dividend declared, nor was there given a mere right to subscribe for the new stock. In effect, the stockholders received a cash dividend, which they could invest in the new stock or not, as they chose.

For the reasons stated, the Appellate Court held as erroneous that part of the decree of the circuit court which finds the stock dividends of the Pullman Palace Car Company, the Pullman Loan & Savings Bank, the Chicago Telephone Company and the Chicago, Rock Island & Pacific Railway Company to be part of the net income of the estate. The case seems to have received, throughout, a most careful consideration by the Appellate Court, and its views and conclusions are fully sustained by the authorities cited in its opinion, and we fully concur in the same. Its judgment will accordingly be affirmed.

Judgment affirmed.

(205 Ill. 365)

LANGE et al. v. CULLINAN et al.*

(Supreme Court of Illinois. Oct. 26, 1903.)

DEEDS—DELIVERY—EVIDENCE.

1. The grantor, being advised by his physician to make a disposition of his estate, made two

deeds—one conveying a portion of his real estate to his sister, and the other conveying the remainder to his housekeeper—and delivered both deeds to the sister, although the housekeeper was in the house at the time. Testator then disposed of his personal property by will; stating therein that he had disposed of his realty by deed, and that it should not be considered as part of his estate. On being asked if the deed to the housekeeper should be delivered to her he said "No," directing that it be given to his sister. *Held*, that it was no delivery of the deed to the housekeeper.

Appeal from Circuit Court, Cook County; Charles A. Bishop, Judge.

Action by Theodore G. Lange and others against Sarah A. Cullinan and others. From a judgment for defendants, plaintiffs appeal. Reversed.

This is a bill in chancery in the circuit court of Cook county by appellants, as the heirs of Herman G. Lange, deceased, against his grantee, Sarah Anna Cullinan, and William J. Waddell, to set aside and cancel a warranty deed purporting to be made by him in his lifetime to her, conveying lot 9 in section 3, township 36, range 14, in the town of Dolton, in Cook county. The conveyance is dated June 7, 1900, and the grantor died on the 24th of the same month. The bill alleges that the deed is void for want of delivery, and seeks to cancel the same as a cloud upon complainants' title.

The grantor was a bachelor, and lived and conducted a saloon upon the premises in question. The grantee was his housekeeper, and sometimes tended bar for him. He owned certain other real estate in Chicago, and an undivided interest in his deceased mother's estate; also a small amount of personal property. For some time prior to the date of this deed, June 7, 1900, he had been in poor health, and undertook at this time, upon the suggestion of his physician, to make a disposition of his estate. A lawyer was sent for, and in the presence of grantor's sister, Mrs. Emma Lange Grant, and William R. Grant, her husband, and a Mr. Dewess, whom the lawyer had brought with him as a witness, two deeds and a will were prepared. One of the deeds conveyed certain property to Mrs. Grant and her sister, the other being the deed in controversy. The will disposed of the personal property, and contained this clause: "My real estate I have this day disposed of by warranty deeds and shall not be considered as any part of my estate." Mrs. Grant testifies that after the deeds were executed the attorney asked the grantor to whom he should deliver them, and he replied, "Deliver them to Mrs. Grant, but not by all means to deliver the one to Mrs. Cullinan, saying Mrs. Grant was all right;" that he gave Mrs. Grant no directions as to what to do with the deed in controversy, and that he did not tell Mrs. Grant to deliver it to Mrs. Cullinan. At the time of the making of the deed, Mrs. Cullinan was in the house as usual, performing her duties as his housekeeper, and occasionally

*Rehearing denied December 9, 1903.

came into the room. Mrs. Grant for about two months before this had been looking after some business for her brother, having charge of certain property on the west side of the city, attending to repairs, collecting rents, etc., and from this day on remained with him practically all the time until after his death. William R. Grant substantially corroborated the statement made by Mrs. Grant, and says: "There were two deeds made at the time. One deed ran to Mrs. Grant and her sister, Emma; the other, to Mrs. Cullinan. They were both delivered to Mrs. Grant." He was then asked: "Q. Was anything said to Mr. Lange about the delivery of those deeds? A. Yes, sir. Q. What was said? A. Mr. Camp [the attorney] asked him if he should deliver the one that ran to Mrs. Cullinan to Mrs. Cullinan, and he said, 'No,' and seemed to be agitated—almost angry that he was asked to do it; and then Mr. Camp asked Mr. Lange if he should deliver the one that ran to Mrs. Grant and her sister to Mrs. Grant, and he said, 'Yes; she is all right.'" The deeds were taken to Chicago by the attorney for the purpose of having the notarial seal attached, and by him delivered to Mrs. Grant, as directed. Some time after the grantor's death Mrs. Grant handed Mrs. Cullinan the deed. Mr. Camp, the attorney who drew the deeds, did not testify, nor did Mr. Dewess. The latter had gone to Texas, and his post office address could not be learned, but it appears that the former was only temporarily absent from the city of Chicago. Counsel contends, though the abstract of the record is silent upon that subject, that a rule had been made by the chancellor to close the evidence within 10 days. Counsel for complainants offered to take the deposition of Mr. Camp, who was then in St. Louis, but did not have time to do so unless counsel for the defendants would waive the service of notice, which the latter refused to do. Why the evidence of Mr. Camp was not obtained by counsel for defendants was not explained. The defense consisted of the evidence of several persons to the effect that the grantor had stated to them beforehand that he intended to make this conveyance, or afterward that he had done so. The chancellor, on the recommendation of the master in chancery, and in accordance with the latter's finding, held that the evidence did not sustain the material allegation in the bill, and thereupon dismissed it for want of equity. The complainants prosecute this appeal, seeking to reverse the decree below.

Asa Q. Reynolds, for appellants. William F. Propper and Frederic R. De Young, for appellees.

WILKIN, J. (after stating the facts). The point urged by complainants below, and again made here, is that the evidence clearly showed that the deed in question was not

delivered by the grantor to Mrs. Cullinan, but that, on the other hand, it was placed in Mrs. Grant's possession under such circumstances as to make it her duty to hold it, as the agent of the grantor, and subject to his control, during his life. The competency of the evidence of Mrs. Grant and her husband is not questioned, and it is in evidence that the grantor, by his attorney, delivered the deed to Mrs. Grant, and not to the grantee; that Mrs. Grant was at that time attending to some of his business; that, when the grantor was asked as to the disposition of the deed, he directed it to be delivered to Mrs. Grant, saying, "She is all right," and expressly directing that it be not delivered to the grantee named therein. The grantee was in the house at the time, going about her household duties, but whether or not she was aware of the making of the deed does not appear. The deed could have been handed to her, but the grantor expressed a desire not to do so. Why it was placed in the hands of his sister, without any directions as to its delivery, has no explanation, unless it be inferred that he desired to retain control over it. Nothing was said, indicating that she was to take the deed as the trustee or agent for the grantee, but, on the other hand, inasmuch as his sister was attending to a part of his business because of his illness and inability to attend to it himself, it is not unreasonable to infer that she was in this, as in other things, acting for him. If he had regained his health, there can be no doubt that the custodian would have been bound to return the deed to the grantor upon his demand, had she received no instructions other than those detailed by her in her testimony. Delivery to the agent of the grantor is not sufficient. *Barrows v. Barrows*, 138 Ill. 649, 28 N. E. 983. To be a good delivery, the deed must pass beyond control of the grantor and not be subject to his call. *Stinson v. Anderson*, 96 Ill. 373; *Byars v. Spencer*, 101 Ill. 429, 40 Am. Rep. 212; *Bovee v. Hinde*, 135 Ill. 137, 25 N. E. 694; *Wilson v. Wilson*, 158 Ill. 567, 41 N. E. 1007, 49 Am. St. Rep. 176; *Shults v. Shults*, 159 Ill. 654, 43 N. E. 800, 50 Am. St. Rep. 188; *Walter v. Way*, 170 Ill. 96, 48 N. E. 421; *Hawes v. Hawes*, 177 Ill. 409, 53 N. E. 78; *Walls v. Ritter*, 180 Ill. 616, 54 N. E. 565.

Counsel contends that the intention of the grantor to presently deliver the deed is clearly shown by the statement made in his will that he had made such a deed, and by his statements to several persons that he would make such a deed, and afterwards that he had made it. It is true, these statements indicate an intention to execute a conveyance to the grantee; but, as this court said in *Walls v. Ritter*, *supra*, such declarations have no bearing on the vital question, did the grantor actually make and deliver the deed of conveyance to the grantee? The fact that the will makes no disposition of this property

does not show that he intended the title to pass presently to the grantee, during his lifetime. *Hawes v. Hawes*, supra. There was neither act nor declaration of delivery, nor intention to deliver presently at the time the instrument was made. *Bryan v. Wash*, 2 Gilman, 557; *Gunnell v. Cockerill*, 79 Ill. 79; *Stinson v. Anderson*, supra; *Byars v. Spencer*, supra; *Jordan v. Davis*, 108 Ill. 336; *Wellington v. Heermans*, 110 Ill. 564; *Weber v. Christen*, 121 Ill. 91, 11 N. E. 893, 2 Am. St. Rep. 68; *Wilson v. Wilson*, supra; *Bovee v. Hinde*, supra.

Under the well-settled rules of this state we are satisfied that in this instance there was no delivery of the deed to the grantee. It is true, the master reached the conclusion of fact that delivery was made to the custodian of the deed for and on behalf of the grantee, but this finding is not supported by the evidence. The testimony of Mrs. Grant and her husband is not disputed, nor is its competency questioned. The finding of the master has not the force it would have had if the evidence upon the material points had been directly contradictory and disputed.

The decree of the circuit court dismissing complainants' bill will be reversed, and the cause remanded, with directions to proceed in a manner not inconsistent with the views herein expressed. Decree reversed.

(205 Ill. 273)

WEBSTER MFG. CO. v. NESBITT.*

(Supreme Court of Illinois. Oct. 26, 1903.)

MASTER AND SERVANT—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—ASSUMPTION OF RISK—PROMISE TO REPAIR—ORDINARY TOOL.

1. Where a blacksmith was furnished by his master with a "backing hammer" which had become chipped, and he was injured, owing to its defective condition, after a promise to repair, he being a blacksmith, with long experience in using such hammers, and the tool being merely a common hammer, of which he had as complete knowledge as to its construction as the master had, the servant would be deemed to have assumed the risk.

Appeal from Appellate Court, First District.

Action by Adam Nesbitt against the Webster Manufacturing Company. From a judgment of the Appellate Court (105 Ill. App. 261) affirming a judgment for plaintiff, defendant appeals. Reversed.

O. W. Dynes, for appellant. Francis T. Murphy (Edward C. Higgins, of counsel), for appellee.

WILKIN, J. Appellee recovered a judgment in the superior court of Cook county against appellant for \$6,000, in an action for a personal injury alleged to have been sustained by him, while in the employ of appellant, on September 23, 1897, which judgment has been affirmed by the Appellate

Court for the First District. Appellant prosecutes a further appeal to this court to reverse the judgment below.

The declaration consists of five counts, in one or more of which it is alleged defendant negligently furnished and supplied plaintiff with an "old, insufficient, unsafe, and dangerous tool with which to work; that defendant was notified of the condition of said tool, and thereupon promised to repair the same, and induced the plaintiff to continue its use." The evidence shows that the appellee at the time in question was at work as a blacksmith in the shop of appellant, working with a helper by the name of Neunschwander, who was using what is known as a "backing hammer," the face of which had become somewhat chipped and out of repair. It further tends to prove that a few days before the accident the tool was shown to appellant's foreman by appellee, and complaint made as to its condition, and the foreman promised to have it fixed; that, on the day of the accident, appellee again took it to the same foreman, and asked him for the privilege of fixing it, complaining of its condition, to which the foreman replied: "Well, go ahead and use it now, and I will fix it, or get some one to fix it. Don't stop that job. I am in a hurry." Afterwards, while appellee and the helper were engaged upon the work, a small particle of steel flew from one of the hammers as the helper struck a blow, hitting appellee in one eye and destroying the sight. The jury specifically found that the chip or particle flew from the said backing hammer. At the close of plaintiff's evidence, and again at the close of all the evidence, the defendant requested the court to peremptorily instruct the jury to render a verdict of not guilty, but both instructions were refused, the refusal of which is assigned for error as a question of law. From a careful reading and consideration of the evidence, we find the only counts relied upon by plaintiff for a recovery were those alleging that the defendant negligently furnished the helper with an old, insufficient, and dangerous backing hammer with which to perform his duties, of which condition the defendant was notified, and promised to repair the same, or provide a suitable one in its place, and so induced the plaintiff to continue in the performance of the work.

It is first contended that the hammer at the time of the accident was, by reason of its condition, no more dangerous than it would have been, had it been redressed and repaired as requested by the plaintiff. There is evidence tending to show that a hammer in a worn and defective condition is somewhat more liable to chip off than one which is new or one newly repaired. On that proposition it cannot be said, as a matter of law, that there was no evidence tending to prove that a hammer in the condition described was no more dangerous than one in good repair.

*Rehearing denied December 9, 1903.

¶ 1. See *Master and Servant*, vol. 34, Cent. Dig. §§ 642, 645.

Plaintiff was shown to have had a long experience in the handling of hammers of this character in his business as a blacksmith, and must be held to have assumed the ordinary risks incident to the use of the one in question. The theory and contention of his counsel are that he did not assume any risk arising from the defect complained of, for the reason that the appellant, by its foreman, promised to repair the hammer, or provide a new one for his use. On the other hand, it is contended by counsel for appellant that a promise to repair, which will excuse the person injured from assuming the risk incident to his employment, does not apply to a simple implement or instrument, such as the hammer in question. We think the latter contention is founded upon good reason and authority. The general rule is that when the master, on being notified by the servant of defects which render the service he is engaged to perform more hazardous, expressly promises to make the needed repairs, the servant may continue in the employment a reasonable time to permit the performance of the promise without being guilty of negligence, and if any injury results therefrom he may recover, unless he should continue in the employment when the danger is so imminent that no prudent man would undertake to perform the service. The promise of the master in such case relieves the servant from the charge of negligence by continuing in the service. This doctrine we have often recognized. *Missouri Furnace Co. v. Abend*, 107 Ill. 44, 47 Am. Rep. 425; *Donley v. Dougherty*, 174 Ill. 582, 51 N. E. 714, and cases cited. But the rule which exempts an employé from assuming the risk where a promise to repair is made is designed for the benefit of those engaged in work where machinery and materials are used of which the employé has little knowledge, but it does not apply to ordinary labor, which only requires the use of implements with which the employé is entirely familiar. *Bailey on Personal Injuries*, § 3103.

In *Meador v. Lake Shore & Michigan Southern Railway Co.*, 138 Ind. 290, 37 N. E. 721, 46 Am. St. Rep. 884, in an action for a personal injury occasioned by a defective ladder used by a watchman in lighting and extinguishing lamps at street crossings, the court said: "The fact that he notified the master of the defect and asked for another implement, and the master promised to furnish it, in such a case, does not render the master responsible if an accident occurs. A rule imposing liability under such circumstances would be far-reaching in its consequences, and would extend the rule of respondeat superior to many of the vocations in life for which it was never intended. It is a just and salutary rule, designed for the benefit of employés engaged in work where machinery and materials are used of which they have little knowledge, and not for those engaged in ordinary labor, which only re-

quires the use of implements with which they are entirely familiar. The plaintiff in the case at bar was of the latter class of laborers, and the work in which he was engaged was not of a character which would entitle him to the protection of the principle referred to, as applied to the use of complicated machinery. * * * No contrivance could be simpler in its construction than this five-foot ladder—not even a hoe, an ax, or a spade. Appellant had at least equal knowledge with the company as to the nature and condition of the ladder."

In *Gowen v. Harley*, 56 Fed. 973, 6 C. C. A. 190, in an opinion by the Circuit Court of Appeals for the Eighth Circuit, the principle above announced is recognized.

In *Marsh v. Chickering*, 101 N. Y. 396, 5 N. E. 56, the defendant furnished a ladder for the plaintiff to use while in his employ in lighting gas lamps; the ladder being defective, in that it needed spikes on the bottom to prevent it slipping. In that case, also, a promise to repair had been made. The court, in its opinion, said: "As a general rule, it is to be supposed that the master who employs a servant has a better and more comprehensive knowledge as to the machinery and materials to be used than the employé, who has claims upon his protection against the use of defective or improper materials or appliances while engaged in the performance of the service required of him. The rule stated, however, is not applicable in all cases; and where the servant has equal knowledge with the master as to the machinery used or the means employed in the performance of the work devolving upon him, and a full knowledge of existing defects, it does not necessarily follow that the master is liable for injuries sustained by reason of the use thereof. In considering the application of the rule just stated, due regard must be had to the limited knowledge of the employé as to the machinery and structure on which he is employed, and to his capacity and intelligence, and to the fact that the servant has a right to rely upon the master to protect him from danger and injury, and in selecting the agent from which it may arise. *Powers v. New York, Lake Erie & Western Railroad Co.*, 98 N. Y. 280. In cases, however, where persons are employed in the performance of ordinary labor, in which no machinery is used and no materials furnished, the use of which requires the exercise of great skill and care, it can scarcely be claimed that a defective instrument or tool furnished by the master, of which the employé has full knowledge and comprehension, can be regarded as making out a case of liability, within the rule laid down. A common laborer who uses agricultural implements while at work upon a farm or in a garden, or one who is employed in any service not requiring great skill and judgment, and who uses the ordinary tools employed in such work, to which he is accustomed, and in regard to

which he has perfect knowledge, can hardly be said to have a claim against his employer for negligence, if, in using a utensil which he knows to be defective, he is accidentally injured. It does not rest with the servant to say that the master has superior knowledge, and has thereby imposed upon him. He fully comprehended that the spade, or the hoe, or the ladder, or the instrument which he employed, was not perfect, and, if he was thereby injured, it was by reason of his own fault and negligence. The fact that he notified the master of the defect and asked for another instrument, and the master promised to furnish the same, in such a case does not render the master responsible if an accident occurs. * * * A rule imposing such a liability would be far-reaching, and would extend the principle stated to many of the vocations of life for which it was never intended. It is one of a just and salutary character, designed for the benefit of employes engaged in work where machinery and materials are used of which they can have but little knowledge, and not for those engaged in ordinary labor, which only requires the use of implements with which they are entirely familiar."

For a further recognition of this rule, see *Corcoran v. Gaslight Co.* (Wis.) 51 N. W. 329; *Power Co. v. Murphy*, 115 Ind. 570, 18 N. E. 30, and *Illinois Steel Co. v. Mann*, 170 Ill. 200, 48 N. E. 417, 40 L. R. A. 781, 62 Am. St. Rep. 370. In the latter case, speaking of the general rule, we said (page 207, 170 Ill., and page 419, 48 N. E.): "This rule, however, is not applicable to all cases, and where the servant has equal knowledge with the master, and a full knowledge of all existing defects, and more especially in the performance of ordinary labor in which no intricate machinery is involved, the rule is not applicable." The evidence in this record wholly fails to prove, nor does it tend to prove, that the instrument in question—that is, the backing hammer—was in any sense intricate or difficult to be understood by plaintiff. It was simply a common hammer, and like an ax, hoe, spade, or other simple tool used in ordinary labor, with which an employe is entirely familiar. There is an entire absence of proof that the labor required the use of complicated machinery or appliances, but, on the contrary, it affirmatively appears that it was performed with a simple hand hammer. Nor does the evidence prove, or tend to prove, that the plaintiff did not have as full and complete knowledge of its construction and defects as had his master, the defendant. Because of the absence of evidence on behalf of plaintiff below establishing or fairly tending to establish these facts, material and essential to his cause of action, it was error to refuse the defendant's request to withdraw the case from the jury.

The judgments of the superior and appellate courts will accordingly be reversed, and

the cause remanded to the superior court for further proceedings not inconsistent with this opinion. Reversed and remanded.

(205 Ill. 497)

**HORWICH et al. v. WALKER-GORDON
LABORATORY CO.***

(Supreme Court of Illinois. Oct. 28, 1903.)

CONSTITUTIONAL LAW — REGISTRY LAW —
TRADE-MARKS — SALE WITHOUT CONSENT —
SUMMARY RECOVERY — POLICE POWER —
CLASS LEGISLATION — PROPERTY RIGHTS —
EVIDENCE.

1. Act May 11, 1901 (Hurd's Rev. St. 1901, p. 1793), prohibiting the unlawful buying and selling of cans, tubs, firkins, boxes, bottles, etc., and providing for the registration of names, brands, trade-marks, etc., in connection with such articles, and for the protection of the owners thereof, is merely to facilitate the recovery of such property, and is not for the protection of the public and manufacturers of food products from fraud.

2. Act May 11, 1901 (Hurd's Rev. St. 1901, p. 1793), prohibiting the selling and using of cans, tubs, boxes, bottles, etc., bearing the registered mark of the owner, without his written consent, does not come within the police power of the state, as the written consent of the owner to the sale is no guaranty that injury to the public will not be done.

3. Act May 11, 1901 (Hurd's Rev. St. 1901, p. 1793), prohibiting the sale and use of cans, boxes, bottles, etc., having the registered mark of the owner, without his consent, is in contravention of Const. art. 4, § 22, prohibiting special legislation, as it gives the owners of property of the class named rights not enjoyed by owners of other classes of personal property.

4. Act May 11, 1901 (Hurd's Rev. St. 1901, p. 1793) § 3, providing that the fact that boxes, bottles, etc., bearing registered marks of the owners, shall be found in the possession of junk dealers, or dealers in cans, boxes, bottles, etc., shall be prima facie evidence of unlawful possession, within the meaning of the act, is unconstitutional, as it authorizes a conviction of such dealers on evidence that would not warrant the conviction of other persons.

Error to Superior Court, Cook County; Axel Chytraus, Judge.

Bill by the Walker-Gordon Laboratory Company against Hirsh Horwich and others. Decree for complainant, and defendants bring error. Reversed.

This is a bill for an injunction, brought by the Walker-Gordon Laboratory Company in the superior court of Cook county, to restrain the plaintiffs in error from buying, selling, keeping for sale, trafficking in, or having in their possession or control for the purposes of sale, any of the bottles of such company upon which are contained the words, "Walker-Gordon Laboratory," "Registered," and the figure of a basket containing bottles, all blown in the glass of the bottle. The action is based upon the sixth section of the act entitled "An act to prevent and punish the unlawful buying, selling, keeping for sale, using, filling or trafficking in cans, tubs, firkins, boxes, bottles, casks, barrels, kegs, cartons, tanks, fountains, vessels or containers; to provide for the registration of the names,

*Rehearing denied December 9, 1903.

brands, designs, trade-marks, devices, and other marks of ownership in connection with such articles, and to protect the owners thereof," approved May 11, 1901, in force July 1, 1901 (Hurd's Rev. St. 1901, p. 1793). An answer was filed by plaintiffs in error to the bill, averring, among other things, that the act under which the proceeding is brought is unconstitutional. A stipulation of facts was entered into between the parties. The cause was heard by the court upon the pleadings and stipulation of facts, no evidence other than the stipulation being taken.

The stipulation of facts recites that defendant in error is a corporation organized under the laws of New Jersey, and doing business in the state of Illinois, with its principal place of business in the city of Chicago; that it is engaged in the business of furnishing milk to the residents of Chicago and adjacent territory; that by reason of exceptional care its milk is of superior quality to other milk, enjoys a better reputation, and brings a higher price on the market; that it is put up in bottles bearing the words, "Walker-Gordon Laboratory," "Registered," and the figure of a basket containing bottles, all blown in the glass of the bottle; that the milk is sold only from wagons of the company and by one or two milk dealers, who act specifically as agents of the company; that the bottles are never sold, but are furnished to the consumers and are collected by agents of the company after the milk placed in them has been used; that the company has complied in all respects with section 1 of said act, and has filed the statements, and published the same, as therein required; that bottles bearing these words and design had been in use by defendant in error for a number of years prior to the passage of the act, and many of them were out of its possession at the time the act was passed; that it is impossible to distinguish the bottles manufactured after the passage of said act from those manufactured before its passage, for the reason that they have never been kept separate; that the plaintiffs in error are engaged in the business of buying and selling bottles in the city of Chicago, and have been so engaged for more than 10 years; that they purchase bottles at wholesale from bottle factories and bottle dealers generally, also from rag-pickers, peddlers, and second-hand dealers, in miscellaneous lots; that most of those purchased from rag-pickers and peddlers are obtained by going from house to house and purchasing them with junk and cast-off articles; that many bottles so purchased are found in the city dumps, and sold in indiscriminate lots; that the bottles are afterwards sorted by plaintiffs in error with reference to size and use, and sold to persons engaged in lines of business for which the bottles are adapted; that bottles bearing the name and mark of ownership of said company have been obtained by plaintiffs in error in the manner above set forth,

and have been sold in the usual course of business, since the passage of said act and the compliance of defendant in error therewith.

The court rendered a decree in conformity with the prayer of the bill, enjoining the plaintiffs in error from directly or indirectly buying, selling, keeping for sale, trafficking in, or having in their possession or under their control, for the purpose of sale, any of the bottles of said company with the name and design above mentioned upon them. The case comes to this court by writ of error.

Elijah N. Zoline and H. R. Platt, for plaintiffs in error. E. S. Cummings and Walker & Payne, for defendant in error.

SCOTT, J. (after stating the facts). Plaintiffs in error contend that the statute under which this proceeding is brought is unconstitutional, and, in the view taken by this court, it is unnecessary to determine any other question.

The first section of the act provides that the owners of cans, tubs, firkins, boxes, bottles, casks, barrels, kegs, cartons, tanks, fountains, vessels, or containers, with his, her, its, or their names, brands, designs, trade-marks, devices, or other marks of ownership stamped, impressed, labeled, blown in, or otherwise marked thereon, may register such names, brands, designs, trade-marks, devices, or other marks of ownership, by filing a verified statement, containing a description thereof, with the Secretary of State and with the clerk of the proper county. Said section also provides for the publication of such statement, and for the filing of certificates of publication with the Secretary of State and county clerk. Certified copies of such statement are made prima facie evidence of the title of the owner or owners named therein to the property upon which the name or other mark of ownership may appear, as the same is described in such copy. The second and third sections of the act read as follows, to wit:

"Sec. 2. It is hereby declared to be unlawful for any person or persons or corporation, without the written consent of the owner or owners thereof, to hereafter keep for sale any can, tub, firkin, box, bottle, cask, barrel, keg, carton, tank, fountain, vessel or container so marked or distinguished as aforesaid, of which a description shall have been filed and published as provided in section 1 of this act, or to use or fill with any substance, commodity or product for the sale therein of such substance, commodity or product, any such can, tub, firkin, box, bottle, cask, barrel, keg, carton, tank, fountain, vessel, or container, or to wantonly break or destroy or to buy, sell or dispose of or traffic in any such can, tub, firkin, bottle, box, cask, barrel, keg, carton, tank, fountain, vessel, or container, or to deface, erase, obliterate, cover up or otherwise remove or conceal any

such name, brand, design, trade-mark, device or other mark thereon, for the purpose of destroying or removing the evidence of the ownership of such article.

"Sec. 3. The using by any person or persons or corporation other than the owner or owners thereof, or his, her, its or their agent, of any such can, tub, firkin, box, bottle, cask, barrel, keg, carton, tank, fountain, vessel, or container, for the sale therein of any substance, commodity or product, other than that originally therein contained, or the buying, selling, or trafficking in any such can, tub, firkin, box, bottle, cask, barrel, keg, carton, tank, fountain, vessel or container, or the fact that any junk dealer or dealer in cans, tubs, firkins, boxes, bottles, casks, barrels, kegs, cartons, tanks, fountains, vessels, or containers, shall have in his or her possession any such can, tub, firkin, box, bottle, cask, barrel, keg, carton, tank, fountain, vessel, or container, so marked or stamped, and a description of which shall have been filed and published as provided in section 1 of this act, shall be and it hereby is declared to be prima facie evidence that such using, buying, selling, or trafficking in or possession of is unlawful within the meaning of this act."

The fourth section fixes a penalty, recoverable at the suit of the people of the state of Illinois by summons, for the violation of any of the provisions of the act. The fifth section provides for the issuance of a search warrant upon the filing of a proper affidavit; and the sixth section, under which this proceeding is brought, provides, in substance, that any person may be enjoined from violating the second section of the act.

A somewhat similar statute was passed in 1873 (Rev. St. 1874, p. 1084, c. 140), and that statute was held by this court to be unconstitutional in *Lippman v. People*, 175 Ill. 101, 51 N. E. 872. The act of 1901 seems, from an examination thereof, to have been passed by the Legislature with a view to obviate the constitutional objections to the earlier act, but for the purpose of accomplishing the same results as were sought by the law of 1873.

It is argued by counsel for defendant in error that the purpose of the present act is to protect the public and manufacturers of food products from frauds and imitations, and to prevent the public from being deceived in the use of adulterated foods. Neither the title nor the language of the act shows evidence of any such purpose. The law is entirely silent in regard to the quality of the commodity that may be sold in the receptacles by the owner or by the person to whom the owner may have given his written consent to use or buy the receptacle. There is no provision that the person who has purchased one of these receptacles with the written consent of the owner shall only put therein food products of as high a standard as those manufactured by the original owner of

the receptacle (by which term we designate the owner whose registered mark of ownership appears on the receptacle), or that the food placed therein shall be of any particular standard of purity. If, indeed, it was the purpose of the Legislature by this statute to protect the public in the purchase of food, the Legislature, instead of exercising the power itself, has delegated to the persons throughout the state who may see fit to register their names or other marks of ownership, as provided by the statute, the power to determine what is deleterious to the health of the public, and what may or may not be sold in these receptacles after they have passed from the hands of the original owners, or such original owners may sell these receptacles or grant their use to others without any limitations whatever in regard to what shall thereafter be placed or sold therein.

We have examined this statute in vain for the purpose of finding any evidence that it was intended by the Legislature to apply particularly to food products. The only thing that could possibly be construed as any evidence on that score is the fact that it describes receptacles in which food might be sold; but it will be observed that, in the list of these receptacles, cans, boxes, kegs, and barrels are included in which gunpowder, boots, and shoes, nails, lime, and an innumerable number of other articles of merchandise are habitually inclosed and sold. A patient consideration of the provisions of this statute leads us to the conclusion that its purpose, like that of the earlier statute, was to facilitate the recovery of certain kinds of personal property, to wit, the receptacles described in the first section of this statute, which have passed from the possession of the owners thereof to others, and which the owners desire to recover summarily. The act is wholly for the benefit of the owners of personal property of this class, and is designed to give to the owners of personal property of this class rights and privileges not possessed by the owners of other classes of personal property.

It is argued that this law should be sustained under the police power of the state. It has been frequently said by this court that where a statute is referable to that power it must appear that it tends in some degree towards the prevention of offenses or the preservation of the public health, morals, safety, or welfare. *Toledo, Wabash & Western Railway Co. v. City of Jacksonville*, 67 Ill. 37, 16 Am. Rep. 611; *Eden v. People*, 161 Ill. 296, 43 N. E. 1108, 32 L. R. A. 659, 52 Am. St. Rep. 365; *City of Chicago v. Netcher*, 183 Ill. 104, 55 N. E. 707, 48 L. R. A. 261, 75 Am. St. Rep. 93; *Noel v. People*, 187 Ill. 587, 58 N. E. 616, 52 L. R. A. 287, 79 Am. St. Rep. 238. It cannot be contended that the selling or using of any of these receptacles in the manner prohibited by this statute, viz., without the written consent of the owner, is in any manner more injurious

to the public health, morals, safety, or welfare than if the same things be done with the written consent of the owner. The written consent of the owner is no guaranty to the public that any wrong which it is in the power of the purchaser, possessor, or user of the receptacles in question to do to the public will not be done.

Under the second section it is unlawful to purchase from the owner thereof one of these receptacles bearing the registered mark without first or at the same time obtaining the written consent of the owner to make the purchase. It might perhaps be argued that such was not the legislative intent, but that the provision requiring the written consent was only intended to apply where the receptacle was purchased from some person other than the original owner thereof, and then was meant to require the written consent of such original owner; but it seems quite certain, from an inspection of this enactment, that the legislative purpose was to place the possessor of these receptacles in a position where he could not testify to a verbal consent given by the owner from whom he purchased, and thereby establish a defense; the purpose being to so fully protect the original owner, whose registered marks of ownership appeared on the article, that he should have to meet no evidence except evidence written by himself, if an issue upon the question of his consent arose.

In view of the fact that this statute does not come within the police power of the state, it is beyond the power of the Legislature to make unlawful the purchase of one of these receptacles without the written consent of the owner from whom it was purchased. As was said by this court in *Gillespie v. People*, 188 Ill. 176, 58 N. E. 1007, 52 L. R. A. 283, 80 Am. St. Rep. 176, the Legislature has no authority to pronounce the performance of an innocent act criminal, when the public health, safety, comfort, or welfare is not interfered with.

An attempt is made to justify the prohibition of these acts without the consent of the owner by reference to the statute making it an offense for the mortgagor of chattels to sell the same without the written consent of the mortgagee. But in considering that argument the objects of the two statutes should be compared. The purpose of the statute requiring the written consent of the mortgagee was to prevent property in which he had an interest from being so disposed of that he would be hindered in enforcing his debt. That was intended as a protection to his property rights, while a provision that he who purchases from the mortgagor (or, as in this case, from the owner of the receptacle) is guilty of a misdemeanor unless he has the written consent of the seller to make the purchase is in no wise a protection to the property rights of the seller. The chattel mortgage statute is for the protection of the mortgagee, who is

not a party to the sale and cannot protect himself. This statute is for the benefit of the owner, who is the seller, and who, being at no disadvantage and under no disability, needs no protection.

In *Tiedeman on Limitations of Police Power* (page 208), in discussing police regulations established for detecting and preventing fraud, it is said: "Laws which provide for the inspection and grading of flour * * * are constitutional exercises of police power, so far as they permit one party to compel the other to comply with the regulation, in the absence of their agreement to the contrary. For example, it is permissible for a statutory regulation to provide for standard weights and measures and to compel their use when the parties had not agreed upon the use of others, but it cannot be reasonable to prohibit the use of any other mode of measurement. It is an excessive exercise of police power when the law compels one to make use of the means provided for his own protection against fraud." There is no reason which can set the legislative police power of the state in motion for placing in a statute a provision that the seller or bailor must give to the buyer or bailee his written consent to buy or use an article of personal property sold or bailed. The manner in which the acquiescence of the seller or bailor in such a transaction shall be evidenced is wholly for the parties themselves.

There is no distinction in this act between receptacles of the class specified in the law which were in existence when the act became effective and such receptacles thereafter made or manufactured; that is, by the terms of the law a receptacle then in existence bearing one of the marks of ownership specified in the law, which mark should thereafter be registered, would, together with the person then in possession thereof, whether the original owner or another, upon the registering of the mark, become subject to the operation of this law, and in this case it is sought to make this law apply to bottles some of which may have been manufactured with the mark blown in them before the passage of the law and long before the mark was registered. In the judgment of the court this law granted to all persons who at the time of its passage owned receptacles of the specified kinds, whether in or out of the possession of the owner, bearing marks of ownership of the nature denominated in the statute, who afterwards registered those marks of ownership, and to all persons who thereafter registered such marks of ownership and placed them upon any such receptacles acquired after the passage of the law, special and exclusive privileges, in that it vested them with rights for the recovery of personal property not enjoyed in common by all the owners of personal property in the state of Illinois. The language of this statute is much broader than that of the act of 1873, but it is still legislation in favor of a por-

tion of the community only, namely, the portion that are the owners of receptacles named in the first section of the act. It is legislation in favor of the owners of personal property of a certain kind. There is no reason why the owners of personal property of the character named in this statute should be distinguished from or placed in a class apart from the owners of other personal property in this state.

In *Lippman v. People*, supra, this court emphasized the fact that in *Eden v. People*, 161 Ill. 296, 43 N. E. 1108, 32 L. R. A. 659, 52 Am. St. Rep. 365, in passing upon the validity of the act requiring barber shops to be closed on Sunday, the distinction was pointed out that where legislation concerns laborers, and there is no reasonable ground of distinction or division into classes, the general class includes all laborers, and as barbers were only a branch of that class the law was not general. So here, this legislation concerns the owners of personal property. It attempts to legislate for the benefit only of the owners of such personal property as is named in this act, and is therefore legislation conferring special rights and privileges upon a portion only of the owners of personal property. There is no reason that suggests itself to our minds, and none has been suggested by counsel, why such owners should be entitled to this special protection, or why they should be considered a class by themselves, so that legislation for their benefit alone would not be obnoxious to the constitution. This act fails to meet the reasoning of this court as found in *Lippman v. People* in this regard.

Legislation in favor of a class is not prohibited, but the class must be composed of individuals possessing in common some disability, attribute, or qualification or in some condition marking them as proper objects for legislative favor, as debtors and wage earners who are heads of families residing with the same, who have been given by our laws more liberal exemptions than are given to persons upon whom none are dependent. The conditions that make such wage earners and debtors the proper and lawful beneficiaries of legislation of this character readily occur to every one, and they are conditions which put such persons in classes easily distinguishable from the remainder of the community. No such reason can be found for considering persons owning receptacles of the character specified in this act as a class by themselves and singling them out as objects of special consideration at the hands of the lawmaker. They stand on the same footing as other owners of personal property, and any law favoring them above others, for the reason alone that they own personal property of the kind specified in this act, is a special law, within the meaning of our Constitution.

The third section of the act provides, among other things, that "the fact that any junk dealer or dealer in cans, tubs, firkins,

boxes, bottles, casks, barrels, kegs, cartons, tanks, fountains, vessels, or containers, shall have in his or her possession" any such receptacles bearing a registered mark shall be prima facie evidence that such possession is unlawful, within the meaning of this act. Such possession by others is given no such effect by this statute. Dealers of the kind mentioned in the quoted language are merchants. An empty pasteboard shoe box found in the residence of one whose business is the manufacture and sale of tubs, casks, kegs, and barrels, bearing a registered mark, would be prima facie evidence that he had violated this law, and if he were unable to explain his possession would warrant his conviction, while if the same box, bearing the same mark, were found in the residence of his next-door neighbor, who is a grocer, it would be no evidence at all of any violation of this statute. This is an unlawful discrimination against persons dealing in receptacles of the specified class, and confers a special privilege or immunity upon all other persons. It makes that evidence against one which is not evidence against another. The Legislature is without power to make any such arbitrary distinction. In the case of *Mathews v. People*, 202 Ill. 389, 67 N. E. 28, the following language from *Cooley on Constitutional Limitations* is quoted with approval (page 402, 202 Ill., and page 33, 67 N. E.): "A statute would not be constitutional * * * which should select particular individuals from a class or locality and subject them to peculiar rules, or impose upon them special obligations or burdens from which others in the same locality or class are exempt. * * * Every one has a right to demand that he be governed by general rules, and a special statute which, without his consent, singles his case out as one to be regulated by a different law from that which is applied in all similar cases, would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free governments." The same doctrine is announced in *Millett v. People*, 117 Ill. 294, 7 N. E. 631, 57 Am. Rep. 869; *Harding v. People*, 160 Ill. 459, 43 N. E. 624, 32 L. R. A. 445, 52 Am. St. Rep. 344, and *Gillespie v. People*, 188 Ill. 176, 58 N. E. 1007, 52 L. R. A. 233, 80 Am. St. Rep. 176. We therefore conclude that in making it possible to convict junk dealers, and dealers in receptacles of the class mentioned in the statute, on evidence that would not warrant the conviction of other persons, the Legislature has made an unwarranted and unconstitutional distinction between such dealers and other persons.

Defendant in error relies upon the case of *People v. Cannon*, 139 N. Y. 32, 34 N. E. 759, 36 Am. St. Rep. 668, as an authority for upholding the validity of this statute. In that case the validity of a New York statute entitled "An act to protect the owners of bottles, boxes, syphons and kegs used in the sale of soda waters, mineral and aerated wa-

ters, porter, ale, cider, ginger ale, milk, cream, small beer, lager beer, weiss beer, beer, white beer, or other beverages," was considered by the court. That statute is materially different from the statute we have under consideration, but it is sufficient to say that in that case so relied upon by defendant in error the points that the statute there under consideration granted any special or exclusive privileges or immunities, and that such statute was invalid because it made unjust discriminations between members of the same class in the community, were neither made nor considered.

The statute in question in the case under consideration here is in contravention of section 22 of article 4 of our Constitution of 1870. The decree of the superior court of Cook county will therefore be reversed, and this cause will be remanded to that court, with directions to dismiss the bill for want of equity.

Reversed and remanded, with directions.

(205 Ill. 296)

PEOPLE ex rel. CITY OF CHICAGO et al. v.
STATE BOARD OF EQUALIZATION et al.*

(Supreme Court of Illinois. Oct. 26, 1903.)

TAXATION — RAILROAD TRACK — ASSESSMENT
FOR LOCAL PURPOSES — CONSTITUTIONAL LAW — MANDAMUS.

1. Revenue Law 1872 (Laws 1871-72, p. 14) divides, for the purposes of assessment for taxation, all real estate belonging to railroad companies into "railroad track," and all real estate, including the stations and other buildings and structures thereon, other than that denominated "railroad track"; provides that "railroad track" shall be assessed by the State Board of Equalization, and that all real estate designated as "other than railroad track" shall be assessed by the local assessors, and directs that "railroad track," with the exception of the value of the second or side track and all station houses and other buildings which are assessed separate from the land on which they are located, shall be listed and taxed in the several counties, towns, and cities through which the railroad passes in the proportion that the length of the main track therein bears to the whole length of the road in the state. *Held*, that the State Board of Equalization could not be compelled to divide the real estate of a railroad returned to it for assessment as "railroad track" into "main track," to be a strip 100 feet wide, and "property other than main track," and to certify its assessment of the latter class to the clerk of Cook county to be taxed for local purposes in Chicago, as the statute confers on it no power to make such division.

2. Revenue Law 1872 (Laws 1871-72, p. 14), requiring that all of the real estate of a railroad company denominated "railroad track" may be assessed as a unit, and the amount thus determined apportioned to the several taxing bodies through which the road runs in the proportion that the length of the main track in each taxing body bears to the whole length of the road in the state, is not in conflict with the constitutional provision directing that all real estate be taxed within the limits, and not otherwise, of the municipality wherein it is located.

3. On mandamus to require the State Board of Equalization to divide the real estate of rail-

roads in Chicago denominated "railroad track" into "main track" and "property other than main track," a contention that large amounts of real estate in the city denominated "railroad track" have not been assessed by the board, and will not be assessed in future, is without merit, where the method pursued was legal, and it does not appear that the board contemplated any change in the method.

Appeal from Circuit Court, Sangamon County; J. A. Crieghton, Judge.

Mandamus by the people, on relation of the city of Chicago and others, against the State Board of Equalization and others. From a judgment denying the writ, relators appeal. Affirmed.

Charles M. Walker, Corp. Counsel, and Shope, Mathis, Zane & Weber, for appellants. H. J. Hamlin, Atty. Gen. (Lloyd W. Bowers, of counsel), for appellees.

HAND, C. J. This is a petition for a writ of mandamus, filed by the relators against the respondents in the circuit court of Sangamon county, to require the State Board of Equalization to divide the real estate of all railroad companies entering the city of Chicago, denominated "railroad track" by the revenue law, into two classes, viz., "main track" and "property other than main track," and to certify its assessment of the latter class to the county clerk of Cook county, to the end that such real estate may be taxed for local purposes in said city. An answer and reply having been filed, a jury was waived, and a trial was had before the court, and a judgment entered denying the writ, and an appeal has been prosecuted to this court.

The revenue law of 1872 (Laws 1871-72, p. 14) divides, for the purposes of assessment for taxation, all real estate belonging to railroad companies in the state of Illinois into "railroad track," and "all real estate, including the stations and other buildings and structures thereon, other than that denominated 'railroad track,'" and provides that "railroad track" shall be assessed by the State Board of Equalization, and that all real estate designated as "other than 'railroad track'" shall be assessed by the local assessors. It is further provided that "railroad track," with the exception of the value of the side or second track, and all turn-outs, and all station houses, depots, machine shops or other buildings, which are assessed separate from the land upon which they are located, shall be listed and taxed in the several counties, towns, villages, districts, and cities through which the railroad passes, in the proportion that the length of the main track in such county, town, village, district, or city bears to the whole length of the road in the state.

It is clear, from a consideration of the language of the statute, and the repeated decisions of this court (Chicago & Alton Railroad Co. v. People, 98 Ill. 350; Chicago & Alton Railroad Co. v. People, 99 Ill. 464; Peoria, Decatur & Evansville Railway Co. v. Goar,

*Rehearing denied December 9, 1903.

118 Ill. 134, 8 N. E. 682; Chicago & Alton Railroad Co. v. People, 129 Ill. 571, 22 N. E. 864, 25 N. E. 5; Quincy, Omaha & Kansas City Railway Co. v. People, 156 Ill. 437, 41 N. E. 162; Chicago & Northwestern Railway Co. v. People, 195 Ill. 184, 62 N. E. 869), that "railroad track" or right of way may include much more than the main track of a railroad, and that it includes so much real estate as is actually in use for right of way purposes, which in Chicago & Alton Railroad Co. v. People, 98 Ill. 350, was held to be upwards of 32 acres, which was in use for switches, side tracks, roundhouses, etc. In that case, on page 356, it is said: "The land upon which a side track, a switch, or a turn-out is built and in actual use by the company in the business for which it was organized, for all practical purposes, is as much held for right of way as is the land upon which the main track is constructed. In the operation of a railroad, it is necessary that trains should pass each other, and hence the necessity of turn-outs, switches, and side tracks. In the loading of cars, transfer of cars, the making up of trains, and in innumerable other instances that might be named, in the prosecution of its business as a common carrier, side tracks, switches, and turn-outs are as indispensable to a proper transaction of its business as the main track itself. We are therefore of the opinion that the land held and in actual use by a railroad company for side tracks, switches, and turn-outs must be regarded, within the meaning of the revenue law, as a part of the right of way of the company. It is used in the transportation of freight, and also for the purpose of carrying passengers, alike with the land upon which the main track is constructed; and upon what principle the land upon which the main track is laid can be held to be right of way, and the land over which a side track, switch, or a turn-out passes can be termed something else, we are at a loss to understand." We find no authority in the statute for the board of equalization to divide the real estate of a railroad returned to it for assessment as "railroad track" into two parts, one to be known as "main track," which it is suggested by relators should be a strip 100 feet wide, and "railroad track" other than "main track," which, it is said, should include all the real estate returned for assessment as "railroad track" other than "main track." The board of equalization is a creature of the statute, and has no powers other than those expressly conferred upon it by the statute; and, as the statute confers upon it no power to make such division, the power does not exist. Its duty, as fixed by the statute, is plain. It is to assess the real estate of railroads denominated "railroad track," which amount so determined and assessed is to be certified by the Auditor to the county clerks of the proper counties.

The statute clearly contemplates that the right of way of a railroad company, for the

purposes of assessment, shall be treated as a unit, and that the assessment of its real estate used for right of way purposes shall be apportioned among all the counties, cities, etc., through which the road runs, in the proportion that the length of its main track in each county, city, etc., bears to the whole length of the road in the state. This method of assessment has been in force in this state for many years, and is equitable and fair. In Porter v. Rockford, Rock Island & St. Louis Railroad Co., 76 Ill. 561, on page 584, Mr. Justice Scholfeld, in discussing the question now under consideration, said: "There is, moreover, an almost insuperable difficulty which must attend all attempts by local assessors to assess the capital stock, franchise, roadway, and rolling stock of most railroad companies. Such roads are usually located through several counties. The cost of construction in a particular town or county affords no criterion of the value of that portion of the road, for every mile of the road is equally indispensable to its existence as a whole, and contributes proportionally to its principal earnings. Local improvements may, indeed, vary, and they are required to be assessed by the local assessors; but the road and its equipment constitute a single, entire property. In determining the value of such property, the question is neither one of original cost, nor of the intrinsic value of the various items of which the road and its equipment are composed, taken separately, but, what is it worth with all its capabilities and facilities as a railroad? The franchise extends to the entire corporate property, and it is not possible that it can be divided. It must, if assessed at all, be assessed as an entirety; and this, as we have already shown, may be in connection with the property to which it is attached."

The right of way of a railroad company cannot be cut up, for the purposes of assessment, into parts, either by dividing it into sections by the lines of the different taxing bodies which it crosses, or by severing from its main track the portions that lie outside of some arbitrary line drawn through the center of the right of way. A railroad is a unit, and for the purposes of assessment its right of way must be treated as a whole. The switch or side track at which it receives coal, grain, stock, or freight in a country village is as essential to the successful operation of the road as is the switch or side track in the city at which the articles which it handles as a common carrier are discharged; and the land upon which its side or second track and turn-outs, and its station, machine shops, roundhouses, etc., stand, is as necessary to the successful operation of the road, and as much a part of its right of way, as the land upon which its main track is laid, and the value of each piece of its right of way must be determined by taking into consideration the value of the entire right of way, rather than the value of each piece for commercial pur-

poses, wholly disconnected from the use to which it has been applied, as compared with contiguous property used for purposes other than right of way.

It is, however, urged, that to hold all of the real estate of a railroad company denominated "railroad track" may be assessed as a unit, and the amount thus determined apportioned to the several taxing bodies through which the road runs, in the proportion that the length of the main track in each taxing body bears to the whole length of the road in the state, is to put a construction upon the statute which renders it in conflict with the Constitution of this state, which, it is said, requires all real estate to be taxed within the limits, and not otherwise, of the municipality wherein it is located. If this contention were conceded, then the trial court was right in denying the writ of mandamus, as, if the act in question is unconstitutional, then the power of the State Board of Equalization to assess "railroad track," which includes the property which the board is sought to be coerced to assess, is swept away, and the board in no event could act. We are of the opinion, however, that the revenue act, in so far as it requires the State Board of Equalization to assess "railroad track," and that the assessment be apportioned to the several taxing bodies through which the road runs, in the manner pointed out by the statute, is clearly constitutional. The method provided in said act for assessing "railroad track" does not remove real estate used for railroad right of way from within the limits of one taxing body and place it within the limits of another taxing body, but merely establishes a method of valuing the proportionate share of each taxing body through which the road runs, in the right of way as a whole, which, as we have seen, is equitable and just; and that method of assessing railroad right of way has frequently been approved by the courts of this and other states, as well as the Supreme Court of the United States. *Porter v. Rockford, Rock Island & St. Louis Railroad Co.*, supra; *Law v. People*, 87 Ill. 385; *State Railroad Tax Cases*, 92 U. S. 575, 23 L. Ed. 663; *City of Dubuque v. C., D. & M. Railroad Co.*, 47 Iowa, 196. In *State Railroad Tax Cases* the Supreme Court of the United States had under consideration the constitutionality of the revenue act of 1872 of this state, and it is there said: "It is further objected that the railroad track, capital stock, and franchise is not assessed in each county where it lies, according to its value there, but according to an aggregate value of the whole, on which each county, city, and town collects taxes according to the length of the track within its limits. This, it is said, works injustice both to the counties and to the companies—to the counties and cities, by depriving them of the benefit of this value as a basis of local taxation; to the company, by subjecting its track and fran-

chises, on the basis of this general value, to the taxation of the counties and towns, varying, as they do, in rate, without the benefit of the rule of assessment which prevails in those counties in the valuation of other and similar property. But as we have already said, a railroad must be regarded for many—indeed for most—purposes as a unit. The track of the road is but one track, from one end of it to the other, and, except in its use as one track, is of little value. In this track as a whole, each county through which it passes has an interest much more important than it has in the limited part of it lying within its boundary. Destroy, by any means, a few miles of this track within an interior county, so as to cut off the connection between the two parts thus separated, and, if it could not be repaired or replaced, its effect upon the value of the remainder of the road is out of all proportion to the mere local value of the part of it destroyed. A similar effect on the value of the interior of the road would follow the destruction of that end of the road lying in Chicago, or some other place where its largest traffic centers. It may well be doubted whether any better mode of determining the value of that portion of the track within any one county has been devised than to ascertain the value of the whole road, and apportion the value within the country by its relative length to the whole." In the case of *City of Dubuque v. C., D. & M. Railroad Co.*, supra, the court had under consideration the validity of a similar statute. On page 202 it was said: "The road, with its right of way, embankments, excavations, iron rails, switches, depots, engine houses, machine shops, etc., is, in a certain sense, an entirety, extending from one terminus to the other. Its value largely depends upon its length of line, the country through which it is located, its proximity to other roads, and the business transacted by it. The extent of the line situated in any one city or town, township, or other taxing district, whatever improvements it may have therein in the way of machine shops and depots, is valuable chiefly by reason of its connection with the whole line. The value in each taxing district, without reference to the whole line, would be little more than the value of the iron rails for the purposes of removal, and the value of the land used for machine shops, engine houses, and other buildings. Under these circumstances, it will be readily seen that, under our general revenue law, to impose upon local assessors throughout the length of our long lines of road, extending in some instances across the state a distance of three hundred and fifty miles, exclusive of branches, the duty of ascertaining the value of the road in each assessment district, would be productive of anything but uniform results."

The contention that large amounts of real estate in the city of Chicago denominated

"railroad track" have not been assessed by the board of equalization in the past, and will not be assessed by the board in the future, from an examination of the briefs, appears to amount to no more than this: that the board heretofore has assessed, and asserts that it hereafter proposes to assess, the real estate of the several railroads located in this state returned to it as "railroad track," as a unit. The method pursued by the board in the past in the assessment of this class of property, in the view of the trial court and of this court, was legal; and, as there is no evidence in the record to show that the board contemplates any change in the method of assessing the class of property denominated "railroad track," there is no force in such contention. The petition filed in this case must be held to concede that the property, the assessment of which is sought to be enforced, is "railroad track," within the meaning of the revenue act; otherwise the board of equalization would be powerless to assess the same at all, as all real estate of railroad companies in this state, other than that denominated "railroad track," is assessable by the local assessors, and, unless the property sought to be assessed is properly denominated "railroad track," the board of equalization would be without jurisdiction to assess the same. This court has repeatedly held that a railroad company cannot escape the assessment of its property which is not "railroad track" by the local assessors, by returning it as "railroad track." *Chicago & Northwestern Railroad Co. v. People*, supra.

The evidence found in this record wholly fails to make a case of fraudulent undervaluation, or to show that real estate properly denominated "railroad track" has been omitted by the board of equalization in assessing the real estate of any railroad located in the city of Chicago.

We are of the opinion that it was within the power of the Legislature to provide the method designated in the revenue act for the assessment of the real estate of railroad companies denominated "railroad track," and that the amounts so determined be apportioned among the several counties, cities, etc., through which the road runs, in the proportion that the length of the main track in a county, city, etc., bears to the whole length of the road in the state, and that the circuit court properly denied the writ of mandamus. The judgment of the circuit court will therefore be affirmed. Judgment affirmed.

(176 N. Y. 535)

TRUNKEY v. VAN SANT et al.

(Court of Appeals of New York. Dec. 1, 1903.)

WILL—CONSTRUCTION—TRUSTS—INVALIDITY—EFFECT.

1. Testatrix gave all her property to three persons named to hold for themselves, their heirs and assigns, on the following trusts: To pay all the debts and pay such proportions of

the estate to such persons as they may ascertain and a majority shall agree "to have been my express wish, or as I may hereafter formally designate; and I hereby nominate and constitute and appoint my said trustees residuary legatees of my estate." Held, that the use of the words "said trustees" in the residuary clause was the equivalent of specifying by name the residuary legatees, who had already been designated by their several names.

2. Where testatrix leaves her property in trust to pay her debts and such proportion of her estate to such persons as the trustees may ascertain and a majority shall agree to have been the expressed wish of the testatrix, and the latter trust is void for indefiniteness, the residue of the estate after the payment of the debts as directed by the first trust passes to the residuary legatees.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Agnes G. Trunkey against Jane B. Van Sant and others. From an order of the Appellate Division (82 N. Y. Supp. 94) reversing a judgment in favor of certain defendants, they appeal. Reversed.

Franklin Pierce and William Arrowsmith, for appellants. Richard B. Aldcroft, Jr., and Edwin Louis Garvin, for respondent plaintiff. Samuel S. Mehard and Charles W. McCandless, for respondent defendants.

WERNER, J. This is a contest between heirs at law and legatees over the construction of a will. On the 28th day of May, 1902, Sarah M. Berlin died, leaving a last will dated May 19, 1902, in the following form: "Being of feeble health, but of sound mind, at the time of making and publishing this, my last Will and Testament, I give and devise all my estate, real and personal, whereof I may die seized or possessed, to Mrs. Jane B. Van Sant, of Philadelphia; Mrs. Julia D. Lawrence, of New York City, and Louis Faugeres Bishop, of the same place, to have and to hold the same to themselves, their heirs and assigns forever, upon the uses and trust following: To pay all my debts and pay such proportions of said estate to such persons as they may ascertain and a majority shall agree to have been my expressed wish, or as I may hereafter formally designate, and I hereby nominate and constitute and appoint my said trustees residuary legatees of my estate, and I hereby nominate, constitute and appoint said trustees Mrs. Jane B. Van Sant, Mrs. Julia D. Lawrence and Louis Faugeres Bishop, Executors of my last Will and Testament."

The only surviving heirs at law and next of kin of the testatrix are the plaintiff and the defendants Garvin, who were her cousins. The defendant Van Sant was a stepdaughter of the testatrix. The defendant Lawrence had been her close friend for many years, and the defendant Bishop had been her physician, and was a distant relative. It is conceded that the trust to pay debts is valid; that the direction to pay and distribute such proportions of the estate to such persons as a majority of the trustees should ascertain

and agree to have been the expressed wish of the testatrix is void for indefiniteness; and the issue is therefore narrowed to the single question whether the trustees named in the will take as legatees under the residuary clause, or whether the residuum after the payment of the debts passes to the next of kin.

The Supreme Court at Special Term held that after the cessation of the trust for the payment of debts the estate passed to the residuary legatees. At the Appellate Division a different conclusion was reached, and the next of kin were held to be entitled to the residue of the estate, upon the theory that the second and third provisions of the will are inseparable, and that the conceded invalidity of the one inevitably establishes the invalidity of the other. The cases of *Beekman v. Bonsor*, 23 N. Y. 299, and *Kerr v. Dougherty*, 79 N. Y. 328, are cited in support of this conclusion, but we think neither of them is a controlling authority in the case at bar. In the *Beekman* Case the testator's will, after having disposed of various specific legacies, contained a provision that out of the residue his executors should establish a medical dispensary, if they should have sufficient funds; but there was no specification of the amount to be expended for that purpose. This was followed by a direction that, if there should be any overplus, the executors might, within 15 years, give it to any other charitable society or societies for the relief of the comfortless and indigent whom they might select. In discussing these two provisions of the will the learned judge who wrote for this court said: "Now, we have seen that the sum which the testator intended to give for a dispensary was wholly uncertain in amount, and that the bequest was void on that and other grounds. As that portion of the residuum must go to the next of kin as undisposed of, the final gift of the remainder involves precisely the same uncertainty, and is void for the same reason. In order to ascertain the amount of this gift (the final residue), the sum intended to be previously appropriated out of the whole residue must first be known. But, as this cannot be known, the ultimate bequest falls to the ground also." This argument, as applied to the facts of that case, was strictly logical, because the court was dealing with the residue of a residue that was indefinite and unascertainable; but the decision of the court was not based on that sole ground, for in a following paragraph of the opinion it was held that the final bequest was also void, because it was so indefinite that its amount and purpose were incapable of being ascertained. In the *Kerr* Case, *supra*, one of the questions involved also arose over the residue of a residue. There the testator made certain specific bequests, some of which were to various religious, educational, and charitable institutions. To the wife of the testator was bequeathed during her life the net in-

come of the estate after the payment of the specific legacies, and after her death the principal left of the estate was bequeathed to some of the institutions named in the specific bequests. The specific bequests to religious, educational, and charitable institutions were declared void, and thus the question arose whether the amounts of the several void bequests passed into the residuum of the estate, or were to be distributed as in cases of intestacy. This court held that the sums attempted to be bequeathed by the void legacies went to the widow and next of kin as undisposed of by the will, because the wife's life estate was expressly limited to that portion of the estate remaining after the payment of the specific legacies, and the residuary bequests, which were not to take effect until the wife's death, were undisposed of during the period covered by her life, and after her death were good for only one-half their amount under the provisions of chapter 380, p. 607, Laws 1860. In that case the court was dealing with two residues, one of which was limited upon the other, and neither of which included the amounts attempted to be bequeathed by the void legacies. The residue, of which the testator's wife was to have the life use, was expressly limited to that portion of the estate remaining after the payment of the specific legacies. The final residuary legacies were not to take effect until the wife's death, and, like the latter's life estate, related to the residue of the estate which should remain after the payment of the specific legacies. The failure of the specific legacies, therefore, created a second residue, for which no provision was made in the will, and hence it devolved as in cases of intestacy.

In the case at bar we have a radically different condition than that which existed in either of the two cases above referred to. Here the conceded invalidity of the second clause of the will reduces the residuum to a definite and ascertainable quantity, unless, as held below, all the provisions of the will are so inseparable that each is dependent upon the other. As we read the will, there is no such connection between its several parts as to make the invalidity of one determinative of all. The first, which contains the direction to pay debts, is concededly good. The second, which directs the payment of indefinite amounts to undesignated beneficiaries, is clearly invalid. The validity of the third, which nominates as residuary legatees the designated trustees of the testatrix, depends upon the intention of the latter, which is to be derived from the context of the whole will. It is to be noted that, although the estate is given to the three persons named in the will upon the trusts therein named, it is also given to them, their heirs and assigns, forever. While these latter words must undoubtedly yield to a clear, positive, and valid creation of a trust or of a limited

estate, it is equally true that they will be given great weight and cogency when the language relied upon to import a trust or a limited estate is uncertain or ambiguous. *Clay v. Wood*, 153 N. Y. 134, 47 N. E. 274.

The only two trusts specified in the will are (1) the trust to pay debts, and (2) the trust to "pay such proportions of my said estate to such persons as they (trustees) may ascertain and a majority shall agree to have been my expressed wish or as I may hereafter formally designate." Immediately following the declarations of these two trusts the testatrix goes on to say, "And I hereby nominate, constitute and appoint my said trustees residuary legatees of my estate." In *Morton v. Woodbury*, 153 N. Y. 251, 47 N. E. 283, the language of the testatrix was, "I hereby appoint E. C. W. my legatee and give to her all not before specified in this," and it was held to be sufficient to pass the residue of the estate as effectually as though more formal words had been employed. The court below seemed to think the use of the words "my said trustees" in the residuary clause of the will indicated an intention to create an undisclosed and nameless third trust, to satisfy which the residuary legacy was created. We think the use of the words "said trustees" in the residuary clause are the equivalent of specifying by name the residuary legatees, who had already been designated by their several names in the opening clause of the will, and that it refers to them as trustees of the previously declared trusts, rather than as trustees of some imaginary trust which is to be added to the end of the will by judicial construction.

In the light of these observations upon the unscientific phraseology of the will, let us look for the intention of the testatrix, which, in the language of Chief Justice Marshall, is the "polar star" of testamentary construction. The opening and the closing words of the will serve to clearly indicate an intention to bequeath substantially the whole of the estate to Jane B. Van Sant, Julia D. Lawrence, and Louis F. Bishop. This, as we have said, is shown by the use of the words "their heirs and assigns forever" before the words "upon the uses and trust following," and is emphasized by the fact that the only trusts thereafter named are to pay debts and to distribute unspecified portions of the estate to unnamed persons. If the testatrix had intended that after payment of her debts the second trust should absorb all, or the greater portion, of her estate, she would, presumably, have employed more specific directions concerning it, or at least have expressed some limitation as to the residuum. In the absence of these things, the probabilities strongly support the contention of the residuary legatees that the real and substantial part of this considerable estate was intended to go to them.

But the result does not depend upon this last conclusion. If the second trust were

valid, the residue of the estate, whether great or small, would go to the residuary legatees. The second trust was not to be carved out of a residue, as in the *Beekman and Kerr Cases*, above cited. Here there was to be no residue until the two trusts had been fulfilled. The residue then remaining would have been definite and ascertainable; not the unascertainable residue of a residue, but a sum capable of exact computation. Has the failure of the second trust complicated conditions? This question carries its own answer. As the will now stands, it is precisely as though the testatrix had said, "I give to these three persons all my property upon the trust to pay my debts and the residue to them, their heirs and assigns, forever." The diversity in wills is as great as the difference in individuals. Authorities are therefore seldom of value or assistance except as they treat of similar cases or bear upon the general rules of construction.

Without further discussion of the cases cited in the briefs of counsel, we conclude that the order of the Appellate Division must be reversed, and the judgment entered upon the decision of the Special Term must be affirmed, with costs.

PARKER, C. J., and GRAY, BARTLETT, HAIGHT, VANN, and CULLEN, JJ., concur.

Order reversed, etc.

(205 Ill. 305)

CHICAGO UNION TRACTION CO. v. FORTIER.*

(Supreme Court of Illinois. Oct. 26, 1903.)
PERSONAL INJURIES—INSTRUCTIONS—MODIFICATION—EXPERT EVIDENCE.

1. In an action for personal injuries defendant requested an instruction in part as follows: "The jury are instructed that they have no right to conjecture that any ailment complained of by the plaintiff is the result of the accident. The jury are not to understand from this instruction that the court intends to intimate that the plaintiff has such disabilities as is claimed, or that the defendant is or is not in any manner liable, or to intimate any opinion upon any other question of fact in the case." Held, that it was not error to modify the request by adding after the first sentence the following: "Whether it is or not must be determined by the jury from the evidence," and by striking from the second sentence the words, "that the plaintiff has such disabilities as is claimed, or that the defendant is or is not in any manner liable or to intimate," and by adding after the second sentence the further statement that "all such questions are exclusively for the jury, and they must determine them from the evidence, and from that alone."

2. In an action for personal injuries, in which the defendant claimed that plaintiff's injuries were feigned, and asked plaintiff's expert witnesses a number of questions to establish this theory, evidence upon redirect examination of such witnesses that from tests and observations made while examining plaintiff they did not

*Rehearing denied December 10, 1903.

think her injuries were feigned is not objectionable on the ground that it was directed to a mental process, as to which the witnesses could not know, or because usurping the province of the jury.

Appeal from Appellate Court, First District.

Action by Florence Fortier against the Chicago Union Traction Company. From a judgment of the Appellate Court affirming a judgment for plaintiff, defendant appeals. Affirmed.

John A. Rose and Louis Boisot (W. W. Gurley, of counsel), for appellant. Gemmill & Foell, for appellee.

RICKS, J. This is an action on the case, commenced in the superior court of Cook county, to recover damages for injuries sustained by appellee while a passenger on a street car operated by appellant. A judgment for \$10,000 was rendered in the trial court, which, upon appeal to the Appellate Court for the First District, was affirmed, and this further appeal is prosecuted by appellant.

The only errors assigned and discussed are the refusing of the first and second instructions offered by appellant, the modification by the court of appellant's third instruction, and also the admission of certain evidence offered by appellee, which is hereinafter referred to.

The first instruction is fully covered by the third instruction as modified by the court. The second instruction was covered, in all its essential features, by the sixteenth, seventeenth, eighteenth, and twenty-third instructions given by the court at the request of appellant. The third instruction was modified by the court by expunging the parts printed in italics and by adding the parts between brackets. It was as follows: "(3) The jury are instructed that with respect to the ailments and disabilities claimed for the plaintiff in this case the burden of proof is upon the plaintiff in that respect, as it is with respect to the question of liability, to show, by a preponderance of the evidence, not only that such ailments really exist or have existed, but also that such ailments and disabilities are the result of the action in question; and the burden of proof is not upon the defendant to show that such alleged ailments do not proceed or arise from any other cause. The jury are further instructed that they have no right to guess or conjecture that any ailment complained of by the plaintiff is the result of this accident. [Whether it is or not must be determined by the jury from the evidence.] The jury are not to understand from this [or any other] instruction that the court intends to intimate that the plaintiff has such disabilities as is claimed, or that the defendant is or is not in any manner liable, or to intimate any opinion upon that or any other question of fact in this case. [All such questions

and matters are solely and exclusively for the jury, and they must determine them from the evidence, and from that alone.]" We are unable to see any error in thus modifying this instruction.

It is also assigned as error that the trial court improperly permitted two expert witnesses produced by appellee to give, on redirect examination, their opinions as to whether the plaintiff was feigning. Two objections are made to this evidence: First, because it was directed to a mental process, about which the witnesses could not know; and, second, because it was usurping the province of the jury by asking the witnesses to give their opinions upon the very question which the jury were empaneled to decide. It appears from the evidence that on flexing appellee's right leg there was a sudden jump at the hip joint, which assumed somewhat the characteristics of a dislocation at the hip joint, but which apparent dislocation proved to be fallacious; that a close examination disclosed, not a true dislocation of the joint, but rather a dislocation of the large muscle which covers the outside of the thigh bone. This apparent dislocation of the joint took place when appellee moved her leg in the motion she would naturally go through in making an attempt to walk, and was of such a serious nature that it prevented her from walking except with the aid of crutches. This sudden jump was by these experts attributed to an overstretching of the covering of this large muscle, or to the actual tearing of that covering, together with a probable overstretching of the ligaments of the hip joint, and perhaps a tear in one of those ligaments. One of the experts called by the appellee on cross-examination stated that he had never seen a case like this one, and had never read of one, and distinguished the case of appellee, who was suffering from a dislocation of the muscle, from the so-called "voluntary dislocations of the hip joint," which latter dislocation appears to be mentioned in a number of textbooks on surgery. Upon cross-examination of these witnesses by counsel for appellant it plainly appeared that appellant rested its defense upon the theory that the plaintiff was feigning to a large extent the injury complained of, and on such examination a number of questions were asked them seeking to establish this theory. Upon re-direct examination, counsel for appellee then asked such witnesses as experts, and based upon their knowledge of the case and tests and observations made while examining appellee, whether or not the action of the muscle was voluntary or involuntary on the part of appellee, to which they replied that in their opinion such movement was involuntary, and not feigned. As we understand the record, these opinions were not based on the mental process of the appellee, but were founded upon their opinions as expert surgeons and examinations made on the person

of the appellee. From the testimony of these experts it appears that from their examinations they were able to state with more or less certainty whether or not it was possible for the appellee to simulate this condition, and it is plainly apparent that on this matter, and from the conditions described, one who was not an expert could not form an intelligent opinion, and there was therefore no error in admitting this testimony. *Chicago, Burlington & Quincy Railroad Co. v. Martin*, 112 Ill. 16.

As no other errors are raised on this record, the judgment of the Appellate Court will therefore be affirmed. Judgment affirmed.

(205-Ill. 482)

PEOPLE ex rel. DENEEN v. PEOPLE'S GASLIGHT & COKE CO.*

(Supreme Court of Illinois. Oct. 26, 1903.)

CORPORATIONS—GAS COMPANIES—CONSOLIDATION — MONOPOLY — STATUTES — VALIDITY — TITLE—SPECIAL LAWS—QUO WARRANTO—PRACTICE—GOOD FAITH.

1. Where a writ of quo warranto was issued, with leave to respondent to move to set it aside, it was proper, on presentation of a petition to vacate the same and the appearance of respondent, for the court to hear affidavits and counter affidavits as to the facts relied on.

2. Since leave to file an information in quo warranto rests in the sound discretion of the court, an order vacating a previous order granting such leave after hearing will be affirmed on appeal in the absence of abuse of the trial court's discretion.

3. Where, on an application for leave to file an information in quo warranto against a quasi public corporation, the state's attorney filed an affidavit that after careful consideration he had reached a conclusion that a certain act under which defendant was acting was unconstitutional, and that he instituted the proceeding influenced by no other consideration than the protection of what he understood to be the public interest, affidavits tending to show that the object of the proceeding was to subvert the purpose of private individuals will not be considered.

4. Under 3 Starr & C. Ann. St. p. 3180, c. 112, authorizing the issuance of a writ of quo warranto in case any corporation exercises powers not conferred by law, the writ was maintainable to test the constitutionality of Hurd's Rev. St. p. 495, authorizing the consolidation of gas companies in the same city.

5. Hurd's Rev. St. 1901, p. 485, entitled "An act in relation to gas companies," and authorizing the consolidation and merger of gas companies organized under the laws of the state and located within the same city, is not invalid on the ground that the title did not refer to the merging or consolidating of such companies, such authority being germane to the general subject expressed in the title.

6. Hurd's Rev. St. 1901, p. 495, authorizing gas companies organized in the state to consolidate with any other gas company located in the same city, applies to all gas companies organized or to be organized within the state doing business in the same city, and is therefore not in violation of Const. art. 4, § 22, prohibiting the passage of any local or special law granting any corporation special privileges or franchises.

7. Hurd's Rev. St. 1901, p. 495, § 1, authorizes the merger of gas companies in the same city, and section 2 provides that the consolidation must be into one of the merging and consolidating corporations, which, by section 11, must be at the time of the merger in the actual business of furnishing gas to consumers. Section 8 declares that the corporation so merged shall thereafter be consolidated and merged into the one corporation specified in the agreement, and section 9 makes the consolidated corporation subject to, and requires it to perform for each of the companies, the legal obligations resting on each of them in the same manner and to the same extent as if the companies had remained individual and distinct. *Held*, that since such act did not confer on the corporation any enlarged powers or privileges by reason of the merger, it was not invalid, as in violation of Const. art. 11, § 1, providing that no corporation shall be changed by special laws, or its charter amended or changed except by a general law for the organization of all corporations thereafter created.

8. Such act is not invalid as authorizing the creation of a monopoly.

Error to Circuit Court, Cook County; Elbridge Hanecey, Judge.

Quo warranto by the people, on the relation of Deneen, against the People's Gaslight & Coke Company. From an order dismissing the writ, relator brings error. Affirmed.

Charles S. Deneen, State's Atty. for Cook County (A. C. Barnes, Adolph Moses, Clarence S. Darrow, Wm. Thompson, and Albert M. Cross, of counsel), for plaintiff in error. Sears, Meagher & Whitney (Nathaniel C. Sears and James F. Meagher, of counsel), for defendant in error.

WILKIN, J. Prior to August 9, 1901, plaintiff in error presented a petition to the circuit court of Cook county for leave to file an information in the nature of quo warranto against defendant in error, which was on that day allowed, and the information filed, but with the understanding on the part of the court and counsel for the respective parties that the respondent should have the right thereafter to ask that the order be set aside. On the 17th of the same month a motion to that effect was duly made, and after some delay, the occasion of which is unimportant, submitted to Judge Hanecey on the petition and affidavits presented pro and con. On January 25, 1902, the motion was allowed, and the order of August 9th vacated, leave to file the information denied, and the petition dismissed. To reverse that ruling this writ of error is prosecuted.

Counsel agree that leave to file an information in quo warranto rests in the sound discretion of the court, and it is admitted by plaintiff in error that this case is to be considered as though the petition had originally been presented to Judge Hanecey at the time he denied the leave to file the information. It was proper practice, upon the presentation of the petition and the appearance of the respondent, to hear affidavits and counter affidavits as to the facts relied upon for the leave asked; and unless we can say

*Rehearing denied December 11, 1903.

§ 1. See Quo Warranto, vol. 41, Cent. Dig. § 35.

the court below, upon a consideration of the case so presented, abused its legal discretion, the judgment must be affirmed.

The petition shows that the respondent obtained a franchise from the state of Illinois by an act of the Legislature approved February 12, 1855, amended February 7, 1865, under which, by authority of an ordinance of the city of Chicago, it purchased real estate and erected gasworks, etc., for the purpose of supplying gas to the city and its inhabitants, and was engaged in so doing in the month of August, 1897, when, contrary to law, in addition to its own franchise, it began to use and usurp, and continues to use and usurp, without any legal warrant whatsoever, certain franchises and privileges, to the prejudice of the people of the state of Illinois. It then proceeds to aver the consolidation or merger of eight other gas companies furnishing light to the inhabitants of the city of Chicago with the respondent, and concludes with the averment that it "is now using and usurping the several above-named franchises and privileges, and has so used the same since and after the 3d day of August, 1897, in said county of Cook, and still usurps and uses the same, to the great damage and prejudice of the said people of the state of Illinois, and against the peace and dignity of the same." The affidavits filed on behalf of the respondent tended to show that the object of the proceeding was to subserve the purpose of private individuals, and in resisting the leave to file the information it relied upon the well-understood rule of law that quo warranto will not lie for the enforcement of mere private rights, but can only be resorted to for the vindication of the public interest. The counter affidavits, though not denying many of the facts set forth in those filed on behalf of the respondent, relied mainly upon the sworn statement of the state's attorney to the effect that, after a full and careful consideration of the whole matter, he reached the conclusion that the act under which the defendant had consolidated with other gas companies was unconstitutional and void, and that he instituted the proceeding influenced by no other consideration than the protection of what he understood to be the public interest. Comment upon the conduct of parties who seem to have been interested in bringing about the filing of the petition is, in our view of the case, unnecessary, the affidavit of the public officer satisfactorily showing that he acted from a sense of official duty, uninfluenced by private interests or motives. *People v. North Chicago Railway Co.*, 88 Ill. 537; *McGahan v. People*, 191 Ill. 493, 61 N. E. 418. It is not, however, clear from the petition, when considered in the light of the statute authorizing the consolidation and merger of gas companies, that the public would in any way be benefited by the judgment of ouster here sought, and it seems that the order of the court below

denying leave to file the information and dismissing the petition was largely upon that ground. Inasmuch, however, as the petition is based solely upon the theory that the statute "in relation to gas companies," approved June 5, 1897, is unconstitutional and void, in view of our conclusion upon that subject it will be unnecessary to consider other questions raised in the argument.

The position of counsel for defendant in error that quo warranto cannot be resorted to for the purpose of determining whether a law is constitutional is not tenable. Section 1 of chapter 112 of our statutes (3 Starr & C. Ann. St. p. 3180), authorizes the bringing of the action in cases of this kind. The statute is entitled "An act in relation to gas companies" (Hurd's Rev. St. 1901, p. 495). Section 1 authorizes gas companies organized in this state "to sell, transfer and convey or lease their real and personal property, rights, franchises and privileges, in whole or in part, to any other gas company doing business in the same city, town or village, and such other gas company is authorized to purchase or lease and to hold and enjoy said property." The second section (the one under which the respondent is charged with usurping the franchises of other companies) is as follows: "It shall be lawful for any gas companies now organized or hereafter to be organized in this state, doing business in the same city, town or village, to consolidate and merge into a single corporation, which shall be one of said merging and consolidating corporations, by complying with the provisions of this act, as hereinafter specified." Section 3 authorizes all gas companies "to manufacture and distribute gas for fuel purposes and to distribute natural gas," etc. Sections 4, 5, 6, 7, 8, 9, and 10 pertain to the manner of perfecting the sale or consolidation of companies, and the effect thereof. Section 11 is: "Any corporation purchasing or leasing the property of any company or companies, or into which any company or companies are consolidated and merged under this act, shall be, at the time of availing itself of or accepting the benefits of this act, in the actual business of furnishing gas to consumers; and shall be subject to the following provisions: Such corporation shall not increase the price charged by it for gas of the quality furnished to consumers during any part of the year immediately preceding such purchase or lease, or such consolidation and merger. Such corporation shall furnish gas to consumers as good in quality as it furnished previous to such purchase or lease, or such consolidation and merger." Section 12 provides for the infliction of penalties for the violation of the preceding section and the recovery of damages by any person injured thereby, etc.

The contention of counsel for plaintiff in error against the validity of the law is, first, it contravenes section 13 of article 4 of the Constitution of 1870, and it is said: "The

title of this act is 'An act in relation to gas companies.' The whole body of the act relates to the consolidation of gas companies and the sale or lease by one of its property and franchises to another. The subject of 'consolidation,' which freights most of its provisions, is not expressed in the title. The absence of such reference is fatal to the act." If by the expression, "which freights most of its provisions," it is meant that the subject of consolidation is the principal object of the statute, the assertion is unwarranted by its language and provisions. The enactment in the first section, not questioned in the argument, is no less fully provided for in the subsequent provisions of the act than is the "consolidation and merger" authorized by the second. The contention is that authority for any gas companies now organized or hereafter to be organized in this state, doing business in the same city, town, or village, to consolidate and merge into a single corporation, which shall be one of said merging and consolidating corporations, is not consistent with or germane to the general subject "in relation to gas companies."

The validity of statutes under the foregoing section of the present Constitution, and a similar one as to special or local statutes in that of 1848, has frequently been before us, and we have uniformly held that "the general purpose of the provision is accomplished when the title is comprehensive enough to reasonably include as falling within that general subject, and as subordinate branches thereof, the several objects which the statute assumes to effect" (*Potwin v. Johnson*, 103 Ill. 70); that "the fact that many things of a diverse nature are authorized or required to be done is unimportant, provided the doing of them may fairly be regarded as in furtherance of the general subject of the enactment" (*Blake v. People*, 109 Ill. 504); and that "the generality of the subject embraced in the title is no objection to it, since it is purely a matter of legislative discretion whether the subject expressed shall be general or specific; and it is clear that, the broader and more general the subject, the greater the number of particular or subordinate subjects which will be embraced within it" (*People v. Nelson*, 133 Ill. 565, 27 N. E. 217). "If all the provisions of the act relate to one subject, which is indicated in its title, and the parts of the act are incident to and reasonably connected with the subject indicated, and are reasonably auxiliary thereto, then the act may include details of legislation with reference to that subject-matter so indicated without the title being a mere index of everything contained therein. The provision of the Constitution cannot be so narrowly construed as to require the title of an act of itself to contain the entire act" (*Park v. Modern Woodmen of America*, 181 Ill. 214, 54 N. E. 932); or, stated in other language: "It is not to be expected, neither is it possible, for the title of the act to contain

all the various provisions of the act itself. * * * If such was the case, the title to the act would have to be as comprehensive as the act itself. Such was not the object or intent of the Constitution." *Burke v. Monroe County*, 77 Ill. 610. "Judge Cooley, in his work on Constitutional Limitations (172), dealing with this subject, says: 'The general purpose of these provisions is accomplished when a law has but one general object, which is fairly indicated by its title. To require every end and means necessary or convenient for the accomplishment of this general object to be provided for by a separate act relating to that alone would not only be unreasonable, but would actually render legislation impossible.'" *Arms v. Ayer*, 192 Ill. 601, 61 N. E. 851, 58 L. R. A. 277, 85 Am. St. Rep. 357. We again said in *Allard v. People*, 197 Ill. 501, 64 N. E. 533: "The framers of the Constitution intended by it to prevent legislation which should not, by the title, clearly inform the Legislature of its purpose, and prevent the people from being misled thereby. 'The generality of a title is therefore no objection to it, so long as it is not made a cover to legislation incongruous in itself, and which by no fair intendment can be considered as having a necessary or proper connection'"—citing *Cooley on Const. Lim.* § 169 et seq., and *People v. Institution of Protestant Deaconesses*, 71 Ill. 229.

The many cases referred to as supporting the contention of plaintiff in error, most of which are found in our own Reports, all recognize and enforce the same construction announced in the foregoing decisions. Those of them which hold statutes unconstitutional for a failure to conform to section 13, *supra*, of the Constitution, do so because the enactments were incongruous, not germane to the subject expressed in the title, or that the title furnished no information to the members of the Legislature or the public of their purpose. *New York & Long Island Bridge Co. v. Smith*, 148 N. Y. 540, 42 N. E. 1088, is cited in the brief of counsel for plaintiff in error in support of the foregoing objection, with the comment, "squarely in point." This must have been by inadvertence. The case has no bearing whatever upon the question involved. It neither deals with nor discusses it. The only constitutional question there decided was that parts of a statute conceded to be unconstitutional did not invalidate the whole act.

We have been unable to find any authority for the position that the consolidation and merger of gas companies authorized by section 2 are in any way inconsistent with or foreign to the title of the foregoing statute relating to gas companies, nor are we able to perceive any good reason for such a conclusion. There can be no doubt that, in the absence of constitutional limitation, the Legislature has full power to authorize the consolidation of all private corporations organized under the laws of the state. 1 *Beach on Pri-*

vate Corp. § 332. The only restriction in our Constitution upon that power is the provision found in section 11 of article 11, which prohibits railroad corporations from consolidating with any other railroad corporation owning a parallel or competing line. Many of the state Constitutions contain provisions similar to section 11, supra, of our own, and some states have, by their Constitutions, prohibited all combinations of corporations to prevent competition (6 Am. & Eng. Ency. of Law [2d Ed.] p. 825); but, as above stated, our Constitution contains no such prohibition. "The legislative power may be exercised by grant in the charters of consolidating companies, or by the provisions of a general or special act of the Legislature passed prior to consolidation and after the organization of the original corporations." 1 Beach on Private Corp. § 334. In section 326 of the same work the following definition of "consolidation" is given: "The word 'consolidation' is used to denote any conjunction or union of the stock, property, or franchises of two or more corporations, whereby the conduct of their affairs is permanently, or for a long period of time, placed under one management, whether the agreement between them be by lease, sale, or other form of contract, and whether its effect be the dissolution of neither of the companies, or whether one of them be dissolved and its existence be merged in the corporate being of the other, or whether it result in the dissolution of both companies and the creation of a new corporation out of such portions of the original companies as enter into the new." Statutes "authorizing the consolidation of 'manufacturing' corporations have been held to include electric light companies, and also, undoubtedly, include gas companies." "Acts of several of the states also authorize the consolidation of corporations of the same nature and covering the same territory. Such an act has been held to include gas companies, and water companies organized to furnish water for the same village." 6 Am. & Eng. Ency. of Law, p. 803, and cases cited. The frequency with which corporations are consolidated by sale, lease, or other form of contract, and the fact that many of the states have adopted general statutes authorizing the consolidation and merger of corporations, repel the idea that such consolidation and merger are foreign to the general subject "in relation to corporations," and not reasonably included therein, or, when applied to this act, the subject "consolidation and merger" is not germane to the title "in relation to gas companies." We entertain no doubt that the enactment authorizing the consolidation of gas companies, is, under the repeated decisions of this court, embraced in the title of this act, within the meaning of section 13 of article 4 of the Constitution of 1870.

The second ground upon which the act is condemned is that it violates section 22 of article 4, which prohibits the passage by the

General Assembly of any local or special laws "granting to any corporation, association, or individual any special or exclusive privilege, immunity, or franchise whatever." Soon after the adoption of the present Constitution, in passing upon the validity of a provision in the act in force July 1, 1872 (Laws 1871-72, p. 269) known as the "Mayors' Bill," we said: "The act is neither local nor special. It applies in general terms to all the cities in the state. Whether there may be many or few to whom its provisions will be of any practical force is not the question. As was observed in *McAunich v. M. & M. R. Co.*, 20 Iowa, 338: 'These laws are general and uniform, not because they operate upon every person in the state, for they do not, but because every person who is brought within the relations and circumstances provided for is affected by the laws. They are general and uniform in their operation upon all persons in the like situation, and the fact of their being general and uniform is not affected by the number of those within the scope of their operation.' " *People v. Wright*, 70 Ill. 388. To the same effect is *Potwin v. Johnson*, supra. In *Hawthorn v. People*, 109 Ill. 302, 50 Am. Rep. 610, the validity of the act of June 18, 1883, in relation to butter and cheese factories, was challenged for the reason, among others, that it was special or class legislation; but we again said (page 311): "We fail to perceive that this is not a general law. It embraces all persons in the state similarly engaged. If all laws were held unconstitutional because they did not embrace all persons, few would stand the test. * * * A law is general, not because it embraces all of the governed, but that it may, from its terms, when many are embraced in its provisions, and all others may be when they occupy the position of those who are embraced." See, also, *People v. Hazelwood*, 116 Ill. 319, 6 N. E. 480; *Cummings v. City of Chicago*, 144 Ill. 563, 33 N. E. 854; *Park v. Modern Woodmen of America*, supra. The act under consideration applies to all gas companies organized or to be organized in this state doing business in the same city, etc., and is therefore in no proper sense special or local legislation.

Again, it is said the respondent, "as a result of the act in question, would acquire to itself the franchise of eight other corporations organized under general laws. The company's charter would thus be extended or amended so as to confer upon said company the right to merge with other gas companies, or the right of having them merged into itself; and this not by general law relating to all corporations, but by this special law relating only to gas companies. This distinctly contravenes section 1 of article 11, that 'no corporation shall be created by special laws, or its charter extended, changed or amended, * * * but the General Assembly shall provide, by general laws, for the organization of all corporations hereafter

to be created.' The entire argument in support of this proposition rests upon the assertion that, "as a result of this act the respondent would acquire to itself the franchise of eight other corporations organized under general law." If the proposition was otherwise sound, it cannot be sustained under the facts of this case. The petition fails to show in what way or manner the respondent is exercising any of the rights or privileges granted to either of the other companies, or that it is using other rights and privileges than those authorized by its own charter. Although the general rule is that the consolidation of several corporations into a new one invests the latter with all the rights and privileges of the several constituent companies, such is not the result of consolidation or merger under this statute. Section 2 expressly provides that the consolidation and merger into a single corporation must be into one of the merging and consolidating corporations, which, by section 11, shall be, at the time of availing itself of or accepting the benefits of the act, in the actual business of furnishing gas to consumers. By the last clause of section 8 it is provided: "The companies, parties to the agreement or agreements, which provide for consolidation and merger, shall thereupon be and are hereby declared to be consolidated and merged into the one corporation specified in such agreement or agreements." While section 9 makes the consolidated corporation subject to and requires it to perform for each of the companies so entering into said agreement or agreements the legal obligations resting upon each of them, respectively, under their respective charters and ordinances, in the same manner and to the same extent as if the companies had remained individual and distinct, it does not confer upon it any enlarged powers or privileges. Moreover, there is nothing whatever in the petition to show that the rights, privileges, and franchises of any or either of the consolidated or merged companies are larger or in any way different from those of the respondent.

We are of the opinion that none of the objections urged to the constitutionality of the statute can be sustained. It is scarcely necessary in this case to call attention to or place reliance upon the well-understood rule that every presumption must be indulged in favor of the validity of enactments by the legislative branch of the government, and that statutes will only be held unconstitutional and void after resolving every reasonable doubt in favor of their validity. It is said: "If this act is sustained, its necessary and only possible operation will be to promote and create a monopoly. The attempted consolidation under it has resulted in a gas trust." If a monopoly has been created or a gas trust formed by the consolidation of the defendant in error with the other corporations named in the petition, it does not so appear in this proceeding; nor are we

able to see how such a result can follow in view of the requirements of section 11 of the act and the penalties imposed by section 12. Whether the city council of the city of Chicago has power to regulate the price which the respondent company may charge for gas furnished to it and its inhabitants or not, there is nothing in this case to show that extortion is being practiced, or a monopoly created by it. It will be time enough to meet those questions when a case is presented involving them. There was no abuse of legal discretion in denying the leave to file the information and dismissing the petition.

The judgment of the circuit court will accordingly be affirmed. Judgment affirmed.

(206 Ill. 372)

CITY OF CHICAGO v. McKECHNEY
et al.

(Supreme Court of Illinois. Dec. 16, 1903.)

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—CONTRACTS—SUPPLEMENTAL AGREEMENT—INVALIDITY—RECOVERY OF REASONABLE VALUE OF WORK—EVIDENCE.

1. Letters written to a contractor under contract with a city for the construction of a public improvement by agents appointed by him to examine the condition of the work done and to report thereon are inadmissible in favor of the contractor in an action to recover the value of the work done.

2. Where a supplemental agreement relied on by a city contractor under contract for the construction of a public improvement was not binding on the city the contractor was entitled to recover the reasonable value of all labor and materials furnished and accepted by the city in the construction of the improvement not covered by the original contract.

Appeal from Appellate Court, First District.

Action by John McKechney and another, as the surviving partners of the firm of Weir, McKechney & Co., against the city of Chicago. From a judgment of the Appellate Court (91 Ill. App. 442), affirming a judgment in favor of plaintiffs, defendant appeals. Reversed.

This is an action of assumpsit, brought on December 8, 1897, in the circuit court of Cook county, by Frederick C. Weir, since deceased, and the appellees, John McKechney and John McKechney, Jr., then constituting the firm of Weir, McKechney & Co., against the appellant, the city of Chicago. The trial, which began before the court and a jury on June 23, 1899, resulted in a verdict in favor of the plaintiffs below and against the city, on July 15, 1899, for \$619,638.81. Afterwards, during the argument for a new trial, a remittitur of \$64,078.59 was entered, and on August 29, 1899, judgment was rendered against the city for \$555,560.22 and costs in favor of the present appellees. An appeal was taken from this judgment to the Appellate Court, where the judgment was affirmed, and the present appeal is prosecuted.

¶ 3. See *Municipal Corporations*, vol. 38, Cent. Dig. § 892.

from such judgment of affirmance. On March 10, 1899, the death of Frederick C. Weir, one of the plaintiffs, was suggested upon the record, and the cause was ordered to proceed at the suit of the surviving plaintiffs, John McKechney and John McKechney, Jr., the present appellees.

The suit is brought to recover for work done in the construction of section 3 of what is called the "Northwest Land Tunnel," built for the purpose of conducting water to the northwest quarter of the city of Chicago, and running from a point on North Green street, in that city, near Grand avenue, in a northwesterly direction, to a point in section 35, town 40, range 13 E. of the third P. M. On August 20, 1895, the department of public works advertised for bids for the construction of said tunnel, and in the advertisement announced that sealed proposals would be received by the city until 11 a. m., August 31, 1895, for furnishing all material and constructing a water tunnel under the city of Chicago, with necessary shafts. The advertisement described section 3 as "tunnel eight feet internal diameter, from junction of ten and eight foot tunnels at or near Green street, in a northwesterly direction; * * * all with necessary shafts, according to plans and specifications on file in the office of the department of public works of said city." Said Weir and appellees put in the lowest bid for the construction of said tunnel, and therein stated as follows:

"The undersigned hereby propose to do all the work and furnish all the material necessary in the construction of the water tunnels * * * from North Green street northwesterly, * * * according to the specifications hereto attached, at the following rate of prices:

"Sec. 3. Shafts, ten feet internal diameter, per lineal foot, \$69.50. Tunnel in earth, eight feet internal diameter, per lineal foot, \$16.65. Tunnel in rock, eight feet internal diameter, per lineal foot, \$15.90. Rock excavation over and above cost of lineal foot of tunnel or shaft, per cubic yard, \$2.00. Cast iron in covers, etc., per pound, .05.

"The undersigned also agree to a deduction of \$200.00 per day for each and every day after the expiration of the time named in these specifications that the work is not completed. The undersigned hereby certify that they have read the foregoing specifications, and that the proposal of the work is based on the conditions and requirements embodied therein, and, should the contract be awarded to them, they agree to execute the work in strict accordance herewith. The above proposal is based upon the conditions and stipulations named in the advertisement inviting proposals for such work, material, or supplies, and in accordance with the specifications and plans prepared for the same on file in the office of the department of public works; and, should the commissioner of public works award the contract to the under-

signed, then the undersigned agree to do such work or furnish such material or supplies upon the terms and conditions prescribed in the said advertisement, specifications, and plans referred to, and hereby agree to enter into such contract with said city within such time and in such manner as shall be required by such commissioner for the doing of such work or the furnishing of such material or supplies," etc.

The above proposal and bid, and agreement embodied therein, were signed by Weir and the appellees. Thereupon, on October 19, 1895, a contract was entered into between Weir and appellees, composing the firm of Weir, McKechney & Co., of Chicago, parties of the first part, and the city of Chicago, of the second part. Said contract of October 19, 1895, with the specifications thereto attached, is as follows:

"This agreement, made and concluded this 19th day of October, A. D. 1895, between Fred O. Weir, John McKechney, and John McKechney, Jr., composing the firm of Weir, McKechney & Co., of the city of Chicago, county of Cook, and state of Illinois, parties of the first part, and the city of Chicago, of the second part, witnesseth: That the said parties of the first part, for and in consideration of the payments to be to them made by the said city of Chicago, as hereinafter set forth, hereby covenant and agree to build and construct a water tunnel and shafts in said city from a point on North Green street, near Grand avenue, in a northwesterly direction, to a point in section 35, town 40, range 13 east of third principal meridian, according to the terms, conditions, and directions set forth in the plans and specifications hereto attached and made a part hereof, same being designated in said specifications as 'third section, eight feet internal diameter.' It is expressly understood and agreed that all material and excavation taken from the first or easternmost shaft of said section 3 of said tunnel shall be transported, at the expense of said contractors and for the use of said city for filling, to such point within the limits of the so-called proposed 'Lake Front Park' as the commissioner of public works may direct, or the same shall be so delivered at any other place or places, not exceeding two and one-half (2½) miles from the top of such shaft, as the commissioner of public works may from time to time direct; and in case the said commissioner of public works, acting for and upon behalf of the city, shall not desire to use any part or portion of such material for filling purposes, then it shall be the duty of said contractors to remove the same at their own expense. The said Weir, McKechney & Co. further agree to have all of said work finished and fully completed on or before the first day of October, A. D. 1897; and, further, that in case of their neglect, failure, or refusal to so complete said tunnel and shafts within the time herein agreed

upon, then in such event they hereby agree to forfeit to the city of Chicago the sum of two hundred (\$200.00) dollars per day for each and every day after said first day of October, A. D. 1897, that said work shall remain unfinished, and further agree and direct that such sums of money so forfeited shall be retained by said city from any money due and owing to said first parties by said city under this contract, and shall be paid into the city treasury as liquidated damages. All of the material used in said work, manner, time, and place of doing said work, together with all things therewith connected, must be in each and every particular satisfactory to said commissioner of public works. Said work shall be done in accordance with plans prepared for the doing of the same, on file in the office of the department of public works of said city, and with the specifications appended hereto and made a part of this contract. Said work shall be commenced on or before the first day of November, A. D. 1895, shall progress regularly and uninterruptedly after it shall have been begun, excepting as shall be otherwise ordered by the commissioner of public works, and be finished and fully completed on or before the first day of October, A. D. 1897; the time of commencement, rate of progress, and time of completion being essential conditions of this contract. All the work shall be executed in the best and most workmanlike manner, and no improper materials shall be used; but all materials of every kind shall fully answer the specifications, or, if not particularly specified, shall be suitable for the place where used.

"Should the commissioner of public works deem it proper or necessary, in the execution of the work, to make any alterations which shall increase or diminish the expense, such alterations shall not vitiate or annul the contract or agreement hereby entered into; but the said commissioner shall determine the value of the work so added or omitted, such value to be added to or to be deducted from the contract price, as the case may be. The whole of the work shall be commenced and carried on when and where the commissioner of public works shall direct, and it shall be carried on regularly, so as to give the necessary time for each part to settle and harden, and also for other purposes, as the commissioner may require. In case the commissioner of public works shall think that this is not sufficiently heeded, he may order more men to be employed upon the work, and, if he shall think the work proceeding too rapidly, he may order the employment of a less number of men. Should the weather be unusually wet, or so cold and frosty that any part of the work cannot be done in a proper manner or with due regard to durability, or should such be the case from any other cause, then the commissioner of public works may order such part of the work to be suspended altogether until a more suitable sea-

son, in which case the parties of the first part shall cover and otherwise sufficiently protect the several parts of the work, so that they will not be injured by the weather.

"The said parties of the first part hereby covenant and agree that if, in the prosecution of said work, it shall be necessary to dig up, use, or occupy any street, alley, highway, or public grounds of said city, to erect and maintain such strong and substantial barriers, and also, during the nighttime, such lights, as will effectually prevent the happening of any accident or harm to life, limb, or property in consequence of such digging up, use, or occupancy of said street, alley, highway, or public grounds; and it is further covenanted and agreed that the said party of the first part shall be liable for all damages occasioned by the digging up, use, or occupancy of any street, alley, highway, or public grounds, or which may result therefrom, or which may result from the carelessness of such contractor or contractors, his or their agents, employés, or workmen.

"This agreement shall not be assigned, or any part of the work subcontracted, without the written consent of the commissioner of public works indorsed hereon; and in no case shall such consent relieve the parties of the first part from the obligations herein entered into by the same or change the terms of this agreement.

"It is hereby provided and agreed that the said work shall be prosecuted with such force as the commissioner of public works shall deem adequate to its completion within the time specified; and if at any time the said parties of the first part shall refuse or neglect to prosecute the work with a force sufficient, in the opinion of said commissioner, for its completion within said specified time, or if, in any event, the said parties of the first part shall fail to proceed with the work in accordance with the requirements and the conditions of this agreement, that the said city, by its commissioner of public works, shall have full right and authority to take the work out of the hands of the said parties of the first part, and to employ other workmen to complete the unfinished work, and to deduct the expenses thereof from any money that may be due and owing to said parties of the first part on account of the work, or to relet the same to other contractors, as provided for hereinafter. And the said parties of the first part covenant and agree to perform all of said work under the immediate direction and superintendence of the commissioner of public works of the city of Chicago, and to his entire satisfaction, approval, and acceptance. All material used and all labor performed shall be subject to the inspection and the approval or rejection of said commissioner, and the said city of Chicago hereby reserves to its commissioner of public works the right finally to decide all questions arising as to the proper performance of said work, and as

to whether the rate of progress thereon is such as to correspond with the conditions of this contract; and if the said work shall not be begun at the time herein stipulated, or if the rate at which said work shall be performed shall not, in the judgment of said commissioner, be such as to insure its progress and completion in the time and manner herein stipulated, or if said work shall be wholly or in part improperly constructed, then to declare this contract forfeited, either as to a portion or the whole of said work, and to relet the same, or to order the entire reconstruction of said work if improperly done, and in such case of default, or in any case of default, to adjust the difference of damage or price (if any there be) which, according to the just and reasonable interpretation of this contract, the said contractors should, in the opinion of said commissioner, pay to the said city for any failure to properly commence and prosecute, or to properly construct, said work, in all respects, according to the conditions hereinbefore specified, or for any other default. And it is hereby understood and agreed that for any amount of damage or price determined by said commissioner to be paid to said city by said contractor for any such default, or for any money paid out by said city on account of said contractor in consequence of any default, there shall be applied in payment thereof a like amount of any money that may be due and owing to said party of the first part on account of said work, so far as there may be any such money, and so far as the same shall be sufficient; and if there shall not be a sufficient amount retained from the said party of the first part, then and in such case the amount to be paid to said city in consequence of such default shall be a just claim against said contractors, and shall be recovered from him or them at law, in the name of the city, before any court of competent jurisdiction.

"In case the said commissioner of public works shall deem it necessary to declare any portion or section of said work forfeited, it is hereby expressly stipulated and understood such declaration of forfeiture shall not in any way relieve the contractors from the covenants and conditions of this contract; but the same shall be and remain valid and binding on said contractors. And it is understood and agreed that no claim whatever will be made by the said parties of the first part for extra work or material, or for a greater amount of money than is herein stipulated to be paid, unless some changes in or additions to said work, requiring additional outlay by said parties of the first part, shall first have been ordered, in writing, by the said commissioner of public works.

"The said city of Chicago hereby covenants and agrees, in consideration of the covenants and agreements in this contract specified to be kept and performed by the said parties of the first part, to pay to said

parties of the first part, when this contract shall be wholly carried out and completed on the part of said contractors, and when said work shall have been accepted by said commissioner of public works, the following prices, to wit: Shafts, ten (10) feet internal diameter, sixty-nine dollars and fifty cents (\$69.50) per lineal foot; tunnel in earth, eight (8) feet internal diameter, sixteen dollars and sixty-five cents (\$16.65) per lineal foot; tunnel in rock, eight (8) feet internal diameter, fifteen dollars and ninety cents (\$15.90) per lineal foot; rock excavation, over and above cost of lineal foot of tunnel or shaft, two dollars (\$2.00) per cubic yard; cast iron in covers, etc., five cents (.05) per pound.

"It is further agreed that, in case the said contractor or contractors shall abandon or in any way or manner fail to complete said work, the city of Chicago is hereby authorized and empowered to pay to any laborer or laborers who may have been employed by such contractor or contractors upon the above described work, out of the funds due said contractor or contractors, upon the estimates of the commissioner of public works, at the time said commissioner shall declare said contract forfeited, any and all sums of money which may be found to be due and owing to such contractor or contractors under this contract, and without giving any notice whatsoever to said contractor or contractors of the intention so to do. And in every such case the city comptroller is hereby authorized and empowered to ascertain the amount or amounts so due and owing to any such laborer or laborers from said contractor or contractors in such manner and upon such proof as he may deem sufficient, and without giving any notice of such proceedings to said contractor or contractors; and the amount or amounts so found by him to be due and owing to such laborer or laborers shall be final and conclusive as against said contractor or contractors, and may thereafter be paid over by said city to such laborer or laborers, and no estimate will be issued to said contractor or contractors until all claims for labor on this contract shall have been satisfied.

"It is also agreed by said city that, if the rate of progress shall be satisfactory to said commissioner of public works, estimates in its usual form will be issued to said party of the first part, during the making of said improvements, for eighty-five (85) per cent. of the value of the work done and in place at the time of issuing such estimate; the remaining fifteen (15) per cent. being reserved until the final completion and acceptance of said work. No payment will be made for any extra work not specified in this contract, unless such extra work shall have been done by the written order of the commissioner of public works, to be attached to such contract, directing the same, and stating that such work is not included in the contract, what the extras are, and that such extras are

necessary for the proper completion of, or for the security of, the work previously done, and the reasons therefor.

"In testimony whereof the said parties of the first part have set their hands and seals, and the said city of Chicago has caused this agreement to be signed by its commissioner of public works, countersigned by its comptroller, and approved by its mayor, the day and year above written.

"Fred C. Weir, [Seal.]

"John McKechney, [Seal.]

"John McKechney, Jr., [Seal.]

"W. D. Kent,

"Com'r of Public Works,

"By John A. Moody, Deputy.

"Countersigned:

"O. D. Wetherell, Comptroller.

"Approved: Geo. B. Swift, Mayor."

"Specifications for the construction of a water tunnel from Green Bay Park, near intersection of Cass and Rush streets, to a point west of Rockwell street; also a tunnel from a point on North Green street, near Grand avenue, in a northwesterly direction to a point in Sec. 35, T. 40, R. 13 E. of 3d P. M., in the city of Chicago. August, 1895.

"Location and General Description.

"The tunnel will be located within the area shown colored on the plat attached to these specifications. The inside diameter of the tunnel, from the beginning at Green Bay Park, near the intersection of Cass and Rush streets, to North Green street, will be ten (10) feet, and the extension of the tunnel from this point to the terminus west of Rockwell street will be eight (8) feet internal diameter. From the shaft where the ten and eight feet tunnels join there will be a tunnel eight (8) feet internal diameter built in a northwesterly direction to a point in Sec. 35, T. 40, R. 13 E. of 3d P. M.

"Tunnels.

FIRST SECTION: } From commencement to 10 ft. internal diameter. } North Green street, near Grand avenue.

"The clear width of the tunnel shall be ten (10) feet and the clear height ten feet two inches. The top and bottom arches shall be semicircles. The tunnel shall be lined with bricks in four rings, or about eighteen inches in thickness.

SECOND SECTION: } From shaft at west end of 8 ft. internal diameter. } ten-foot tunnel to the terminus west of Rockwell street.

"The clear width of the tunnel shall be eight (8) feet and the clear height eight feet two inches. The top and bottom arches shall be semicircles. The tunnel shall be lined with brick masonry in three rings, or about thirteen inches in thickness.

THIRD SECTION: } From intersection of the ten and eight feet tunnels on 8 ft. internal diameter. } North Green street to a point in Sec. 35, T. 40, R. 13 E. of the 3d P. M.

"The clear width of the tunnel shall be eight (8) feet and the clear height eight feet

two inches. The top and bottom arches shall be semicircles. The tunnel shall be lined with brick masonry in three rings, or about thirteen inches in thickness.

"Grades and Alignments.

"The tunnels shall be built on such lines and grades as may be determined by the city engineer. The depth of the center line of the tunnel will be approximately between seventy-five and eighty-five feet below the Chicago city datum.

"Shafts.

"There will be two shafts for gates, to be twelve feet internal diameter, located over the tunnels, one at the commencement at Green Bay Park, and the other at the junction of the ten-foot and of the eight-foot tunnels on North Green street. In addition, there will be a number of shafts to be located by the city engineer, on section 2 not less than three, and on section 3 not less than four. The shafts shall be lined with brick masonry, not less than eighteen inches, or four rings, in thickness, and, when completed, the inside surface shall be perfectly plumb, true, and cylindrical, and the joints between the bricks not over one-half inch in thickness. The courses must be horizontal, and all joints in the masonry must be perfectly filled by pressing the bricks in the cement mortar, and not by pressing the mortar between the bricks. The surface shall be pointed smooth and cleaned as the work progresses. The eyes or openings for the tunnels in the shafts shall be neatly groined. There shall be built in all shafts ladder irons from top to bottom, these to be of such form, number, and size as directed by the city engineer. The tops of all shafts shall be domed over, and provided with cast-iron covers and frames, according to detailed drawings to be furnished.

"Material and Construction—Bricks.

"All bricks used in the work shall be first-class sewer bricks, made of well tempered and puddled clay, free from lime and pebbles. They shall be hard burned, clear ringing, and well formed. The size shall be uniform, viz., 8"x4"x2½", and they will be carefully inspected by the city, and immediately rejected if not up to the standard required.

"Cement Mortar for Tunnel.

"All cement shall be of the best quality of American natural cement, with a tensile strength of the neat material of not less than ninety (90) pounds per square inch after seven (7) days' and not less than one hundred and forty (140) pounds per square inch after twenty-eight (28) days' immersion in the water. No cement shall be used on the work until it has been tested and accepted by the city engineer, and the contractor must furnish storage capacity, and must keep at least one month's supply on the grounds at all times. All mortar shall be made with one part cement and one part clean, sharp,

beach sand from the lake shore, or such sand as may be acceptable to the commissioner of public works, and it shall be used as soon as possible after being mixed. (Dredged sand will not be allowed on the work.)

"Borings.

"Borings have been made by the city near the proposed routes of the tunnels. The notes from these borings have been platted, and are now on file in the office of the city engineer for the inspection of bidders.

"Construction.

"The contractor must provide a complete plant for the introduction of compressed air to guard against danger or damage in the prosecution of the work and to support the roof of the tunnel. The contractor must take the work entirely at his own risk. No extra allowance will be made for quicksand, hardpan, or boulders. In the earth or clay sections the contractor will not be allowed to excavate, even in good ground, more than can be lined with masonry the same day, and in soft and dangerous ground the contractor will be allowed to excavate only so far in advance of the masonry as the city engineer may consider safe. When the tunnel is wholly in sound rock, the excavation must be kept so far in advance of the masonry that no injury shall be done to the brick lining by blasting. The use of explosives will not be allowed or permitted, except in rock excavation. All lumber, timber, or other material used for bracing and supporting the sides or roof of the tunnel previous to the completion of the masonry shall be furnished and put in place by the contractor. If the condition of the soil is such that, in the judgment of the city engineer, it becomes necessary to leave permanently any timbers or boards used in supporting the soil in the excavation, the contractor will be paid for such lumber at the rate of \$10.00 per thousand feet, b. m. The amount of lumber left in the work shall be reduced to what is absolutely necessary. The contractor must furnish and put in place all necessary air pipes and apparatus for ventilating the tunnel, all steam engines and pumps, hoisting apparatus and fixtures for the same, all sheds and shelters for the protection of the workmen and materials, and all necessary tracks and other necessary implements or machinery for removing excavated material out of and taking building material into the tunnel, and he shall keep the streets and public grounds of the city free from all rubbish and debris at all times during the progress of the work.

"Masonry.

"The tunnels shall be lined with brick masonry, the bricks being laid longitudinally with the tunnel, with the edges toward the center and with toothing joints. The bricks must be clean and thoroughly wet before being laid. Those having smooth surfaces

to be used on the inside face of the tunnel, to be laid fair and smooth to line and to a true and cylindrical form. All joints in the masonry must be perfectly filled by pressing the bricks into the cement mortar, and not by pressing the mortar between the bricks. The joints in the courses shall not exceed one-half inch in thickness, and between the rings or shells not less than one-half inch in thickness. All mortar joints shall be carefully struck and smoothed with the surface of the bricks. All refuse mortar to be scraped off, and, with the rubbish of every kind and description, removed daily from the tunnel, which must be kept perfectly clean. The excavation for the tunnel, when through firm clay, shall conform exactly to the outside of the masonry. No extra allowance will be made for quicksand, hardpan, or boulders. When the tunnel is partly in earth and partly in rock, the contractor will be paid an additional price per cubic yard for rock excavation over and above the unit price per lineal foot of tunnel in earth. When the tunnel is in rock, the brick lining may, if deemed secure by the city engineer, be reduced one ring less of brick, and in all cases the masonry shall be brought to a true circular section. In every instance all spaces left between the outside of the regular brick work and the excavation shall be filled in with solid brick masonry, but no allowance will be made for such additional work and material.

"Special and General Requirements.

"All the materials, of whatever kind, to be used in the work, are to be subject to inspection by the commissioner of public works, and all unsuitable materials will be rejected, and must be immediately removed from the work.

"The contractor shall discharge from his employment, when directed by the commissioner of public works, all unfaithful and incompetent workmen and overseers.

"The commissioner of public works must be permitted to remove such portions of the work as he may from time to time think necessary, for the discovery of improper materials, or workmanship, and the contractor shall restore such work at his own expense in case it shall have been done improperly, and at the expense of the city of Chicago if done in a proper manner.

"The contractor shall furnish all pumping, transporting, hoisting, and other apparatus or machinery, all the tools, all the materials, and whatsoever else may be needed, and do all the work of whatsoever nature necessary to complete the work named in these specifications, and to protect the work during its construction, for the price named in the contract. Material from section 3 shall be deposited at such places as the commissioner of public works may direct, and in accordance with the conditions relating to same, as set forth in contract hereto attached. The contractor shall furnish men and stakes suf-

ficient to enable the city engineer to give the necessary lines and levels to construct the work by, and is to render him all necessary assistance, without charge for any necessary delay of the work while giving lines and levels. He shall maintain suitable signals and lights, to be approved by the commissioner of public works, as a warning to the public, and he shall be held responsible for all damages resulting from neglect or failure to comply with any or all of the above stipulations.

"The contractor shall take away all lumber, timber, and stone from the public grounds of the city, and clean out all dirt and rubbish, and remove the same, and clean down all masonry and other work, and leave the site clean at the completion of his contract.

"It is understood and agreed that no claim whatever will be made or allowed for extra work or material, unless some changes or additions to the work herein specified or shown on the drawings, requiring additional outlay by the contractor, shall have first been ordered in writing by the commissioner of public works.

"The contractor must deliver to the commissioner of public works, on or before the tenth day of each month, a written statement of amount of claims, if any, for extra work done and extra materials furnished during the previous month, or for extra expenses incurred, from any cause whatever; otherwise, claims for extras during that month will be forfeited and waived.

"The contractor must guaranty and keep in perfect repair all the work done under this contract during the progress and for one year after the final completion and acceptance of the work, whether the damage be caused by irruption of water, springs, quicksand, gas, or by any other disturbances or causes.

"The contractor will be required to guard the public effectually from liability to accident during the whole progress of the work, both by night and by day, and will be held responsible for any damages the city may have to pay in consequence of neglect on the part of the contractor, or any of his agents, to protect the public against such accidents.

"The commissioner of public works reserves the right to make any changes in the foregoing plans and specifications that he may deem desirable or necessary, or the emergency of the work may demand, and the contractor shall furnish any additional material and do any additional work required by such changes or emergency at the prices for like work stipulated in the contract. If any change which the commissioner of public works shall deem necessary in the foregoing plans and specifications shall lessen the amount of labor and material required, then the contractor shall sustain such a reduction in the amount of his contract as above provided. The contractor will receive

pay for the amount of work actually done, and shall not be paid for constructive loss for that which may be omitted.

"The proposals of parties bidding for the work are to be made in accordance with the following form, and must include everything described in these specifications or shown on the drawings. The work, as a whole, includes furnishing of all material and the construction of shafts and tunnels; all excavations; the pumping; the cleaning out of and off from the entire premises, and removal, of all refuse; the making of all repairs to the masonry, and the completion, in a thorough and workmanlike manner, of all the work, of every kind and description, included in the foregoing specifications and shown on the drawings ready for use.

"The nature and intent of these specifications are to provide for the work herein enumerated to be fully completed in every detail for the purpose designed, and the contractor hereby agrees to furnish everything necessary for such construction, notwithstanding any omissions in the drawings or specifications. It is further understood and agreed that these specifications shall be and hereby are declared a part of the contract.

"Time of Completion.

"The work described in these specifications shall be commenced immediately after the signing of the contract, and the whole work finished and completed, ready for letting in the water, within two (2) years after the signing of the contract; and it is stipulated and agreed that, in the event of the work not being completed at the time herein specified, the contractor shall pay to the city of Chicago the sum of \$200.00 per day, as liquidated damages, for each and every day beyond the time stipulated for the completion of said work, until the same is completed, and that the city of Chicago may retain and deduct the amount of such liquidated damages from any estimate or amount otherwise owing to said contractor under this contract. If, from the character and condition of the ground through which the tunnel is to be constructed, any unavoidable emergency shall arise from quicksand pockets, then the commissioners of public works shall have the authority to extend the time of completion of the contract, and shall have authority to release the contractor from the enforcement of the penalty herein provided; but such extension of time and release of penalty shall not be granted for any other cause, and shall not be granted by reason of any negligence, incompetency, or inefficiency of the contractor or his employes.

"Approximate Estimate of Quantities.

"The following is an approximate length of tunnels and shafts to be built under this contract, and the bids will be compared on this basis. The city of Chicago, however, reserves the right to do the whole or any

part of this work, or to make such modifications as may be deemed advisable.

"Sec. 1. 6,650 lineal feet of ten (10) feet tunnel in earth; 210 lineal feet of twelve (12) feet shaft.

"Sec. 2. 3,000 lineal feet of eight (8) feet tunnel in earth; 11,500 lineal feet of eight (8) feet tunnel in rock; 320 lineal feet of ten (10) feet shaft.

"Sec. 3. 2,000 lineal feet of eight (8) feet tunnel in earth; 18,000 lineal feet of eight (8) feet tunnel in rock; 440 lineal feet of ten (10) feet shaft.

Fred C. Weir,

"John McKechney,

"John McKechney, Jr."

The alleged and unsigned contract, dated May 17, 1897, hereafter referred to, is as follows:

"Whereas, a contract in writing, dated the 19th day of October, 1895, was heretofore entered into by and between Fred C. Weir, John McKechney, and John McKechney, Jr., composing the firm of Weir, McKechney & Co., of the city of Chicago, county of Cook, and state of Illinois, parties of the first part, and the city of Chicago, of the second part, whereby said company agreed to construct for said city a certain section or portion of a tunnel, commonly designated as 'third section, eight feet internal diameter,' of the northwestern water tunnel, according to the terms of said contract and of the specifications forming a part thereof; and whereas, said specifications provide that in excavating for said section the use of explosives will not be permitted by said city except in rock; and whereas, the material required to be excavated in part of said section has unexpectedly been found to be neither ordinary earth nor solid rock, but a material exceedingly hard in its nature, requiring practically as much use of explosives as rock, and practically incapable of being excavated with any fair degree of progress without use of explosives; and whereas, said company has recently been using explosives in its said work, thereby causing complaints and claims for damages to be made by neighboring residents and property owners; and whereas, controversies have arisen between the parties hereto respecting such use of explosives and such complaints, and respecting the obligation of said company to protect and indemnify the city against damages and claims for damages resulting from the use of explosives; and whereas, the further satisfactory progress of said work is believed impracticable unless some use of explosives shall be allowed in connection therewith; and whereas, it is desirable to limit the use of explosives as much as possible, whereby the expense of excavation will be increased; and whereas, the parties hereto desire to settle said controversies and to provide for carrying on said work effectively and without injury or annoyance to neighboring residents and property owners; and whereas, there

have been delays in the prosecution of said work growing out of a difference of opinion between said contractors and said city of Chicago as to the proper construction to be given to the said contract between said parties bearing date October 19, 1895; and whereas, it will be practically impossible to complete said work within the time provided for in said contract on account of the delays hereinbefore set forth: Now, therefore, it is mutually agreed by and between the parties hereto as follows:

"First. Hereafter any material to be excavated of a conglomerate nature, of such a character that satisfactory progress cannot be made without the use of explosives, the same shall be allowed in such manner and in such quantities and to such an extent as may be practicable, and such use of explosives shall at all times be subject to the supervision and control of the commissioner of public works of said city.

"Second. Said Weir, McKechney & Co. shall fully protect and keep harmless said city in respect to any and all damages and claims for damages to persons and to property which may arise in consequence of the use of explosives by said Weir, McKechney & Co., by virtue of this supplemental agreement. The amount of any and every judgment which may be recovered against said city for damages occasioned through the use of explosives by said Weir, McKechney & Co. by virtue of the terms of this supplemental agreement, and the cost incident thereto, shall be a debt due and payable to said city by said Weir, McKechney & Co., and may be deducted from any moneys due and owing by said city to said Weir, McKechney & Co. under said contract. It shall be the duty of the said city to notify the firm of Weir, McKechney & Co. of every such suit made to recover such damages against the said city, and the said Weir, McKechney & Co. shall have the privilege of defending against such claims in every case.

"Third. From and after the 15th day of March, A. D. 1897, the said Weir, McKechney & Co. shall be allowed, in estimating for work done on said tunnel as provided for in the contract of October 19, 1895, for all material encountered in earth tunnel that is rock, or of such a nature that it is classified as rock, shall be paid for at the rate of six (\$6.00) dollars per cubic yard in addition to the lineal foot price. The specifications and the contract of October 19, 1895, covering this allowance, are as follows: 'When the tunnel is partly in earth and partly in rock, the contractor will be paid an additional price per cubic yard for rock excavation over and above the unit price per lineal foot of tunnel in earth.'

"Fourth. It is further agreed that the time for the completion of said tunnel, as provided for in the contract of October 19, 1895, viz., October 1, 1897, shall be, and the same

is, hereby extended nine months from the last-mentioned date, to wit, to July 1, 1898.

"Fifth. In earth tunnel, or in tunnel which is excavated partly in earth and partly in rock, where extra masonry is directed to be placed between the upper quarters, outside the regular specified rings of brick work of the tunnel and the crown bars or planks to protect the work, the same shall be allowed and estimated at the price of ten (\$10.00) dollars per cubic yard.

"In testimony whereof the said parties of the first part have set their hands and seals, and the said city of Chicago has caused this supplemental agreement to be signed by its commissioner of public works, countersigned by its comptroller, and approved by its mayor, the day and year as above mentioned.

"Fred C. Weir,

"By His Attorney in Fact.

"John McKechney,

"John McKechney, Jr.,

"By _____.

"City of Chicago,

"By _____, Com'r of Public Works.

"Approved:

"_____, Mayor.

"_____, Comptroller."

(Executed in triplicate.)

The letter of Weir, McKechney & Co., addressed to the mayor of the city and dated June 28, 1898, is as follows:

"Chicago, June 28, 1898.

"Hon. Carter H. Harrison, Mayor, City of Chicago—Dear Sir—In accordance with your request, and for the purpose of expediting the completion of section 3, northwest land tunnel, we beg to confirm the statement made to your honor and the finance committee of the city council, June 27, 1898, as follows, viz.:

"First. That the city pay Weir, McKechney & Co. the amount of their estimate for work done and material furnished during the month of April, 1898, about \$30,000.00.

"Second. That the city pay Weir, McKechney & Co. such an amount of the fifteen per cent. reservation as shall be in proportion to the payments already made to the contractors on sections 1 and 2 of this tunnel.

"Third. That the city pay Weir, McKechney & Co. \$2,806.30 for expenses incurred in pumping water from the different shafts and maintaining the work in good condition from April 21, 1898, to May 23, 1898.

"Fourth. That the city pay Weir, McKechney & Co. the amount necessary to pump the water from the various shafts and prepare for the resumption of work.

"Fifth. That the city shall issue estimates in regular form twice each month for work which may hereafter be done, but shall pay on said estimates only the cost of the expenses of the work; the balance of said estimates and all other matters in controversy to abide the result of suits now pending.

"In consideration of the above the city of Chicago shall reduce to writing the stipula-

tion heretofore made to try the case, Gen No. 178,643, in the circuit court of Cook county, wherein Frederick C. Weir et al. are plaintiffs and the city of Chicago defendant, on or before July 29, 1898; and the city shall further stipulate that the plaintiffs shall amend their declaration so that the same shall include all matters of difference between the said Weir, McKechney & Co. and the city of Chicago up to the closing of the issues in said case, and that the issues in said case shall be closed not later than July 19, 1898. In case either party to said suit shall desire to appeal the same to the Appellate Court or Supreme Court, either one or both, then both parties agree to expedite the hearing of the same, either by stipulating to have the case advanced on the calendar of the court in which it may be pending, or otherwise, as may be thought best by the party desiring to have the case advanced.

"Very respectfully,

"Weir, McKechney & Co.

"L. D. Condee and T. A. Moran,

"Attys. for Weir, McKechney & Co."

The proceedings of the city council, hereafter referred to, and dated July 11, 1898, are as follows:

"The same committee to whom was referred the matter of the delay in the construction of the northwest land tunnel and the claim of Weir, McKechney & Co. submitted a report recommending the adoption of a certain agreement.

"Ald. Powers moved that the report be concurred in, that the resolution therewith be adopted, that the agreement be ratified, and that the whole subject-matter be published and placed on file. The motion prevailed by yeas and nays, as follows:

"Yeas—Coughlin, Kenna, Cook, Gunther, Alling, Fitch, Ballenberg, Jackson, Cloidt, Connor, O'Brien, Martin, Murphy, Flick, Bennett (8th ward), Novak, Hurt, Oullerton, Blewer, Duddleston, Colson, Francis, Neagle, Little, Ziehn, Beilfuss, Tuite, Smulski, Kunz, Walsh, Oberndorf, Brennan, Conlon, Haberkorn, Powers, Alwart, Brown, Mangler, Herrman, Upham, Lyman, Olson, Barry, Cannon, Hirsch, Griffith, Walker, Schlake, Kimbell, Butler, McCarthy, Bigane, McInerney, Carey, Reichardt, Boyd, Sproul, Badenoch, Nelson, Mavor, Wiora, Darcy, Bennet (34th ward), Math.—64. Nays—None."

The following is the report:

"Your committee would respectfully report that, pursuant to the order of this honorable council, passed on May 23, 1896, they have had under consideration the subject of the delay in the construction of the northwest land tunnel, the causes therefor, and the best method of hastening the completion of this great work. The committee invited the commissioner of public works, the city engineer, the corporation counsel and his assistants, the contractors and their counsel, and these gentlemen, through numerous sittings of the committee, have laid before us the causes

of the delay and the various contentions of the city and the contractors. The pressing need of the early completion of this work is apparent from the reports of the engineering department and of this honorable council, which appear throughout the proceedings of this council for the years 1893, 1894, 1895, 1896, 1897, and 1898, and is becoming more urgent as time goes by. The fact that this council, at the request of a great number of citizens, ordered the construction of so stupendous and beneficial a work, which the people of the west side so much need, shows the necessity for its early completion. The efforts that are being made by the department of public works to furnish temporary relief are commendable, but wholly inadequate. The delays in construction are caused by differences of opinion between the city officials and the contractors as to the rights of the city and the contractors under contracts for the construction of the tunnel, and as to section 3, under a certain supplemental agreement which has been acted upon during a long course of time. The questions relating to sections 2 and 3 are alike in some, but different in other, important respects, and the sections must be treated in this report separately. It appears that, after the execution of the original contracts between the city and contractors on sections 2 and 3 of the northwest land tunnel, the city authorities made certain changes in the location and western terminal points of both sections, and this council has authorized the construction of pumping stations at the western terminals of sections 2 and 3, as located by the department of public works, and the same are now far advanced in process of construction. These and other changes have given rise to much of the difficulty between the city and the contractors.

"The first contention considered by the committee was that with Weir, McKechney & Co., the contractors on section 3. The nature of the differences, its effect on the work of construction, and our conclusions and report thereon, are as follows:

"(1) We find that the firm of Weir, McKechney & Co., as city contractors, have been engaged in constructing section 3 of the northwest land tunnel for the city of Chicago under a contract dated October 19, 1895, and under a contract supplemental thereto, dated May 17, 1897.

"(2) We further find that complicated litigation now exists between the contractors on said section 3 and the city, involving many disputed questions both of law and fact, and that this litigation cannot be settled in the courts, in the ordinary course of events, for years to come. In the meantime the capital already invested in the enterprise would be idle and useless, and the people of the west side without water. In view of which fact we deem it important that some arrangement should be made by which work upon this section of the tunnel can be pushed to comple-

tion without waiting for the termination of the litigation, and which will protect both the city and the contractors in their rights as they may ultimately be decided in the lawsuits now pending; and to that end we recommend that an arrangement be made with said contractors to at once proceed in the work of completing section 3 of said tunnel upon the following basis:

"First. Commissioner of public works to issue an estimate to Weir, McKechney & Co. for the work done and material furnished for said tunnel during the month of April, 1898, amounting to about \$30,000.00, and that the comptroller pay the same.

"Second. That the comptroller pay to Weir, McKechney & Co. fifty per cent. of the amount now held by the city under the fifteen per cent. reservation clause in their contract.

"Third. That the city pay Weir, McKechney & Co. \$2,806.38 on account of expenses incurred in pumping water from the different shafts, to maintain the work in condition, from April 21, 1898, to May 23, 1898.

"Fourth. That the city pay Weir, McKechney & Co. the amount necessary to pump the water from the various shafts to prepare for the resumption of work.

"Fifth. That the commissioner of public works issue estimates in regular form twice each month for work which may hereafter be done; the city paying on such estimates only the cost of the expense of the work, and in no event paying more than the amount called for by such estimates.

"Sixth. That the pleadings in the pending suits between said contractors and the city be so changed as to cover and settle all controversies and matters at issue between the city and said contractors up to the time of the trial of said suits, and that said suits be advanced to a hearing at the earliest possible day, and that upon the hearing of said suits all questions in controversy shall be open for determination and decision, without prejudice to either party by the making of the arrangement under which work is resumed and the making of any payment thereunder, so that the final judgment or decree may be in accordance with the rights of the parties upon the merits as determined by the court, independent of such arrangement for the resumption of the work. In the final adjustment the city to receive credit for all moneys paid to said contractors on any account in connection with the construction of said section 3, and judgment to be rendered, if at all, against the city, for the balance due; and, in the event that an overpayment shall be found to have been made, the city to be entitled to recover the amount of such overpayment."

The resolution, hereinafter referred to, adopted by the city council on July 11, 1898, is as follows:

"Resolved, That the commissioner of public works be, and he is hereby, authorized, in making estimates for work done by Weir,

McKechney & Co. on section 3 of the northwest land tunnel pending the settlement of the questions at issue between said contractors and the city, to allow said contractors, in addition to the lineal foot price where the tunnel is in earth, \$6.00 per cubic yard for rock and for all material which shall be classified as rock; and where the tunnel is in earth, or partly in earth and partly in rock, to allow said contractors \$10.00 per cubic yard for all extra masonry directed to be placed between the upper quarters, outside of the regular specified rings of brick work of the tunnel and the crown bars or plank to protect the work—the making of said estimates in said manner and payments made thereon to be without prejudice to the rights of the city, and in no wise to affect the determination of the questions at issue between the city and said contractors.”

The agreement of October 8, 1898, herein-after referred to, is as follows:

“Articles of agreement made and entered into this eighth (8th) day of October, A. D. 1898, by and between the city of Chicago, the party of the first part, and Weir, McKechney & Co., the parties of the second part, witnesseth: That whereas, the said parties of the second part entered into a contract with the city of Chicago dated October 19, 1895, and a contract supplemental thereto dated May 17, 1897, for constructing section 3 of the northwest land tunnel in the city of Chicago, and subsequently entered upon the performance of the work covered by said contract; and whereas, during the progress of said work certain controversies in regard to the construction of the said contract, and of the rights of the said parties of the second part thereunder arose, which led to the suspension of further work under said contract; and whereas, the committee on finance of the city council of the city of Chicago made a report recommending that an arrangement should be made with said contractors to at once proceed in the work of completing said section 3 of said tunnel on a basis set forth in the said report, accompanying which said report was also a resolution, the adoption of which was recommended by said committee; and whereas, said report and resolution were adopted by the city council of the city of Chicago on the 11th day of July, 1898, which said report and resolution are shown upon pages 562 to 566, inclusive, of the printed proceedings of said city council of date July 11, 1898; and whereas, the said parties of the second part accepted the arrangement so proposed and ratified on behalf of the city of Chicago, and resumed work on said tunnel thereunder, and have received divers payments of money under said arrangement so authorized as aforesaid; and whereas, the said parties are desirous of evidencing the said arrangement by written agreement: Now, therefore, it is hereby mutually agreed between the parties hereto, as follows:

“First. That all work done by said parties

of the second part upon said section 3 of said northwest land tunnel since the 11th day of July, 1898, has been done under and in performance of the arrangement authorized by said city council as hereinbefore stated, and that all payments made by the city of Chicago to said parties of the second part since said 11th day of July, 1898, have been made by the city of Chicago and received by the said parties of the second part under said arrangement so authorized by the city of Chicago.

“Second. That said parties of the second part agree to proceed and complete the work called for by their said contract under the said arrangement, it being agreed that the commissioner of public works shall issue estimates in the regular form twice each month for work that may be done hereafter, the city paying on such estimates only the cost of the expense of such work, and in no event paying more than the amount called for by such estimates, and that pending the settlement of the questions at issue between the parties hereto the said contractors in said estimates shall be allowed, in addition to the lineal foot price where the tunnel is in earth, \$6.00 per cubic yard for rock and for all material which shall be classified as rock, and where the tunnel is in earth, or partly in earth and partly in rock, said contractors shall be allowed \$10.00 per cubic yard for all extra masonry directed to be placed between the upper quarters, outside of the regular specified rings of brick work of the tunnel and the crown bars or plank to protect the work; the making of said estimates in said manner and payments made thereon to be without prejudice to the rights of the city, and in no wise to affect the determination of the questions at issue between the city and the said contractors.

“Third. That the pleadings in the pending suits between the parties hereto shall be so changed as to cover and settle all controversies and matters at issue between the city and said contractors up to the time of the trial of said suits, and that said suits shall be advanced to a hearing at the earliest possible day, in accordance with resolutions passed by city council July 11, 1898, and that upon the hearing of said suits all questions in controversy shall be open for determination and decision without prejudice to either party by the making of the arrangement under which work has been resumed and the making of any payment thereunder, so that the final judgment or decree may be in accordance with the rights of the parties upon the merits as determined by the court, independent of such arrangement for the resumption of work. In the final adjustment the city shall be entitled to receive credit for all moneys paid to said contractors, on any account, in connection with the construction of said section 3; judgment to be rendered, if at all, against the city, for the balance due, and, in the event an over-payment

shall be found to have been made, the city to be entitled to recover the amount of such over-payment.

"In witness whereof the said city of Chicago has caused this agreement to be signed by its commissioner of public works, countersigned by its comptroller and approved by its mayor, and the said parties of the second part have hereunto set their hands and seals the day and year above written.

"The City of Chicago,

"By L. E. McGann, Com'r of Public Works.
"Approved:

"Carter H. Harrison, Mayor.

"Countersigned:

"R. A. Waller, Comptroller.

"Weir, McKechney & Co., [Seal.]

"Fred C. Weir, [Seal.]

"John McKechney, [Seal.]

"John McKechney, Jr. [Seal.]

The notice of forfeiture, hereinafter referred to, and dated June 22, 1890, is as follows:

"To John McKechney and John McKechney, Jr., as Surviving Partners of the Firm and Copartnership of Weir, McKechney & Co., Chicago, Illinois:

"Take notice that, whereas, your firm and you have repeatedly violated the provisions of that certain contract and agreement heretofore made and entered into by and between said firm and the city of Chicago on, to wit, the 19th day of October, A. D. 1895, for the construction by said firm of section three (3) of the northwest land tunnel, and that you are now continuing to violate the same; that as a part of such violation you have failed to proceed, and are now refusing and failing and omitting to proceed, with the work of constructing said tunnel in accordance with the requirements and conditions of said contract and agreement; that the rate of progress heretofore made and being now made by said firm and you in the construction of said tunnel was not and is not, in my judgment, as rapid as it should be, nor according to the requirements of said contract and agreement; that, whereas, in a portion of said tunnel the material is earth or clay, yet you have been, and were up to the 11th day of November, A. D. 1898, still excavating therein more than could be lined with masonry the same day, which was and is contrary to the provisions of said contract; that whereas, the contract and agreement provides that the excavation for the tunnel, when through firm clay, shall conform exactly to the outside of the masonry, and whereas, also, a portion of the excavation of the tunnel being constructed previous to November 11, 1898, was in such material, yet that nevertheless you have not made such excavation conform to the outside of the said masonry, as required by said contract and agreement; that in doing the work of constructing said tunnel you have been making excavations therefor a great deal larger than necessary, which is liable to cause injury to

said tunnel when completed; that the methods of construction heretofore pursued by said firm and you have been extravagant, reckless, and dangerous, thus greatly, unjustly, and wrongfully increasing the cost of the tunnel to the city of Chicago, the practice of your firm and you having been to make unnecessary excavations, which have been and are required to be filled with expensive masonry and timbering, and which has been done by your firm and you against the protest and objections of the engineer in charge of the work and of the city engineer; and whereas, your said firm and you did, on or about the 11th day of November, A. D. 1898, in violation of said contract, abandon and discontinue the construction of said section three (3) of the said tunnel, and have allowed portions of the same to remain in a very dangerous condition, and thereby causing the said city of Chicago great expense, solicitude, and annoyance, and you have also refused and omitted to protect the unfinished portions of said tunnel, so that great injury has been thereby caused to it and also to the buildings of certain citizens of Chicago upon the surface of the earth over said tunnel, and that you have unnecessarily, maliciously, and wrongfully, and in violation of said contract, delayed the construction of said tunnel greatly beyond the time provided for its completion in and by the provisions of the said contract; and whereas, your firm and you have also violated and are violating the said contract and agreement in other respects: Therefore, I, as commissioner of public works of the city of Chicago, do hereby and now, and from the delivery of this notice to you, declare the said contract and agreement forfeited as to the whole of said work provided to be done by the terms of said contract and agreement, and yet unfinished, and you are ordered and directed to at once discontinue all work upon said tunnel, and to at once remove all of your property therefrom.

"Chicago, June 22, A. D. 1890.

"L. E. McGann,

"Com'r of Public Works of City of Chicago."

Charles M. Walker, Corp. Counsel, Thomas J. Sutherland, and James E. Munroe, for appellant. Peck, Miller & Starr and L. D. Condee, for appellees.

MAGRUDER, J. (after stating the facts). The contractors, Weir, McKechney & Co., began work under the contract of October 19, 1895, in December of that year. They first sank a shaft at Keith street, northwest of the southeast end of section 3. Their next work was to sink a shaft at Potomac avenue, northwest from the Keith street shaft. After sinking these shafts they began to excavate for the tunnel both ways from the two shafts. They continued the work until August 1, 1896, and then stopped work. From the time they began their work in December,

1895, until they ceased working in July, 1896, the city paid them \$39,574.81. These payments were made in various sums, all the payments except the first two being made at the rate of two per month upon certified estimates, signed by the proper city officials. Upon these estimates are indorsed written receipts for the amounts so paid to them, signed by Weir, McKechney & Co., amounting altogether to the total sum above named. When the contractors, Weir, McKechney & Co., ceased work on August 1, 1896, they at once began a suit against the city. This suit grew out of differences of opinion between the city and the contractors as to the proper construction of certain provisions of the contract of October 19, 1895. This suit was begun in the circuit court of Cook county, and resulted in a judgment in favor of the plaintiffs therein on September 14, 1896. An appeal was taken from such judgment to the Appellate Court, and on December 31, 1896, the Appellate Court entered a judgment. Weir v. City of Chicago, 67 Ill. App. 247. An appeal was taken from the judgment of the Appellate Court to this court, and the decision of this court, embodied in an opinion filed on March 12, 1897, is reported as *City of Chicago v. Weir*, 165 Ill. 582, 46 N. E. 725. During the pendency of this litigation, from August, 1896, to the final termination thereof on March 12, 1897, very little work was done by the contractors in the construction of the tunnel; but they resumed work on November 14, 1896, in view of a threat by the commissioner of public works to cancel the contract, and during this period six payments were made to them, two in December, 1896, three in February, 1897, and one on March 1, 1897, amounting altogether to \$12,591.40. Substantially all of the payments thus made to the contractors during the period between August, 1896, and March, 1897, were receipted for under protest. Work was resumed in March, 1897, and between March 20, 1897, and December 1, 1897, and including those dates, the city paid to the contractors, Weir, McKechney & Co., the sum of \$283,094.86 upon certified estimates. The said sum of \$283,094.86 was paid out to Weir, McKechney & Co. in various amounts; the payments being made twice in each month during that period, and sometimes three payments were made in one month. Upon the certified estimates are indorsed written receipts, signed by Weir, McKechney & Co., for the amounts of such payments.

At this point, and on December 8, 1897, the contractors began this present suit against the city. Before proceeding to state the substance of the pleadings in the present action, it may be remarked that the contractors proceeded with the work of construction, and the city continued to make payments to the contractors, such payments being for the most part semimonthly payments, until about the 21st of April, 1898, when the contractors again abandoned their

work upon the tunnel. They did not resume work until about July 11, 1898, at the time of the proceedings by the common council of Chicago, set forth in the statement preceding this opinion. About July 11, 1898, work was again resumed, and continued with more or less regularity until November 11, 1898, when the contractors abandoned the work altogether, and never have since resumed it. The work of constructing the tunnel was unfinished on November 11, 1898, when the contractors finally abandoned it. Between the time when this suit was begun, and November 11, 1898, when the work was finally abandoned, the city paid to the contractors various sums of money, amounting altogether to the sum of \$283,455.59. The payments constituting this total amount were made between December 16, 1897, and November 1, 1898, including those dates, upon certified estimates, and for the most part at the rate of two payments in each month. These payments were duly receipted for without protest by the contractors in writing indorsed upon the estimates. The total amount paid to the contractors by the city between December 31, 1895, about the time when the construction of the tunnel began, and November 11, 1898, when the same was abandoned, was the sum of \$618,716.66. This sum, and the judgment rendered in this case for \$555,560.22, amount to \$1,174,276.88.

Besides the suit begun in August, 1896, and the present suit, begun on December 8, 1897, the contractors during the progress of the work brought at least three injunction suits against the city. The first injunction suit was brought by them against the city in March, 1898. In the beginning of that month the city engineer gave the contractors a written direction to raise the grade in certain drifts, and, although the specifications provided that the tunnel should be built on such grades as should be determined by the city engineer, they refused to obey the order, and procured an injunction from the superior court of Cook county restraining the city from enforcing the order. This injunction was subsequently dissolved. The second injunction suit, brought by the contractors against the city, was commenced on April 30, 1898. At that time the city engineer wrote a letter to the contractors, ordering them to brick up certain portions of the excavation in certain drifts of the tunnel; there being danger at those points that the tunnel would cave in. This order was not complied with, but the contractors obtained an injunction against the city from interfering with the work. This injunction was in force when the council proceedings of July 11, 1898, were had. At the time of the last suspension of the work, on or about November 11, 1898, the contractors filed a third bill for an injunction against the city. By this third bill they sought to prevent the city, through an injunction, from seizing the tunnel and machinery and forfeiting the contract. This last injunc-

tion was finally dissolved on June 16, 1899, one week before the beginning of the trial of this case; and on June 23, 1899, the day on which the trial began, the commissioner of public works served upon the contractors the notice of forfeiture of the contract of October 19, 1895, as the same is set forth in the statement preceding this opinion.

1. The Pleadings: In order to understand the present case, and the various points involved in the record, it will be necessary to state somewhat in full the very extraordinary condition of the pleadings in the case. When the suit was brought on December 8, 1897, the ad damnum was laid at \$68,000. On January 7, 1898, a declaration was filed. On March 5, 1898, a demurrer was filed to this declaration, and, after argument, was overruled, and the plaintiffs were given leave to increase the ad damnum to \$125,000. On November 28, 1898, the plaintiffs were granted leave to amend their declaration instantler by increasing the ad damnum to the sum of \$650,000, and to file their bill of particulars instantler, which they did. The sum total of the bill of particulars so filed on November 28, 1898, is \$620,833.18. On November 30, 1898, it appearing that the declaration which had been filed on January 7, 1898, had been lost, the court granted leave to the plaintiffs to file an amended declaration, which was substituted for the former declaration and filed on November 30, 1898. The declaration of November 30, 1898, consisted of five counts and the common counts. The first count alleged that the defendant was indebted to the plaintiffs in the sum of \$650,000 for work and materials furnished for the construction of the tunnel, known as "section 3 of the northwest land tunnel." The second count was substantially the same as the first. The third count alleged that on October 19, 1895, an agreement was made between the plaintiffs and the city that the former should build the water tunnel according to the terms, conditions, and specifications set forth in said contract, and that the defendant should direct the construction thereof, and alleged that said contract of October 19, 1895, was afterwards, on May 17, 1897, and on October 8, 1898, amended, modified, and changed by agreement, and that defendant was to pay plaintiffs according to a schedule of prices set forth in said contract and the modifications thereof, the payments to be made from time to time as the work progressed; that the city promised to fulfill said contract and the modifications thereof, but that the city refused to pay plaintiffs for their work and materials furnished in the construction of the tunnel. The fourth count also declared upon the contract of October 19, 1895, and the alleged modifications made therein by the contracts of May 17, 1897, and October 8, 1898, and alleged that the defendant promised to fulfill said contract and the modifications thereof, but that defendant did not direct plaintiffs to construct the tunnel at the grade,

or on the line, prescribed by said contracts, but required and compelled them to construct the tunnel at a different grade and in a different direction from the grade and direction provided for in and by said contracts, whereby the cost of the work was greatly and unnecessarily and unreasonably increased, and plaintiffs were compelled to expend large sums of money, to wit, the sum of \$3,000, as compensation for injuries to the property of third persons. The fifth count also declared specially upon the contract of October 19, 1895, and the alleged supplemental contracts or modifications of May 17, 1897, and October 8, 1898, and avers that defendant did not perform said contract, in that it did not properly direct the construction of the tunnel, but gave plaintiffs unreasonable, erroneous, incorrect, and contradictory directions in regard to the same, whereby the cost was unreasonably and unnecessarily increased. Demurrers filed by the city to these five counts were overruled as to the first and second and common counts, and sustained as to the third, fourth, and fifth counts.

On March 11, 1898, appellant had filed to the original declaration of January 7, 1898, which was subsequently lost, four pleas, including the general issue sworn to, and a plea of set-off, with a copy of account and bill of particulars accompanying the same. These pleas were lost, together with the declaration, and by stipulation between the parties copies of such pleas so filed on March 11, 1898, were refiled in said cause as substitutes for, and in place of, said original pleas and of said original bill of particulars and copy of account. The second plea so filed by the city on March 11, 1898, and a copy of which was subsequently refiled as a substitute for the lost original thereof, averred that the contract of October 19, 1895, together with the specifications attached thereto, was executed by the plaintiffs and the city, and further averred that no other or different contract, agreement, undertaking, or promise than as contained in said contract of October 19, 1895, with the specifications attached, was ever made by the city with the plaintiffs, or either of them, and that the promises set forth in the several counts of the declaration were those contained in said contract of October 19, 1895, and not otherwise, and that at the several times so named the defendant had not, by its city council or otherwise, made any appropriation of moneys for the payment of the several sums so promised to be paid, etc. The third plea, so filed by the city, alleged that at the time of the making of said contract of October 19, 1895, and of the promises alleged in the declaration, the city was indebted, in the aggregate, exceeding 5 per centum on the value of the taxable property therein, and within its limits, as ascertained by the last assessment for state and county taxes, etc. The fourth plea was a plea of set-off, alleging that plaintiffs were indebted to the city in the sum of \$540,000

for money before that time lent, paid, laid out, and expended, etc., and also for moneys before that time unlawfully paid to the plaintiffs by the agents and officials of the defendant, and without any authority from the defendant, and for overpayments of moneys of the city unlawfully before that time made to the plaintiffs, at their request, by the agents and officials of the city and without authority, and also for moneys before that time due to the city from the plaintiffs by reason of the delays of the plaintiffs in doing the work provided to be done by them in and by said contract of October 19, 1895, which sums of money, so due from the plaintiffs to the city, were alleged to exceed the damages sustained by the plaintiffs, etc. The copy of the account or bill of particulars attached to said fourth plea, or plea of set-off, set forth alleged unlawful and overpayments to said firm of Weir, McKechney & Co. for alleged and pretended rock excavation in tunnel, part earth and part rock, and in all earth, at \$6 per cubic yard; said payments amounting to \$101,836.74, and having been made at various dates and in various sums between March 23, 1897, and November 1, 1897, inclusive of both of said dates. Said bill of particulars or copy of account also set forth alleged unlawful payments to said firm for back masonry at \$10 per cubic yard, amounting altogether to \$102,959, and having been made at various dates and in various sums between June 3, 1897, and November 1, 1898, including both of those dates. Each overpayment for such excavation and back masonry is referred to in said bill of particulars as being contained in the various estimates made by the city and shown by the record. Other items are set forth in said bill of particulars, amounting altogether to \$195,841.18, being for alleged unlawful payments for back masonry at \$10 per cubic yard, and for timber unnecessarily used in certain drifts and one of the shafts of the tunnel at \$10 per thousand feet, amounting altogether to \$21,145.81; also certain payments alleged to have been made to employees of said firm, and for pumping and maintenance, and out of the reserve of 15 per cent., etc., amounting altogether to \$64,002.51; and also certain other alleged unlawful payments on account of rock excavation and amounts due as liquidated and fixed sums for delay in completion of section 3 of the tunnel under the contract at \$200 per day, amounting altogether to \$110,692.86. The total items of set-off, shown by the bill of particulars attached to the plea of set-off, filed as a substitute for the plea of March 11, 1898, amount to \$400,636.92. The first of the four pleas above named was the plea of general issue, and attached to the same was an affidavit of the corporation counsel of the city that the said plea and all the statements therein were true in substance and in fact.

On December 2, 1898, the plaintiffs below were given leave to file an additional count to their amended and supplied declaration,

which had been filed on November 30, 1898. Accordingly, on December 2, 1898, the plaintiffs below filed the first additional count to their declaration. This count set forth in *hæc verba* the contract of October 19, 1895, together with all the specifications thereto attached, also the alleged contract of May 17, 1897, unsigned by the city, and the contract of October 8, 1898, all of which are set forth in the statement preceding this opinion. After setting forth the instruments last above referred to, the first additional count alleges that, in consideration thereof and of the promises of the plaintiffs to construct said tunnel, the city promised the plaintiffs to perform said three contracts, but avers that the city has not done so, but refuses to pay plaintiffs for their work and materials done and furnished in the construction of the said tunnel, to the damage of the plaintiffs of \$650,000, for wages, materials, machinery, and other disbursements, etc. Said first additional count also alleges that the city did not direct plaintiffs to construct the tunnel at the grade or on the line described in the contract of October 19, 1895, but directed and compelled plaintiffs to construct said tunnel at a different grade, to wit, at a grade higher than that provided for in the contract, and in a different direction from that provided for in the contract, whereby the cost of the work was greatly increased, etc.; and it also alleged in said count that the city did not properly direct the construction of the tunnel, as required by the contract of October 19, 1895, but gave plaintiffs unreasonable and erroneous directions in regard to the same, etc.

The city demurred to the first additional count, so filed on December 2, 1898, and this demurrer was sustained. Thereupon plaintiffs were given leave to file two additional counts to the declaration, known as the "second additional count" and the "third additional count," which were so filed on December 21, 1898.

The second additional count averred the execution of the agreement of October 19, 1895, referring to the same as set out in full in the first additional count above referred to, and further averred that plaintiffs performed work upon the tunnel pursuant to the same under the direction of the commissioner of public works of the city, and to his satisfaction and approval; that according to a prevailing custom the city should have made estimates every two weeks of the amount of work done by the plaintiffs according to the prices fixed by the contract; that by said contract it was agreed that, if the rate of progress should be satisfactory to said commissioner, estimates in the usual form would be issued to the contractors, during the construction, for 85 per cent. of the value of the work done and in place at the time of issuing the same, the remaining 15 per cent. being reserved until the final completion of the work; that plaintiffs did the

work, and the rate of progress was at all times satisfactory to the commissioner, but the defendant did not and would not estimate every two weeks in the usual form for 85 per cent. of the value of the work done, and did not and would not pay to plaintiffs 85 per cent. of such value; that there was due to the plaintiffs prior to May 17, 1897, a large sum of money, to wit, \$300,000, which the city refused to pay to them. The second additional count then proceeds to aver that a further contract was made on May 17, 1897, as set forth in the first additional count; that plaintiffs proceeded with the work in accordance with the terms of said contract of October 19, 1895, as modified by the contract of May 17, 1897, and that, after the making of the latter contract, estimates for the work done should have been made every two weeks in accordance with said contract and the custom aforesaid; that plaintiffs were entitled to receive payment for said work in accordance with the terms of the original contract of October 19, 1895, as modified and supplemented by the contract of May 17, 1897; that the city did not pay the plaintiffs 85 per cent. of the value of the work, and would not allow and pay to plaintiffs for the materials encountered, that should be classified as rock, at the rate fixed in the contract of May 17, 1897, and would not allow plaintiffs for the extra masonry placed between the upper quarters outside the regular specified rings of brick work of the tunnel and the crown bars or planks to protect the work, as provided in the contract of May 17, 1897; that there was due to plaintiffs, prior to July 11, 1898, under said two contracts, large sums of money, to wit, \$300,000, which the city refused and still refuses to pay; that prior to July 11, 1898, certain differences arose between plaintiffs and the city, and on or about June 28, 1898, plaintiffs addressed to the mayor of the city a proposition, dated June 28, 1898, which is set forth in the statement preceding this opinion, and which said second additional count also set forth in *hæc verba*. The second additional count further avers that, on or about July 11, 1898, the city council adopted a certain resolution, which is set forth in *hæc verba* in the count, and a copy of which is also set forth in the statement preceding this opinion. The second additional count then avers that such resolution was approved by the mayor, and that, in accordance with said proposition of plaintiffs and said resolution, plaintiffs proceeded with the construction of the tunnel, and on October 8, 1898, there was executed by the plaintiffs and the city a contract, dated October 8, 1898, which is set forth in the statement preceding this opinion, and which is referred to in the count as being set out in said first additional count; that after July 11, 1898, and after the execution of the contract of October 8, 1898, plaintiffs proceeded to carry on the work called for by the original contract and by

the supplemental contract of May 17, 1897, in accordance with the terms thereof, and in pursuance of the arrangements made by the letter of the plaintiffs to the mayor and said resolution of July 11, 1898, and under the terms of the contract of October 8, 1898; that it was the duty of the commissioner of public works to issue estimates twice each month for work done, and to pay on such estimates the cost of the expense of such work, and to allow, in addition to the lineal foot price where the tunnel was in earth, \$6 per cubic yard for rock and for all material which should be classified as rock, and where the tunnel was in earth, or partly in earth and partly in rock, it became the duty of the city to allow plaintiffs \$10 per cubic yard for the extra masonry directed to be placed between the upper quarters outside the regular specified rings of brick work of the tunnel and the crown bars or planks to protect the work; that plaintiffs laid out large sums of money for material and labor, and the city would not issue estimates to them, nor pay on said estimates the costs and expenses incurred by them, and did not allow to said plaintiffs, in addition to the lineal foot price, the \$6 per cubic yard and the \$10 per cubic yard above mentioned; that after July 11, 1898, large sums of money became due to plaintiffs for rock, and material classified as rock, excavated, and for extra masonry placed as above specified, to wit, the sum of \$300,000, which the city refuses to pay plaintiffs, to their damage of \$350,000.

The third additional count, so filed on December 21, 1898, makes substantially the same averments as the second additional count, and sets forth and refers to the same instruments in writing and alleged contracts. The third additional count avers that said contract of October 8, 1898, upon its execution, immediately became a part of the agreement between the plaintiffs and the defendant for the construction of said tunnel; that the city promised to give plaintiffs proper and reasonable directions for the construction thereof, on a line within the area shown as colored on a certain map made by the officers of the city and attached to the original contract, and at such a grade that the depth of the center line of said tunnel should be approximately between 75 and 85 feet below Chicago city datum, the plaintiffs being required by said contract to obey such directions; that the city also promised that it would issue estimates twice every month for 85 per cent. of the value of the work done as above stated, and would pay such estimates upon their presentation to the comptroller, and would allow to plaintiffs for timbers and boards, used in supporting the soil in the excavation and left permanently in the work, at the rate of \$10 per thousand feet board measure, and would allow plaintiffs for excavation, etc., at the rate of \$6 per cubic yard as above stated, and also \$10 per cubic yard for extra masonry as above stated.

ed; that plaintiffs have in all things performed said three contracts, yet the city did not give them reasonable directions, but gave them unreasonable and contradictory directions, whereby the cost of the work was unnecessarily and unreasonably increased, to wit, in the sum of \$300,000, without any corresponding increase in the compensation of plaintiffs therefor; that the city did not direct the tunnel to be run at the grade, or on the line, required by the contracts, but required plaintiffs to construct the same on a line outside the area above mentioned, and with a grade much higher than that described in the contracts, to wit, at a grade of but 65 feet below Chicago city datum, whereby the cost of the work was greatly increased in the sum above named, and whereby plaintiffs expended large sums of money, as compensation for injuries to the property of third persons, caused by constructing the tunnel at such changed grade; that the city did not issue estimates twice every month for 85 per cent. of the value as above specified, and did not pay plaintiffs the cost of the expense of the work, and did not allow them the \$6 per cubic yard for excavation and \$10 per cubic yard for extra masonry as above set forth, and did not allow them \$10 per thousand feet, board measure, for the timbers used in supporting the soil and left permanently in the work; that in carrying on the work the plaintiffs paid out large amounts of money, to wit, \$500,000, for material and labor; that there is now due to them from the city, under the contract of October 19, 1895, and the confirmatory contracts of May 17, 1897, and October 8, 1898, a large sum of money for work done, etc., to wit, \$650,000, which the city refuses to pay.

Demurrer was filed by the city to the second and third additional counts of the amended declaration, and was overruled.

On March 10, 1899, the death of Frederick C. Weir was suggested, as above stated, and the cause proceeded at the suit of the present appellees.

On April 1, 1899, the city filed four pleas to the second and third additional counts of the plaintiffs as above set forth. The first of these pleas was the general issue, sworn to. The second plea alleged the execution of the contract of October 19, 1895, and averred that it constituted the only promise and undertaking of the city, as charged in the declaration, and that no other or different contract, agreement, undertaking, or promise than as contained in said contract of October 19, 1895, in writing, with said specifications attached, was ever made by the city with the plaintiffs, or any or either of them, and that all the promises set forth in the several counts of the declaration of the plaintiffs are those contained in said contract of October 19, 1895, and not otherwise. This plea also sets up that the city council did not make any appropriation of moneys for the payment of the sums so promised to be

paid as aforesaid. The third plea is the same as the third plea already set forth, alleging that, at the time of the execution of the contract of October 19, 1895, the city was indebted in the aggregate exceeding 5 per cent. of the value of the taxable property, etc. The fourth plea was a plea of set-off, alleging the indebtedness of the plaintiffs to the city in the sum of \$540,000, and alleging overpayments by the city to the plaintiffs, unlawfully made, as alleged in the plea of set-off already described.

On April 7, 1899, the plaintiffs filed a similiter to the plea of the general issue, and demurred to the second, third, and fourth pleas filed by the city. Subsequently, on May 25, 1899, the plaintiffs filed two replications to the second plea of the city. The first replication, in reply to the statement that the city had not made any appropriation, etc., set up the proceedings in the suit begun in August, 1896, and the judgments therein by the trial court, the Appellate Court, and the Supreme Court as *res judicata*. The second replication sets up that the city of its own wrong broke the promises in the declaration mentioned. The plaintiffs also filed two replications to the third plea. In the first replication, as to the statement that the city was indebted in the aggregate exceeding 5 per cent., the proceedings and judgments in the suit begun in August, 1896, are pleaded as *res judicata*. The second replication to the third plea merely avers that the city of its own wrong, etc., broke the promises in the declaration and each count thereof mentioned.

On June 23, 1899, the city filed a rejoinder to the first replication to the second plea, which was in effect a plea of *nul tiel record* as to the judgments mentioned in the plea. The city also filed a rejoinder to the first replication to the third plea, which was also in substance a plea of *nul tiel record*. The city also filed a second rejoinder to the first replication to the second plea, setting up that the contract referred to in the suit begun in August, 1896, was not the same contract as that upon which the present suit is brought, but was another and different contract. The second rejoinder filed by the city to the first replication of plaintiffs to the third plea is substantially the same as the second rejoinder to the first replication to the second plea.

On May 26, 1899, the cause was set down for trial for Monday, June 19, 1899. Subsequently the city asked and obtained leave to withdraw its third plea, filed on April 1, 1899. On June 23, 1899, the trial of the cause commenced, and the jury was impaneled. On July 3, 1899, during the trial, and on the eleventh day after the trial had begun, an order was entered, on the motion of the attorneys of the plaintiffs, permitting all papers and proceedings to be amended by increasing the *ad damnum* to \$1,000,000, and, on like motion, the plaintiffs were given leave to file additional counts *instantly*, and

to file an additional bill of particulars instant; and it was ordered that said additional counts and additional bill of particulars be filed nunc pro tunc as of June 23, 1899. Accordingly, two additional counts, known as the fourth and fifth additional counts, were filed to the plaintiffs' declaration on July 3, 1899, nunc pro tunc as of June 23, 1899, entitled in the cause of John McKechney and John McKechney, Jr., as surviving partners of Frederick C. Weir, John McKechney, and John McKechney, Jr., against the city of Chicago. At the same time, to wit, July 3, 1899, the plaintiffs were permitted to file, nunc pro tunc as of June 23, 1899, an additional bill of particulars, the sum total of items therein being \$830,340.29. Subsequently, on July 8, 1899, plaintiffs were permitted to file an additional bill of particulars, the items in which amounted altogether to \$19,118.95, and subsequently, on July 13, 1899, plaintiffs were permitted to file another bill of particulars amounting to \$63,155.05, including the \$19,118.95 already mentioned.

The fourth additional count filed by the plaintiffs on July 3, 1899, nunc pro tunc as of June 23, 1899, sets up the execution of the contract of October 19, 1895, the beginning of the work thereunder under the direction of the commissioner of public works of the city, etc., and avers that such work was done to the entire satisfaction of said commissioner; and after setting up the provisions of the contract as to estimates, and the alleged custom as to the giving of such estimates every month, and the alleged execution of the contract of May 17, 1897, and after setting forth said letter of June 28, 1898, to the mayor, and the resolution of the city council passed on July 11, 1898, and after further setting up the making of the alleged contract of October 8, 1898, and the making of the promises by the city to give plaintiffs proper directions for the construction of the tunnel on a certain line within the area shown on a certain map made by officers of the city, and at such a grade that the depth of the center line of said tunnel should be approximately between 75 and 85 feet below Chicago city datum, and to issue estimates to the plaintiffs twice every month for 85 per cent. of the value of the work, and to pay such estimates upon presentation to the city comptroller, and to allow plaintiffs for the timbers and boards used as above stated at the rate of \$10 per thousand feet, and after further setting up the alleged promises of the city to allow plaintiffs for all materials encountered in earth tunnel that was rock, or of such a nature as to be classified as rock, at the rate of \$6 per cubic yard, in addition to the lineal foot provided for by said original contract, and after further setting up that by the contract of October 8, 1898, and said resolution, the city agreed to allow the plaintiff, where the tunnel was in earth, or partly in earth and partly in rock, \$10 per

cubic yard for all extra masonry directed to be placed between the upper quarters outside of the regular specified rings of brick work of the tunnel and the crown bars or planks to protect the work, and after further alleging that plaintiffs always performed said three contracts on their part, the count then charges that the city did not give the plaintiffs proper or reasonable directions for the construction of the tunnel, but gave unreasonable, erroneous, incorrect, and contradictory directions, whereby the cost of the work was greatly increased, to wit, in the sum of \$300,000, without any corresponding increase in plaintiffs' compensation therefor, and that defendant did not direct the tunnel to be run at the grade or on the line required by said contract, but required it to be constructed on a different line and with a higher grade. to wit, at a grade of but 65 feet below Chicago city datum, whereby the cost was greatly increased, to wit, in the sum of \$500,000, etc.; and it is therein further alleged that defendant did not issue estimates twice every month for 85 per cent. of the value, etc., and did not allow the price of \$6 per cubic yard for excavation, and \$10 per cubic yard for back masonry, as above alleged, and did not allow \$10 per thousand feet, board measure, for timbers and boards used as aforesaid; and it is charged that plaintiffs laid out large amounts of money, to wit, \$500,000, for material and labor.

The fourth additional count, after making the averments above stated, which are substantially the same as those made in the second and third additional counts, then proceeds to make additional allegations, not contained in any previous count, and constituting new issues, not theretofore formed or made in the case. The additional allegations, thus incorporated into the declaration by the fourth additional count during the trial of the cause, and after more than half of the time of such trial had passed, were substantially as follows: That the city issued to the plaintiffs certain pretended estimates, which were incorrect and purported to certify the value of the work at amounts less than the actual value of the work done and materials furnished. The fourth additional count then proceeds to aver as follows: "That the said mistaken and erroneous estimates, so furnished and issued by the said city, were so issued by the mistake and fraud and fraudulent purposes and acts of the officers of said city, and for the fraudulent and wrongful purpose of depriving plaintiffs of the compensation to which they were justly entitled under the said contract and supplemental contract, and proposition and resolution, and for the purpose of making the said contracts, and the rights and obligations of plaintiffs thereunder, as hereinbefore stated, so burdensome and unprofitable as, if possible, to induce and compel these plaintiffs to abandon the same." It is further averred in said fourth additional count that

the city sometimes required extra work to be done, and ordered work to be done and materials to be furnished which were in the nature of extra work, and sometimes gave written orders therefor, and sometimes required such extra work to be done without giving written orders therefor. The count then makes the following allegation: "That said original contract was so modified that the said supplemental agreement, proposition, resolution, and stipulation were, by the mutual agreement and consent of the parties, substituted for and accepted and adopted as the written orders for extra work required by the provision in the original contract, requiring that 'no payment will be made for any extra work not specified in this contract, unless such extra work shall have been done by the written order of the commissioner of public works, to be attached to such contract, directing the same, and stating that such work is not included in the contract, what extras are, and that such extras are necessary to the proper completion or for the security of the work previously done, and the reasons therefor,' and that said requirements of said original contract, in respect to written orders for extra work, were by the mutual agreement of the parties, and by the acts of the parties, and by the acts of the defendant in ordering and requiring such extra work to be done and issuing estimates therefor and making payments therefor, waived and abandoned." The count then further proceeds to allege "that after the making of said contract of October 19, 1895, to wit, on the 1st day of December, 1895, the defendant waived the provision and requirement of said contract of October 19, 1895, that the contractor must deliver to the commissioner of public works, on or before the 10th day of each month, a written statement of amount of claims for extra work done and extra materials furnished during the previous month, or for extra expenses incurred from any cause whatever, otherwise claims for extras during the month would be forfeited and waived, and waived each and every part thereof; and that thereafter, and after the 10th day of each month, to wit, on the 11th day of each month thereafter, thence hitherto, the defendant and the commissioner of public works accepted and received written statements of the amount of claims, and also oral statements of other claims for extra work done and extra materials furnished during the previous month, and for extra expenses incurred, with like effect as if such statements for each month were written statements and were delivered to the commissioner of public works on or before the 10th day of the succeeding month," etc.

The count then proceeds to set up the fact that the city maintained waterworks and a water system under the statutes of the state, and collected water rates or rents for water furnished by it, and kept the income

therefrom in a separate fund, known as the "water fund"; that the contracts for the construction of water tunnels have been silent since 1872 as to the fund from which payments therefor were to be made, and payments on such contracts have been made from said water fund, and up to the time of making the tunnel contract herein no express appropriation of money from said water fund was ever made to pay for the construction of any of the water tunnels which were a part of said waterworks or system; that the moneys provided to be paid to plaintiffs by said original and supplemental contracts, proposition, resolution, and stipulation were payable out of, and understood to be payable out of, said water fund. The count further avers that the issue of said estimates and the making of said payments were necessary in order to enable plaintiffs to complete the work within the time contemplated by the contract; that the performance thereof was made a condition precedent to the performance by plaintiffs of the things on their part to be performed. The count then charges that the city withheld said estimates and payments, and refused to make same, and made such fraudulent and false estimates as aforesaid, for the purpose of making the performance of said contract, as so modified, so burdensome, injurious, and disastrous to these plaintiffs as would make it impossible for these plaintiffs to perform the same and induce them to abandon the contract. The count then averred that plaintiffs have not abandoned the contract and are in possession of the work, and insist upon the performance of the contract by the city as modified; "that by reason of the said wrongful, fraudulent, and mistaken acts and misconduct of the defendant, its officers, and agents, as aforesaid, these plaintiffs have been prevented from completing the performance of said work and finishing the said tunnel within the time contemplated by said contract, and the city of Chicago is solely responsible for the noncompletion of said work;" that by reason of said wrongful misconduct the machinery of plaintiffs has been tied up, and they have been prevented from completing the work with the same, and entering upon other work, and have been deprived of the use of their plant in other work; that the city, "in further pursuance of said wrongful and fraudulent purpose, has seized upon certain of said plants and machinery, and taken and appropriated the same, and carried off, and deprived the plaintiffs of the possession thereof, to the damage of the plaintiffs in the sum of, to wit, \$75,000." The count further alleges that defendant did not and would not perform the said three contracts, "but, on the contrary, said defendant willfully, wrongfully, fraudulently, capriciously, arbitrarily, unreasonably, and without any reason or cause, and contrary to the provisions of said contracts, and each of them, on, to wit, the 23d of June, A. D. 1899, at, to wit, the county of

Cook aforesaid, assumed to declare said contracts, and each of them, rescinded and forfeited, and assumed to declare and did declare the rights of these plaintiffs under said contracts, and each of them, then and there terminated, and in a like manner assumed to and did notify plaintiffs that the said contracts were then and there ended, rescinded, forfeited, terminated, and abandoned, and then and there abandoned and refused to perform said contracts and each of them," etc.; that the city put an end to the further performance thereof by the plaintiffs, and notified them to surrender possession of the work and the tunnel, attaching said notice of forfeiture to the count as "Exhibit A," the said notice being the same as that which is set forth in full in the statement preceding this opinion.

The count then averred that the city wrongfully seized and took possession of the machinery, plant, tools, fixtures, equipments, and property of the plaintiffs used by them in carrying on said work, which were of great value, to wit, of the value of \$100,000; that plaintiffs were willing and offered to continue in the performance of the work, and to complete the same, and have ever since been willing to perform the same, but the city wrongfully, arbitrarily, and without cause refused to permit plaintiffs to continue to perform the work, and on June 23, 1899, prevented plaintiffs from proceeding to complete the work, and hindered and prevented them from so doing, "whereby the said plaintiffs have lost and have been deprived of the earnings, considerations, and moneys which would have accrued to and become due unto these plaintiffs from said defendant, by their further performance and completion of their said work, and their said agreements and undertakings, and whereby the plaintiffs have lost and have been deprived of the profits and advantages which they otherwise would have derived and acquired from the completion of said work and performance of said contracts and the promises on their part to be performed, which earnings, considerations, moneys, profits, and advantages then and there amounted to a large sum of money, to wit, \$650,000." The count further avers that by reason of the wrongful repudiation of said contracts by the city, and its wrongful acts in assuming to forfeit the same, and in discharging the plaintiffs from further performance thereof, and preventing them from further performing the same, and seizing said work, and depriving them of the possession thereof, the right of the said defendant to retain the remaining 15 per cent. of the amount earned and to be earned was terminated; that the defendant still retains said 15 per cent., and that the same is due and payable unto plaintiffs, but defendants refuse to pay the same; that by reason of the conduct of the city said tools, plant, machinery, fixtures, and equipment have become of no value to the plaintiffs and utterly lost to

them, whereby they have suffered damage in the sum of \$250,000; and that there is due to them from the city on account of the non-performance of said contract a large sum of money, to wit, \$650,000, being the amount of damage by reason of the wrongful termination, abandonment, and forfeiture of the contracts, and prevention of plaintiffs from completing the same, and by reason of the premises the city became indebted to the plaintiffs in the sum of \$1,000,000.

The fifth additional count to the declaration makes the same allegations as the fourth additional count, except that it goes into more detail, giving figures and amounts as set up in the itemized bill of particulars filed with the declaration. It sets up the same allegations in regard to the refusal to give estimates, to pay the amounts mentioned in the alleged supplemental contract, and also charges the giving of fraudulent and pretended estimates. It also sets up "that said original contract was so modified that said supplemental agreement, proposition, resolution, and stipulation were by the mutual agreement and consent of the parties substituted for, and accepted and adopted as, the written orders for extra work required by the provisions in the original contract," as above set forth. It also alleges that said requirements of said original contract in respect to written orders for extra work were by the mutual agreement and by the acts of the parties, and by the acts of the defendant, etc., waived and abandoned. It contains the same allegations in regard to waiver of the provision as to the delivery to the commissioner of public works, on or before the 10th day of each month, of a written statement of amount of claims for extra work, as are contained in the fourth additional count. It also adds that the city refused to make said estimates and payments as aforesaid, but made such mistaken, improper, fraudulent, and false estimates for the said fraudulent purpose of making the performance of said contract, as so modified, so burdensome, injurious, unprofitable, and disastrous to plaintiffs as would make it impossible for plaintiffs to perform the same, and as would induce plaintiffs to abandon said contract. It further alleges "that, by reason of the said wrongful, fraudulent, and mistaken acts and misconduct of the defendant, plaintiffs have been prevented from completing the performance of said work and finishing said tunnel within the time contemplated by said contract," and that "said city of Chicago, in pursuance of said wrongful and fraudulent purpose, has seized upon certain of said plants and machinery, and taken and appropriated the same, and deprived the plaintiffs of the possession thereof," etc. The fifth additional count charges that, by reason of the alleged refusal of the city to be bound by the terms of said contracts, said tools, plant, machinery, fixtures, and equipment have become of no value to the plaintiffs, and utterly lost to

them, whereby they have suffered damage in the sum of \$250,000; that the city by its wrongful acts has further damaged plaintiffs, and is indebted to plaintiffs in the further sum of \$35,000 for the cost of maintenance, and in the further sum of \$20,000 for interest upon the moneys of plaintiffs invested in said plant, etc., and in the further sum of \$75,000, withheld by the city from the payments to be made to plaintiffs as the so-called 15 per cent. reservation, and in the further sum of \$25,000 by depreciation in value of said plant, etc., caused by the wrongful acts of the city, and in the further sum of \$100,000 for special damages to plaintiffs by preventing them from completing the work; and there is due to plaintiffs from the city a large sum of money, to wit, \$650,000, being the amount of damage by reason of the wrongful termination of said contracts and the prevention of plaintiffs from completing the same; and that the city is indebted to the plaintiffs in the sum of \$1,000,000, etc.

On July 6, 1899, the city filed an amended copy of account in support of their plea of set-off. The city also filed on July 6, 1899, a plea of the general issue, sworn to, and a further plea setting up the execution of the contract of October 19, 1895, and the specifications thereto attached, and alleging that said contract of October 19, 1895, constituted and was the only promise and undertaking of the city referred to and charged in said counts, and each of them, and that no other or different contract, undertaking, or promise than as contained in said instrument in writing dated October 19, 1895, was ever made by the city to or with the plaintiffs, or any of them, etc.

2. The effect of the new allegations made by the fourth and fifth additional counts to the declaration, and of the new issues formed by such allegations during the trial and at a time when the trial of the cause was approaching its close. The original contract of October 19, 1895, which is admitted by both sides to have been executed and to be binding upon both parties, provides, among other things, that "no payment will be made for any extra work not specified in this contract, unless such extra work shall have been done by the written order of the commissioner of public works, to be attached to such contract, directing the same, and stating that such work is not included in the contract, what the extras are, and that such extras are necessary for the proper completion of, or for the security of the work previously done, and the reasons therefor." The additional counts, filed on July 3, 1899, after the trial of the cause had lasted some 11 days, averred "that said original contract was so modified that said supplemental agreement, proposition, resolution, and stipulation were, by the mutual agreement and consent of the parties, substituted for, and accepted and adopted as, the written orders for extra work required by

the provisions in the original contract," as above quoted.

The first instruction given for the plaintiffs upon the trial below was as follows: "The jury are instructed that if they believe, from the evidence, that plaintiffs performed labor and furnished materials for the city of Chicago in the construction of section 3 of the northwest land tunnel in question under and in accordance with the terms of a contract or contracts therefor between the plaintiffs and the defendant, as alleged in the declaration, or any count thereof, and that the plaintiffs have not been paid therefor, then the plaintiffs are entitled to recover herein for the same at the price or prices fixed by such contract or contracts therefor." By this instruction the attention of the jury was called specifically to "the terms of a contract or contracts * * * as alleged in the declaration or any count thereof." The fourth and fifth additional counts, filed in the midst of the trial, were as much a part of the declaration as any of the other counts thereof, and are included within the meaning of the expression "any count thereof." Therefore the minds of the jury were directed to the new contract set up in the new and additional counts. These counts alleged that there was an agreement between the parties, by the terms of which the supplemental agreement of May 17, 1897, and the proposition to the mayor of June 28, 1898, and the resolution of July 11, 1898, and the stipulation made on October 8, 1898, were substituted for, and accepted and adopted as, the written orders for extra work, required by the original contract. There is no evidence whatever in the record, so far as we have been able to discover, that any agreement was made between the city and the plaintiffs by which the documents and instruments last referred to were to be regarded as substitutes for the written orders required by the contract of October 19, 1895. The first instruction given for the plaintiffs was broad enough in its terms to include this contract, and, as applicable to that contract, the instruction was erroneous because there was no evidence upon which to base it. By the instruction the right of the plaintiffs to recover was based upon the condition that they had performed labor and furnished materials in accordance with the terms of any contract mentioned in any count of the declaration. The contractors were not to be paid for extra work, except where it was done by the written order of the commissioner of public works. The first instruction told the jury that the parties had agreed to accept certain instruments in writing as substitutes for the written orders so required. There being no evidence to support the existence of any such contract as that, the instruction was wrong.

Again, the additional counts charge the city with making false and fraudulent estimates

for the fraudulent purpose of depriving plaintiffs of the compensation to which they were entitled, and for the purpose of making the contracts so burdensome and unprofitable to them as to compel them to abandon the work. So far as we have been able to discover, there was no proof whatever in the record to sustain this allegation of the additional counts. The notice of the forfeiture of the contract of October 19, 1895, attached as an exhibit to the fourth additional count, is alleged to have been served upon the plaintiffs as a part of the alleged fraudulent conduct of the city as thus specified. By the terms of the contract of October 19, 1895, it was provided that if the rate at which the work should be performed should not, in the judgment of the commissioner of public works, be such as to insure its progress and completion in the time and manner stipulated, or if the work should be wholly or in part improperly constructed, the commissioner of public works of the city had the right to declare the contract forfeited as to a portion or the whole of the work and to relet the same. In pursuance of the power conferred by the original contract the notice of forfeiture was served, and yet the giving of that notice, and the action of the city taken under and in pursuance of it, are charged in the additional counts to be the culmination of a fraudulent scheme to compel the plaintiffs to abandon the work. The fifth instruction given for the plaintiffs begins as follows: "If the jury believe from the evidence that the defendant wrongfully seized and appropriated to its own use the plant or property of the plaintiffs, in manner and form as averred in the declaration, or any count thereof, then the plaintiffs are entitled to recover," etc. By this instruction the attention of the jury was directed to the additional counts, which charged the fraud therein alleged against the city. The right of the plaintiffs to recover was conditioned upon the finding of the jury that the city had seized the plant of the plaintiffs in pursuance of a fraudulent scheme to compel the plaintiffs to quit the work. As there was no evidence whatever of any such fraudulent scheme on the part of the city, this instruction clearly was not based upon the evidence.

3. One of the principal questions in the case relates to the alleged contract of May 17, 1897. It is claimed by appellees that the contract was valid and a binding obligation upon the city. On the other hand, it is contended by the city that the contract was void and invalid, and that the city was not bound thereby, or by any of the actions of the parties taken thereunder. The contract of May 17, 1897, was signed by the members of the firm of Weir, McKechney & Co., the contractors, but was never signed by the city of Chicago, or by any of its officials. It was claimed by the contractors that, after making excavations for the purpose of constructing the tunnel in rock and in earth sep-

arately, they began to make their excavations through a new material, called by them "conglomerate," a substance claimed by them to be like neither rock nor earth, but classified as "material encountered in earth tunnel that is rock or of such a nature that it is classified as rock." One of the witnesses defined "conglomerate" as "rock formed by the cementing together of gravel stones and boulders by argillaceous and silicious cement, making it rock; a homogeneous mass, so that, when it breaks, it doesn't separate the pebbles, but breaks as one mass." "Conglomerate" is defined as rock composed of particles of pre-existent rocks cemented together, so as to make a uniformly solid substance. 1 Cent. Dict. p. 1191; Webster's Int. Dict. tit. "Conglomerate"; Standard Dict., same title. The contractors claimed that this conglomerate substance or material was not provided for in the original contract of October 19, 1895, and that, therefore, they were not obliged to make excavations through it at the prices fixed by the contract of October 19, 1895. Accordingly, as the testimony tends to show, some verbal arrangement was made with a former superintendent of public works of the city, named Downey, by which the contractors were to be allowed \$6, instead of \$2, per cubic yard for rock excavation, and \$10 per cubic yard for back masonry, instead of nothing for such back masonry. The price allowed by the contract of October 19, 1895, for rock excavation over and above cost of lineal foot of tunnel or shaft, was \$2 per cubic yard, so that the allowance of \$6 per cubic yard by the alleged contract of May 17, 1897, was an increase over the amount allowed by the former contract. As will appear hereafter, the contract of October 19, 1895, allowed nothing for back masonry, and the alleged contract of May 17, 1897, in providing for a payment to the contractors of \$10 per cubic yard for such back masonry, made a material change in the terms of the former contract in this respect. Some time in April, 1897, Downey went out of office, and a new superintendent of public works by the name of McGann was appointed by the mayor. The unsigned contract of May 17, 1897, was prepared by the contractors, or in their interest, as embodying the former verbal arrangement with Superintendent Downey. The contract of May 17, 1897, after being drafted and signed by Weir, McKechney & Co., was presented to Superintendent McGann, but was never signed by any city official. McGann testifies that he never said that he would sign the contract of May 17, 1897, or execute it; that he never asked McKechney to sign it; that its terms were never agreed to or assented to by him.

The question, then, arises as to whether this alleged contract of May 17, 1897, which was never signed by the city, or any of its officials, was a valid and binding contract, so far as the city was concerned. Undoubt-

edly the city officials, after May 17, 1897, paid from time to time to the contractors for material encountered in earth tunnel that was rock, or of such a nature that it was classified as rock, at the rate of \$6 per cubic yard in addition to the lineal foot price; and also, in earth tunnel, or in tunnel which was excavated partly in earth and partly in rock, where extra masonry was directed to be placed between the upper quarters outside the regular specified rings of brick work of the tunnel and the crown bars or planks to protect the work, the city paid the contractors the price of \$10 per cubic yard for such back masonry. Such back masonry is thus defined in *City of Chicago v. Weir*, 165 Ill. 582, 46 N. E. 725: "In blasting the opening in the rock for the tunnel, owing to the formation of the rock, the opening was in many places made larger than was required for the tunnel. This space had to be filled up with brick work, which is called 'back masonry.'" But the evidence tends to show that these amounts of \$6 per cubic yard for rock excavations and \$10 per cubic yard for back masonry were paid by the city in order to secure a continuation of the construction of the tunnel and prevent the stoppages of work by the contractors which had occurred. Such amounts, if in excess of what the city was authorized to pay, were to be paid back to the city, or to be deducted from the moneys due to the contractors, which were held in reserve. In the case of *City of Chicago v. Weir*, supra, this court had decided that, where an overpayment had been made upon this same contract of October 19, 1895, by the city to the contractors, such overpayment might properly be deducted from whatever sum might be due to the contractors for any portion of the work. The contract of October 19, 1895, had provided that, if the rate of progress in the construction of the tunnel should be satisfactory to the commissioner of public works, estimates in the usual form would be issued to the contractors, during the making of the improvements, for 85 per cent. of the value of the work done and in place at the time of issuing such estimates, and the remaining fifteen per cent. should be reserved until the final completion and acceptance of said work. The intention was that any overpayments which might be made should be taken by the city out of the 15 per cent. so reserved. The fact, therefore, that the city may have paid out from time to time the amounts named in the contract of May 17, 1897, did not establish the adoption or acceptance of that contract by the city as a binding obligation.

The main ground upon which it is claimed by appellees that the contract of May 17, 1897, though never signed by the city, or any of its officials, was binding upon the city, is an alleged ratification of that contract, claimed to have been made by certain proceedings taken by the city council and some of the city officials subsequently to

May 17, 1897. The principal question, therefore, to be considered in determining whether or not the contract of May 17, 1897, was binding upon the city, is the question whether or not that contract was in any way ratified by the city. The proceedings taken by the city and its officials, which are alleged to amount to such ratification, were substantially as follows: On May 23, 1897, as we understand the record, the city council appointed a committee to investigate the matter of the delay in the construction of the northwest land tunnel. This committee made a report to the city council on or about July 11, 1898, accompanying their report by a letter written to the mayor of the city on June 28, 1898, by Weir, McKechney & Co., and also accompanied by a letter, dated July 9, 1898, written to the mayor of the city by a special counsel, who appears to have been appointed by the mayor for the purpose of investigating the matter. The report made by the committee to the council on July 11, 1898, was concurred in by the city council by a vote of 64 aldermen in favor of such concurrence, there being no vote against it. At the same time, to wit, on July 11, 1898, the city council adopted a resolution in relation to this matter. Subsequently, on October 8, 1898, a new contract was signed by Weir, McKechney & Co., and by the city of Chicago by its commissioner of public works, which latter contract was approved by the mayor. The report of the committee to the city council, with its accompanying letters, the resolution adopted by the city council on July 11, 1898, and the alleged contract of October 8, 1898, are all set out in full in the statement preceding this opinion. We are unable, however, to see that there is anything in these documents or proceedings which amounts to a ratification by the city of the contract of May 17, 1897. On the contrary, all these proceedings and documents expressly reserve the validity of that contract as a question to be thereafter determined, and refer to it as a question at issue between the parties and not yet settled. For instance, in the report made by the committee to the common council, which recommends that an arrangement be made with the contractors to at once proceed in the work of completing section 3 of said tunnel, the sixth recommendation is "that the pleadings in the pending suits between said contractors and the city be so changed as to cover and settle all controversies and matters at issue between the city and said contractors up to the time of the trial of said suits, and * * * that upon the hearing of said suits all questions in controversy shall be open for determination and decision, without prejudice to either party by the making of the arrangement under which work is resumed, and the making of any payments thereunder, so that the final judgment or decree may be in accordance with the rights of the parties upon the merits, as determined

by the court, independent of such arrangement for the resumption of the work; in the final adjustment the city to receive credit for all moneys paid to said contractors on any account in connection with the construction of said section 3, and judgment to be rendered, if at all, against the city for the balance due, and, in the event that an overpayment shall be found to have been made, the city to be entitled to recover the amount of such overpayment." It is quite clear, from this language, that the arrangement proposed by the committee was to be subject to the future determination of the questions at issue between the parties. The questions thus in controversy were to remain open for determination and decision, and were not to be prejudiced by the making of the arrangement recommended by the committee. The judgment or decree to be thereafter rendered in the pending litigation was to be in accordance with the rights of the parties, as determined by the court upon the merits, without reference to, and independent of, the arrangement recommended by the committee for the resumption of the work. The sixth recommendation of the committee expressly recognized the fact that overpayments might be found to have been made, and that, if it was finally determined that such overpayments had been made, the city was to be entitled to recover the amount of the same.

What were the matters then at issue between the contractors and the city, which were recognized as pending on July 11, 1898, when the report was made? The pleadings already set forth show to some extent what those issues were. On March 11, 1898, in the present suit, being the case at bar, the city filed a plea of the general issue, sworn to, and also a second plea, averring, in substance, that the contract of October 19, 1895, was the only contract made by the city with Weir, McKechney & Co., the contractors. It is expressly averred in that second plea, filed on March 11, 1898, that no other or different contract, agreement, undertaking, or promise than as contained in the contract of October 19, 1895, with the specifications attached, was ever made by the city with the contractors, or any or either of them. This was, substantially and in effect, a denial that the city had ever executed or intended to be bound by the contract of May 17, 1897. Therefore one of the matters at issue between the city and the contractors on July 11, 1898, was the question whether the contract of May 17, 1897, was binding or not. The fourth plea, filed on March 11, 1898, by the city, was a plea of set-off, alleging overpayments made by the city to the contractors, thus repudiating the idea that such payments were made under and in pursuance of the contract of May 17, 1897. Now, then, as one of the issues between the parties was the validity of the contract of May 17, 1897, and as nothing stated in the report, or in the recommendations of the report, was to prejudice

in any way the future determination of that issue, how can it be said that the report of the committee was a ratification of the contract of May 17, 1897? On the contrary, it was an express reservation of the validity of that contract for the future determination of the court. All the other pleas filed by the city, as will be seen by an examination of the statement heretofore made, set up the fact that the only contract made between the city and the contractors, which the city regarded as binding upon it, was the contract of October 19, 1895, thereby denying the binding force of the alleged contract of May 17, 1897, upon the city. Again, in the answer filed by the city in April, 1898, to the bill filed by the contractors in the superior court, the city alleged and claimed that the agreement of May 17, 1897, was void. Such was the contention of the city at every stage of the proceedings thereafter and theretofore. The resolution adopted by the city council on July 11, 1898, contains the same reservation as the report of the committee upon the subject of the questions at issue between the city and the contractors. By the terms of that resolution it was resolved "that the commissioner of public works be, and he is hereby, authorized, in making estimates for work done by Weir, McKechney & Co. on section 3 of the northwest land tunnel, pending the settlement of the questions at issue between said contractors and the city, to allow said contractors, in addition to the lineal foot price, where the tunnel is in earth, \$6 per cubic yard for rock and for all material which shall be classified as rock, and where the tunnel is in earth, or partly in earth and partly in rock, to allow said contractors \$10 per cubic yard for all extra masonry directed to be placed between the upper quarters outside of the regular specified rings of brick work of the tunnel and the crown bars or plank to protect the work; the making of said estimates in said manner and payments made thereon to be without prejudice to the rights of the city, and in no wise to affect the determination of the questions at issue between the city and said contractors." This resolution states that the allowance to be made to the contractors is in no wise to affect the determination of the questions at issue between the city and the contractors, and, as the main question in issue between them at that time was the validity of the contract of May 17, 1897, the resolution was in no sense a ratification of that contract. The same reservation as to the determination of the matters then at issue between the city and the contractors is made in the letter of the contractors to the mayor, dated June 28, 1898, and in the letter of special counsel to the mayor, dated July 9, 1898. Again, the contract of October 8, 1898, contains the same reservation. The third clause of that contract provides, as the sixth recommendation of the report of the committee of the common council provided, that "all questions in controversy shall be open for determination

and decision, without prejudice to either party by the making of the arrangement under which work has been resumed, and the making of any payment thereunder, so that the final judgment or decree may be in accordance with the rights of the parties upon the merits, as determined by the court, independent of such arrangement for the resumption of work. In the final adjustment the city shall be entitled to receive credit for all moneys paid to said contractors on any account, in connection with the construction of said section 3; judgment to be rendered, if at all, against the city, for the balance due, and, in the event that an overpayment shall be found to have been made, the city to be entitled to recover the amount of such overpayment." Inasmuch as the contract of October 8, 1898, states that the arrangement therein referred to is to be without prejudice to the questions at issue between the parties, and inasmuch as the validity of the contract of May 17, 1897, was one of the questions at issue, it cannot be said that the contract of October 8, 1898, was a ratification of the contract of May 17, 1897. Instead of being a ratification, it left the validity of that contract, as did all the other documents and proceedings, for the future determination of the court.

Whether or not the resolution of July 11, 1898, or the report of the committee which preceded it, or the agreement of October 8, 1898, which followed it, were valid and binding upon the city, so far as they authorized the payment to the contractors of \$6 per cubic yard for rock and for all material which should be classified as rock, in addition to the lineal foot price where the tunnel was in earth, and so far as they authorized the payment to the contractors of \$10 per cubic yard for extra or back masonry, they had no reference to the payments which had been made or to matters which had taken place prior to July 11, 1898. The report, the resolution, and the agreement of October 8, 1898, all refer to the future. For instance, the fifth section of the report of the committee recommends that the commissioner of public works issue estimates in regular form twice each month for work "which may hereafter be done." The resolution of July 11, 1898, provides that the commissioner of public works "is hereby authorized, in making estimates for work done by Weir, McKechney & Co., * * * to allow such contractors," etc. The reference is to estimates thereafter to be made and to allowances thereafter to be made. So, also, the agreement of October 8, 1898, expressly provides that only work done since July 11, 1898, has been done in performance of the arrangement authorized by the city council. Such agreement also expressly provides that all payments made by the city to the contractors since July 11, 1898, have been made under the arrangement so authorized. The second paragraph of the agreement also provides that the contractors "agree to proceed and complete the work called for by

their said contract under the said arrangement; it being agreed that the commissioner of public works shall issue estimates in the regular form twice each month for work that may be done hereafter, the city paying on such estimates only the cost of the expense of such work, and in no event paying more than the amount called for by such estimates." Here, also, the transactions referred to are transactions that are to take place in the future. The estimates to be issued are estimates to be issued after October 8, 1898. Inasmuch, therefore, as the report and its accompanying letters, and the resolution, and the agreement of October 8, 1898, all refer to future transactions taking place after July 11, 1898, they can in no sense refer to payments made by the city to the contractors theretofore, or to any occurrences taking place between the city and the contractors theretofore, or to any supposed compliance with the contract of May 17, 1897. The character of these proceedings and documents, as contemplating and referring to future transactions, negatives the idea that there was any intention on the part of the city to ratify the contract of May 17, 1897, or any payments made before July 11, 1898, to the contractors. The references in the report of the committee to the common council, to the contract of May 17, 1897, were merely expressions of opinion by the members of the council voting to concur in the report; but the concurrence of the council in the report of the committee did not bind the city as a legislative act. "A municipal corporation, by accepting—that is, receiving—the report of a committee of inquiry, does not admit the truth of the facts stated therein; and such a report, though accepted by a vote of the corporation, is not admissible in evidence against it." 1 Dillon, Mun. Corp. (4th Ed.) § 305.

It being true, then, that there was no ratification by the city in the manner claimed of the contract of May 17, 1897, it cannot be said that the contract, never having been signed by the city or any of its officials, was binding upon the city. If any arrangement at all of the kind set forth in the alleged contract of May 17, 1897, existed between the city and the contractors, it was purely verbal, and rested in parol so far as the city is concerned. As the contract of May 17, 1897, materially changed the contract of October 19, 1895, which is admitted by both parties to be a valid and binding contract, were the changes so made valid and binding upon the city, or authorized by any of the terms of the contract of October 19, 1895? We are unable to see how the contract of May 17, 1897, can be regarded as a valid and binding contract, as against the city, in view of the provisions of the contract of October 19, 1895, and of the previous decisions of this court so far as the following provision of the contract of May 17, 1897, is concerned, to wit: "Fifth. In earth tunnel, or in tunnel which

is excavated partly in earth and partly in rock, where extra masonry is directed to be placed between the upper quarters, outside the regular specified rings of brickwork of the tunnel and the crown bars or planks to protect the work, the same shall be allowed and estimated at the price of \$10 per cubic yard." The specifications attached to the contract of October 19, 1895, and which are thereby expressly made a part of said contract, provide, among other things, as follows: "When the tunnel is partly in earth and partly in rock, the contractor will be paid an additional price per cubic yard for rock excavation over and above the unit price per lineal foot of tunnel in earth. When the tunnel is in rock, the brick lining may, if deemed secure by the city engineer, be reduced one ring less of brick, and in all cases the masonry shall be brought to a true circular section. In every instance all spaces left between the outside of the regular brick work and the excavation shall be filled in with solid brick masonry, but no allowance will be made for such additional work and material."

The specifications provide that "the tunnel shall be lined with brick masonry in three rings." The words, "In every instance all spaces left between the outside of the regular brick work and the excavation shall be filled in with solid brick masonry, but no allowance will be made for such additional work and material," apply to excavations in all kinds of material, to wit, to excavations when the tunnel is partly in earth and partly in rock, and to excavations when the tunnel is wholly in earth or wholly in rock. It makes no difference, therefore, that the excavations of a part of the tunnel may have been through what is called by appellees "conglomerate" substance or material. By the express terms of the contract of October 19, 1895, no allowance was to be made for back masonry, whether the excavation was through conglomerate material, or through all rock or all earth. This provision of the contract of October 19, 1895, was construed and commented upon by this court in *City of Chicago v. Weir*, supra, where we said (page 591, 165 Ill., page 728, 46 N. E.): "In regard to the question whether plaintiffs are entitled to compensation for filling with masonry the space between the brick line of the tunnel and the irregular excavation of the rock, that is settled by a plain provision found in the specifications, as follows: 'In every instance all spaces left between the outside of the regular brick work and the excavation shall be filled in with solid brick masonry, but no allowance will be made for such additional work and material.' This is so plain that argument in support of the language used is unnecessary." It was also held in *City of Chicago v. Weir*, supra, that the city was entitled to repayment of all money it was shown to have paid out for back masonry. Now, then, the fifth clause of the contract of May 17, 1897, which author-

izes an allowance of \$10 per cubic yard for extra or back masonry, is in direct violation of the contract of October 19, 1895, which provides that in "every instance" no allowance will be made for such back masonry. The city officials had no right or authority to make a verbal agreement or arrangement with the contractors which was in direct violation of the contract of October 19, 1895, which had been let in pursuance of the statute to the lowest bidder after due advertisement for bids. The city officials had no right to agree verbally or orally to pay \$10 per cubic yard for back masonry, when the contract of October 19, 1895, provided that no allowance whatever should be made for such back masonry. To this extent, therefore, the contract of May 17, 1897, was absolutely void. It follows that the trial court erred in admitting testimony, the effect of which was to hold the city liable for amounts paid out for back masonry at the rate of \$10 per cubic yard prior to July 11, 1898.

The court also erred in giving instructions to the jury which recognized the validity of the contract of May 17, 1897. The first instruction told the jury "that, if they believe[d] from the evidence that the plaintiffs performed labor and furnished materials for the city of Chicago in the construction of section 3 of the northwest land tunnel in question under and in accordance with the terms of a contract or contracts therefor between the plaintiffs and the defendant, as alleged in the declaration or any count thereof, and that the plaintiffs have not been paid therefor, then the plaintiffs are entitled to recover herein for the same at the price or prices fixed by such contract or contracts therefor." The contract of May 17, 1897, was one of the contracts alleged in the declaration, or in one of the counts thereof, and consequently the jury were told that the appellees were entitled to recover for back masonry at the price fixed by the contract of May 17, 1897. In view of what has been said, this instruction to the jury was clearly erroneous. For the same reason, the trial court erred in refusing to give the eighteenth instruction asked by the city upon the trial below. That instruction is as follows: "The court further instructs the jury that the jury cannot allow to the plaintiffs any compensation in addition to the compensation for lineal foot of tunnel for any back masonry placed behind the outer rings of brick work in any portion of the tunnel which is constructed in rock."

The provision in the unsigned contract of May 17, 1897, in regard to the payment of \$6 per cubic yard, in addition to the lineal foot price, for all material encountered in earth tunnel that is rock, or of such a nature that it is classified as rock, presents greater difficulty than the provision of that contract in relation to back masonry. The specifications attached to the contract of October 19, 1895, and which are a part of that contract, contain the following provision: "When the

tunnel is partly in earth and partly in rock, the contractor will be paid an additional price per cubic yard for rock excavation over and above the unit price per lineal foot of tunnel in earth." The third section of the contract of May 17, 1897, bases the right to charge \$6 per cubic yard, in addition to the lineal foot price for all material encountered in earth tunnel that is rock, or of such a nature that it is classified as rock, upon the clause thus quoted from the specifications. It is claimed that the commissioner of public works had a right to allow \$6 per cubic yard, because the contractor was to be paid an additional price per cubic yard when the tunnel was partly in earth and partly in rock. If this provision in the specifications authorized an allowance to the contractors of a greater price than any named in the contract of October 19, 1895, such allowance could only be made in the mode prescribed by that contract. "Public officers or agents are held more strictly within their prescribed powers than private general agents." 1 Dillon, Mun. Corp. (4th Ed.) § 445; *Littler v. Jayne*, 124 Ill. 123, 16 N. E. 374; *Stuart v. Cambridge*, 125 Mass. 102; *Woodruff v. R. & P. Railroad Co.*, 108 N. Y. 48, 14 N. E. 832; *Gillison v. Wanamaker*, 140 Pa. 358, 21 Atl. 361. The contract of October 19, 1895, provides, among other things, as follows: "No claim whatever will be made by the said parties of the first part for extra work or material, or for a greater amount of money than is herein stipulated to be paid, unless some changes in or additions to said work, requiring additional outlay by said parties of the first part, shall first have been ordered in writing by the said commissioner of public works. * * * No claim whatever will be made or allowed for extra work or material, unless some changes or additions to the work herein specified or shown on the drawings requiring additional outlay by the contractor, shall have first been ordered in writing by the commissioner of public works. * * * No payment will be made for any extra work not specified in this contract, unless such extra work shall have been done by the written order of the commissioner of public works, to be attached to such contract, directing the same and stating that such work is not included in the contract, what the extras are, and that such extras are necessary for the proper completion of, or for the security of, the work previously done, and the reasons therefor." An allowance of \$6 per cubic yard, as fixed by the contract of May 17, 1897, was for a greater amount of money than was stipulated for in the contract of October 19, 1895, and therefore, if allowed at all, must have been allowed in pursuance of a written order. Our attention has been called to no evidence in the record showing that the commissioner of public works made any such written order. The design of the contract of October 19, 1895, was to protect the city from claims for extra work which

might be based upon oral evidence after the work was completed. Hence a mere verbal arrangement by any city official to pay the \$6 per cubic yard in question could not be binding upon the city.

Section 50, art. 9, City and Village Act (Starr & C. Ann. St. c. 24, par. 166), which was the charter of the city of Chicago at the time the transactions here involved took place, provides that "all contracts for the making of any public improvement, to be paid for in whole or in part by a special assessment, and any work or other public improvement, when the expense thereof shall exceed \$500.00, shall be let to the lowest responsible bidder, in the manner to be prescribed by ordinance—such contracts to be approved by the mayor or president of the board of trustees: provided, however, any such contract may be entered into by the proper officer without advertising for bids, and without such approval, by a vote of two-thirds of all the aldermen or trustees elected." It may be true that it would have been impracticable to readvertise for bids, and let a new contract for the excavation, when the tunnel was partly in earth and partly in rock. But such a contract could have been made by the city council without such re-advertisement and reletting, provided there was a vote in favor of the same by two-thirds of all the aldermen elected. It certainly was practicable to obtain such vote. What has been said upon this subject so far, however, is based upon the supposition that the clause above quoted from the specifications authorized the fixing of a new allowance for the excavation, where the tunnel was partly in earth and partly in rock, independently of any price fixed in the contract of October 19, 1895. Under the circumstances of this case, however, the price for excavation through such conglomerate substance or material was to be fixed in accordance with the terms of the contract of October 19, 1895, and not by an oral arrangement between the contractors and any city official.

The specifications provide that "the tunnel will be located within the area shown colored on the plat attached to these specifications." The specifications also provide that "the tunnels shall be on such lines and grades as may be determined by the city engineer. The depth of the center line of the tunnel will be approximately between seventy-five and eighty-five feet below the Chicago city datum." It is claimed by the appellees that the city made certain changes in the work specified in the original agreement, both as respects the depth below city datum at which the tunnel was to be constructed, and also as respects the course or direction of section 3 of the tunnel. In other words, it is contended that the city fixed upon 65 feet below city datum as the center line of the tunnel, when the specifications required such center line to be approximately between 75

and 85 feet below the Chicago city datum. It is also claimed that the course or direction of the tunnel was so changed by the city as to take a part of it outside of the area shown colored on the plat attached to the specifications. Appellees complain that, by reason of these changes as to the depth and direction so made by the city, this conglomerate material was encountered, and thereby increased the cost of the construction of the tunnel. It is not altogether clear from the evidence that such conglomerate material may not have been encountered if the center line of the tunnel had been between 75 and 85 feet, instead of 65 feet, below Chicago city datum. The specifications do not require that the center of the tunnel shall be between 75 and 85 feet below Chicago city datum, but that such center line shall be "approximately" between 75 and 85 feet below the city datum; and it is not clear that, even if the center of the tunnel was only 65 feet below city datum, it was not approximately between the distances named. But, whether it was or not, it is expressly provided that the tunnel shall be built on such lines and grades as may be determined by the city engineer, and the provision in regard to the depth below city datum must be construed in connection with the discretion thus invested in the city engineer.

It cannot be said that the power of a city official to allow \$6 per cubic yard for the excavation through the conglomerate substance by an oral arrangement with the contractors can be derived from the following provision of the contract, to wit: "Should the commissioner of public works deem it proper or necessary, in the execution of the work, to make any alterations which shall increase or diminish the expense, such alterations shall not vitiate or annul the contract or agreement hereby entered into; but the said commissioner shall determine the value of the work so added or omitted, such value to be added to or to be deducted from the contract price as the case may be." Such a provision as that last quoted, in a construction contract, only justifies such changes as are incidental to the complete execution of the work described in the contract, and as are of minor importance, and gives no authority for changes involving material departures from the plans. *County of Cook v. Harms*, 108 Ill. 151; *City of Chicago v. Sexton*, 115 Ill. 230, 2 N. E. 263. In *City of Elgin v. Joslyn*, 136 Ill. 525, 26 N. E. 1090, we said (page 531, 136 Ill., page 1092, 26 N. E.): "Where extra work, growing out of changes and alterations made in the original contract, is to be ordered and paid for upon the estimates of an architect or engineer, it will be presumed that only such changes and alterations are intended as are of minor importance and incidental only to the execution of the work described in the plans." If, as is claimed by the appellees, the excavation through con-

glomerate substance was caused by these alleged changes as to depth and direction, the increased cost to the amount of several hundred thousand dollars paid to the contractors would indicate that such changes were not of trifling or minor importance, or merely incidental to the execution of the work. Such could not be the character of alterations which would appear to have doubled, or nearly doubled, the cost of the work.

On the contrary, the power to fix an increased price for the excavation through the conglomerate material would appear to be based upon the following provision of the specifications attached to the contract of October 19, 1895, to wit: "The commissioner of public works reserves the right to make any changes in the foregoing plans and specifications that he may deem desirable or necessary or the emergency of the work may demand, and the contractor shall furnish any additional material and do any additional work required by such changes or emergency at the prices for like work stipulated in the contract." The plans here referred to were plans on file in the office of the department of public works of the city. One of these plans was a plat or map showing the area within which section 3 of the tunnel was to be constructed. This map or plat was shown to the contractors and signed by them as part of their agreement. They are, therefore, bound by it as a part of their agreement. *City of Elgin v. Joslyn*, 136 Ill. 525, 26 N. E. 1090. There were also two other plats or maps showing the borings as platted. The specifications state that "borings have been made by the city near the proposed routes of the tunnels. The notes from these borings have been platted, and are now on file in the office of the city engineer for the inspection of bidders." The three maps or plats showing the area of section 3 of the tunnel, and showing the borings made by the city near the proposed route of the tunnel, were exhibited to the contractors when they signed the agreement, and, as introduced in evidence, bear the names of the contractors indorsed thereon. These plats or maps tend to show that the center line of the tunnel was to be about 65 feet below Chicago city datum. The first shaft which was constructed is known as the "Keith Street Shaft." When the city engineer or his assistant measured from the surface of the ground in the Keith street shaft a distance below the surface of 65 feet below Chicago city datum, and thereby indicated on each side of the shaft the center line or "eye" of the tunnel, the appellee John McKechney, one of the contractors, was present. It also appears that the contractors during the progress of the work passed up and down the shafts daily. This and other evidence in the record tends to show that the contractors were affected with notice that the center line of the tunnel was only about 65 feet below city datum. There was other evidence tending to

show that they did not know of the exact depth of such center line until as late as March, 1898; but, in view of the conflict in the evidence, it was proper to submit the matter to the jury. Therefore the court should have given instruction No. 15, asked by the appellant, which told the jury that if they believed, from the evidence, that the contractors knew that the center line of the tunnel had been located at or about 65 feet below Chicago city datum, appellees were not entitled to any damages on account of such facts. It was error to refuse such instruction.

The two provisions in the specifications, one to the effect that the commissioner of public works had the right to make changes in the plans and specifications, and the contractor was bound to do any additional work required thereby "at the prices for like work stipulated in the contract," and the other to the effect that, "when the tunnel is partly in earth and partly in rock, the contractor will be paid an additional price per cubic yard for rock excavation over and above the unit price per lineal foot of tunnel in earth," should be construed together. Appellees claim that the changes in the plans and specifications, made by the commissioner of public works, led up to an excavation which was partly in earth and partly in rock. Therefore the additional work required thereby should have been done by the contractors at the prices for like work stipulated in the contract. What is the price for like work as stipulated in the contract? The contract of October 19, 1895, provides, among other things, as follows: "Rock excavation over and above cost of lineal foot of tunnel or shaft, \$2.00 per cubic yard." The "rock excavation" applies to all-rock tunnel and includes tunnel in mixed earth and rock. Indeed, the contract of May 17, 1897, refers to "all material encountered in earth tunnel that is rock, or of such a nature that it is classified as rock." If it was rock, or of such a nature as to be classified as rock, it would come within the provision which provides for \$2 per cubic yard for rock excavation, except that such additional price of \$2 per cubic yard for rock excavation is over and above the unit price per lineal foot of tunnel in rock. It would seem to follow, therefore, that the contract of October 19, 1895, provided for the cost of tunneling partly in earth and partly in rock at the price of \$2 per cubic yard over and above the unit price per lineal foot of tunnel in earth. This being so, the provision in the contract of May 17, 1897, providing for an allowance of \$6 per cubic yard, instead of \$2 per cubic yard, was unauthorized, and the city cannot be bound by such payments amounting to \$6 per cubic yard. Therefore the trial court erred in admitting evidence tending to establish the liability of the city for the payment of \$6 per cubic yard, instead of \$2.

4. We are also of the opinion that the court below erred in allowing proof to be intro-

duced to show the amount of exterior rock excavation, and in refusing to give instruction No. 13 asked by the city, which is as follows: "The jury are further instructed that, in arriving at your verdict in this case, you are not entitled, under the contract of October 19, A. D. 1895, or under any other document or agreement in evidence before you, to allow to the plaintiffs any compensation for the excavating of any rock, or material classified as rock, taken outside of the space occupied by the inside bore of the tunnel and the rings of brick surrounding it." In constructing the tunnel, and especially where blasting was done, the rock would break at points outside of the cross-section, and thereby portions of the rock would be loosened, and it was necessary to remove the portions so loosened. In *City of Chicago v. Weir*, supra, it was held that the agreement to pay for rock excavation embraced rock excavated in all-rock work, but only within the cross-section lines or nominal bore of the tunnel. The material removed which was without the cross-section lines is spoken of in the record as exterior breakage. The fact that appellees were not entitled to any compensation, in addition to the compensation for lineal foot of tunnel, for any exterior rock excavation, or back masonry, in any portion of the tunnel which was constructed in rock, was decided in the former litigation commenced by the appellees against the city in 1896. That matter, therefore, was *res judicata* as between the parties.

The opinion of this court in *City of Chicago v. Weir*, supra, shows that the amount sued for by appellees in August, 1896, embraced the following items: "Removal of rock taken from outside said cross-section lines, \$3,503.70; back masonry put in during July, 1896, \$4,492.25." In a trial before the circuit court without a jury the court disallowed these items. Upon appeal by the contractors to the Appellate Court these rulings of the trial court were affirmed. *Weir v. City of Chicago*, 67 Ill. App. 247. One of the questions submitted to the circuit court in that case by the stipulation between the parties was "whether or not the contractors are entitled to compensation for the removal of rock which breaks outside of the cross-section lines as indicated by the engineer." That question was decided in favor of the city by the Appellate Court, which affirmed the ruling of the trial court, and such ruling, not being assigned as cross-error by the contractors, was not passed upon in this court. The adverse decision of the Appellate Court on that subject was apparently submitted to. The circuit court having thus decided that appellees were not entitled to compensation for such exterior breakage or excavation, and that decision not having been questioned in any reviewing court, it still stands and is binding upon appellees. Where there has been a final judicial decision of a question of law or fact directly in issue by a competent court, and the same matter is again drawn

in question between the same parties or their privies in a subsequent litigation, the former decision is conclusive. In the stipulation referred to it was claimed by the contractors that such exterior rock excavation was inevitable; and therefore it cannot be said that the question of the necessity of such exterior excavation in the all-rock work makes the issue in this suit any different from the issue in the former suit. Nor has our attention been called to any evidence tending to show that this exterior breakage in the all-rock work was the result of digging the tunnel at 65 feet below datum, instead of "approximately between 75 and 85 feet below datum," if there is any difference between the two depths.

5. Evidence of an arrangement between L. B. Jackson, the city engineer, and the contractors, by which the contractors were allowed \$10 per cubic yard for the masonry in the third ring of brick in the mixed work, was improperly admitted, and the twelfth instruction asked by the city upon that subject should not have been refused. That instruction is as follows: "The court further instructs the jury that it is provided by the written contract, introduced in evidence in this case and dated the 19th day of October, A. D. 1895, that the tunnel, which by said contract said plaintiffs agreed to construct, shall be lined with brick masonry in three rings, or about thirteen inches in thickness, and that, when the tunnel is in rock, the brick lining may, if deemed secure by the city engineer, be reduced one ring less of brick. Under the law applicable to this case, it was not in the power of the city engineer to agree with the firm of Weir, McKechney & Co. that the defendant should pay to the firm of Weir, McKechney & Co. for the third ring of brick in the lining of any part of the tunnel anything whatever in addition to or outside of the unit price per lineal foot of tunnel as agreed to be paid by the defendant to the firm of Weir, McKechney & Co. by said agreement of the 19th day of October, 1895." The specifications provide as follows: "The tunnel shall be lined with brick masonry in three rings, or about thirteen inches in thickness." "When the tunnel is in rock, the brick lining may, if deemed secure by the city engineer, be reduced one ring less of brick." "The work as a whole includes furnishing of all material and the construction of shafts and tunnels; all excavations; the pumping; the cleaning out of and off from the entire premises, and the removal, of all refuse; the making of all repairs to the masonry, and the completion in a thorough and workmanlike manner of all the work of every kind and description included in the foregoing specifications and shown on the drawings ready for use."

In *City of Chicago v. Weir*, supra, the decision related to work which was wholly in rock, and was to the effect that, where the third ring of brick was omitted in the all-

rock work, no allowance could be made to the city therefor, and the contractors could not be allowed for filling with masonry the space which would have been occupied by the third ring of brick, if it had not been omitted. In that case we said (page 591, 185 Ill., page 728, 46 N. E.): "In regard to an allowance where the third ring of brick mentioned in the contract is omitted by permission of the city engineer, the Appellate Court held that no allowance should be made either party, and in this we think the court was correct. The specifications contained this provision: 'When the tunnel is in rock, the brick lining may, if deemed secure by the city engineer, be reduced one ring less of brick, and in all cases the masonry shall be brought to a true circular section.' If an allowance had been intended to either party where the third ring of brick should be omitted, the contract or specifications would have contained a clause on that subject." The third ring of brick appears to have been omitted from all of the work which was wholly in rock. The controversy here is as to the right of the contractors to recover for the masonry which they placed in the space which was occupied by the third ring of brick in the mixed work. There is evidence tending to show that what is called by the contractors "conglomerate" was nothing more than boulder clay or hardpan; that is to say, boulder clay when containing pebbles, and hardpan when free from pebbles. Many of the expert witnesses testified that the samples of so-called conglomerate produced by appellees were boulder clay and hardpan. If this evidence was believed by the jury, then no extra allowance should have been made for excavation through this material, because the specifications attached to the contract of October 19, 1895, provided, among other things, as follows: "No extra allowance will be made for quicksand, hardpan, or boulders."

The contractors offered in evidence a letter, written by Weir, McKechney & Co. to L. B. Jackson, the city engineer, setting forth an arrangement made between the engineer and the contractors upon this subject. The letter was objected to, but the objection was overruled, and it was read. To this ruling of the court the city took exception. The clause of the agreement of October 19, 1895, requiring the tunnel to be lined with three rings of brick, and the clause providing that, where the tunnel is in rock, the brick lining may, if deemed secure by the city engineer, be reduced one ring less of brick, must mean that, where the tunnel is not in rock, the lining shall consist of three rings of brick. By the terms of this arrangement between Jackson and the contractors the latter were to be allowed \$10 a cubic yard for back masonry in the third ring of brick in the mixed work. This arrangement was void, because the third ring of brick in the mixed work was necessarily a part of the tunnel proper, and

the price therefor was included in the lineal foot price of the tunnel. The third ring of brick appears to have been placed in all of the earth and mixed parts of the tunnel, and, so far as such third ring of brick in those portions of the tunnel is concerned, there was no alteration in the plans or specifications. The engineer had no power to bind the city to pay \$10 per cubic yard for the third ring of brick as back masonry. When the third ring of brick was put in and made a part of the tunnel, the city could not be made to pay for it an additional price to the price of each lineal foot of tunnel. When such third ring was placed in the lining of the tunnel, it became a part of the completed tunnel, to be paid for as such according to the original contract price. The original agreement required the contractors to fill in the space between the excavation and the lining with solid masonry without extra cost, and for doing what the contractors originally agreed to do for the lineal foot price of tunnel they were not entitled to receive the extra amount of \$10 a yard. This arrangement seems to have been made with Jackson, the engineer, only a short time before he ceased to be city engineer and went into the service of the contractors.

6. It is charged by the appellant that the trial court erred in admitting in evidence a certain preliminary estimate, dated August 31, 1897, certifying that there was due to the contractors from the city, under the agreement of October 19, 1895, the sum of \$29,140.45 for work done by them in August, 1897. The objection made to the introduction of this estimate was that it was merely signed by one of the assistant engineers of the city, but was not signed or approved by the city engineer or by the commissioner of public works. As we understand the evidence, this preliminary estimate was subsequently revised by the city engineer and the commissioner of public works, and the amount thereof was reduced by them to \$18,855.05, and, as thus reduced, it was approved by the city engineer and commissioner of public works. The original contract of October 19, 1895, provides, among other things, as follows: "It is also agreed by said city that, if the rate of progress shall be satisfactory to said commissioner of public works, estimates in the usual form will be issued to said party of the first part [the contractors] during the making of said improvements for eighty-five per cent. of the value of the work done and in place at the time of issuing such estimate; the remaining fifteen per cent. being reserved until the final completion and acceptance of said work." The contract of October 19, 1895, provides that the water tunnel should be constructed under the supervision of the commissioner of public works and to his satisfaction, and that final payment should be made to the contractors when the work should have been accepted by the commissioner of public works. The latter

was clothed with authority under the terms of the contract to pass judgment upon the work of the contractors, and to determine whether it was done according to the contract, and to make estimates for such parts of the work as in his judgment were done according to the contract. Under such provisions of the contract, the commissioner alone was competent to make an estimate which should be binding upon the city, and no estimate of his could be overcome, unless it was proven to be the result of fraud, bad faith, or willful disregard of duty on his part. *Snell v. Brown*, 71 Ill. 133; *Gilmore v. Courtney*, 158 Ill. 432, 41 N. E. 1023.

The evidence tends to show that at the end of the month a preliminary estimate of the value of the work done during that month would be made out by the assistant engineer, upon a blank form prepared for that purpose, and submitted to the city engineer for his examination. The city engineer would revise such estimate, if it was found to be incorrect, and approve it as revised; and, if it was found to be correct, he would approve it. Upon his approval of it, the estimate would be sent to the commissioner of public works for his final action. After an examination of more than 50 estimates, which were issued during the progress of the construction of the tunnel, we find that they are all indorsed as correct by the city engineer and approved by the commissioner of public works. It seems that a practice of showing some of these preliminary estimates to the contractors grew up among the assistant engineers; that is to say, the assistant engineer, when he made out such a preliminary estimate upon one of the blank forms, would give a duplicate thereof to the contractors as a special favor to them before the approval of the preliminary estimate by the city engineer, or the commissioner of public works. In pursuance of such practice, preliminary estimate No. 27, above referred to, reached the hands of the contractors. It was written upon one of the estimate blanks of the city, and signed by one of the assistant engineers, and had upon it the initials of another assistant engineer, but was not signed or approved by the city engineer, or the superintendent of public works. When this preliminary estimate No. 27, certifying that the contractors were entitled to \$29,140.45, was introduced in evidence, it was objected to by the city upon the ground that, not having been finally approved by the city engineer and the commissioner of public works, it was not the act of the city. But the court, over the objection of the city, admitted the preliminary estimate in evidence. The corrected estimate, which was subsequently approved of by the city engineer and the commissioner of public works, was for a less amount than the preliminary estimate, as has already been stated.

The effect of this action by the court was to make the impression upon the jury that the

contractors were entitled to the amount specified in the preliminary estimate, instead of the amount stated to be correct in the estimate finally corrected and approved. We think that the court erred in admitting this preliminary estimate in evidence. It was not prepared to be finally submitted to the contractors as a statement of the amount due them for the work done during the past month, but was merely prepared by the assistant engineer, to be submitted to the engineer and the commissioner of public works for their final action. In other words, the preliminary estimate was merely a report by an agent of the city to a superior agent of the city for review and final action by such superior agent. It had no vitality until it was finally approved by the commissioner of public works. Where suit was brought by contractors to recover for breach of a railroad construction contract, which provided that payments for the work should be made upon estimates certified by the engineer in chief of the company, and where the plaintiffs on the trial read in evidence estimates, made by a subordinate engineer of the company, not certified by its engineer in chief, it was held that the admission of such estimates was error. *Tennessee Railroad Co. v. Danforth*, 112 Ala. 80, 20 South. 502. See, also, *Culver v. Alabama Midland Railway Co.*, 108 Ala. 330, 18 South. 827; *Wabash Railroad Co. v. Farrell*, 79 Ill. App. 508; *Doyle v. St. P., M. & M. Ry. Co.*, 42 Minn. 82, 43 N. W. 787; *Vicksburg Railroad Co. v. O'Brien*, 119 U. S. 99, 7 Sup. Ct. 118, 30 L. Ed. 299; *Ohio & Mississippi Railway Co. v. Atteberry*, 43 Ill. App. 80. The general doctrine is that a report made by an agent to his principal is not evidence against the principal. In *re Devala Co. L. R. 22 Ch. Div. 593*; *Langhorn v. Allnutt*, 4 Taunt. 511.

7. It is furthermore charged by the appellant that the court below erred in admitting in evidence certain letters, introduced by the appellees upon the trial below and read in the presence of the jury. A few of these letters were written to the contractors, Weir, McKechney & Co., by agents of their own, or experts employed by them to examine their work. The large majority of the letters, however, which were upwards of 150 in number, were letters which had passed between the contractors and certain city officials. One of the questions in the case is whether or not these letters were properly admitted in evidence under the circumstances shown by the proofs.

A large amount of evidence was taken on both sides upon the issue whether or not Weir, McKechney & Co., the contractors, did their work in the construction of the tunnel in a proper manner. It was insisted by the city officials, at various times during the progress of the work, that the contractors made the excavations in the work unnecessarily large, and thereby greatly increased the cost of the work to the city. For in-

stance, it was claimed by the city that, in certain places where the normal section of the tunnel was wholly in rock, and there was sufficient rock roof to support the tunnel, the contractors blasted out the rock roof to reach the earth above, and thereby made the tunnel part earth and part rock, so as to force the city to pay \$6, instead of \$2 per cubic yard for rock excavation, and \$10 per cubic yard for back masonry. The larger the cavities caused by the excavation, the greater the amount of back masonry required to fill such cavities. Of course, these charges of the city officials were denied by the contractors, and the evidence upon the subject was conflicting. We find in the record letters written to the contractors by the city engineer and by the commissioner of public works, calling their attention to these methods of doing the work, and demanding that the contractors should discontinue such methods, claiming that they resulted in making the excavations too large and the expense of the work to the city too great. The testimony introduced by the city upon this subject, with a view of showing this alleged improper method of construction, was introduced after the city had read to the jury the letters so introduced in evidence.

There was much evidence, introduced upon both sides, also, upon the question as to whether the material through which the tunnel was constructed, which was neither all rock nor all earth, was what was called "conglomerate" substance, or whether it was simply the boulder clay or hard pan material mentioned in the contract of October 19, 1895. There was also much conflicting testimony upon the subject of exterior rock excavation and back masonry. Item 5 in the bill of particulars filed by appellees, amounting to \$60,592.99, was for outside breakage in all-rock work, and appellees claimed that this was caused by the alleged change in the depth of the tunnel. Item 6, amounting to \$261,467.49, was for back masonry in all-rock work, and it was claimed by appellees that this was made necessary by such change in the depth of the tunnel. Item 7, amounting to \$60,959, was for alleged discrepancies in estimates made by the commissioner of public works with the assistance of the city engineer. All these subjects were matters of dispute between the parties, and the evidence was conflicting in relation to the same. The letters, introduced by the appellees and read before the jury, were substantially expressions of opinion on the part of the writers of such letters to the effect that the work done by appellees was properly done; and they were to a large extent arguments on the part of the writers in favor of the claims of the appellees as to such exterior excavation, back masonry, and discrepancies in the estimates.

One of these letters was a report, or opinion, dated January 29, 1898, prepared by William Sooy Smith, who was an agent in

that regard for the contractors, and addressed by Smith to the contractors. In this report Smith said to the contractors: "Having this day completely examined the heading of drift No. 2, shaft No. 1, of the north-west land tunnel, now in the course of construction by you, I beg leave to submit the following report: * * * The material resting on this formation is indurated drift, consisting of boulders, small and large, imbedded in a hard matrix of clay, sand, and gravel. * * * The methods pursued in the excavation of the work seem careful and judicious, as the conditions which exist imperatively demand. * * * A just classification would undoubtedly characterize it as partly in solid rock and partly in loose rock and drift." On January 26, 1898, Louis B. Jackson, who had been city engineer, but who had resigned his position and entered the service of the appellees, wrote a letter or report to the appellees, in which he said, among other things: "The material lying over the rock is a conglomerate, with strata of soft clay. * * * From close observation, I consider that you are employing the best methods in your construction and performing your work carefully and well. I do not consider the additional area caused by the falling in of the material outside of the true cross-section line as excessive. It is practically impossible to avoid this. Owing to the careful manner in which this work has to be done, and necessarily the brickling up of each day's excavation, it is impossible to make over two-thirds of the progress that could be made where the tunnel is in solid rock. Additional cost is consequent. In my opinion, the entire area excavated should be measured and paid for at the price per cubic yard named in your supplemental contract with the city; also, the caves that occur should be filled with masonry to properly protect the tunnel, and should be paid for at the price established by the city—\$10.00 per cubic yard." On August 24, 1898, William Sooy Smith wrote a letter to the contractors, in which he stated that he had carefully examined the headings of the tunnel they were constructing for the city, and he proceeds to make the following statements: "I brought a sample of the hardpan from the second heading visited, weighing 27½ ounces. This I pulverized and dissolved in water, separating the sand and gravel from the cementing materials (mostly clay) present, and found that the sand and gravel it contained weighed 12 ounces. The materials in both headings, excepting the one-foot stratum of sandy clay found in the first heading visited, is a conglomerate or hardpan."

These letters were admitted in evidence over the objection of appellant, and their admission was excepted to. The objections were made in apt time. These letters and reports were written statements made to the appellees by their own paid agents. In oth-

er words, they were simply declarations made by agents to their principals. They were incompetent testimony, and should not have been admitted. They constituted nothing else than hearsay evidence, made for the contractors by their own agents. In these letters the agents of the contractors expressed the opinion that the work done by the contractors was properly done, and that the material, about the character of which there was a dispute, was such material as the contractors claimed it to be. Surely a party cannot be allowed thus to make evidence for himself. The introduction of these letters presents the case of a principal employing an agent to write him a letter, and then introducing such letter in evidence in the principal's behalf in the subsequent trial of an action at law, in which the agent is neither a party nor interested, so far as the record discloses. The contents of these letters, thus read before the jury, were calculated to make an unfavorable impression upon the jury to the injury of the city. The appellees, upon the trial below, also read in evidence a letter written by the firm of Weir, McKechney & Co. to the mayor of the city, dated August 11, 1897. This letter was never answered or noticed in any way by the mayor. It was an argument in favor of allowing the contractors for back masonry and exterior rock excavation in the all-rock work. These matters were matters of dispute between the parties, and the letter advocated the reasonableness of the claims of the contractors under items 5 and 6 of their bill of particulars, amounting to \$322,060.48. This letter to the mayor of August 11, 1897, contained, among other statements, the following: "We believe that an equitable basis could be reached whereby we could be restricted to a certain limit. Take, for instance, the city of New York in the construction of their aqueduct. In framing their specifications, which was all through rock, they allowed the contractors compensation for the rock excavated and the back masonry to a limit of one foot outside the cross-section lines; they realizing that it would be impossible for the contractors to blast the rock to a neat cross-section line." It cannot be said that any action taken by the city of New York in regard to paying for exterior rock excavation and back masonry in all rock had anything to do with the case at bar; but the court admitted this letter, with the objectionable reference to the course pursued by New York, notwithstanding the objection thereto made by the appellant. The impression liable to be made upon the minds of the jury was that, if certain prices were allowed by the city of New York for certain work, the same prices ought to have been allowed to the contractors in the present case.

Again, on November 8, 1897, the contractors wrote a letter to the superintendent of public works of the city of Chicago, in which the writers criticize the city engineer, one of

the chief witnesses for the city upon the trial of the case. The letter was objected to, but was admitted in evidence by the trial court. It was calculated to discredit in advance the city engineer, who was to come before the jury as a witness. This letter makes, among others, the following statements: "In his [Ericson's] rambling conversation with the writer, he suggests referring the subject [of the construction of the May agreement] to the law department. We do not propose to hazard the risk of being classified as imbeciles by adopting any such suggestion. We believe the law department would be perfectly justified in asking an instant order from the county court for a commitment to be examined as to our sanity. He [Ericson] also takes the position that it is singular that we had not made a claim for the balance of this material [the alleged conglomerate in drift 1] until recently. That is absolutely untrue. * * * There have been several discussions on this question with your city engineer [Ericson], and each time he has admitted it, and it was only a couple of days ago that he admitted to the writer that it [the material in drift 1] was conglomerate. We believe further comment on this question unnecessary. The gentleman [Ericson] then takes occasion to say to the writer that it is singular that, immediately after Mr. Barnes took charge of the work, the back masonry in drift 1 increased. The insinuation is not true and is unmanly. * * * We submit that he [Ericson] is not fair; that he is not treating us fair, nor treating his men fair. Every time an estimate comes into the office for work done by us, he reminds us of the pious silversmith in *Gil Blas*—throws up both hands and exclaims: 'This work is costing the city too much money.' If the city is not able to pay for its work it ought to stop it. * * * He admits that the material over the rock is conglomerate. He has admitted that over his own signature when he agreed to the former estimates. Perhaps, had the gentleman been more accurate in his borings, he would have known the class of material that he had to go through. * * * We submit, Mr. Commissioner, that this is not fair treatment," etc.

The appellees also read in evidence a letter, dated April 24, 1897, written by the contractors to the said commissioner of public works. This letter is an argument by the contractors in favor of certain claims made by them, to wit, their claim for rock excavation at \$6 per cubic yard, and their claim for damages on account of litigation and delay in the work, although the evidence shows that all of the litigation was begun by the contractors themselves. They also therein set up their claim for back masonry, although this court had decided that such claim could not be allowed. In this letter of April 24, 1897, the contractors make the following statement: "We state, as a fact, that Commissioner Downey has paid the contractors

on sections 1 and 2, Fitz Simons & Connel Co. and Joseph Duffy, for back masonry, which he has refused to pay us. Commissioner Kent, Gen. Fitz Simons, Joseph Duffy, and the writer, Mr. McKechney, made a verbal agreement that we were all to receive \$10.00 per cubic yard for the back masonry in addition to our contract price." The city objected strenuously to this part of the letter, but the trial court permitted it to be read. The matter thus allowed to go to the jury was not only incompetent, but it was prejudicial and harmful to the city. The jury would necessarily conclude, from what was said in this letter, that the contractors should have paid for back masonry, because the contractors on the other sections, numbered 1 and 2, not involved in the present suit, which concerns only section 3, had received pay for back masonry from the city.

We cannot notice any further the contents of the letters thus introduced, but are of the opinion that they were improperly admitted in evidence. The grounds upon which the admission in evidence of these letters is sought to be sustained as proper may be arranged generally under three heads: First, it is said that John McKechney, one of the contractors, showed these documents to the commissioner of public works; second, that they were part of the *res gestæ*; and, third, that the contract of October 19, 1895, required the contractors to deliver to the commissioner of public works, on or before the 10th day of each month, a written statement of the "amount of claims for extra work done or extra materials furnished during the previous month, or extra expenses incurred in the work," and that such letters and reports can be regarded as the written statements, thus required by the contract.

As to the first ground, there is no evidence to show that the commissioner of public works ever made any statement or admission in regard to the contents of any of these documents, or that they were shown to him at his request, or applied for by him in any way, or that they form a part of the correspondence between the contractors and any city officials. Contractors with a municipality cannot make evidence for themselves by showing to the municipal officers written reports or declarations of third persons, who are mere strangers, where the officer merely reads the documents and makes no admission in regard to them. "A letter written by a party is not admissible in his own favor, except as a notice or a demand." 13 Am. & Eng. Ency. of Law, p. 259. Letters written by the contractors to the city officials did not tend to prove or disprove any issue in the case, and were clearly inadmissible. Such testimony tended to prejudice the minds of the jury against the city and in favor of the contractors. "The mere fact that letters were received and remain unanswered has no tendency to show an acquiescence of the party in the facts stated in them. A

party is not to be driven into a correspondence of that character to protect himself from such consequences. In the case of *Firbee v. Denton*, 3 C. & P. 103, the plaintiff had sent a letter to the defendant, demanding a sum of money as due to him, to which no answer was returned. On the offer to prove its contents * * * Lord Tenterton, C. J., observed: 'I am slow to admit that. What is said to a man before his face, he is in some degree called on to contradict, if he does not acquiesce in it; but the not answering the letter is quite different, and it is too much to say that a man, by omitting to answer a letter, at all events admits the truth of the statements that letter contains. I am of opinion,' he observed, 'that this letter cannot be read.' *Hill v. Pratt*, 29 Vt. 119.

In *Bank v. Delafield*, 126 N. Y. 410, 27 N. E. 797, it was said: "We can see no ground upon which the letter is admissible. It is not in the nature of a declaration, which the defendant admits by not answering; nor is it on the same plane as an oral declaration to the same effect, made in the presence of the party to be charged, and who may be regarded as admitting its truth by failing to deny it. This letter is a mere declaration of the writer, assuming in his own behalf to characterize and determine the nature of a past transaction, and it does not demand an answer, and is not admissible in evidence against the defendant. *Learned v. Tillotson*, 97 N. Y. 1 [49 Am. Rep. 508]; *Talcott v. Harris*, 93 N. Y. 567."

In *Fearing v. Kimball*, 4 Allen, 125, 81 Am. Dec. 690, it was said: "The general rule that a party cannot make evidence for himself by his written communications addressed to the other party as to the character of dealings between them, or the liability of the party to whom they are addressed, in the absence of any reply assenting to the same, is well settled. * * * Omitting to answer a written communication is no evidence of the truth of the facts therein stated, nor is a party under ordinary circumstances required to reply to a letter containing false statements of facts. * * * A party cannot make evidence for himself by his own declarations. * * * The omission to answer letters written to a party by a third person does not show an acquiescence in the facts there stated, as might be authorized to be inferred in the case of silence where verbal statements were made directly to him." *Waring v. United States Tel. Co.*, 4 Daly, 233; *Child v. Grace*, 3 C. & P. 193; 1 Greenleaf on Evidence, § 199; *Moore v. Smith*, 14 Serg. & R. 393; *Robinson v. Fitchburg & W. R. Co.*, 7 Gray, 92.

In *Hammond v. Beeson*, 112 Mo. 190, 20 S. W. 474, it was said of the contents of such a letter: "These were declarations of a party in his own interest, and should not have been read in evidence to the jury. A party

is not allowed in that manner to make evidence for himself."

In *Dempsey v. Dobson*, 174 Pa. 122, 34 Atl. 459, 32 L. R. A. 761, 52 Am. St. Rep. 816, it was said: "The letter, written after the plaintiff's color books had been returned to him, demanding that the copy that had been made should be given up to him, was inadmissible. It was an argumentative presentation of his view of his rights as an employé, and of the grievance of which he complained. It was unanswered. It was the declaration of the plaintiff in his own behalf, and was no more admissible because reduced to writing than it would have been if delivered orally."

Moreover, neither the contractors nor the city officials had any power to change in any material particular the terms of the contract of October 19, 1895, or make any new contracts or create new obligations on the part of the city. This being so, they could not write letters which should have that effect. The contractors could not affect the contract already made, or make a new one, by any letters they might write to the officials of the city, whether such official was the mayor or the commissioner of public works, because those officials were not clothed with the contracting power of the city. *Sexton v. County of Cook*, 114 Ill. 174, 28 N. E. 608; *Stevens v. Coffeen*, 39 Ill. 148; *Clawson v. Munson*, 55 Ill. 394; *Clarkson v. Kerber*, 84 Ill. App. 658. The commissioner of public works, to whom the letters and reports were said to have been handed, was acting merely as a public officer, and had no implied power to make admissions against the city. *Bouton v. Board of Sup'rs of McDonough County*, 84 Ill. 384; *Lee v. Munroe*, 7 Cranch, 366, 8 L. Ed. 373.

As to the second ground upon which the admission of the letters is sought to be sustained, namely, that they were a part of the *res gestæ*, it is to be remarked that these letters were in fact merely narrative of past transactions or expressions of opinion by the writers. To be a part of the *res gestæ*, the declaration, whether verbal or written, must affect the act which is the subject of the inquiry, and explain, illustrate, qualify, limit, or characterize it, and it must not be narrative of a past transaction; for, if it be wholly so, it will be entirely excluded, and if a part of the declaration be so, that part will be excluded. *Chamberlain v. Chamberlain*, 118 Ill. 480, 6 N. E. 444; *Phenix Ins. Co. v. La Pointe*, 118 Ill. 384, 8 N. E. 353. These letters and reports cannot be regarded as a part of the *res gestæ*. Where the trial court admitted in evidence letters written by plaintiff to defendant setting forth the plaintiff's claims and views in regard to the merits of the case, it was said, in regard to such evidence: "It was not the admission of his adversary, but was appellee's own statement and declaration, made long after the difficul-

ties between the parties arose; nor was it any part of the *res gestæ* of the original transaction. It does not need the citation of authorities to show that the declarations of a party, made after the transaction is closed, and which are merely a recital of the transaction such as the party then chooses to give, and especially offers by him to compromise, cannot be used by him as evidence in his own favor." *Rollins v. Duffy*, 14 Ill. App. 69.

The third ground upon which it is sought to defend the admission of these letters and reports is equally untenable. The contract of October 19, 1895, contained the following provision, to wit: "The contractors must deliver to the commissioner of public works, on or before the 10th day of each month, a written statement of amount of claims, if any, for extra work done and extra materials furnished during the previous month, or for extra expenses incurred from any cause whatever; otherwise, claims for extras during that month will be forfeited and waived." None of these letters or reports can be regarded as statements of the amounts of any claims of the contractors. The clause in the contract thus quoted refers to a specific bill of particulars of the demands of the contractors for extras, giving the amount in dollars and cents. These letters and reports do not give the amounts of any such claims of the contractors, but consist of statements of opinions and conclusions by the authors of the letters. There is not one word in the letters or reports on the subject of extra work or materials, and no claim is made in them for anything in the nature of an extra, so far as we have been able to discover.

8. We cannot resist the conclusion that the conduct of the trial judge upon the trial of this case was prejudicial to the rights of the city. At one stage in the course of the trial the trial judge made the following remark: "The city had better get somebody to do that work who can do it faster. If we can do it here in three or four days and the city can't get a man to do it outside of court in three or four months, they had better change their men or their system."

It would appear that the appellees, upon the trial below, were allowed about two weeks to introduce their evidence in chief. The remarks of the court during this time, as well as during the few days which were allowed to the city for the introduction of its testimony, were calculated, as we think, to prejudice the interests of the city before the jury. For instance, the following occurs in the testimony of one of the witnesses: "If you take a piece of conglomerate, and put it in a wet cloth, and wrap it in an oil cloth covering, I should not think there would be any effect upon it in two hours. It would remain as hard as it was when it was put there. Mr. Sutherland: It would remain as hard as it was when it was put there, would it? A. Yes, sir. The Court:

If there was no effect on it, it would be just the same, wouldn't it? Don't ask silly questions. We have a whole lot to do here, to do our best, but we haven't any time for foolishness. Mr. Sutherland: I take an exception to the remarks of the court. The Court: You will follow it just the same. I shall compel you to if you do not go on with your—"

Again, the following occurred: "The material in drift 4, the last time I was there, was conglomerate. Mr. Sutherland: What was it? Leave out the word 'conglomerate,' and describe the condition of it as you saw it there. The Court: You need not analyze conglomerate. They are well-known terms, and I am not going to let him give an analysis of what conglomerate would mean. Mr. Sutherland: They are well-known terms, your honor. The Court: Do not talk to me at all. I have ruled on it, and I am not arguing with you. Mr. Sutherland: Does your honor rule I cannot ask him— The Court: You heard my ruling. Proceed. Mr. Sutherland: I will take an exception. The Court: That is your right. Now go on."

Again occurs the following: "Mr. Starr: You may describe the joints used between the brick—whether the joints were clean and wet, or otherwise. Mr. Sutherland: That is objected to as leading. I do not think it is proper to read from the specifications and instruct the witness. The Court: That is not reading from the specifications. He is asking what kind of joints there were. Mr. Sutherland: Let him state what was— The Court: Stop. I will not have you stopping and interfering with the proceedings all the time, when there is a ruling. Mr. Sutherland: I except to that. The Court: This case must be tried the same as any other case, and you must observe the rules that are observed in courts generally, the same as any other lawyer. Let us go on that way. Mr. Sutherland: We try to do so, but we want to put our exceptions in. The Court: If you do not go on, I shall compel you to do it in such a manner that there will be no doubt about it. Mr. Sutherland: I take an exception to the court's remarks."

Again, the following occurred in the testimony of one of the witnesses: "In my all-rock figures I did not include the part that was conglomerate. In that part of the tunnel which was part earth and part rock I figured the whole as one quantity. Mr. Sutherland: Did you figure it as rock? The Court: Let us see what he wants. If there is any catch in it, let us get the catch. If it is a straight question, let us tell him what it is, so he will give us an answer." It seems to us that this language of the court was calculated to make the impression upon the jury that the counsel for the city was endeavoring to catch the witness, or, in other words, to deceive the witness. We see nothing in the conduct of the counsel, or in the character of the questions asked by him,

which justified such an imputation on the part of the court.

One of the issues in the case was as to the quality and component parts of the material excavated by the contractors; the latter contending that it was the so-called conglomerate, or a material almost as hard as rock, and the city contending that it was not conglomerate, but merely earth mixed with sand and gravel, with some rock or pebbles. If the material was such that it could have been excavated without blasting, it could have been bored with a common hand auger; that is, where the material was earth. Some of the witnesses for the city so testified. The following occurred upon the cross-examination by the city's counsel of one of the witnesses of the appellees, to wit: "Mr. Sutherland: If it had not been for those rock or pebbles, you could have used augers all the while, couldn't you? The Court: Yes, if it was all mud, and you could use a hand auger. Let us go to something that is not silly. What next? Mr. Sutherland: I take an exception to the remark of the court."

It was charged by the appellees upon the trial below, as we understand the evidence, that there was a conversion by the city of the plant of appellees on July 8, 1899, 19 months after the suit was brought, and several days after the commencement of the trial. The appellees introduced evidence as to the value of the plant alleged to be converted, and claimed \$63,086.21 therefor. There was evidence tending to show that there was no appropriation of the plant by the city, or that it was at any time seized by the city. The notice of forfeiture, served upon the contractors by the city on June 22, 1899, notified them to remove their property from the tunnel at once, and, they not having done so, it was necessary for the city to take charge of a portion of it. It may be a question whether this was an appropriation in law, as the property was upon the ground of the city, and still remained there. Upon this subject the following occurs in the testimony of one of the witnesses: "Item 49 of bill of particulars, for 130,000 brick at shaft 5, refers to brick on hand there, on the surface of the ground at the shaft house. Mr. Munroe: I object to the evidence in regard to that item. The Court: Has the city refused to let you take this away? Mr. Munroe: The city notified plaintiffs to move their plant, and invites them now to remove it, and they won't say whether they will take it away or not. We now request plaintiffs to remove their plant and all their material from section 3 of northwest land tunnel. Mr. Miller: You may state the cost of the 130,000 brick referred to in item 49, which Weir, McKechney & Co. paid. Can you state it? (Said question was objected to by defendant as incompetent and immaterial, but the objection was overruled by the court, and to said ruling defendant then and there duly excepted). The Witness: I can state it. It

was \$6.50 per thousand, or \$845 for the whole, or \$845 altogether." The remark of the court, "Has the city refused to let you take this away?" could have had no other effect than to prejudice the city in the minds of the jury, because it led them to believe that there had been a misappropriation of the property by the city. It was a pure assumption that this property had been appropriated by the city. The evidence tends to show that it had never been taken possession of by the city, and therefore evidence of its value should not have been admitted.

The following also occurs: "Mr. Munroe: You charge the city for this plant, although on the 27th day of October, 1898, it notified you where the plant was, and requested you to either take it away or notify the department of public works to what place you wished it removed. The Witness: Two months after they stole it from us they notified us; yes. Mr. Munroe: I move that the words 'two months after they stole it from us' be stricken out. I do not think that is a proper answer. The Court: He might use more elegant language to indicate what he meant; but I cannot frame the language that the witness should use, so long as it does not violate the propriety of the occasion. Mr. Munroe: I will take an exception." One of the material questions in the case being whether the city had wrongfully appropriated this plant to its own use or not, so as to render the city liable to the contractors for its value, the statement of the witness that the city had stolen the property from them was an improper statement, but was substantially indorsed by the trial court. Instead of rebuking the witness for his remark, the words of the court rather tended to commend the language of the witness.

On July 10, 1899, the city had begun to put in its evidence, and the following occurred: "Mr. Sutherland: I expect to show by this witness that he saw them putting in brick back of the rings of brick without any mortar at all. The Court: Certainly there is no mortar between the brick when they are laid in there. Mr. Sutherland: The contract requires the contractor to put back masonry in there. They cannot put dry brick in. The Court: Go on, sir. The Witness: While I was there I saw the masons laying brick in, sometimes two or three at a time, in the back above the three rings of brick, in the back filling, without mortar. Mr. Miller: Objected to. The Court: Of course they went in without mortar. The mortar was put in afterwards, I suppose. He did not stay there long enough to see it. Mr. Sutherland: Did you stay there long enough to see the work finished as they went along? The Witness: Yes, sir; I was. Two or three tiers of brick put in, one ahead of the other. They back out to the end of the arch. It is not a fact that they put in a lot of brick and then put the mortar over it afterward. I stayed there long enough to see one course filled up to the

roof, and another course put in, in front of that, up to the roof. I have been down there to put the lights in when they were putting in slabs over the timber or the crown bars. They would fill them up with slabs, up above those timbers. That was in drift 5." The contract provided that in every instance all spaces left between the outside of the regular brick work and the excavation should be filled in with solid brick masonry, but that no allowance should be made for such additional work and material, and also provides that all joints in the masonry must be perfectly filled by pressing the bricks in the cement mortar, and not by pressing the mortar between the bricks. In order to comply with the terms of the contract, the entire exterior spaces were to be filled in with brick masonry; that is to say, brick laid in mortar. *Weir v. City of Chicago, supra.* The city had a right to show, if it could, that the contractors had not filled in these exterior spaces as required by the contract, but had filled them with dry brick uncemented with mortar. Therefore the language of the court, as above quoted, was calculated to make the impression upon the jury that in his opinion the contractors had done the work properly, inasmuch as the judge said that the mortar was put in afterwards, and that the witness did not stay long enough to see it. Certainly this language of the judge amounted to a passing by the court upon the evidence, when it was the province of the jury to pass upon it.

Again, the following occurred: "The Court: If he wanted to make his computations, he should have made them from those in the record. If you wanted, as a matter of evidence, to make them from those books, he might have compared them with those in evidence. Mr. Munroe: We will compare them to-night. The Court: Go on with this witness now. Mr. Munroe: I suppose I may offer to show the total amount of rock excavation in the all-rock parts of the tunnel and the total amount of back masonry? The Court: He may do his figuring to-night. He may take these figures from the cross-sections that are in evidence and put them in duplicate form. Mr. Munroe: It cannot be done in one night. The Court: I am not going to string this out indefinitely, because you have not done what you should have done. Mr. Munroe: With a sufficient force we can compare our books with the plaintiffs' books to-night, if your honor will adjourn now. The Court: I will not adjourn now. Go on with this examination. This is the last of your witnesses? Mr. Munroe: This is the last witness, except on the question of the valuation of the plant." From the showing of the record it would appear that the evidence was not introduced, as the testimony was closed on the same night; the taking of the testimony for the appellees having occupied two weeks, and for the city three and one-half days only.

The following occurred in the examination of a witness for the city: "Mr. Munroe: What do you say as to the necessity of the large excavation in drift 4, which you have described? Mr. Miller: Objected to. The Court: Objection sustained. (To said ruling of the court defendant then and there duly excepted.) Mr. Munroe: Are you able to state whether that large excavation was or was not necessary? The Witness: Yes, sir. The Court: Of course he is able to state, if he is able to talk. The Witness: I know whether that large excavation was necessary. It was not necessary."

The following also occurred on the evening of the 13th of July, 1899: "Mr. Munroe: That is our case, as far as we have been able to obtain the evidence up to this time. It is now 19 minutes to 8 o'clock in the evening. The Court: That is all your evidence, is it? Mr. Munroe: That is all the evidence we have here. The Court to Plaintiffs' Counsel: "Call your witnesses on rebuttal. If not, I will send you to the argument." The jury was instructed on the next morning.

The remarks made by the court during the progress of the trial, as above quoted, had a tendency to prejudice the jury against the city, especially when considered in connection with the derogatory remarks made about the city and its officials in the letters which were improperly admitted, and also in connection with the additional counts added to the declaration a few days before the close of the trial, which counts made charges of fraud against the city which had not been before made, and in support of which there was no evidence. The instructions to the jury expressly referred to each count of the declaration, and therefore included these new counts. It is true that, in two instructions given by the court, the jury were told that the remarks made by the court admonishing the counsel as to their duties, and commenting upon the proper manner for the conduct of the trial, were to be disregarded by the jury; but we do not think that these instructions were calculated altogether to remove the unpleasant impression made upon the minds of the jury by the language used by the trial judge. Many of the remarks were not made in ruling upon motions made by counsel, but were volunteered by the court, and were not entirely covered by the language used in the instructions. The dangerous tendency of the remarks that were made cannot always be obviated or cured by instructions. *Lafayette, Bloomington & Mississippi Railroad Co. v. Winslow*, 66 Ill. 219; *Lycoming Fire Ins. Co. v. Rubin*, 79 Ill. 402.

Many other points and objections are urged on behalf of the city in favor of a reversal of this judgment. Upon these we pass no opinion, and the fact that they are not here discussed does not indicate whether we regard them as well taken or not.

For the errors above indicated, we think that there should be another trial of this

case. Accordingly, the judgments of the Appellate and of the circuit courts are reversed, and the cause is remanded to the circuit court for further proceedings.

Reversed and remanded.

HAND, C. J., and WILKIN, CARTWRIGHT, and BOGGS, JJ. (specially concurring). We concur in the conclusion reached in the foregoing opinion that the judgment should be reversed but do not agree to all that is said therein. We base our opinion that the case should be reversed upon the ground mainly that the court erred in admitting in evidence the letters and reports written to the plaintiffs and made to them by their own agents, attorneys and other employes, and which were not proper evidence against the city. We think whether or not the supplemental agreement referred to in the opinion was ratified should be left open to be determined upon the next trial and that in case it should be found that said supplemental agreement is not binding upon the city that the plaintiffs should be allowed to recover the reasonable value of all labor and material furnished the city and accepted by it which is not covered by the terms of the original agreement but which was furnished by the plaintiffs in the construction of the improvement. We are also of the opinion that on the further hearing the evidence should be confined to the proof of a cause of action which existed at the time suit was commenced and that proof that the city converted the plant of the plaintiffs during the former trial should not be heard unless agreed to by the parties.

(177 N. Y. 8)

M. GROH'S SONS v. GROH.

(Court of Appeals of New York. Dec. 8, 1903.)

TRIAL—OBJECTIONS TO EVIDENCE—HARMLESS ERROR.

1. Where evidence is objected to on the specific ground that it is immaterial, the objection sufficiently points out the precise ground on which the evidence should be excluded.

2. Where evidence is neither immaterial nor irrelevant, an objection that it is incompetent should state the precise grounds on which the objection is based.

3. The reception of evidence is reversible error, over an objection to it as immaterial, where it is so clearly immaterial as to be also incompetent and irrelevant.

4. Where improper evidence is erroneously admitted, and is not stricken out, the fact that the court acquiesced in plaintiff's request to charge does not render such error harmless.

5. Subsequent withdrawal from the record of defendant's pleading erroneously admitted in evidence cures the error.

Appeal from Supreme Court, Appellate Division, First Department.

Action by M. Groh's Sons against Julia A. Groh, executrix of John Groh, deceased. From a judgment of the Appellate Division

(80 N. Y. Supp. 438) affirming a judgment for defendant, plaintiff appeals. Reversed.

Frank S. Black, Henderson Peck, and Thomas F. Keogh, for appellant. Abram I. Elkus and Carlisle J. Gleason, for respondent.

WERNER, J. This action was brought to recover of the defendant's testator various sums of money, aggregating in all \$15,515.71. The complaint sets forth three separate causes of action. The first two proceed upon the theory that the defendant's testator was indebted to the plaintiff in the sum of \$8,000, and upwards, for moneys received and not accounted for. The third alleges that he received from the plaintiff \$8,763.17 upon representations that were not true. Upon the questions of fact submitted to the jury, the defendant was given the verdict. The judgment entered thereon was affirmed in the Appellate Division by a divided court. There was evidence before the jury upon which to base their verdict, and therefore no questions are presented which this court can review, except upon exceptions taken during the course of the trial. The bearing of these exceptions will appear from a short statement of the facts: Prior to December 30, 1896, M. Groh's Sons had been a copartnership, and conducted a brewery in the city of New York. The firm was a family affair, and originally consisted of Michael Groh, Julia A. Groh, his wife, and their two sons, Michael J. and John Groh. Michael, the father, died in 1895, and Michael J., the son, in 1896; leaving Julia A. and John, her son, the original defendant herein, the sole owners of the business. On December 30, 1896, the plaintiff corporation was formed under the name of M. Groh's Sons, and took over all the assets of the partnership, including all debts and claims due to or owed by it. The capital stock of the corporation was \$600,000, which was divided equally between Julia A. and John Groh. Bonds were issued to the amount of \$500,000, and these were also divided equally between them. On December 16, 1897, J. George Flammer bought all of the stock and bonds belonging to Julia A., and also one share of stock belonging to John Groh. Pending this action, John, the original defendant, died; and his executrix, the present defendant, was substituted in his place.

The first cause of action in the complaint sets forth that, before the corporation was formed, John Groh, deceased, had become indebted to the partnership in the sum of \$7,175.02, for which he had failed to account. The second cause of action sets forth that, as president and treasurer of the plaintiff, and between January 1 and April 17, 1897, he misappropriated \$1,577.53 belonging to the plaintiff. In the third cause of action it is alleged that on or about the 17th of April, 1897, he received from the corporation, with-

¶ 5. See Appeal and Error, vol. 3, Cent. Dig. § 4178.

out consideration therefor, the sum of \$6,763.16, upon the representation that the corporation was indebted to him in that amount. The answer contains a general denial of the material allegations of the complaint, and several separate defenses. These alleged defenses are, in substance, that one J. George Flammer was the attorney of Julia A. Groh and of the firm, as well as of the corporation that succeeded it, and that, as such attorney, Flammer was fully conversant with all the business affairs of each; that the sums of money claimed in the first and second causes of action in the complaint set forth were expended by John Groh in the business of the firm and corporation; that, when Julia A. Groh transferred to Flammer her stock and bonds in the corporation, a written agreement was entered into by which it was covenanted that the former should cancel, discharge, and pay all debts and liabilities of the corporation; that, as a part of the consideration of the transfer, Flammer executed and delivered to Julia A. Groh his promissory note for \$50,000, payable November 1, 1897; that immediately after such transfer, and on or about April 17, 1897, Flammer was elected a director, and afterwards president, of the corporation, and assumed entire charge of its business affairs; that, when the note for \$50,000 became due, Flammer refused to pay it, because he claimed the amounts set forth in the complaint were liabilities of the corporation, and should be deducted from the amount of the note; that an amicable agreement was entered into between Flammer and Julia A. Groh, under which, in consideration of \$10,000, the sums set forth in the complaint were satisfied, and the plaintiff received the \$10,000 in full satisfaction and discharge of such claims. As a separate defense to the third cause of action, it was alleged that the plaintiff, by and with the consent of Flammer and Julia A. Groh, paid to the latter and John Groh, the original defendant, each the sum of \$3,381.68, as a dividend upon the earnings of the plaintiff then due to them.

As tending to sustain the allegations of the answer, the defendant was permitted to introduce in evidence the agreement under which Flammer purchased from Mrs. Groh for \$150,000 her stock and bonds of the plaintiff corporation, of the par value of \$550,000, in which she stipulated to pay all the debts of the firm and the corporation. Counsel for the plaintiff objected to this as immaterial, and added, "What possible materiality a transaction between Mrs. Groh and Mr. Flammer can have on the issue in this action is difficult for me to see." The objection was overruled, and an exception taken. Again, the defendant introduced evidence showing that in July, 1898, John Groh, deceased, ceased to be an officer of the plaintiff, and that Flammer, who controlled a majority of the stock, then elected himself president and treasurer of the corporation,

and he, with his two brothers-in-law, one of whom was vice president, composed the board of directors. The defendant proceeded to show that, up to the time when John Groh ceased to be an officer of the plaintiff, none of the officers thereof had received salaries. This latter part of the evidence was objected to as immaterial, the objection was overruled, and an exception taken by plaintiff. After the introduction of this testimony, defendant's counsel asked the witness the question: "When did the officers first begin to receive salaries? Mr. Nathan [plaintiff's counsel]: Objected to as immaterial. How does that have any bearing upon the case? The Court: It may have no bearing at all, but I think it proper to allow it in the case for what it may hereafter be worth. Mr. Nathan: Exception. * * * Q. You were the secretary, and kept the minutes? A. Yes, sir. Q. Will you look at the minute book, and tell me when the officers first began to receive salaries, and what they received? (Same objection, ruling, and exception.)" This was followed by evidence adduced by the defendant disclosing that Flammer, as president, received \$15,000 a year, which was afterwards increased to \$25,000; that his brother-in-law, as vice president and cashier, received \$5,200 a year, and that during all this time John Groh continued to own one-half of the bonds of the plaintiff and one-half of the stock, less one share; and that no dividends were paid on the stock. All this was under the objection of the plaintiff that it was immaterial, and exceptions were duly taken to the rulings of the court admitting the evidence. Again, the defendant was permitted to introduce in evidence a written release from Flammer individually to Julia A. Groh, purporting to release her from all debts and obligations he had against her, excepting debts or obligations arising out of the agreement between them for the purchase by the former of the stock and bonds from the latter. Counsel for the plaintiff objected to this paper as immaterial, and, in doing so, pointed out to the court that it was an individual release of Flammer, and not the act of the plaintiff. The court said: "It is received. The jury should have the entire transaction before them. Mr. Nathan: It has nothing to do with this transaction. The Court: I think it has a great deal to do with it. It involves the \$10,000 the corporation is endeavoring to get from this estate. * * * Mr. Nathan: I except." The record contains other exceptions of a similar character, but we need not discuss them in detail, since those set forth clearly disclose the extent to which evidence was admitted that was not only foreign to the real issues in the case, but which, in the nature of things, must have been prejudicial to the plaintiff. The issues to be tried were those tendered by the complaint, and fairly controverted by the answer. The allegations of the answer relating to

the personal transactions between Flammer and the defendant, and to the subsequent proceedings of the plaintiff corporation in the payment of salaries to its officers, were not germane to the issues in the case. This, indeed, is conceded in the prevailing opinion of the learned Appellate Division, but the judgment was affirmed because the objections to the improper evidence were regarded as insufficient. We entertain a different view. When evidence is immaterial, and is objected to on that specific ground, the objection is well taken, because it points out the precise ground upon which the evidence should be excluded, and that is all the objector is required to do. It frequently happens that evidence which is immaterial is also incompetent and irrelevant, and in that event it may properly be objected to on all or either of these grounds. It is equally true that evidence may be incompetent, but neither immaterial nor irrelevant, or vice versa, in which case the objection may and should be urged upon the precise ground that provokes it. And the reason of the rule is plain. If evidence is inadmissible upon one ground, and is objected to upon another ground, the trial court is not advised of the true reason for its rejection, and the objector is held to have waived it.

In the case at bar some of the evidence objected to was immaterial, irrelevant, and incompetent. It might have been objected to on all or each of these grounds. It was objected to only as being immaterial. It was, however, so utterly and clearly immaterial as to point out clearly its incompetency as well as its irrelevancy. The objection having been taken upon a ground that was proper and precise, and being obviously suggestive of the other two grounds upon which the evidence might have been excluded, we think the cases cited by the learned Appellate Division in support of the conclusion that the objections herein were not properly taken have no application. In those cases (*Turner v. City of Newburgh*, 109 N. Y. 301, 16 N. E. 844, 4 Am. St. Rep. 453; *Atkins v. Elwell*, 45 N. Y. 753; *Ward v. Kilpatrick*, 85 N. Y. 413, 39 Am. Rep. 674; *Charlton v. Rose*, 24 App. Div. 485, 48 N. Y. Supp. 1073) the objections were either general in form, or placed upon one ground, while the evidence was inadmissible only upon different and distinct grounds, which were not urged, and hence the court was not apprised of the real ground upon which the evidence should have been excluded.

The learned counsel for the defendant further relies upon the contention that the erroneous rulings herein were cured by the charge of the court made in response to the requests of the plaintiff's counsel: (1) "That the release by Flammer to Julia A. Groh did not release John Groh from liability in any of the claims made by the plaintiff in this action;" and (2) that "the amount of Mr. Flammer's salary has no bearing upon the is-

ssues in this action." The difficulty with this claim is that, while the request was submitted in the language above quoted, the court did nothing more than to respond, "I so charge." The evidence was not stricken out. The jury were not instructed to disregard it. In the face of these facts, the mere acquiescence of the court in the requests above quoted cannot be said to have been sufficient to remove the impression which the evidence upon these subjects must have left on the minds of the jury. *Ives v. Ellis*, 169 N. Y. 85, 62 N. E. 138; *People v. Smith*, 172 N. Y. 210, 64 N. E. 814, and cases there cited.

As to the alleged error of the trial court in permitting the defendant's pleading to be put in evidence, it is enough to say that we think it was cured by its subsequent withdrawal from the record.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

PARKER, C. J., and GRAY, O'BRIEN, HAIGHT, MARTIN, and VANN, JJ., concur.

Judgment reversed, etc.

(177 N. Y. 23)

WOODRUFF et al. v. OSWEGO STARCH FACTORY.

(Court of Appeals of New York. Dec. 8, 1903.)

CONSTITUTIONAL LAW—TAXATION OF RENTS—DOUBLE TAXATION—CONSTRUCTION OF LEASE.

1. Laws 1896, p. 800, c. 908, § 8, re-enacting chapter 327, p. 466, Laws 1848, providing for the taxation of rents reserved in any lease in fee to the person entitled to receive the same as personal property, does not create double taxation, as they are severed from the real estate, and taxed at their capitalized value as a new subject of taxation, while the real estate remains taxable to the lessee or tenant.

2. Where, in a perpetual lease, the tenant covenanted to pay all taxes on the demised premises, they do not include taxes assessed against the lessor on the rents reserved under the lease, and not measured by the lands leased, but the lessee is liable only for such taxes as are directly imposed upon the land.

Bartlett, J., dissenting.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by Caroline B. Woodruff and others, executors of Nelson Beardsley, against the Oswego Starch Factory. From a judgment of the Appellate Division (74 N. Y. Supp. 961) entered in favor of defendant on the submission of controversy, plaintiffs appeal. Affirmed.

Frederic E. Storke, for appellants. H. L. Howe, for respondent.

GRAY, J. The parties to this proceeding agreed to submit the controversy between them to the court below in the following language: "Judgment may be rendered for or against either party, determining which par-

ty is liable to pay the taxes described in the case and submission, and awarding a money judgment in accordance with such determination, with costs." The statement of facts upon which the parties agreed to the submission shows that the plaintiffs represent one-half of all the right, title, and interest of the grantors in certain conveyances in fee, which reserved to them a perpetual rent; while the defendant owns the right, title, and interest of the several grantees named in those conveyances, subject to the same rents reserved therein. These conveyances were executed between the years 1847 and 1867, and they granted certain lands and water power situate on the Oswego river within the city of Oswego. Each of the conveyances contained, in substantially the same language, the covenant to pay, in addition to a yearly rent in cash, "all taxes, charges, and assessments, ordinary and extraordinary, which shall be taxed, charged, imposed, or assessed on the hereby demised premises and privileges, or any part thereof, or on the said parties of the first part, their heirs and assigns, in respect thereof." In 1898 the assessors of the city of Oswego made an assessment upon the interest of the plaintiffs in the leases, as personal estate, at a gross valuation, and levied thereon a city tax. Thereafter, in the years 1899 and 1900, the said assessors made assessments, in the same form and at the same amount, and levied state, city, and county taxes thereon for the city and county of Oswego. Prior to the year 1898 no assessment had ever been made up on the interest of the plaintiffs in these rents or that of their predecessors in title for purposes of taxation. The plaintiffs failed and refused to pay the taxes so levied, as did the defendant, and, so far as they have been paid, they were collected by the enforced levy upon and sale of defendant's property, and under its protest. To the extent to which the payment of these taxes had been enforced by the taxing officers, the defendant has deducted, and has claimed the right to deduct, from installments of rents maturing under the leases, the amount of such enforced collections; and by reason, in one instance, of the amount collected exceeding the amount of rents due, a counterclaim for the excess is made by the defendant. Similar taxes were also outstanding and unpaid at the time of the submission of the controversy, the liability for the payment of which was to be determined by the judgment.

It further appears from the agreed statement of facts that prior to the completion of the assessment rolls of 1898 the plaintiffs notified the defendant of the proposed assessment and of their claim, "that defendant was bound to pay all taxes levied thereon by virtue of the provisions of the tax clause contained in each of said conveyances," and the statement further contains the language that "the defendant refused to pay said tax, or

any part thereof, claiming that it was not liable for such tax under said tax clause; but that the plaintiffs were liable to pay the same and so advised the plaintiffs."

The Appellate Division in the Fourth Department decided the controversy against the plaintiffs and adjudged that they were liable to pay the taxes in question "under a construction of the covenant in said leases, and that the defendant had a legal right under the statute to charge the amount of said taxes collected of and from it to the plaintiffs, and to deduct the same from the rent due or to become due from it to the plaintiffs." Upon the appeal which the plaintiffs have taken to this court they insist, in the first place, that the tax is unconstitutional and void, and that it should be so adjudged by the court. In the second place, they insist that under the tax covenant of the leases the defendant is bound to pay the taxes upon the rent. The act under which the taxes were assessed and levied upon the rents reserved in the leases was originally passed by the Legislature on May 13, 1846 (Laws 1846, p. 466, c. 327), prior to the execution of the leases, and its provisions have been, substantially, re-enacted in the present Tax Law (Laws 1896, p. 795, c. 908). Section 8 (Laws 1896, p. 800, c. 908) of the tax law provides that "rents reserved in any lease in fee, * * * and chargeable upon real property within the state, shall be taxable to the person entitled to receive the same as personal property in the tax district where such real property is situated." Section 21, subd. 5 (Laws 1896, p. 804, c. 908), provides that the value of taxable rents reserved and chargeable upon lands within the tax district, estimated at a principal sum, the interest of which at the legal rate per annum would produce a sum equal to such annual rents, shall be set down in the fifth column of the assessment roll. Section 75 provides with respect to the collection of such taxes, in the event of a failure to pay them, that the collector, if no sufficient personal property belonging to the person against whom the tax is levied can be found in the county, shall collect of the tenant or lessee in possession of the premises on which the rent is reserved in the same manner as though such taxes had been assessed against such tenant or lessee. It further provides that in such event the tenant or lessee shall be entitled to have the amount of the tax deducted from the amount of rent reserved which may be or become due, or may maintain an action to recover the same.

I very much doubt that the question of the constitutionality of the law has been raised in this case. The terms of the submission do not seem to present it, and the city of Oswego was not made a party. The only judgment asked for is as to "which party is liable to pay the taxes described in the case," and in the agreed statement of facts no claim of illegality or invalidity is made

with respect to the law. But it may be important, in the interest of a termination of the litigation, that we should briefly declare our judgment to be in favor of the constitutionality of the statute. The argument of the appellants, or so much as we need consider, is that it offends the rule of equality in the imposition of taxes, and permits of double taxation. It is not pretended that the validity of this law, which had existed for over 50 years upon the statute books, has ever been questioned in the courts, and that it should seriously be assailed at this late day, proceeds from a misapprehension either of its operation or of the power of the Legislature. If the result of its enforcement was to effect double taxation, that would be no reason for holding it an invalid exercise of the legislative power. The power of the state Legislature to impose taxes is unlimited, and its exercise will be guided and restrained by those considerations of wisdom and of policy to which the members are naturally subject in their own interests as in those of their constituents. In construing laws which impose taxes courts will incline to that construction which will avoid double taxation; but the power, if clearly exercised, cannot be denied to the legislative body.

But this is not, in strictness, a case of double taxation. What the Legislature has done is to declare that the rents reserved in such leases shall be assessable to the person entitled to receive the same as personal property. They are severed from the real estate and taxed at their capitalized value as a new subject of taxation, while the real estate remains taxable to the lessee or tenant. The Legislature may competently do this, for it rests in its discretion to select the persons and the objects of taxation. Courts are not concerned with the motives or with the wisdom of the legislative action, and the only limitation is that the burden of taxation shall be uniform and equal over all. That is the result under this law. Wherever real estate is held under the form of grant or lease described in the statute, the interest of the person entitled to the rents reserved is subjected to taxation as a species of property, which, for the purpose, is classed as personal estate.

It seems to me, however, that the actual controversy between these parties relates to the construction to be given to the covenant in question. The liability under this covenant is of a twofold nature. The lessee is to pay all taxes, ordinary and extraordinary, which shall be imposed upon the demised premises, and he is also required to pay such as shall be imposed on the lessors "in respect thereof." The taxes in question were not assessed upon the demised premises. A tax upon rents may doubtless be regarded, in legal theory, as a tax upon the land; but while, as a general proposition, that may be true, it has no influence upon the question

here. The Legislature has, for the purposes of taxation, separated the rents reserved in such leases from the real estate demised, and hence the question arises, under the language of this covenant, whether, notwithstanding the legislative action, the covenantor is liable for the taxes against the lessors, as being taxes assessed in respect of the demised premises. Is the assessment, in such a case in relation to the property demised, or is it in relation, essentially, to the rents or income therefrom? The ordinary meaning of the words employed, read in connection with the provisions of the statute, should influence our judgment. It was the view of the learned court below that the taxes to which the covenant related must be such as were directed specifically against the demised property, or against the lessors in respect of or on account of such property, and that an assessment against the lessor upon the rents reserved under a lease not based upon or measured by the lands leased was not a tax in respect of the demised premises. I am inclined to that view. At the time of the execution of these leases the act of 1846 provided for the assessment and taxation of rents reserved in such leases as personal estate of the lessors, and the parties to them must be presumed to have entered into their engagements with knowledge of the existing law. The covenant is of ancient use, but in determining its comprehensiveness with respect to the covenantee's liability we cannot be controlled by common-law rules if our statutes furnish the basis for a different consideration of the question. The act of 1846 was a legislative declaration, which must control. It severed the rents reserved in leases in fee as property, and declared them to be assessable as personal estate for the purpose of taxation. That being the law of the state, the contract of lease must be read in its light. The grantor or the lessor will be presumed to have fixed the amount of the rental moneys to be reserved with some regard to the question of taxation, and if it is not clear upon the reading of the instrument what his intention in that respect was, the doubt should be resolved against him, rather than against his lessee. In *Van Rensselaer v. Dennison*, 8 Barb. 23, the General Term of the Supreme Court held that the tenant was not liable, under a covenant to pay taxes, ordinary and extraordinary, which might be assessed upon the premises granted in a perpetual lease or upon the lessor "for and in respect of the said premises," for the amount of a tax on the rents reserved in the lease. In that case the action was to recover for arrears of rents, and the plaintiff also claimed the right to recover the amount of a tax on the rents reserved, which he had been compelled to pay under the act of 1846. The decision was rendered in 1850, and it has never been overruled in this state, I believe, in so far as it holds adversely upon the claim of the tenant's liability under the covenant

to pay taxes imposed upon the rents, and the lease in that case antedated the enactment of the act of 1846. It was held in that case that the tax, being on property which was declared by the act of 1846 to be, for the purposes of taxation, personal estate, it was in no sense a tax on the granted premises. It was considered that "it was the income of the person which was taxed at a uniform value prescribed by the statute." A reason for the use of the language in the covenant was suggested, in that the parties might well have intended to provide for the case where, if the Legislature should enact that a tax on the real estate might be assessed either upon the landlord or the tenant, the taxing authorities might assess it to and collect it from the landlord. My consideration of this case leads me to the conclusion that, in view of the statute existing when these leases were made, which severed the taxes on rents reserved in leases from the property leased, and made them taxable to the lessor as personal estate, the covenant of the lessee in question related only to such taxes as were directly imposed upon the land demised, and that it did not relate to a tax assessed and levied under that provision of the law.

I advise an affirmance of the judgment appealed from, with costs.

BARTLETT, J. (dissenting). I agree with Judge GRAY that the question of the constitutionality of the law of 1846 (page 466, c. 327), which provides that the rents of leases for a term exceeding 21 years shall be assessed to the person or persons entitled to receive the same as personal estate, is not presented by the terms of this submitted controversy, construing the same strictly. While I do not agree with the judgment about to be rendered by the court in favor of the constitutionality of the law of 1846, I refrain from discussing the reasons upon which I rest my dissent, as I am of opinion that, if the law is held valid, the defendant company is nevertheless liable upon a proper construction of the covenant in the lease. The defendant company covenanted to pay to the appellants certain rent, "and also to pay all taxes, charges, and assessments, ordinary and extraordinary, which shall be taxed, charged, imposed, or assessed on the hereby demised premises and privileges, or any part thereof, or on the said parties of the first part, their heirs and assigns, in respect thereof." It will be observed that this covenant is dual in character: (1) It covers all taxes upon the premises, ordinary and extraordinary; and (2) it covers all taxes imposed on the lessors in respect thereof. This comprehensive covenant has long been employed by English conveyancers, and is intended to cover every form of taxation to which the landlord may be subject by reason of his ownership of the land or receiving the rents thereof. In the view I entertain of this covenant, it is of no importance whether the taxation

of rents be construed as a tax on land, or, under the act of 1846, a tax on personal property. The tenant has clearly assumed the payment of taxes on the land, and also the taxes imposed on the landlord in respect of the same. If this construction is not the proper one, no force or effect is given to the words in the latter part of the covenant assuming taxes imposed upon the landlord in respect to the premises. I vote for reversal on the ground that the defendant company is bound by this covenant to pay the taxes imposed on the rents as personal property, under the law of 1846.

PARKER, C. J., and O'BRIEN, HAIGHT, MARTIN, and VANN, JJ., concur with GRAY, J. BARTLETT, J., dissents.

Judgment affirmed.

(177 N. Y. 16)

CORBETT v. ST. VINCENT'S INDUSTRIAL SCHOOL OF UTICA.

(Court of Appeals of New York. Dec. 8, 1903.)

NEGLIGENCE—INJURY TO CONVICT—LIABILITIES OF CHARITABLE INSTITUTION.

1. A charitable institution organized under Laws 1848, p. 447, c. 319, as amended by Laws 1883, p. 623, c. 446, to maintain an industrial school for the support and education of male orphans, to which magistrates, under Pen. Code, § 713, are authorized to send minors convicted of crime, is, as to such convicts, a governmental agency, and is not liable to a minor, legally committed to it for a crime, for personal injuries sustained, resulting from the negligence of defendant's managers in failing to warn him as to the dangers incurred in operating the machine at which he was set to work.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by James Corbett, by Michael J. Corbett, his guardian ad litem, against the St. Vincent's Industrial School of Utica. From a judgment of the Appellate Division (79 N. Y. Supp. 369) reversing a judgment in favor of plaintiff and granting a new trial, plaintiff appeals. Affirmed.

Henry E. Miller, for appellant. William Kernan, for respondent.

O'BRIEN, J. The plaintiff, a boy under 16 years of age, brought this action in the name of his guardian ad litem against this defendant to recover damages for a personal injury sustained by him while confined as a prisoner by the defendant, having been required to do some work in a laundry in which a machine called a "steam mangle" was in operation in doing the work. The plaintiff was assigned to duty in operating the mangle, assisted by another boy. He had never worked upon such a machine before, and it is claimed that he received no instructions from the managers of the defendant institution in regard to the management of the man-

gle, and while operating it on September 14, 1900, his right hand was caught between the cylinders and severely burned, mutilated, and crushed, and thus he became permanently disabled. The case was submitted to the jury, and a verdict rendered for the plaintiff, upon which judgment was entered, but was reversed at the Appellate Division.

In view of the extensive discussion which the case received in the learned court below, the only question that need be discussed in this court is whether the general law of negligence has any application to the case, inasmuch as it is not claimed that there was any neglect on the part of the officers or managers of the defendant in the selection of their inferior agents, even though the injury occurred by the negligence of such agents. The relation of master and servant did not exist between the plaintiff and the defendant, nor any other relation based upon contract. The plaintiff, instead of being committed to a prison or reformatory, was confined in this institution in pursuance of law; and even if it be true, as claimed by the plaintiff's counsel, that he received no instructions as to the operation of the machine, or any warning from the defendant that it was dangerous, or that the defendant posted no rules or regulations governing the management of such machinery, the question arises whether the defendant can be subjected to liability. The defendant is a charitable institution, organized under the laws of this state to support and maintain an industrial school and asylum for the sustenance and education of male orphan children. Boys were committed to the defendant from various counties by the overseers of the poor, justices of the peace, police magistrates, and judges. For the care, education, and support of such boys the counties, including Onondaga county, allowed and paid to the defendant for most of the boys \$2 per week. It appears that the defendant had a farm in connection with its institution, upon which it raised vegetables and hay for the institution, and upon which some of the boys did some work. It also manufactured clothing for the boys, and made stockings for their use. For these purposes defendant had sewing and knitting machines. The articles so manufactured by the inmates of the institution were not sold unless there was a surplus. The defendant maintained a school for these boys, at which they were required to attend, and also maintained a laundry, in which was laundered the clothing of the inmates, but not for the public, or for any one outside of the institution. There is no proof in the case that any of the agents of the defendant were incompetent to discharge the duties assigned to them, or that the managers were negligent in their selection or retention of its employés. On the 19th day of August, 1900, the plaintiff, who was then about 15 years of age, was arrested upon the charge of petit larceny. He was tried and

convicted of this offense before a police justice, and thereupon committed to the defendant institution, where he was received and detained until after the occurrence of the accident in question, when he was discharged. By section 713 of the Penal Code the court in which he was convicted was required to commit him to some reformatory, charitable or other institution authorized by law to receive and take charge of minors. There is no dispute as to the fact that this institution was authorized to receive and take care of the plaintiff, and no question as to the legality of his commitment. It is quite true that the defendant was not obliged to receive him, but, having decided to place him in the institution, the mere fact that it could have refused has no bearing on the question of liability.

When we read the statutes under which this institution was incorporated, and which authorized county authorities to make contracts with it for the care and custody of juvenile delinquents, and the provision of the Penal Code authorizing magistrates and other authorities to send boys under the age of 16 years to such institutions, it is manifest that the state has made use of these institutions for the purpose of caring for and taking charge of minors convicted of crime. That is one of the functions of government which the state may exercise, and which it may delegate to charitable institutions created under its laws, and for the purpose of taking care of the morals of the youthful delinquent himself. In other words, it was thought to be wise to send boys of that age to this institution, rather than confine them in the state prisons or county jails, where they would necessarily mingle with older and more hardened criminals. This was doubtless the policy which was expressed in the statutes referred to. The question here is whether the defendant, acting, so far as this plaintiff was concerned, as a governmental agency for the care of such convicts, is not entitled to the same immunity from liability for damages in case of such accidents that is conceded to the state itself and to all its municipal divisions.

It is quite possible that, if this case is governed by the general law of negligence as applied to the relation of master and servant, there was sufficient evidence to justify the submission of the case to the jury. We do not, however, consider it necessary to pass upon that question, since it has been fully disposed of in the court below, and we think that, inasmuch as the defendant, in receiving and taking charge of the plaintiff, was exercising functions which in a large sense belonged to the state, it cannot be held liable for accidents of this character. This view is well supported by abundant authority, as will be seen by the adjudged cases, which it is only necessary to cite without comment. *Lewis v. State*, 96 N. Y. 71, 48 Am. Rep. 607; *Hughes v. County of Monroe*,

147 N. Y. 49, 41 N. E. 407, 39 L. R. A. 33; McDonald v. Mass. General Hospital, 120 Mass. 432, 21 Am. Rep. 529; Benton v. Trustees of City Hospital of Boston, 140 Mass. 13, 1 N. E. 836, 54 Am. Rep. 436; People ex rel. N. Y. Inst. for Blind v. Fitch, 154 N. Y. 14, 47 N. E. 983, 38 L. R. A. 591; People ex rel. Mt. Magdalen School v. Dickson, 57 Hun, 312, 10 N. Y. Supp. 604; Collins v. N. Y. Post Graduate Medical School, 59 App. Div. 63, 69 N. Y. Supp. 106; Joel v. Woman's Hospital, 89 Hun, 73, 35 N. Y. Supp. 37; Springfield Fire & M. Ins. Co. v. Village of Keeseville, 148 N. Y. 46, 42 N. E. 405, 30 L. R. A. 660, 51 Am. St. Rep. 667. The rule which exempts the defendant from damages resulting from accidents of this character would seem to be founded upon the plainest principles of reason and justice. The plaintiff was really a prisoner in the custody of the defendant, deprived of his liberty, and all his conduct and movements subject to such regulations as the defendant might reasonably prescribe, just as in the case of convicts in the prisons or jails of the state. In the interest of humanity it was thought to be wise to subject such young boys to a milder punishment than is meted out to older criminals. It was the duty of the defendant, having decided to receive the plaintiff into custody, to subject him to such care and discipline as would be likely to produce a reformation in his life, and to this end his employment at some useful labor was thought to be, and doubtless was, necessary. The defendant is in no sense a business enterprise. It has no stockholders, and is not organized for money-making purposes. The fact that it has a farm upon which it employs boys confined in the institution to some extent does not change its character as a charitable institution. It appears that there were something less than 200 boys in the institution at the time this accident happened. They were sent there, just as the plaintiff was, from various counties in the state. It is not at all likely that the institution could support these boys upon the small pittance of \$2 a week, or less, as it was in some cases. Their proper support was derived from the farm and some other industries where the labor of the inmates could be utilized, and, of course, the proper care of their clothing rendered it necessary to keep and maintain a laundry. If, while working in that laundry upon a machine, the plaintiff was injured, as the record shows that he was, the result is doubtless unfortunate, but it is obvious that the defendant cannot be made liable in damages for the injury.

We think, therefore, that the judgment must be affirmed, with costs.

PARKER, C. J., and GRAY, HAIGHT, MARTIN, VANN, and WERNER, JJ., concur.

Judgment affirmed.

(177 N. Y. 1)

BENEDICT v. DESHEL et al.

(Court of Appeals of New York. Dec. 8, 1903.)

BANKRUPTCY—PREFERENTIAL PAYMENT—RECOVERY BY TRUSTEE.

1. In an action by a trustee in bankruptcy under Bankr. Act, § 60 (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]), to recover moneys paid by an insolvent to a creditor in violation of the provisions relating to preferences, proof that an insolvent made a payment the effect of which was to give one creditor a preference over others from the same class, where there is evidence from which a jury might find that such creditor had reasonable ground to believe it was intended as a preference, the intent of the debtor in making the payment need not also be shown.

Haight and Cullen, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Edward G. Benedict, trustee in bankruptcy of the Union Cloak & Suit Company, against Jacob Deshel and others. From a judgment of the Appellate Division (79 N. Y. Supp. 205) affirming a judgment for defendants and from an order denying a new trial, plaintiff appeals. Reversed.

J. Woolsey Shepard and Joseph McElroy, Jr., for appellant. Morris Hillquit, for respondents.

WERNER, J. This action was brought by the plaintiff, as trustee in bankruptcy of the Union Cloak & Suit Company, a domestic corporation, to recover from the defendants, who were creditors of that corporation, certain moneys paid by it to them in alleged violation of the provisions of the bankruptcy act relating to preferences. At the Trial Term the defendants had a verdict, and the judgment entered upon it was affirmed at the Appellate Division. The order of affirmance is not in the record, but there is evidence to support the contentions of fact advanced by the defendants, so that, if the case was submitted to the jury with correct instructions as to the law and sound rulings upon objections to the reception and exclusion of evidence, the verdict is conclusive, whether its affirmance was unanimous or not.

The case turns upon the construction of section 60 of the national bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]), and the specific question involved is presented by exception taken by the plaintiff to the charge of the court to the jury. Section 60 of the act referred to consists of two subdivisions and reads as follows:

"(a) A person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater

percentage of his debt than any other of such creditors of the same class.

"(b) If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition and before the adjudication, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person."

The learned trial court charged the jury that plaintiff's right to recover depended upon three distinct facts, each of which he was bound to establish by evidence: First. "That the Union Cloak & Suit Company was insolvent on July 3rd, 1901." Second. "That in transferring to the defendant the \$1,000 the said company intended to give a preference to the defendant." Third. "That at the time of receiving from the Union Cloak & Suit Company the transfer of the \$1,000 on July 3, 1901, the defendant had reasonable cause to believe that said company was insolvent, and intended to give them, the defendants, such preference." The first and third instructions above quoted were concededly correct, but plaintiff's counsel excepted to the second instruction, and that presents the question in the case. Is it incumbent upon a trustee, in an action to avoid an alleged preferential payment by an insolvent debtor to his creditor, to prove the intent of the debtor to give a preference, as well as the creditor's reasonable ground to believe that a preference was intended to be given? The language of the statute (subdivision "b") makes it perfectly clear that a preferential payment by an insolvent debtor to his creditor cannot be avoided by a trustee in bankruptcy unless he can prove that the creditor receiving it "shall have reasonable cause to believe that it was intended thereby to give a preference." In the case at bar the courts below have gone a step further, and have held that such an action cannot be maintained without affirmative proof of the debtor's intent to give a preference. It is practically conceded that this interpretation of the statute rests upon judicial construction, rather than direct language, and the argument by which it is sought to be supported is that a creditor's reasonable cause to believe that, in the payment to him it was intended to give a preference, can only be predicated upon the existence of such an intent in the mind of the debtor. It is contended that it would be paradoxical to hold that the creditor should have reasonable ground to believe in the debtor's intent to give a preference unless that intent in fact exists and is disclosed by proof. The difficulty with this argument is that it ignores the explicit language of the statute (subdivision "a"), by which the debtor's intent is removed from the sphere of speculation or evidence into the category of established fact. In unmis-

takable language Congress has said that when an insolvent debtor makes a transfer of property, the effect of which will be to enable any one of his creditors to obtain a greater percentage of his debt than any other creditor of the same class, "the debtor shall be deemed to have given a preference." Shall this language be held to be meaningless? Shall it be expunged from the statute by judicial construction? If it does not disclose the legislative intent to fix by law that which would otherwise be the subject of controversy, what purpose does it serve? The only answer to these queries is found in the rather metaphysical contention, already alluded to, that, if the debtor's intent depends upon his act, without reference to his state of mind, it is quite superfluous to ascertain the creditor's reasonable ground for belief as to the character and purpose of the debtor's act. This argument, it seems to us, is more refined than sound. The statute deals with three distinct legal entities concerned in the administration of a bankrupt's estate: (1) The debtor. (2) The trustee. (3) The creditor. As to the debtor, the statute declares that a payment under certain conditions shall be held to be preferential. He is not to be heard upon the question of his intent. The effect of his act is fixed by law. That is the scope and purport of subdivision "a." The next section (subdivision "b") declares, in effect, that a preferential payment is not void per se, but voidable by the trustee upon a certain condition. And what is the condition? Simply that the trustee shall establish that the creditor had reasonable cause to believe that the payment to him was intended as a preference. In other words, the trustee's remedy is not absolute, but is made to depend upon proof of the knowledge or belief with which the creditor took the payment.

If Congress should have reversed the order of things by providing that upon proof of the debtor's intent to create a preference any payment made by him within the prohibited time and under the forbidden conditions should be void, regardless of the creditor's knowledge or belief in the matter, no one could deny that it would have been a valid exercise of legislative power, however unreasonable or unequitable it might prove in its practical application to individual instances. The present statute does not differ in principle from the illustration cited. In each case the condition affixed to the remedy ignores the state of mind of one of the parties to the transaction, and renders his act dependent upon the purpose of the other. We think, therefore, that when a trustee in bankruptcy has proven that a debtor who is insolvent has made a payment, the effect of which will be to give one creditor a preference over others of the same class, and has supplemented this by evidence from which a jury would have the right to find that the creditor receiving the payment had reasonable ground to believe that it was intended

thereby to give a preference, he has established all that the statute requires in support of his cause of action. He need not go further, as the plaintiff herein was required to do, and seek to prove the intent of the debtor in making the payment.

This seems to be the view of this statute taken by the Supreme Court of the United States in *Pirle v. Chicago Title & Trust Co.*, 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171. That was an action in which the claim of *Pirle & Co.* had been allowed for goods sold to the bankrupts, and a dividend paid thereon in the bankruptcy proceedings. The *Chicago Title & Trust Company* asked for a reconsideration of the claim and its rejection on the ground that *Pirle & Co.* had, within four months prior to the filing of the petition in bankruptcy, received large preferential payments. The question directly involved was whether the creditors could keep their dividends, but underlying this was the construction of several sections of the bankruptcy statute, among them the one here under consideration. The court there said: "Subdivisions 'a' and 'b' are concerned with a preference given by a debtor to his creditor. Subdivision 'a' defines what shall constitute it, and subdivision 'b' states a consequence of it—gives a remedy against it. The former defines it to be a transfer of property which will enable him to whom the transfer is made to obtain a greater percentage of his debt than other creditors. The latter provides a consequence to be that transfers may be avoided by the trustee, and the property or its value recovered; provided, however, that the preference was given within four months before the filing of the petition in bankruptcy or before the adjudication, and the creditor had reason to believe a preference was intended. So far, so clear. If the conditions mentioned exist, the preference may be avoided. But if the person receiving the preference did not have cause to believe it was intended, what then? It follows that the condition being absent, its effect will be absent. In other words, he may keep the property transferred to him whether it be a complete or partial discharge of his debt." And again: "It is further contended, 'that, to constitute a preference under the bankruptcy act [Act July 1, 1898, c. 541 (U. S. Comp. St. 1901, p. 3418)] within either 57g or 60a, at least, the intent on the part of the bankrupt to prefer must be present.' In support of this it has been said that an act of bankruptcy consists under section 3a (2) of a transfer by a debtor, while insolvent, of any portion of his property to one or more of his creditors, with intent to prefer such creditors over other creditors, and in such a case a petition in involuntary insolvency may be filed against him. Section 3b. It is hence deduced, reading those provisions with section 60a, that preferences under the latter may be taken with the intent declared in the former, because it is not reasonable to

assume that Congress intended that there should be preferences which were not acts of bankruptcy. The claim overlooks the fact that the language of section 3a (2) implies a difference between a preference and the intent with which it is given, and, besides, confounds the different purposes of the sections and their different conditions. It was for Congress to decide whether the consequences to a debtor of being forced into bankruptcy so far transcended the consequences to a creditor by a surrender of his preference as to make the former depend upon an intent to offend the provision of the statute, and the latter not so depend. And we see nothing unreasonable in the distinction or purpose. Nor does the contention of appellants find support in the provisions of the act of 1867 [14 Stat. 517, c. 176], and the cases of *Mays v. Fritton*, 20 Wall. 414 [22 L. Ed. 389], and *Wilson v. City Bank*, 17 Wall. 473 [21 L. Ed. 723]. In that act there was a careful expression of the intent of the debtor (section 5021, Rev. St.), and as careful an expression of the state of mind of the preferred creditor. Sections 5084, 5128."

If, as we think, the construction of section 60, subdivisions "a" and "b," of the bankruptcy statute, was necessarily involved in the case from which we have quoted, that construction should be followed by this court, even though it might entertain different views as to the meaning of the statute. *York v. Conde*, 147 N. Y. 486, 42 N. E. 193.

In view of these conclusions it is unnecessary to discuss the conflicting decisions under this statute in the Appellate Divisions of our several departments. We hold that it was error for the trial court to charge the jury that it was incumbent upon the plaintiff to prove that the *Union Cloak & Suit Company*, in making its preferential payment to the defendants, intended thereby to give a preference.

It follows that the judgment herein should be reversed, and a new trial granted, with costs to abide the event.

PARKER, C. J., and GRAY, O'BRIEN, and MARTIN, JJ., concur. HAIGHT and CULLEN, JJ., dissent.

Judgment reversed, etc.

(*See* Ohio St. 176)

STACEY et al. v. CUNNINGHAM.

(Supreme Court of Ohio. Nov. 17, 1908.)

WILL—VALIDITY—CONTEST—NATURE OF ISSUE.

1. The action authorized by section 5858, Rev. St. 1892, to contest the validity of a will, can be brought and maintained only after such will has been admitted to probate.

2. In such action the issue to be made up and tried is the one prescribed by section 5861, Rev. St. 1892, and is, "whether the writing produced is the last will or codicil of the testator, or not;" and on the trial of this issue the question of whether the will was properly or im-

properly admitted to probate by the probate court is not involved, and cannot be inquired into.

3. By the bringing of an action to contest the validity of a will, under the statute, plaintiffs admit the probate of the will so put in contest, and will not, therefore, on the trial of said cause, be permitted to question or deny either the regularity of the order of probate, or the authority and jurisdiction of the court that made it.

(Syllabus by the Court.)

Error to Circuit Court, Hamilton County.

Action by Edward F. Stacey and Edna F. Stacey, by her next friend, against Adolphus N. Cunningham, to contest the probate of a will. From a judgment of the circuit court affirming a judgment sustaining the will, plaintiffs bring error. Affirmed.

Frances E. Stacey, whose domicile was in the city of Cincinnati, Ohio, died testate in July, 1894, at Sacramento City, Cal. She left surviving her, as sole beneficiaries and legatees under her will, her two children, Edward F. Stacey and Edna F. Stacey, the plaintiffs in error, and her brother, Adolphus M. Cunningham, the defendant in error. By her will she gave to her brother, Adolphus M. Cunningham, the sum of \$10,000, and the remainder of her property she bequeathed to her two children, Edward and Edna Stacey, in equal proportions. The estate left by said Frances E. Stacey, as shown by the inventory thereof, made February 8, 1895, was \$57,883.99. Soon after the death of Mrs. Stacey, Adolphus M. Cunningham, with his niece and nephew, Edna Stacey and Edward Stacey, returned to the city of Cincinnati. Upon his return he, having in his possession the will of Frances E. Stacey, called at the law office of Mr. Howard Douglass and delivered the same to him, with the request that he have it admitted to probate. Thereafter said will was filed in the probate court of Hamilton county, Ohio, and application was made to said court for its admission to probate. The subscribing witnesses to said will being residents of the state of California, a commission with the will annexed to take the testimony of said witnesses was issued by said probate court to one J. C. Tubbs, of Sacramento City, Cal. This commission, with the testimony of the subscribing witnesses attached thereto, was returned to the probate court of Hamilton county, Ohio, in November, 1894, and on the 1st day of December, 1894, said will was formally offered for probate, and probate thereof was then and there refused by said court, and an entry showing such refusal was entered upon the journal of said probate court, of all of which said Adolphus M. Cunningham at the time had notice. Upon the refusal of the probate court to admit said will to probate, the Union Savings Bank & Trust Company was appointed guardian of the property and estate of the two children, Edward and Edna Stacey, and Mr. Howard Douglass was appointed guardian of their persons. No appeal was taken by Adolphus M. Cunningham from the judgment of said

probate court refusing to admit said will to probate, and nothing further was done in the matter of said will until October 5, 1896, at which time said Adolphus M. Cunningham filed his motion in the probate court of Hamilton county, asking for leave to repropound said will of Frances E. Stacey for probate and record. Said motion was allowed by the court, and thereafter, to wit, on March 23, 1897, due notice of the repropounding and presentation of said will for probate having been given to all of the next of kin of said Frances E. Stacey, residents of Ohio, upon the hearing of said motion and application said will was, by the court, admitted to probate and record. On the same day, to wit, March 23, 1897, said Edward F. Stacey and Edna F. Stacey, by next friend, commenced an action in the court of common pleas of Hamilton county, Ohio, to contest said will of Frances E. Stacey so admitted to probate. In said action, under an order of the court, an issue was duly made up in said court of common pleas as to whether the paper writing produced was the valid last will of Frances E. Stacey, which issue was thereafter submitted to and tried by a jury duly impaneled in said cause. Said jury found, and by their verdict so returned, that said paper writing was the valid last will and testament of Frances E. Stacey, deceased. A motion for new trial was filed by the plaintiffs in error, which motion was overruled, and judgment entered on said verdict sustaining the will. On petition in error in the circuit court this judgment of the court of common pleas was affirmed, and thereupon this proceeding in error was instituted in this court to reverse said judgment of affirmance.

Howard Douglass and Geo. W. Harding, for plaintiffs in error. Charles W. Baker, for defendant in error.

CREW, J. (after stating the facts). On the trial of this action in the court of common pleas the plaintiffs in that court, who are plaintiffs in error here, among other things attempted to show that the paper writing in contest purporting to be the last will and testament of Frances E. Stacey, deceased, was in December, 1894, presented to the probate court of Hamilton county, Ohio, for probate, and that probate thereof was refused by that court on the ground that said will had not been properly and legally executed in conformity with the laws of Ohio. By way of establishing the fact of such presentation and rejection, the plaintiffs offered in evidence a journal entry of the probate court of Hamilton county, bearing date of December 1, 1894, and showing that on that date said court had refused to admit said will to probate and record, on the ground, as appeared from said entry, that said will was not duly and legally attested. Objection was made by defendant to the introduction of this journal entry, which objection was sustained by the

court, and said entry was not permitted to be given in evidence to the jury. Plaintiffs, on said trial, also offered evidence for the purpose of showing that no appeal was ever taken by Adolphus M. Cunningham from the order and judgment of said probate court refusing to admit said will to probate; this evidence was also objected to by defendant, and excluded by the court. The rulings of the court of common pleas in the exclusion of this evidence are here assigned as error.

Whether the action of the court of common pleas in this behalf was erroneous is to be determined from a consideration of the nature and character of the issue involved in an action to contest a will; and if, from the nature of such issue, the evidence offered by the plaintiffs below was incapable of affording any legitimate presumption or inference as to the only fact or matter so in issue, it would be, and was, irrelevant and incompetent, and therefore properly excluded. In Ohio, in an action to contest a will, the issue involved and to be submitted to the jury is fixed and determined by statute. Section 5861, Rev. St. 1892, provides as follows: "An issue shall be made up, either in the pleadings or by an order on the journal, whether the writing produced is the last will or codicil of the testator, or not, which shall be tried by a jury, and the verdict therein shall be conclusive, unless a new trial be granted, or the judgment be reversed or vacated." While the issue prescribed by this section may be made up either by the pleadings, or by an order entered upon the journal of the court, yet, whichever mode be adopted, the issue presented for determination must be the same, and the one prescribed and designated by statute, viz., "whether the writing produced is the last will or codicil of the testator, or not." *Dew et al. v. Reid et al.*, 52 Ohio St. 519, 40 N. E. 718. And, upon the trial of this issue, only such evidence as tends either to establish or disprove the validity, as a will, of the paper writing in controversy, is relevant and competent. Considering, then, the nature of the issue and the character of the evidence offered by the plaintiffs, the only office or effect such evidence could have had, if the same had been admitted by the trial court, would have been to show that the probate court of Hamilton county, having once refused to admit the will of Frances E. Stacey to probate, for the reason that it was not legally executed and attested, and no appeal having been taken therefrom, was thereafter, and because of such former adjudication, without jurisdiction or authority upon the repropounding of said will to admit the same to probate and record. In other words, it was sought by plaintiffs, in this way and by this means, to challenge the validity of said order of probate. And such is admitted in argument to have been their purpose in tendering this evidence, and such it is conceded would have been its only office and effect if it had been

admitted. But the question of the regularity and validity of the order of probate, or the jurisdiction of the court to make such order, is not in issue or involved in an action of this character—an action to contest the validity of a will—and is not, therefore, in such action, the proper subject of inquiry or review. This court has said in the case of *Converse et al. v. Starr, Adm'r, et al.*, 23 Ohio St. 491, that: "On the trial of the issue in a suit to contest the validity of a will, errors or irregularities of the probate court in admitting the will to probate cannot be inquired into. The prima facie effect which the statute gives to the order of probate can only be overcome by showing that the will is in fact invalid." In this case one of the points made in argument for plaintiffs in error was: "That the errors and irregularities of the probate court in admitting a will to probate may be inquired into, on the trial of the issue in a suit contesting such will, for the purpose of invalidating the order of probate." In considering and disposing of this contention, White, C. J., in the opinion, at page 498, says: "In regard to the second proposition, it is to be remarked that it is founded upon a misconception of the jurisdiction of the court in trying the contest of a will. In such case the court does not sit as a court of error to revise the action of the court of probate, but is, in the exercise of the powers and jurisdiction of a court of probate, charged with the duty of finally establishing or rejecting the will. On the trial of the issue in such case, the errors or irregularities of the probate court in admitting the will to probate are immaterial, and cannot be inquired into. The prima facie effect which the statute gives to the order of probate can only be overcome by showing that the will is in fact invalid." The doctrine of this case would seem to control and to be decisive of the question we are now considering, and to sustain the action of the court below in excluding the evidence offered. But there is, we think, a further and cogent reason why the testimony offered by the plaintiffs in error was properly excluded, and as to why in this case they should not have been permitted to challenge or dispute the order of probate, and that is, that by the filing of their petition to contest this will they impliedly admit the regularity and sufficiency of its probate. If, as plaintiffs in error sought to show, the probate court of Hamilton county, at the time it admitted this will to probate, was then without jurisdiction or authority so to do, then such order of probate was void and a mere nullity, and, if a nullity, it could afford plaintiffs no ground on which to predicate their action to contest said will, and their action must fail. In this state, until admitted to probate, a will cannot, under our statute, be made the subject of contest. Therefore, however irregular or erroneous the order admitting the will of Frances E. Stacey to probate may have been,

the plaintiffs in error in an action by them to contest said will, founded upon such order of probate, cannot be heard to deny its validity, or be permitted to question the jurisdiction of the court making such order. It follows, therefore, that the trial court was right in excluding the evidence offered by plaintiffs.

There are other assignments of error in this record, but we do not deem it important to enter upon a discussion of them. We have carefully examined and considered each and all of these assignments, and find no error in the record.

Judgment affirmed.

BURKET, C. J., and SPEAR, DAVIS, SHAUCK, and PRICE, JJ., concur.

(69 Ohio St. 160)

MERCHANTS' NAT. BANK v. WEHRMANN et al.

(Supreme Court of Ohio. Oct. 27, 1903.)

NATIONAL BANK—POWERS—PARTNERSHIP.

1. A national bank, established under the act of Congress providing for such banks, cannot be a member of a partnership, and cannot become liable as a partner.

2. A customer of a national bank, being largely indebted to the bank, and being in failing circumstances, and being the owner of nine shares in a partnership consisting of forty shares, each evidenced by a certificate transferable on the books of the partnership, transferred his nine shares to the bank to secure payment of his indebtedness, the bank becoming the owner of such shares. *Held*, that such transfer did not, in legal effect, make said bank a partner, but a part owner in severalty of the property then owned by the partnership, and, as such, liable for nine fortieth parts of the debts and expenses incurred in purchasing, holding, handling, managing, improving, and disposing of said property.

(Syllabus by the Court.)

Error to Circuit Court, Hamilton County.

Action by William F. Wehrmann against the Merchants' National Bank and others. Judgment for plaintiff, and defendant bank brings error. Reversed.

The litigation in this case had its origin in an agreement signed by some 25 persons, of which the following is a copy, omitting signatures:

"We, the undersigned, in consideration of the mutual agreements herein contained, severally agree, as follows:

"First. That we will form a syndicate with a capital stock of \$320,000, divided into forty shares, of the par value of \$8,000 each, and we will take the shares as subscribed by us.

"Second. With said capital stock it is agreed to purchase a certain tract of land lying in section No. 33, Columbia township, Hamilton county, Ohio, as per plat hereunto attached, said tract containing 160 acres, more or less, the purchase price for same to be \$300,000, payable \$100,000 cash, and the balance (\$200,000) on ten-year four per cent.

ground rent, with privilege of purchase at any time, interest payable quarterly.

"Third. The balance of said capital stock, amounting to \$20,000, shall be used for the improvement and development of said land, and for the expenses incidental to the management, control and sale thereof.

"Fourth. The shares of said stock are to be paid for as follows: The sum of \$300 per share immediately on signing this agreement; the sum of \$2,300 immediately after all shares are taken; the sum of \$400 in sixty days after all shares are taken; the balance of \$5,000 on each share to be paid out of the proceeds of lots.

"Fifth. After the cost of land, including the cost of making streets, advertising, etc., etc., shall have been paid out of the receipts for the sale of lots, then the receipts will be considered net profits, and shall be divided among the shareholders equally, share and share alike.

"Sixth. Subscriptions to be binding only in case all the forty shares are taken within fifteen days from date hereof. Otherwise, said first payment of \$300 on each share to be returned.

"Cincinnati, Ohio, January 25, 1889."

The full number of 40 shares was subscribed, and certificates of shares in the following form were issued to the subscribers, respectively:

"The Elsmere Syndicate.

"Investment, \$320,000. Paid up, \$120,000.

"No. ———. Nonassessable.

"This is to certify that ——— is the owner of a 1/40 interest in The Elsmere Syndicate. Transferable in person or by attorney upon the books of the syndicate at its office in the city of Cincinnati, upon the surrender of this certificate.

"Witness our hands this ——— day of ———

"—————.

"—————.

"—————.

"Trustees.

"Countersigned.

"—————.

"Secretary and Treasurer.

"For value received, ——— sells to ——— the interest above mentioned, and authorizes ———, attorney, to transfer the same on the books of the company.

"In presence of

"—————.

"—————."

One F. B. McFarlan subscribed for certain shares, and purchased others, so that he owned nine shares; and, being largely indebted to the Merchants' National Bank, he transferred said nine shares to said bank to secure said indebtedness about the month of January, 1892, which transfer was made to "W. W. Brown, trustee," said Brown being cashier of said bank. The bank contends that the transfer to Mr. Brown was as col-

lateral security for the debt, while others claim that the transfer made the bank the owner of the shares.

The syndicate was organized, by-laws adopted, officers elected, and the powers of the trustees defined, which included the plating of said property, the leasing and selling thereof, to pay the purchase money and ground rents, and to pay the balance of the funds to the holders of said certificates in proportion to the number of shares held by each. The syndicate became insolvent in the year 1896, and the persons from whom the land had been obtained foreclosed and purchased the land, and thereby the syndicate was prevented from further carrying on its business. After this transfer of the nine shares to Mr. Brown, trustee, the syndicate became largely indebted for improvements, ground rent, interest, and other items intended for the betterment of the property, and its conversion into money. About July, 1897, an action was commenced by William F. Wehrmann against the parties interested in said syndicate, including W. W. Brown, trustee, and the said bank, seeking to hold the owners of said certificates as partners, and for an accounting. Issues were made up, in which said Brown and said bank denied that they were at any time partners in said syndicate, and averred that said nine shares were held as collateral only.

The case was referred to a master, and he made his report, and the case was taken to the circuit court on appeal, and there tried upon the report of said master in the common pleas, and exceptions thereto, and a finding of facts and conclusions of law separately were made by the circuit court. The facts found, going to show the liability of said bank, are as follows:

"First. That what has been called herein the Elsmere Syndicate was a partnership formed for the purpose of taking the title by lease, with privilege of purchase, of certain lands situated near Norwood, in this county, owned by George W. B. Cleneay and Joseph S. Cleneay, which was under lease to one John Woltz, who quitclaimed his title to Myron A. Spencer, Frank B. McFarlan, and James McArdle, Jr., as trustees for said syndicate, on or about the 16th day of February, 1889, and that the business of the said syndicate was to subdivide said lands into lots, lay out and improve streets, and sell said lots for the profit of the members of the syndicate.

"Second. That the interest of the partners in said partnership were represented by certificates of equal interest or shares, forty in number, numbered consecutively from one to forty, and transferable from hand to hand on the books of the said company.

"Third. That the partnership became insolvent, and it became impossible to carry on further the said business, and said partnership was deprived of what remained of said leasehold premises by foreclosure and sale of

same, and that it became necessary to file the petition in the court below to wind up the affairs and business of the said partnership, to realize the assets, if any, and to compel the partners to liquidate the indebtedness thereof.

"Fourth. That on June 15, 1896, the interests in said partnership were held by the following named persons, in the proportion set opposite their names, to wit:

Myron A. Spencer	2 shares
Wm. F. Wehrmann estate, Theresa J. Wehrmann, executrix	5 shares
Merchants' National Bank of Cincinnati, Ohio	9 shares
James Armstrong's estate, James C. Armstrong, Floris A. Sackett, and Isaac B. Matson, executors	3 shares
Moses Krohn	1 share
Leopold Feiss	1 share
Benjamin Fritz	1 share
Peter G. Thompson	1 share
Joseph Taylor	1 share
Richard Hempel	3 shares
William Bell	8 shares
W. B. Kennedy	2 shares
J. Fred. Woltz	1 share
James McArdle's estate, Margaret McArdle, administratrix	1 share
Peter J. Dunn's estate, Ella C. Donnell, executrix	1 share

—Being forty in all. That the above-named William Bell and W. B. Kennedy are residents of Canada, and have not and could not have been served with process herein, and are not subject to the jurisdiction of the court. That the shares standing in the name of Richard Hempel were not his property, and he is not liable thereon, but one of said shares was conveyed to him by John Brokamp, party hereto, and one of the original subscribers to said syndicate, who is liable thereon. That the share standing in the name of Adam T. Voll (No. 39) was one of the five shares belonging to William F. Wehrmann, and that said Wehrmann was the owner thereof, and that his estate is liable for all assessments thereon, including the amount already paid up by Adam T. Voll, as herein-after mentioned. That Myron A. Spencer and J. Fred. Woltz, above named, and Peter J. Dunn's estate, are insolvent, and nothing can be made from them. That the others named, including John Brokamp, are liable for the debts of the said partnership and the costs of this case, in proportion to the number of shares held by each, respectively, but the right to contribution against said Myron A. Spencer and J. Fred. Woltz and Peter J. Dunn's estate in favor of the other partners is preserved. That the shares standing in the name of W. W. Brown, trustee, are the shares of the Merchants' National Bank, originally held by it as collateral, but transferred to it as owner when they were transferred to said Brown. That when so transferred the notes for which they had been held as collateral were surrendered, and the said shares were entered on the books of the bank as owned by the bank, and so reported to the United States government, and the bank, through its vice president, took part in the

management of the said syndicate, and in the effort to preserve its property from sacrifice and loss, and all this was done with the knowledge and acquiescence of the board of directors of said bank."

The court found the indebtedness to different persons, in detail, and then found that there are only 23 solvent shareholders, and charges them, including said bank, with the payment of the whole indebtedness, and adjudges that, in case of the subsequent insolvency of any of said shareholders before payment, the deficiency thus caused shall be made up by the remaining solvent shareholders. The decree against the bank is for over \$17,000. The plaintiff having died, his executrix carried on the litigation. A motion for a new trial was overruled, and bill of exceptions taken by the bank. Proper and full exceptions were saved throughout. A petition in error was filed in this court by the bank, seeking to reverse the judgment of the circuit court.

W. C. Herron and Herron, Gatch & Herron, for plaintiff in error. Matthews & Merrill, C. B. Matthews, and Jacob Shroder, for defendant in error.

BURKET, C. J. (after stating the facts). The Merchants' National Bank of Cincinnati is a corporation organized under the national banking laws of the United States, and the Elsmere Syndicate was a partnership consisting of forty shares, each partner holding one or more shares, and each share evidenced by a certificate, as shown in the foregoing statement of facts, and which certificates were transferable on the books of the syndicate; and such transfers were intended to make the transferee a partner in the syndicate, instead of the transferor, without a dissolution of the partnership. The circuit court finds that the bank became owner by transfer of nine shares of this syndicate or partnership, which shares were taken by the bank to secure the payment of a large indebtedness owing to said bank for loans by it made to one of its customers in the usual course of business. The bank, in accepting said transfer, evidently regarded it as a collateral; but it so treated the shares, and so transacted the business as to said shares, that the circuit court found that the bank became the owner of the shares, and there was evidence warranting such finding. The case must therefore be determined upon the theory that the bank held the shares as owner, and not merely as collateral—the purpose of such ownership, however, being to secure the ultimate payment of said indebtedness out of the proceeds of said shares; and, to that end, it was necessary that the property of said syndicate should be put into such condition as to yield the most money, and this is what the trustees of the syndicate attempted to do; and, in so doing, debts were incurred, which the syndicate was unable to

pay, and, after all its property had been consumed in paying said debts, a large debt still remained.

The restrictions contained in our banking laws are for the purpose of securing the solvency and stability of the banks, and the statutes should be so construed and the law administered as to reasonably bring about that end. The wealth and prosperity of the people depend to a large extent upon the soundness of the banks and the safety of the currency. The purpose of the government is to foster and encourage sound banking and preserve a safe currency; and it therefore allows national banks to collect claims due them, even though a statute or a rule of law or equity may have been infringed in the incurring of the debt. The punishment for such infringement must come from the federal authorities, in a proceeding instituted for that purpose, and not by a denial by the courts of the right of collection, as a punishment.

It is largely for the purpose of maintaining the solvency of banks that a national bank is allowed to collect loans secured by mortgage in violation of section 5137, Rev. St. U. S. [page 3460, U. S. Comp. St. 1901]. *National Bank v. Matthews*, 98 U. S. 621, 25 L. Ed. 188; *National Bank v. Whitney*, 103 U. S. 99, 26 L. Ed. 443. It is to the same end that the solvent shareholders in a national bank cannot be compelled to stand good for the individual liability of the insolvent ones, and that the loss caused by such insolvency must be borne by the creditors of the bank. *United States v. Knox*, 102 U. S. 422, 26 L. Ed. 216; section 5151, Rev. St. U. S. [page 3465, U. S. Comp. St. 1901]. Hence it is that while banks are hedged about with restrictive laws as to making loans and discounts, so as to incur no bad debts, the most liberal provisions are made for securing debts already incurred, by the taking of such collateral as may seem best in the judgment of the officers of the bank. Such collateral may become the property of the bank, in course of enforcing the security. And while a national bank cannot lawfully purchase and hold shares in a corporation as an investment (*California Bank v. Kennedy*, 187 U. S. 362, 17 Sup. Ct. 831, 42 L. Ed. 198), it may accept the stock of a corporation as collateral security for a loan, and may thereafter, in realizing upon the collateral, become the owner thereof, and liable for individual liability, the same as any other stockholder. *National Bank v. Case*, 99 U. S. 628, 25 L. Ed. 448. This case seems to have been overruled in *Scott v. Deweese*, 81 U. S. 218, 21 Sup. Ct. 591, 45 L. Ed. 822, where the court say at the close of the opinion: "Whether a national bank may not be deemed a shareholder, within the meaning of section 5151, if it holds shares of another bank as security for previous indebtedness, is a question suggested in former cases, but not decided, and upon which in this case no opinion need be expressed."

But conceding that a national bank may take shares in another bank as collateral security for a new loan, or to secure the payment of an old one, and that it may become the owner of such shares in attempting to realize on such collateral, and that it may thereafter be liable to creditors on its individual liability as such shareholder, yet that falls far short of holding a national bank liable as a partner in a partnership, and liable as such partner for not only its own share of the debts of the firm, but also the debts of its co-partners. The individual liability of a holder of shares in a national bank is in its nature several, and not joint (*United States v. Knox*, 102 U. S. 422, 28 L. Ed. 216), while the liability of a partner for partnership debts is, as to creditors, usually held to be joint; but some cases hold it to be joint and several.

The individual liability is an inseparable incident to national bank shares, for which the lawful holder is liable; but this liability is his own debt, and attaches to a specific several article of his property—the share of stock—and is therefore limited, and cannot exceed the face value of the stock. But in the case of shares in a partnership, the liability of a partner is not for a specific amount adhering to his share as an incident, and limited to a certain amount; but the only limitation is the whole indebtedness of the firm, and which in many cases would far exceed the entire resources of the bank, and drive it into insolvency. The purpose of allowing a national bank to take collateral security is to enhance its solvency, and not to permit it to enter into wild speculations as a partner under the pretext of enforcing its rights as a pledgee or owner. "It is settled that the United States statutes relative to national banks constitute the measure of the authority of such corporations, and that they cannot rightfully exercise any powers except those expressly granted, or which are incidental to carrying on the business for which they are established. *Logan County Bank v. Townsend*, 139 U. S. 67, 73 [11 Sup. Ct. 496, 498, 35 L. Ed. 107]." *California Bank v. Kennedy*, 167 U. S. 362, 366, 17 Sup. Ct. 831, 833, 42 L. Ed. 198.

To become a member of a partnership in any manner or for any purpose is not incidental to carrying on the business for which national banks are established, and is certainly not expressly granted. The power, therefore, does not exist. The liabilities for which a national bank must respond are such only as are created or incurred by its officers, acting in the capacity of officers of the bank alone, and not in connection with other trustees or officers of other companies. Were it otherwise, the other trustees or officers might outnumber the officers of the bank, and impose a burden on the bank which would ruin it; and thus the bank would be controlled, not by its officers, but by outsiders. The officers of a bank cannot delegate their powers to others. It is therefore clear that a na-

tional bank cannot be a partner in a copartnership, and cannot incur a partnership liability. The same has been held as to corporations in this state. *Geurinck v. Alcott*, 68 Ohio St. 94, 63 N. E. 714. The first subdivision of the syllabus was omitted by mistake of printer, but is found in the headnote, and also in the index, and is as follows: "A corporation cannot be a member of a partnership."

But it is contended that, while a national bank cannot become a partner generally, where it becomes the owner of a share in an existing partnership, like this *Elsmere Syndicate*, in effect it becomes a partner, and liable as such. That begs the question. If it had the power to become a partner, such might be the case; but, not having the power, it cannot go beyond its powers, and cannot by any act make itself a partner, and cannot incur a partnership liability.

Cases are cited in which a bank has taken some specific piece of property—as a ship, for instance—to secure a debt, and has been held liable for the expenses of managing or converting such property; but such expenses were incurred by the bank, and were its individual debt, and not the debt of a partnership. With such cases we fully agree, but in those cases it does not appear that the bank was hampered by a lack of power, as is the case under our national banking act. *Royal Bank of India's Case*, L. R. 4 Ch. App. Cas. 252. Not having the power to enter into such partnership, it is well settled that the bank may plead such want of power to defeat an attempt to hold it as such partner. *California Bank v. Kennedy*, 167 U. S. 362, 17 Sup. Ct. 831, 42 L. Ed. 198.

It is further urged that the bank partly realized on some of these shares, and held itself out as partner, and that it is therefore estopped from now claiming that it was not such partner. That the realizing on stocks by receiving dividends does not create an estoppel was held in the above-cited case of *Bank v. Kennedy*, 167 U. S. 371, 17 Sup. Ct. 831, 42 L. Ed. 198. In the case of *Scott v. Deweese*, 181 U. S. 217, 21 Sup. Ct. 591, 45 L. Ed. 822, the court, near the close of the opinion, hold: "Of the powers of a national bank under the statutes providing for their creation, every one must take notice." Every one is therefore chargeable with knowledge that a national bank cannot be a partner, and therefore this bank could not hold itself out as being that which in law it could not be, and its acts in that behalf could deceive no one, as no one could, in law, rely upon such acts. One cannot rely upon a representation which he knows to be false or impossible. The bank having become the owner of these nine shares, and not having the power to become a partner, it became, in legal effect, a part owner of the property of the syndicate, which ownership was in its nature several; and the bank, through its trustee, having managed this several inter-

est in connection with the trustees of the other shares as to their interests, the bank became and is liable for its said share of the expenses of purchasing, managing, handling, holding, improving, and disposing of the property. The bank is thus liable for nine fortieth parts of the debts and expenses remaining after applying the proceeds of the property upon the indebtedness. The record does not clearly furnish the data from which this amount can be ascertained by this court, and therefore the judgment against the plaintiff in error will be reversed, and the cause remanded to the circuit court, with instructions to ascertain what nine fortieth parts of said debts and expenses amount to, and render judgment against said bank for that sum, and also for nine fortieth parts of the costs.

Judgment reversed, and cause remanded.

SPEAR, DAVIS, SHAUCK, and PRICE, JJ., concur.

(161 Ind. 445)

CHICAGO, I. & E. RY. CO. v. INDIANA NATURAL GAS & OIL CO.

(Supreme Court of Indiana. Nov. 24, 1903.)

GAS COMPANIES—CONSTRUCTION OF MAINS—CROSSING RAILROAD TRACKS—LICENSE—FLOW OF GAS—INCREASE—ARTIFICIAL MEANS—VIOLATION OF STATUTE—INJUNCTION—SPECIAL DAMAGES—CROSS-COMPLAINT.

1. Where a railway company granted a license to a natural gas company to maintain its pipe lines under and across the railroad's right of way, and every objection urged in a cross-complaint to prevent the gas company from constructing a fourth pipe line across the right of way existed at the time the license was granted, and it was not averred that the dangers and inconvenience had been increased by any act of the gas company, the cross-complaint was insufficient.

2. Where, in an action to compel a railroad company to permit a natural gas company to lay a pipe line under its right of way, a cross-complaint to restrain such action alleged that plaintiff was using artificial means to increase the flow of gas through its pipes in violation of statute, but failed to show that defendant's acts resulted in any damage to plaintiff, or increased the danger of accident by leakage, fire, or explosion, such allegation did not entitle defendant to an injunction.

3. Where a railroad company licensed a gas company to maintain its mains under the railroad's tracks, an averment in a cross-complaint to prevent the gas company from laying a fourth pipe under the tracks that the latter was violating the statute by increasing the flow of gas by artificial means, and that such violation caused defendant special injury peculiar to itself, and exposed defendant's property to particular damage, etc., was a mere conclusion of fact, and insufficient to show any change in the situation after the execution of the license.

Appeal from Circuit Court, Grant County; H. J. Paulus, Judge.

Action by the Indiana Natural Gas & Oil Company against the Chicago, Indiana & Eastern Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Knight & Brown, Hawkins & Smith, and Custer & Cline, for appellant. Miller, Elam & Fesler, S. D. Miller, W. O. Johnson, and C. C. Shirley, for appellee.

DOWLING, J. The appellee, a corporation organized under the laws of this state, and engaged in the business of transporting natural gas by means of pipe lines and pumping stations to and from points in said state, brought this suit against the appellant, a railroad corporation, also organized under the laws of Indiana, and owning and operating a railroad therein, to compel the latter to permit the appellee to place a fourth line of pipe in and upon a right of way claimed and used by the appellee under the railroad of the appellant, to quiet its title to its said right of way, and to enjoin the appellant from interfering with its use thereof. The appellant filed its answer to the complaint, and also its cross-complaint in five paragraphs. Demurrers to the second and third paragraphs of the cross-complaint were sustained, and after this ruling the appellant dismissed its action as to the first, fourth, and fifth paragraphs of its cross-complaint. Issues were formed, the cause was tried by the court, and there was a finding and judgment for the appellee. The errors assigned are upon the decisions of the court sustaining demurrers to the second and third paragraphs of the cross-complaint.

Counsel for appellee make the point that at the time these rulings occurred there were three other paragraphs of the cross-complaint before the court, which are not now in the record, and that the facts averred in these three paragraphs, or in one or more of them, may have been the same as those set forth in the paragraphs to which the demurrers were sustained. It is contended, therefore, that, as the appellant might have introduced the same evidence and obtained the same relief under the other paragraphs of its cross-complaint, the decision of the court upon the demurrers to the second and third paragraphs, even if erroneous, was harmless. The general rule is that, where a demurrer is sustained to one of several paragraphs of a pleading, the error is harmless if there are other paragraphs under which the same evidence is admissible. *Elliott's App. Proc.* § 637; *Whiteman v. Harriman*, 85 Ind. 49, 52; *City of Elkhart v. Wickwire*, 87 Ind. 77; *Luntz v. Greve*, 102 Ind. 173, 176, 28 N. E. 128.

It is suggested in argument that if several paragraphs of a pleading are filed, and a demurrer is sustained to one of them because of its identity with another paragraph, the unsuccessful party, by afterwards withdrawing the remaining paragraphs, might obtain an unfair advantage on appeal unless it is presumed in favor of the ruling of the trial court that the same evidence would have been admissible under the paragraphs withdrawn after the decision on the demurrer,

and subsequently omitted from the record. There is much force in this suggestion, but we prefer to place our decision in this case upon a more substantial ground. It appears from the allegations of each paragraph of the cross-complaint that the appellee constructed and maintained its pipe lines under and across the right of way of the appellant by virtue of an express license in writing executed by the appellant, and supported by a valuable consideration. This license was executed May 25, 1899, and at the time of the filing of the cross-complaint was in full force. Every objection now urged against the maintenance of the pipe line for the transportation of natural gas existed when this agreement was entered into by the appellant. All the dangers from leakage, fire, explosions, and sinking of the railroad tracks arising from the maintenance of the pipe line, together with the inconvenience of slackening the speed of trains while passing over the intersecting pipe line, were as obvious and urgent when the appellant granted the license to construct and operate the pipe line under and across its right of way and railroad as when the cross-complaint was filed. It is not averred that these dangers and inconvenience have since been increased by any act or omission of the appellee.

The circumstance that the appellee is using artificial means to increase the flow of the gas through its pipes affords no ground for enjoining it from so doing at the suit of the appellant. The violation of a statute by the appellee is not of itself a sufficient reason for an injunction. It does not follow that such method of transportation increases the danger of accidents by leakage, fire, or explosion. In fact, from all that appears, such method may diminish the probability of such misfortunes. Before a party is entitled to relief by injunction because of the violation of a statute, it must appear that by reason of such unlawful act his person or property is exposed to danger or subjected to injury. The dangers described in the cross-complaint arise from the nature of the article transported. They are constant, and inseparable from it. They exist whether the natural gas is carried through pipes at a pressure of 300 pounds to the square inch or at a pressure of 50 pounds. They are as likely to occur when the gas is transported by natural pressure as when it is moved by artificial means. The danger of leakage and explosions are increased by pressure, however that pressure may be applied. The cross-complaint entirely fails to show that the danger to the property of the appellant has been increased in the slightest degree by the means employed by the appellee to move the gas through its pipes, or that it has sustained, or is likely to sustain, any special injury different from that of the public at large by the alleged unlawful acts of the appellee. *Manufacturers', etc., Co. v. The Indiana, etc., Co.*, 155 Ind. 566, 568, 58 N. E. 851.

The general averment in the second and third paragraphs that "such * * * violation of the statute * * * causes appellant a special injury, peculiar to itself, aside from and independent of the general injury to the public, * * * and exposes the property of the appellant to a particular damage, which the statute was intended to prevent," is a mere conclusion of fact, and fails to show any change in the situation since the execution of the license. The facts already stated in the cross-complaint do not authorize this conclusion. The matters set forth in the second and third paragraphs of the cross-complaint did not entitle the appellant to an injunction or other relief, and the demurrers thereto were properly sustained.

Judgment affirmed.

(161 Ind. 449)

WESTFALL v. WAIT et al.¹

(Supreme Court of Indiana. Nov. 24, 1903.)

APPEAL—TRANSFER OF CAUSE—JURISDICTION OF TRIAL COURT—RECEIVER—APPLICATION FOR APPOINTMENT.

1. After an action to contest a will was appealed to the Supreme Court on a general appeal from a final judgment, and while such appeal was still pending and undetermined, the trial court had no jurisdiction of the cause and parties so as to warrant the plaintiff in having such cause redocketed in the trial court, and to file therein a petition for the appointment of a receiver as a further proceeding.

Appeal from Circuit Court, Marion County; H. C. Allen, Judge.

Action by Harriet Westfall against Joseph A. Wait and others. From an order striking plaintiff's petition for a receiver, filed after an appeal by defendants had been taken to the Supreme Court and while the same was pending and undetermined, plaintiff appeals. Affirmed.

W. V. Rooker, for appellant. Samuel Ashby, for appellees.

HADLEY, J. In an action brought by appellant against the appellees in the Marion circuit court to contest the will of Clark Wait, final judgment was rendered for the plaintiff on February 24, 1902. The defendants (appellees) took a general appeal from the judgment, and perfected their appeal by filing a transcript and bond in this court on June 18, 1902. On October 23, 1902, while said appeal was still pending in the Supreme Court undetermined, the trial court, upon appellant's motion, ordered said appealed case, under its original number, restored to the docket of said court, whereupon appellant filed in said original cause her petition for the appointment of a receiver. After said cause had been redocketed and the petition for the appointment of a receiver filed therein, appellant served notice upon appellees' attorney of record in said original case that she would upon the following day present said petition to the court for hearing. No summons or other notice to appellees was issued or re-

¹ See 73 N. E. 1089.

quested upon said petition. Appellees, by attorney, appeared specially, and moved the court to strike said petition for a receiver from the files, which motion was sustained, and, appellant refusing to plead further, and electing to stand by her exception, judgment was rendered against her for costs, from which she appeals.

It is manifest from the steps taken and attempted by appellant that she did not regard her proceeding as an independent action for the appointment of a receiver, but proceeded upon the theory that she had the right to restore the old case to the docket of the circuit court while it was pending undetermined in the Supreme Court, and to file in the case an additional pleading. The central and controlling question therefore is: When a civil action is pending in an appellate tribunal on a general appeal from a final judgment, does the trial court retain such jurisdiction of the case and parties as will warrant the original plaintiff in having such appealed cause redocketed in the trial court, and to file therein, as a further proceeding in the cause, a petition for the appointment of a receiver? This question must be answered in the negative. It seems to be thoroughly settled by the decisions of the American courts that an appeal from a final judgment rendered generally upon the issues in a cause, when properly perfected, carries the whole case embraced within the final adjudication absolutely from the jurisdiction of the trial court to the appellate tribunal. Elliott's App. Prac. § 541. The rule is tersely stated in the text of 2 Ency. of Pl. & Pr. p. 327, thus: "Where an appeal has been perfected, the jurisdiction of the appellate court over the subject-matter and parties attaches, and the trial court has no power to render any further decision affecting the rights of the parties in the cause until it is remanded," citing many authorities. In *State v. Kolsem*, 130 Ind. 435, 29 N. E. 595, 14 L. R. A. 566, this court uses the following language: "If the appellees had perfected their appeal, there could be no doubt that the case would have been entirely removed from the jurisdiction of the trial court." At the bottom of the rule is the infeasibility of two courts having authority over the same case at the same time. The right to retax costs, to correct the record of the trial proceedings, to enforce the judgment when not stayed by order or supersedeas, and the like, remain in the trial court as incidents essential to the perfection and effectiveness of the litigation; but after the case the parties made has been finally adjudicated, and the parties dismissed from further attendance upon court, or the case transferred to another jurisdiction by appeal, there remains in the trial court no power to entertain in the original case a first petition for a receiver, and thus reopen the issues and extend the litigation between the parties affecting the subject-matter of the appeal, without first bringing the parties back

into court in the manner provided by law. See *Gas Company v. Irish*, 152 Ind. 535, 53 N. E. 762. The only exception to the rule against intermeddling in an appealed case that this court has recognized is the authority of the trial court to allow a new trial as matter of right under the plain provision of section 1076, Burns' Rev. St. 1901, pending an appeal. See *Railway Co. v. McBroom*, 103 Ind. 310, 2 N. E. 760; *Atkinson v. Williams*, 151 Ind. 433, 51 N. E. 721. There was no case pending in the circuit court between these parties when appellant filed her petition for a receiver; hence the petition was properly stricken from the files.

Judgment affirmed.

(162 Ind. 434)

FINK v. MONTGOMERY.¹

(Supreme Court of Indiana. Nov. 24, 1903.)

PARTNERSHIP—DISSOLUTION—COLLECTION OF ASSETS—ACCOUNTING—RECEIVER—INSOLVENCY OF PARTNER.

1. A complaint by a partner charged the dissolution of the firm; that the assets consisted of accounts, some of which were barred by limitations and others would soon be barred, but that all could be collected with diligence; that plaintiff had not sufficient knowledge to enable him to successfully prosecute suits for their recovery; that defendant was unnecessarily exposing the assets to waste, and was misappropriating such assets to plaintiff's damage; and prayed an accounting and the appointment of a receiver. The proof showed that defendant had collected and refused to divide some \$308 of the accounts collected, and had not charged himself with the amounts collected, and had taken notes of the firm's debtors, payable to himself, and had sold the notes and appropriated the proceeds, without plaintiff's knowledge or consent. *Held*, that such facts justified the appointment of a receiver pending the accounting.

2. Where, after the dissolution of a firm, it was alleged and proved that defendant, who had possession of the late firm's assets, was unnecessarily exposing them to waste and loss, the fact that it was not proved that defendant was insolvent did not preclude plaintiff partner from obtaining the appointment of a receiver pending a suit for an accounting.

Appeal from Circuit Court, St. Joseph County; W. A. Funk, Judge.

Action by Hugh T. Montgomery against Henry A. Fink for the accounting for the assets of a partnership. From an interlocutory order appointing a receiver, defendant appeals. Affirmed.

Anderson, DuShane & Crabill, for appellant. O. M. Cunningham, for appellee.

DOWLING, J. This is an appeal from an interlocutory order appointing a receiver in an action between partners for an account and settlement of their partnership affairs, to take charge of the assets, collect debts, and wind up the business of the firm. The error assigned is the action of the court sustaining the motion for such appointment. The points of objection made by the appellant to the proceedings and order of the

¹ 2. See *Partnership*, vol. 22, Cent. Dig. § 760.

² Rehearing denied.

court are thus stated: "(1) An action cannot be maintained for the sole purpose of having a receiver appointed. (2) In suits between partners a receiver will not be appointed unless it appears that the assets of the partnership are in danger of loss or depletion on account of the misconduct, fraud, or wrongful acts of defendant partner. (3) When upon a dissolution of a partnership the parties themselves have agreed upon the manner of collecting their accounts and settling up their affairs, a receiver should not be appointed where no violation of the agreement is shown." The complaint alleged the existence of a partnership between the appellant and the appellee, and its dissolution by mutual consent on September 8, 1902. It was also averred that the assets of the firm consisted of open accounts against divers persons amounting to a considerable sum; that some of these were barred by the statute of limitations; that others would soon be barred, but that all could be collected if diligence were used; that most of these uncollected accounts were made with the appellant, and that the appellee had not sufficient knowledge of them to enable him to successfully prosecute suits for their recovery; that the appellant was failing and neglecting and refusing to take steps to secure the said accounts; that there were many other claims made by the appellant which have been collected by him, and which he refused to account for, and concerning which the appellee had no knowledge; that there was an irreconcilable disagreement between the said parties in regard to the collection of said claims due to the partnership, and the settlement of the partnership affairs, and that the interests of the parties were suffering from the delay and the contention between appellee and appellant; that the firm owed no debts; that before the commencement of the action appellee demanded a statement, accounting, and settlement of the partnership affairs, which was refused. Prayer for an accounting, and for the appointment of a receiver to collect all outstanding accounts. By a supplemental complaint the appellee charged that the appellant, since the bringing of this action, was, without the consent of the appellee, taking promissory notes from the debtors of said late firm in settlement of the claims due said firm. No answer to the complaint was filed.

The proof upon the motion for the appointment of a receiver very fully sustained the complaint. It showed the existence of the partnership; its dissolution; that there were uncollected accounts due to the firm; that the appellant refused to press these collections, for the reason that it would hurt his business; that appellant had overdrawn his account by about \$308, and that he told appellee that he needed that money, and was not going to put his hand in his pocket and give it to appellee; that many of the accounts due the firm had been standing six,

or nearly six, years, but were probably collectible by proper effort; that the uncollected accounts amounted to about \$5,000; that the appellant had collected and appropriated some of these accounts since the commencement of this suit; that at the time of the dissolution of the partnership an equal division of the office furniture, surgical instruments, and cash on hand was made; that the parties were unable to agree upon any method for the collection of the outstanding accounts; that a notice of the dissolution of the partnership was published in a local newspaper; that since such dissolution some of the accounts were collected by the appellee; that the appellant had taken notes in his own name in settlement of 10 or more of said accounts, and had sold and discounted the same; and that no accounting or settlement for any moneys so collected by him had taken place.

It is perfectly clear from the complaint that the purpose of this action was not the appointment of a receiver, but to obtain an accounting and settlement of the partnership affairs. The appointment of a receiver was asked for in aid of this purpose. The complaint charged, and the evidence established the fact, that the appellant, by his conduct, was unnecessarily exposing the assets of the late firm to waste and loss, and that he was misappropriating such assets to the damage of the appellee. The fact that he collected and refused to divide the \$308; his failure to charge himself on the books of the firm with the amount of the accounts which he had collected in money, property, or labor; the taking of the notes of the firm's debtors payable to himself to the exclusion of the appellee; the sale of those notes, and the appropriation of the proceeds to his own use, without the knowledge or consent of the appellee, who was equally interested in them—was such misconduct in reference to the assets and business of the partnership as authorized the court to appoint a receiver. *Burns' Rev. St.* 1901, § 1236; *Buflin v. Boyce*, 104 Ind. 53, 3 N. E. 615; *Saylor v. Mockbie*, 9 Iowa, 209; *Webb v. Allen*, 15 Tex. Civ. App. 605, 40 S. W. 342; *High on Receivers*, §§ 472, 474; *New v. Wright*, 44 Miss. 202; *Allen v. Hawley*, 6 Fla. 142, 63 Am. Dec. 198. There was no proof that upon the dissolution the parties agreed upon a plan for the collection of the partnership accounts, or that the method adopted by the appellant was a fair or equitable one. *Sweet v. Morrison*, 103 N. Y. 235, 8 N. E. 396; *Sutro v. Wagner*, 23 N. J. Eq. 388; *Smith v. Jeyes*, 4 Beare, 503. Under the circumstances of this case it is not necessary for the appellee to prove that the appellant was insolvent. Insolvency of itself may, in some cases, justify the appointment of a receiver; but such an appointment cannot be defeated, when otherwise shown to be necessary or proper, by proof or presumption that the defendant is solvent. *Davis v. Grove*, 2 Rob. 134; *Con-*

nelly v. Dickson, 76 Ind. 444; Turnbull v. Prentiss Lumber Co., 55 Mich. 397, 21 N. W. 375. There is no error in the record.

Judgment affirmed.

(161 Ind. 464)

BOARD OF COM'RS OF WHITLEY COUNTY v. GARTY.

(Supreme Court of Indiana. Nov. 24, 1903.)

COUNTY ASSESSOR—FEES—REPEAL OF STATUTE—POPULATION OF COUNTY—JUDICIAL NOTICE—CONSTITUTIONALITY OF STATUTE.

1. Acts 1891, p. 199, c. 99, § 112, created the office of county assessor, fixed the tenure thereof at four years, forbade immediate re-election, and fixed the compensation at \$3 per day for the time actually employed. Acts 1893, p. 183, c. 98, amended this section by allowing assessors in counties of over 100,000 a salary of \$1,800. Acts 1895, p. 207, c. 101, fixed the compensation of county assessors at \$3 per day "for the time actually employed by them, * * * provided that in counties of more than 15,000 and less than 30,000 such assessor shall not charge or receive pay for more than 180 days." Acts 1899, p. 430, c. 197, amending Acts 1893, p. 183, c. 98, provided that no person should be eligible more than twice in any period of 12 years, and prescribed certain duties for the assessor in regard to omitted or sequestered property. It recited that county assessors should receive \$3 per day for the time actually employed. *Held*, that the 180-day limitation in Acts 1895, p. 207, c. 101, was not repealed by Acts 1899, p. 430, c. 197.

2. The Supreme Court will take judicial notice of the population of a county as ascertained by the United States census.

3. Acts 1895, p. 207, c. 101, providing that county assessors shall receive \$3 per day for the time actually employed by them, provided that in counties of certain populations charge shall not be made for more than certain fixed numbers of days, is constitutional.

Appeal from Circuit Court, Whitley County; J. W. Adair, Judge.

Action by Theodore Garty against the board of commissioners of Whitley county. Judgment for plaintiff, and defendant appeals. Reversed.

B. E. Gates, for appellant. Marshall, McNagly & Clugston, for appellee.

JORDAN, J. Action by appellee to recover from Whitley county the sum of \$156 claimed for services rendered as county assessor for the year 1901. The claim apparently proceeds upon the theory that appellee, as county assessor, earned during the year of 1901 \$156 for 52 days' services rendered in the discharge of duties of his office. Appellant filed its answer in three paragraphs, the first being a general denial, which was subsequently withdrawn. Appellee successfully demurred to the second and third paragraphs of this answer, and upon appellant's refusal to further plead judgment was rendered against it for \$156 and costs. From this judgment it appeals.

By the second paragraph of the answer appellant alleges that the compensation of appellee as county assessor was regulated by

an act of the Legislature in force March 9, 1895 (Acts 1895, p. 207, c. 101), which, as averred, forbids the assessor of Whitley county to charge or receive pay or compensation for discharging the duties of his office for more than 180 days in any one year at the rate of \$3 per day for the time actually employed. The paragraph further alleges that the county council of Whitley county for each of the years 1901 and 1902 appropriated \$540, and no more, said amount being to pay appellee for 180 days' services in each of said years at the rate of \$3 per day. Said amount was paid to and received by him as his compensation for each of said years. The third paragraph alleges facts showing that appellee received \$540 as pay for 180 days' services at \$3 per day for the year 1901, and that the county council appropriated said amount, and no more, to defray or pay appellee's per diem for that year, of which fact he had notice. The facts, as we gather them from the pleadings in this case, may be said to be as follows: Appellee was elected county assessor of Whitley county at the November election of 1900, and duly qualified as such, and entered upon the discharge of the duties of the office on January 1, 1901. Whitley county, according to the United States census of 1890, has a population of over 15,000 and less than 30,000. Its county council for the year 1901 appropriated the sum of \$540, and no more, to pay the compensation of the county assessor for that year at the rate of \$3 per day, based upon a maximum limit of 180 days. Appellee's claim of \$540 for that year was allowed, and he was paid that amount of money out of the county treasury. The claim for which he seeks to recover in this action is for 52 days' services performed by him as assessor during the year of 1901. These 52 days were in addition to the 180 days for which the county council had made the appropriation of \$540, which amount appellee received as hereinbefore stated. No appropriation had been made by the council for 1901 to pay appellee's per diem for these extra days, and appellee knew that fact before he performed the services. It is contended by counsel for appellant that the act in force March 9, 1895 (Acts 1895, p. 207, c. 101), which forbids a county assessor to charge or receive pay for more than 180 days in any one year at the rate of \$3 per day in a county like Whitley, the population of which is in excess of 15,000 and under 30,000, must rule in this appeal. Therefore the argument is advanced that, as it appears appellee was allowed and paid \$540 as his compensation for the year 1901, which was the amount appropriated by the county council for 180 days at \$3 per day, he is not entitled to recover upon the extra claim which he sets up in this action. Counsel for appellee insist that the act of 1895, supra, is impliedly repealed by an act of the Legislature approved March 4, 1899 (Acts 1899, p. 430, c. 197). It is further insisted

¶ 2. See Evidence, vol. 20, Cent. Dig. § 17.

that, if the former act is not repealed, it must be held to be unconstitutional and void, for the reason, as urged, that the Legislature, under our Constitution, had no power to impose upon the county assessor duties, and then provide that he should receive \$3 per day for the performances thereof, and then, under the circumstances, declare that he could not receive pay for more than 180 days.

The first question to be determined is, did the act of 1899 repeal by implication that part of the statute of 1895 which in its effect limited the maximum time to 180 days for which the assessor of Whitley county might charge and receive pay in any one year in the discharge of the duties of his office? The act of 1899 does not profess to expressly repeal any other statute in whole or in part. The law of 1895 is entitled "An act concerning the office of county assessors, regulating the appointment of persons who may act as deputies, fixing the pay, and limiting the time of service, repealing all laws in conflict therewith, and declaring an emergency." As applicable to the question herein involved, we quote the following from the act of 1895: "The county assessors in the several counties of this state, shall receive as compensation for their services, the sum of \$3.00 per day for the time actually employed by them in the discharge of the duties of their several offices. Provided, * * * that in counties of more than 15,000 and less than 30,000, such assessor shall not charge or receive pay for more than 180 days." Section 4 of the act provides that the population of the several counties shall be computed from the United States census of 1890. Section 5, p. 206, repeals all laws and parts of laws in conflict with the act. By section 112 of the tax law of 1891 (Acts 1891, p. 199, c. 99) the office of county assessor was created, and the tenure thereof was fixed at four years, and no person was elected to hold the office for more than four years in any period of eight years. The compensation of the office by that act was fixed at \$3 per day for the time actually employed. In 1893 (see Acts 1893, p. 183, c. 98) this section of the tax law was amended. The material change made by the amendatory act was that in counties containing a population of over 100,000 the annual salaries of the county assessors should be \$1,800. The act of 1899 professes to amend section 1 of the amendatory act of 1893. The only changes, however, made in section 112 of the tax law, as amended in 1893, are to the effect that no person shall be eligible for election to the office of county assessor more than twice in any term of 12 years, and to prescribe the duties of this officer in respect to omitted or sequestered property subject to taxation. The amendatory act of 1899 provides, as did section 112, originally, of the tax law of 1891, and also the amendatory act of 1893, that the county assessors "shall receive \$3 per day for the time actually employed in the duties of his office to be

paid out of the county treasury on the order of the board of commissioners, on his filing therewith an itemized statement duly verified, showing the time actually employed by him and the nature of his services." It was also provided by the act of 1899, as it was in the section amended by it, that in counties having a population of more than 100,000 the county assessor should receive \$1,800 per annum. It was expressly declared in the act of 1895 that its provisions should not apply to counties having a population of more than 100,000. It is observable that the act of 1899 provides that county assessors shall receive \$3 per day for the time actually employed, but is wholly silent in respect to any period or limit of time which may be employed by that officer in any one year in the discharge of the duties of his office. Can it, in reason, be asserted that under and by the provisions of the amendatory act of 1899 there is manifested a clear intent or purpose on the part of the Legislature to repeal that part of the statute of 1895 whereby the time which may be employed by county assessors in any one year is limited? It is a familiar rule, and one universally affirmed by the authorities, that a repeal by implication of statutes is not favored. In accordance with this rule, two or more acts on the same subject must, if possible, be so construed that both may be permitted to stand. It has been repeatedly affirmed by the decisions of this court that implied repeals are only recognized and upheld when the later act is so repugnant to the earlier as to render the repugnancy or conflict between them irreconcilable. A court will always, if possible, adopt that construction which, under the particular circumstances in a given case, will permit both laws to stand and be operative. In support of the principles above asserted, vide *Carver v. Smith*, 90 Ind. 222, 46 Am. Rep. 210; *Shea v. City of Muncie*, 148 Ind. 14, 46 N. E. 138; *Pomeroy v. Beach*, 149 Ind. 511, 49 N. E. 370; *State v. City of Noblesville*, 157 Ind. 31, 60 N. E. 704. In the case at bar the earlier act—that of 1895—fixed the per diem of county assessors at \$3 for the time actually employed, and further provided a standard by which the maximum time that might be employed in any one year by county assessors in the discharge of the duties of their offices in their respective counties was fixed. The limitation in the statute of 1895 in regard to the time which may be employed, it would seem, under the circumstances, remains untouched by the act of 1899. At least it may be said that in regard to that provision there is no such irreconcilable conflict or repugnance between the two acts as would require a court to hold that the later repealed the earlier, for in this respect the two acts can be consistently reconciled with each other, and both be allowed to stand, by considering the later law as fixing the per diem of the county assessor, and the provision of the earlier—that of 1895—as placing

a limit on the time which may, if necessary, be actually employed by such officers in their respective counties at \$3 per day. Such a construction will avoid confusion and uncertainty in the law, and will be in harmony, we believe, with the intent of the Legislature. We therefore conclude that the provision in the statute of 1895 by which the time employed by county assessors in their respective counties is limited is not repealed by the provisions of the act of 1899, and the same still remains in force.

Aside from the averment of that fact, we judicially know that by the United States census of 1890 Whitley county had a population of over 15,000 and under 30,000; consequently appellee was limited in the discharge of his duties as county assessor for the year 1901 to 180 days. *State v. Monroe County Council*, 158 Ind. 102, 62 N. E. 1000. For this time at \$3 per day he was allowed and received payment. We are not to be understood as holding in *State v. Monroe County Council*, supra, that the county council is empowered under the law to reduce the number of days that may be actually employed by a county assessor in the discharge of the duties of his office in any one year below the number fixed by the standard provided by the act of 1895. That question is left undetermined. The statute of 1895 is certainly not open to the objection urged against its constitutional validity by appellee's counsel.

It follows, under the facts and the law applicable thereto, that appellee is not entitled to recover in this action. The judgment below is therefore reversed, and the cause remanded, with instructions to the lower court to overrule the demurrer to the second and third paragraphs of the answer, and for further proceedings not inconsistent with this opinion.

(162 Ind. 481)

LUX & TALBOTT STONE CO. v. DONALDSON et al.¹

(Supreme Court of Indiana. Nov. 24, 1903.)

MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—PERFORMANCE BY ABUTTING OWNER—ASSESSMENTS—OBJECTIONS—ESTOPPEL—CITY COUNCIL—ACCEPTANCE OF WORK—EFFECT—FRAUD—CONCLUSIONS OF FACT—PLEADING—DEMURRER—DEFECTIVE COMPLAINT—ADMISSIONS—CURING DEFECT—APPEAL—ASSIGNMENTS OF ERROR—CROSS-ERRORS—FILING OF BRIEF—TIME.

1. Where, on appeal by plaintiff, defendant filed cross-assignments of error, but failed to file its brief on such cross-assignments within 60 days, as required by Sup. Ct. Rule 21 (55 N. E. v.), such cross-assignments and briefs subsequently filed will be stricken from the files.

2. Where a party did not assign as error the failure of the court to carry back a demurrer and sustain it to a pleading of his adversary, such failure will not be reviewed on appeal.

3. The acceptance of an improvement of a street by the common council of the city, in the manner prescribed by statute, after completion of the work, is conclusive on an abutting property owner as to the character of the work done and material used, in the absence of fraud.

4. In an action to recover an assessment for a street improvement, an answer alleging that

defendants called the attention of the city engineer and the street committee in charge of the improvement to certain defects in the work, and, on a hearing, made proof of the same, but that the committee disregarded the evidence, and concealed the facts from the common council, and assured such council that the work had been done according to the contract, and that the civil engineer and the street committee combined and colluded with the contractor to do inferior work and to furnish inferior material and to deceive the common council, etc., was insufficient as an allegation of fraud in the acceptance of the work by the common council.

5. Where, in a suit for assessments for a street improvement, the answer admitted that a hearing was given defendants by the common council according to the requirements of the statute, and that defendants produced their witnesses and submitted their evidence to that body, but alleged that the common council disregarded the evidence and accepted the work, and that the contractor combined and colluded with the city engineer and certain influential members of the common council, and thereby procured the acceptance of the work, it did not state any facts constituting fraud on the part of the common council, and was therefore insufficient.

6. An answer in a suit for a street assessment alleging that, with the consent of the common council and the city engineer, a contractor failed to comply with the contract as to the quality of the materials used and the character of work done, but that the work was done and materials furnished under a separate and independent agreement, and that no notice for bids for the work was given, and no bids for the same received by the common council, constituted a collateral attack on the proceedings of the common council, and did not therefore, state a defense to the action.

7. In a suit to recover an assessment for a street improvement, a paragraph of the answer alleging as a partial defense a breach of the contract by the contractor in the character of the materials and work, that such defects could not be discovered by defendants, and that the acceptance of the work by the common council was procured by a fraudulent conspiracy between the contractor and the city engineer, was demurrable.

8. In a suit to recover assessments for a street improvement, an abutting property owner cannot set up a counterclaim for damages arising out of the failure of the contractor to perform the work according to contract; the work having been duly accepted by the city council.

9. Burns' Rev. St. 1894, § 4291, provides that a reasonable allowance shall be made on the proportionate share of the cost of a whole improvement taxable to an abutting property owner for an improvement made by such owner in front of his property, which is made in accordance with the general plan of the improvement under the ordinance, and which is of such a character that it can be incorporated in such improvement. *Held*, that where an answer in a suit for assessments for a street improvement averred that defendants had previously improved the street in front of their property, and were entitled to a reduction from the assessment therefor, but failed to allege that the improvement made by them was in accordance with the general plan for the improvement of the street, as specified by the ordinance, and that it could have been incorporated in the improvement provided for, such answer was demurrable.

10. That a street has been previously improved did not deprive the common council of the city of authority to require it to be improved again, at the expense of abutting property owners, in

¹ See *Municipal Corporations*, vol. 28, Cent. Dig. § 1017.

¹ Rehearing denied.

the same manner as though it had never been improved.

11. Under Burns' Rev. St. 1901, § 4291, providing that whenever a lot owner, before the letting of a contract for the improvement of a street, shall have made the improvement in accordance with the general plan, he shall be entitled to a reasonable allowance therefor on his proportion of the cost of such improvement, which shall be determined by the city engineer, a claim for a reduction of an assessment by reason of an improvement by the lot owner must be made on the hearing of objections to the report of the engineer before the city council.

12. Where abutting property owners, with full knowledge of the making of a street improvement, and the nature of the work and materials, stood by until the improvement was completed, without objection, and, when it was nearly completed, joined in a petition for a change of the specifications and a reduction of the price, which was granted, they were estopped to deny that the work was done according to contract, and that their property was liable to assessment therefor.

13. Where the complaint in an action to recover assessments for street improvements was demurrable for failure to allege that the ordinance for the improvement of the street was adopted by a two-thirds vote of the common council, or that any such ordinance was passed, but defendants' answer expressly admitted that the improvement of the street was ordered by the common council, such admission cured the defect in the complaint, so as to entitle the plaintiff to a reversal for errors in the overruling of demurrers to the answer, which was also insufficient.

Appeal from Circuit Court, Cass County; Joseph M. Rabb, Special Judge.

Action by the Lux & Talbott Stone Company against Albert N. Donaldson and others. From a judgment in favor of defendants, plaintiff appeals. Transferred from Appellate Court under act of March 13, 1901 (Acts 1901, p. 590, c. 259). Reversed.

Nelson & Myers and McConnell, Jenkins & Jenkins for appellant. M. Winfield, D. B. McConnell, J. W. McGrevy, Chas. Hale, and George Gamble, for appellees.

DOWLING, J. Action to enforce the collection of a final assessment for the improvement of a street in the city of Logansport. The right to recover such assessment was denied and contested on various grounds. A trial by the court resulted in a general finding and judgment for the appellees, who were the defendants below. Demurrers to eight paragraphs of the answer of the appellees were overruled, and demurrers to four paragraphs of appellant's reply were sustained. Appellant's motion for a new trial was denied.

An assignment of cross-errors calling in question the ruling of the trial court upon a motion to make the complaint more certain, a demurrer to the complaint for want of facts, and upon appellant's demurrers to the 12th, 13th, 14th, and 15th paragraphs of appellees' answer, was filed by appellees; and we are asked by them to consider the sufficiency of the complaint before proceeding to examine the errors assigned by the appellant. We find, however, upon an inspection

of the record, that the cross-errors are not before us. Rule 21 of this court, adopted January 4, 1900, and in force from and after November 26, 1900 (55 N. E. v) requires that, "If cross-errors are assigned, the appellee shall file his brief thereon within sixty days from the date of the cross-assignment, or the same will be stricken out." The cross-assignment of errors in this case was filed by the appellees November 9, 1901. The briefs for appellees upon the cross-assignment were not filed until January 16, 1902, or 68 days after the filing of the cross-assignment. Under the rule *supra*, the clerk should have refused to receive the briefs, and the cross-assignment should have been stricken out. *Carriger v. Kennedy*, 134 Ind. 107, 33 N. E. 909; *Loucheim v. Seeley*, 151 Ind. 665, 43 N. E. 646; *Leatherman v. Board, etc.*, 143 Ind. 282, 47 N. E. 458; *Mann's, etc., Co. v. Templeton*, 149 Ind. 706, 44 N. E. 1108; *State v. Van Cleave*, 157 Ind. 608, 62 N. E. 446; *Ewbank's Manual*, §§ 21, 179, pp. 20, 21, 269. In consequence of the failure of appellees to comply with rule 21 (55 N. E. v), *supra*, the cross-assignment of errors is stricken from the record, and the filing of the briefs upon such cross-assignment is set aside.

Nor are we at liberty, in the present state of the record, to carry the appellant's demurrers to the answers back, and sustain them to the complaint, if that pleading should be found insufficient. If a party relies upon a supposed error of the court in failing to carry back a demurrer and sustain it to a pleading of an adversary, he should assign such failure as error; otherwise no question is presented in this court. *Peters v. Banta*, 120 Ind. 416, 22 N. E. 95; *Baldwin v. Sutton*, 148 Ind. 591, 47 N. E. 629, 1067; *Elliott's App. Proc.* §§ 186, 300; *Queen Ins. Co. v. Hudnut Co.*, 8 Ind. App. 22, 35 N. E. 397; *Ewbank's Manual*, § 127, p. 194.

We proceed now to an examination of the errors assigned by appellant on the rulings of the court upon the demurrers to the 1st, 2d, 3d, 5th, 6th, 7th, 8th, and 11th paragraphs of appellees' answer.

1. The first of these alleged that the work was not done by the appellant according to the contract, and that, in consequence of the manner in which it was executed, and the character of the materials used, the improvement was worth only one-half what it would have been, had the terms of the agreement been complied with by appellant. This paragraph admits that the work was approved and accepted by the common council, but attempts to avoid the effect of this confession by averments that the city civil engineer and the street committee combined and conspired with the appellant to permit such defective work to be done and such inferior materials to be used, and to deceive the common council and secure the approval and acceptance of said work and material; that the said parties did so deceive the com-

mon council; and that the approval and acceptance of the work were thereby secured. The acceptance of the improvement by the common council, in the manner prescribed by the statute, after the completion of the work, was conclusive upon the property owner, so far as the character of the work done and materials used was concerned. In such case, in the absence of fraud, the property owner cannot be heard to say, by way of defense to a suit to collect the assessment, that the work was not done according to the contract. *Cooley on Taxation* (1st Ed.) 468; *Elliot's Roads & Streets*, § 416; *Holloran v. Morman*, 27 Ind. App. 309, 59 N. E. 869; *De Puy v. City of Wabash*, 133 Ind. 336, 32 N. E. 1016; *Cason v. City of Lebanon*, 153 Ind. 567, 55 N. E. 768; *Darnell v. Keller*, 18 Ind. App. 103, 45 N. E. 676; *City of Bloomington v. Phelps*, 149 Ind. 596, 49 N. E. 581; *Gorman v. State*, 157 Ind. 205, 60 N. E. 1083. In *Robinson v. City of Valparaiso*, 136 Ind. 616, 619, 36 N. E. 644, 645—a proceeding by a property holder for an injunction—this court said: "The complaint goes on to specify defects in the work. But this matter is placed by law in the hands of the council, and their judgment thereon cannot be questioned in this collateral attack. The law itself provides a method by which any wrong done any property owner may be rectified." And again, in *McEnaney v. Town of Sullivan*, 125 Ind. 407, 410, 25 N. E. 540, 541, the court, by Elliott, J., said: "The attack made upon the proceedings of the corporate officers is a collateral one, and it is well settled that upon such an attack only defects or irregularities affecting the jurisdiction can be made available. Any other rule would break down the distinction between collateral and direct attacks, and open the way to great wrongs and abuses. But upon this question the authorities are quite well agreed. Indeed, the only phase of the question upon which there is diversity of opinion is as to what shall be considered jurisdictional facts. Our cases uniformly hold that, upon such an attack as the present one only such questions as affect the jurisdiction can be considered. *Montgomery v. Wasem*, 116 Ind. 343 [15 N. E. 795, 19 N. E. 184], and cases cited; *Jackson v. Smith*, 120 Ind. 520 [22 N. E. 431], and cases cited; *Barber, etc., Co. v. Edgerton*, 125 Ind. 455 [25 N. E. 436]." Unless the allegations of fraud were sufficient to take the case out of the general rule that acceptance of the improvement by the common council is conclusive upon the property owner, the first paragraph of the answer is bad. The only averments relating to the supposed fraud were that the appellees called the attention of the city civil engineer and the street committee in charge of the improvement to certain defects in the work, and the noncompliance of the appellant with the contract; that, upon a hearing before the committee, they made proof of the same, but that the

committee disregarded the evidence, and concealed the facts from the common council; that the committee assured the common council that the work had been done according to contract; that the civil engineer and the street committee combined and colluded with the appellant to do said inferior work, to furnish said inferior material, and to deceive the common council and secure the approval and acceptance of the work. These allegations amount to nothing more than a charge that certain irregularities occurred previous to the final hearing before the common council. At that hearing the appellees had the opportunity to present every legal objection to the report of the committee, including all accusations of fraudulent conduct on the part of the committee, the civil engineer, and the contractor. If they failed to object to the report on these grounds, or if the common council, upon the hearing, adopted the report, then, unless fraud in the action of the common council itself was properly alleged in the answer, the previous misconduct of the committee and the civil engineer would not vitiate the action of the common council, and would constitute no defense to a suit to enforce the lien of the assessment. *Acts 1889, p. 243, c. 118, § 7*; *Burns' Rev. St. 1894, § 4294*. The first paragraph of the answer contained no averment of fraudulent conduct on the part of the common council at the hearing upon the report of the committee, or in the enactment of the order for the assessment. Consequently it was insufficient, and the demurrer to it should have been sustained. *Darnell v. Keller*, 18 Ind. App. 103, 45 N. E. 676; *Shank v. Smith*, 157 Ind. 401, 412, 61 N. E. 932, 55 L. R. A. 564.

2. The second paragraph of the answer is very similar to the first. An attempt is made, however, to charge the common council with fraud in its proceedings for the adoption of the report of the committee and the acceptance of the improvement. The answer admitted that a hearing was given the appellees by the common council agreeably to the requirement of the statute, and that they produced their witnesses and submitted their evidence to that body; but it was also averred that the common council disregarded the evidence and accepted the work, and that the appellant combined and colluded with the city civil engineer and certain influential members of the common council, and thereby procured the acceptance of the said work. There is no statement of any fact or facts constituting fraud on the part of the common council in adopting the said report and accepting the work. The averment that the appellant combined and colluded with the city civil engineer and certain influential members of the common council amounts to nothing. It is not a charge of fraud. It states no facts constituting fraud. It adds nothing to the defense. Like the confederacy clause in an ancient bill in

equity, it may be omitted without impairing the pleading. *Burden v. Burden*, 141 Ind. 471, 40 N. E. 1067; *Stroup v. Stroup*, 140 Ind. 179, 39 N. E. 864, 27 L. R. A. 523; *Guy v. Blue*, 146 Ind. 629, 45 N. E. 1052; *Story, Eq. Pl. § 29*; *Adams v. Porter*, 1 Cush. 170; *Rules in Equity S. C. U. S.*, Rule 21. The demurrer to this paragraph of answer should have been sustained.

3. The defense set up by the third paragraph of the answer was that, with the consent of the common council and the city engineer, the appellant failed to comply with the contract as to the quality of the materials used and the character of the work done, but that the work was done and the materials were furnished under a separate and independent agreement, and that no notice for bids for the work was given, and that no bids for the same were received by the common council. The matters so set up are a collateral attack upon the proceedings of the common council, and for that reason were not available as a defense to the action. *McEneney v. Town of Sullivan*, 125 Ind. 407, 410, 25 N. E. 540. The court erred in overruling the demurrer to this answer.

4. The fifth paragraph of answer undertook to set up a partial defense, and went to 85 per cent. of the assessment against the property of the appellees. It alleged a breach of the contract by the appellant in the character of the materials and work, that these defects could not be discovered by appellees, and that the acceptance of the work by the common council was procured by a fraudulent conspiracy between the appellant and the city civil engineer. For the reasons already given, this answer, also, was insufficient. The demurrer to it should have been sustained.

The sixth paragraph of answer charged that, without the knowledge or consent of the common council, the appellant was permitted by the street committee and the city civil engineer to disregard the specifications in many important particulars, and that such changes were concealed from the appellees and all persons liable to be assessed for said improvement. The facts so pleaded constituted no defense.

The seventh paragraph of answer purported to set up a counterclaim arising out of the failure of the appellant to perform the work according to the contract. There is no authority for such a claim or defense in actions of this character. *Laverty v. State ex rel.*, 109 Ind. 217, 9 N. E. 774; *Indianapolis, etc., R. Co. v. State ex rel.*, 105 Ind. 37, 4 N. E. 316.

The eighth paragraph of answer was almost identical with the seventh. It should have been held insufficient.

The eleventh paragraph of answer averred that the appellees had previously improved the street and sidewalk in front of their property, and were entitled to a reduction from the assessment on account of such improve-

ment. This paragraph was bad because it failed to show that the improvement made by appellees was in accordance with the general plan for the improvement of Sycamore street under the ordinance of August 17, 1898, and that it was of such a character that it could have been incorporated with the improvement provided for by the said ordinance. It is only where this is the case that the property owner can claim the benefit of section 4291, *Burns' Rev. St.* 1894, which provides for a reasonable allowance for such work upon the proportionate share of the property owner of the cost of the whole improvement. Besides, it appears that the improvement so made by the appellees was constructed under an ordinance passed in 1886, or 24 years before the enactment of the ordinance under which the improvement described in the complaint was made. The fact that the street had before been improved did not deprive the common council of the authority to require it to be improved again, at the expense of the abutting property owners, in the same manner as if it had never before been improved. *City of Lafayette v. Fowler*, 34 Ind. 140; *Yeakel v. City of Lafayette*, 48 Ind. 116; *City of Kokomo v. Mahan*, 100 Ind. 142. Besides, such claim, if it existed, should have been made upon the hearing of objections to the report of the engineer before the common council. *Burns' Rev. St.* 1901, §§ 4291, 4292; *City of Connersville v. Merrill*, 14 Ind. App. 303, 42 N. E. 1112.

The 2d, 3d, and 4th paragraphs of reply to the 1st, 2d, 3d, 5th, 6th, 7th, 8th, and 11th paragraphs of appellees' answer are substantially alike. Their material averments are that the appellees, with full knowledge of the making of the improvement, the expenditures of appellant therefor, and the nature of the work and materials, stood by until the improvement was completed, making no objection thereto, and that the said appellees, during the progress of the work, and when it was nearing completion, joined in a petition to the common council for a change in the specifications, and for the substitution of a sand filler for an asphalt filler, and a reduction of \$700 in the contract price for said improvement; that the common council and the appellant consented to said change and reduction, and that the work was finished in accordance with the said petition; that, by their conduct in these respects, the appellees were estopped to deny that the work was done according to the contract, and that their property was liable to assessment therefor. The matters stated in these replies were sufficient to estop the appellees from taking advantage of the defenses contained in the several paragraphs of answer to which they were addressed. This has often been decided. *Elliott's Roads & Streets*, pp. 419-423, 386-388; *Ross v. Stackhouse*, 114 Ind. 200, 206, 16 N. E. 501; *Prezinger v. Harness*, 114 Ind. 491, 493, 16 N. E. 495;

Cluggish v. Koons, 15 Ind. App. 599, 43 N. E. 158; Shank v. Smith, 157 Ind. 401, 61 N. E. 932, 55 L. R. A. 564.

The fifth paragraph of reply sets out in detail all the steps taken by the common council in the matter of the improvement, and its action upon the objections of the appellees and the report of the committee at the hearing provided for by the statute. This, also, is pleaded by way of estoppel, and, according to the authorities hereinbefore cited, was sufficient.

While it is clear that the trial court erred in all the rulings on the demurrers which we have reviewed, a fatal defect in the complaint deprives the appellant of the advantage it would otherwise have obtained upon its assignment of error, unless such defect is cured by the answer. If a complaint is bad, there can be no reversal of the judgment for error in overruling a demurrer to a bad answer, or in sustaining a demurrer to a good reply. As has often been said, a bad answer is good enough for a bad complaint. *Hiatt v. Town of Darlington*, 152 Ind. 570, 580, 53 N. E. 825; *Ice v. Ball*, 102 Ind. 42, 1 N. E. 66; *Reeves v. Howes*, 104 Ind. 435, 6 N. E. 904; *Low v. Studebaker*, 110 Ind. 57, 10 N. E. 801. And this rule must be applied even where no cross-error is properly assigned upon the overruling of a demurrer to the complaint. *Baldwin v. Sutton*, 148 Ind. 591, 594, 595, 47 N. E. 629, 1067. The complaint in this action wholly failed to allege that an ordinance for the improvement of the street was adopted by a two-thirds vote of the common council, or, indeed, that any such ordinance was passed at all. Neither did it contain an allegation of any matter of estoppel rendering appellees liable for the assessment. The adoption of the resolution declaring the necessity for the improvement by a two-thirds vote was alleged, and the other steps taken by the common council were sufficiently pleaded; but the indispensable jurisdictional fact that the common council, by the vote expressly required by the statute to authorize it to act at all, adopted an ordinance for the improvement of the street, is nowhere averred in the complaint. The adoption of such an ordinance with the concurrence of two-thirds of the members of the common council, where there is no petition, or some action equivalent thereto, is necessary, to give that body jurisdiction of the proceedings for the improvement of the particular street, and to subject the property abutting thereon to the payment of the cost of such improvement. *Acts 1889, p. 241, c. 118, § 5*; *Burns' Rev. St. 1901, § 4292*; *Moberry v. City of Jeffersonville*, 38 Ind. 198, 203; *Elliott's Roads & Streets, §§ 545, 546*. The omission of this averment is of such a vital character that, even upon a default, no judgment could have been rendered against the appellees. But the appellees, by their 1st, 2d, 3d, 5th, 6th, 7th and 8th paragraphs of answer, expressly admit that the improve-

ment of the street was ordered by the common council. The admission that the council ordered the improvement to be made is, in its necessary legal effect, an admission that such order was made in the manner and with the concurrence of the requisite number of the members of the council. This admission was effectual for all the purposes of the case, and not only cured the defect in the complaint, but it relieved the appellant from the necessity of offering any evidence to establish the fact so admitted. That other matters were pleaded by the appellees in avoidance of the confession so made does not alter the effect of the admission. The burden of proving them was assumed by the appellees. The letter and spirit of the Civil Code indicate that pleadings are to state the truth, and neither fiction nor falsehood is presumed to enter into them. We are not called upon in this case to decide what effect a paragraph denying all the allegations of the complaint would have, when a fact was expressly admitted in other paragraphs of the answer. Here the complaint contained no averment of the passage of an ordinance or other resolution causing the improvement to be made. The appellees voluntarily and expressly admitted, in seven separate paragraphs of their answer, that the improvement was made by the order of the council. The admission was in these words: "They admit the order of the council for the improvement of Sycamore street, without any petition of the property holders along the line of said street." This express admission cured the defect and omission in the complaint, and relieved the appellant from the necessity of averring or proving that such an order was made, or that it was passed by the vote required by the statute. The effect of such admissions is thus stated in *Watkins v. Gregory*, 6 Blackf. 113, 115: "The declaration is objected to on the ground that it shows there was no valid consideration for the bond sued on, the consideration being a pre-existing debt. This objection is answered by a reference to the facts contained in the third plea. In showing the transaction to amount to a mortgage, the plea admits that there was a valid consideration for the bond. The defect in the declaration, therefore, though a substantial one, is cured by the express admissions of the plea." Again, in *Conner v. Board*, 57 Ind. 15, the court said: "Two objections are taken to the cause of action: First, that it does not set out the names of the plaintiffs below. This is a fatal objection, if not cured; but it may be cured by the process, amendment, or by a pleading wherein the names are properly stated. In pleading to the cause of action, by an answer which stated the names of the plaintiffs in full, before Justice Wells, the appellant cured this alleged error. *Widup v. Gibson*, 53 Ind. 484." In *Wiles v. Lambert*, 66 Ind. 494, it was held that an insufficient description in the complaint of a judg-

ment on which an execution was issued was cured by a proper description of the same in the answer. See, also, 1 Chitty on Pl. 710; *Miller v. James*, 86 Iowa, 242, 245, 53 N. W. 227; *Daub v. Englebach*, 109 Ill. 267, 271; *Parker v. Lanier*, 82 Ga. 216, 218, 8 S. E. 57; *New Albany Co. v. Stallcup*, 62 Ind. 345; *Colter v. Calloway*, 68 Ind. 219; *Holland v. Spell*, 144 Ind. 561, 42 N. E. 1014; *Woolen's Civil Proc.* § 1085; *Palge v. Willet*, 38 N. Y. 28; *White v. Smith*, 46 N. Y. 418. For a very full and exhaustive discussion of admissions in pleadings, see *Boots v. Canine*, 94 Ind. 408.

The insufficiency of the complaint having been cured by the admissions in the answer, the errors of the court in overruling the demurrers to the 1st, 2d, 3d, 5th, 6th, 7th, 8th, and 11th, paragraphs of answer, and in sustaining the demurrers to the 1st, 2d, 3d, and 4th, paragraphs of reply, require that the judgment should be reversed. Judgment reversed, with instructions to the court to sustain the demurrers to the 1st, 2d, 3d, 5th, 6th, 7th, 8th, and 11th paragraphs of answer, and for further proceedings in conformity to this opinion.

(161 Ind. 481)

RUSSELL et al. v. STATE.¹

(Supreme Court of Indiana. Nov. 24, 1903.)

APPEALS — JURISDICTION — STATUTORY CONSTRUCTION—RULES—AMENDMENT OF STATUTE—EFFECT—CONSTRUCTION OF STATUTE.

1. It is a rule of statutory construction that a section of a statute as amended is to be regarded, as to matters thereafter occurring, as if such section, instead of the section which was blotted out by the amendment, had been a part of the original act.

2. Act March 12, 1901 (Acts 1901, p. 565, c. 247) § 7, provides that no appeal shall be hereafter taken to the Supreme or Appellate Courts in trial for misdemeanor, except as provided in section 8, p. 566, of the act, which provides that "every case in which there is in question the proper construction of a statute, * * * and which case would be otherwise unappealable by virtue of section six (6) or section seven (7), shall be appealable directly to the Supreme Court, for the purpose of presenting such question only." Section 9 provides that no appealable case shall hereafter be taken directly to the Supreme Court unless it falls within one of the nine classes enumerated in said section, and that "all other appealable cases shall be taken to the Appellate Court. Act March 9, 1903 (Acts 1903, p. 281, c. 156) § 2, purports to amend said section 7 so as to make section 7 read: "Hereafter the defendant in all criminal cases of misdemeanors shall have the right of appeal to the Supreme or Appellate Courts." *Held*, that the Supreme Court cannot entertain jurisdiction over any case of misdemeanor which does not fall within section 9 of said act of 1901.

3. Act March 12, 1901 (Acts 1901, p. 565, c. 247) § 9, provides: "No appealable case shall hereafter be taken directly to the Supreme Court unless it be within one of the following classes: First, cases in which there is in question * * * the constitutionality of a statute," etc. *Held* not broad enough to authorize appeals to the Supreme Court in misdemeanor cases involving only a question as to "the proper construction of a statute."

4. Act 1903, p. 281, c. 156, § 2, converts misdemeanor cases into a class of cases appealable generally, so that when the Supreme Court get jurisdiction of such a case under said section it is before the court for all purposes.

Appeal from Criminal Court, Marion County; Tremont Alford, Judge.

James A. Russell and another were convicted of a misdemeanor, and appeal. Case ordered transferred to Appellate Court.

Herod & Herod, for appellants. Chas. W. Miller, C. C. Hadley, W. C. Geake, and L. G. Rothschild, for the State.

GILLETT, C. J. Appellants were convicted in the court below, of the offense of maintaining a nuisance, and they appeal to this court. The transcript was filed and errors assigned May 23, 1903. There is involved in the case a question as to the proper construction of a statute. The question is presented as to the jurisdiction of this court.

Section 7 of the act of March 12, 1901 (Acts 1901, p. 565, c. 247), provided as follows: "No appeal shall hereafter be taken to the Supreme Court or to the Appellate Court in any criminal case of misdemeanor, except as provided in section eight (8) of this act." Section 8, p. 566, of said act, reads thus: "Every case in which there is in question, and such question is duly presented, either the validity of a franchise, or the validity of an ordinance of a municipal corporation, or the constitutionality of a statute, state or federal, or the proper construction of a statute, or rights guaranteed by the state or federal Constitution, and which case would be otherwise unappealable [unappealable] by virtue of section six (6) or section seven (7), shall be appealable directly to the Supreme Court, for the purpose of presenting such question only." Section 9 of said act provides that no appealable case shall hereafter be taken directly to the Supreme Court unless it falls within one of the nine classes enumerated in said section, and it further provides that "all other appealable cases shall be taken to the Appellate Court." Section 2 of the act of March 9, 1903, which purports to amend section 7 of the act of March 12, 1901, is as follows: "That section seven of the said above-entitled act be amended to read as follows: Section 7. Hereafter the defendant in all criminal cases of misdemeanors shall have the right of appeal to the Supreme or Appellate Courts." Acts 1903, p. 281, c. 156. It will be observed that the section last quoted does not specifically provide whether the jurisdiction in a case of this kind shall be in this court or in the Appellate Court. It is a rule of statutory construction that a section of a statute as amended is to be regarded, as to matters thereafter occurring, as if such section, instead of the section which was blotted out by the amendment, had been a part of the original act. *Walsh v. State*, 142 Ind. 357, 41 N. E. 65, 33 L. R. A. 392; *Pomeroy v. Beach*, 149 Ind. 511, 49

¹ Transferred to Appellate Court, 69 N. E. 482.

N. E. 370. So regarding the two acts, we find that section 7 of the original act is not a part of said act, and that, as there is no longer any case of misdemeanor which is not appealable, the language of section 8 of said act, which granted the right of appeal in certain classes of misdemeanor cases that could not be appealed by virtue of section 7, is no longer applicable. Section 1 of the act of 1903, which applies to civil cases, seems to have treated section 8 as in force in so far as appeals in such cases are concerned, but we note the absence of equivalent language in section 2 of the later act. The force of section 8, which is built upon the theory that appeals may be taken in certain of such cases if they cannot be appealed by the preceding sections, is destroyed, in so far as section 8 applies to misdemeanor cases, by a new section that grants the right of appeal in all cases of misdemeanor.

With sections 7 and 8 of the original act regarded as blotted out for present purposes, what meaning is to be attached to section 2 of the new act, which grants "the right of appeal to the Supreme or Appellate Courts"? It is our conclusion that, in the present state of legislation, we cannot entertain jurisdiction over any case of misdemeanor which does not fall within section 9 of the act of 1901. That section is not broad enough to authorize appeals to this court in misdemeanor cases in which there is involved only a question as to "the proper construction of a statute." That class of appeals is not within our jurisdiction, because of the opening language of section 9, but is within the jurisdiction of the Appellate Court by virtue of the closing language of said section. In passing, we may observe that section 2 of the act of 1903 has had the effect upon said section 9 of converting misdemeanor cases into a class of cases that are appealable generally, so that, if this court gets jurisdiction of such a case under said section, it is before us for all purposes.

It is ordered that this case be transferred to the Appellate Court.

(162 Ind. 393)

CONSUMERS' GAS TRUST CO. v. AMERICAN PLATE GLASS CO. et al.¹

(Supreme Court of Indiana. Nov. 24, 1903.)

GAS LEASE—RIGHTS OF LESSEE—RAILROADS—RIGHT OF WAY—ESTATE ACQUIRED—INJUNCTION.

1. One accepting a lease granting the exclusive right to sink gas wells on certain property is charged with notice of the rights of a railroad occupying the property as a right of way, and in case of conflict the rights of the railroad are paramount to those of the lessee.

2. A railroad which enters on property without color of title, and occupies it as a right of way, acquires merely an easement in the property for purposes of a right of way.

3. A lessee under a lease giving it the exclusive right to draw gas from the demised tract

cannot enjoin a railroad, having merely an easement over the land, and no right to draw gas, from sinking a well on its right of way, unless the lessee has a proprietary right in the land over which the right of way extends.

4. A lessee, under a lease giving it the exclusive right to draw gas from the demised tract, has a proprietary interest in the tract, including a part thereof over which a railroad had acquired an easement for its right of way; and though it cannot enter on the railroad's land, so as to sink gas wells thereon, so long as the railroad is in possession, yet it may enjoin the sinking of a gas well on such land, thereby diminishing the flow of gas from its own wells.

5. The mere fact that a gas company uses a pumping station for the purpose of overcoming the friction incident to the flow of gas through a long pipe does not show it to be a lawbreaker, where there is nothing to show that the natural pressure of the gas was thereby increased, or that the pressure in the pipe exceeded 300 pounds per square inch.

6. An injunction against the construction of a pipe line within the limits of the right of way of a railroad over demised land was properly denied the lessee, when at the time it was asked the line was nearly connected, about \$5,000 having been spent thereon, and the damage to the lessee was inconsiderable, since it could not use the right of way itself, and its right therein was merely a dry and technical one, not being the owner of the fee, so that damages would be an adequate remedy.

Appeal from Superior Court, Madison County; Henry C. Ryan, Judge.

Action by the Consumers' Gas Trust Company against the American Plate Glass Company and another. From the judgment rendered granting part of relief asked, both parties appeal. Transferred from the Appellate Court under section 1337u, Burns' Rev. St. 1901. Affirmed.

Miller, Elam & Fesler, for appellants. Chambers, Pickens & Moores, John T. Dye, and Carey Cowgill, for appellees.

GILLETT, C. J. This action was instituted by the Consumers' Gas Trust Company to enjoin the American Plate Glass Company and the Cleveland, Cincinnati, Chicago & St. Louis Railway Company from drilling a natural gas well on, and laying a gas main along, that part of a railroad right of way which extends through section 6, township 21, range 8, in Madison county, Ind. The cause was put at issue, and after a trial the court rendered a finding and decree in favor of said gas company, restraining the defendants below from digging such well, but the court denied the relief prayed relative to the laying of the gas main. Each of the parties to the action filed a motion for a new trial, and has assigned error on appeal.

At the time of the institution of this action the gas company had a written lease, of date October 26, 1896, which purported to grant to it for an indefinite time the exclusive right to drill gas wells and lay pipes for the transportation of gas in a certain 400-acre tract of land in said section, which land, as described, covered said right of way. The lease was executed by the persons who had the record title to the entire tract. When

¹ See Railroads, vol. 41, Cent. Dig. § 162.

² Rehearing denied.

this suit was instituted the gas company had a number of producing wells on said land, without the limits of said right of way. The railroad was built by the Cincinnati, Wabash & Michigan Railway Company about 1871. The right of way through the tract of land mentioned was fenced by said company about the year 1877, and it has since maintained said fences. Its entry upon the land was made without color of title, and over the protest of the holders of the record title. The landowners have not sought to have their damages assessed. The company has occupied the land with a single track railroad and a line of telegraph poles since its entry. Its possession has been continued without interruption since that time, and such possession appears to have been hostile. The Cleveland, Cincinnati, Chicago & St. Louis Railway Company has been using said railroad for a number of years under an operating agreement with the Cincinnati, Wabash & Michigan Railway Company, and at the time this suit was instituted the American Plate Glass Company was engaged in drilling a gas well on, and laying a line of gas main along, the right of way through said section, under and by virtue of a lease with said operating company. It appears from the evidence that such is the character of the particular gas field that the sinking of a well into the gas reservoir within two miles of a producing well will appreciably reduce the flow of such well, and that the injury to it would be still greater if the new well were in close proximity. The lease of the gas company was sufficiently broad to vest in it the exclusive right to sink gas wells in said 400-acre tract; but, as said Cincinnati, Wabash & Michigan Railway Company was in the possession of and using said right of way for railroad purposes at the time of the execution of said lease, it is evident that the gas company was charged with notice of whatever rights said railway company had; and it is also clear that, to the extent of a conflict between the terms of the gas company's lease and the right of said railway company, it must be held that the rights of the latter are paramount.

Assuming, without deciding, that the glass company was invested with whatever right the Cincinnati, Wabash & Michigan Railway Company had, we proceed to consider whether the latter company had a fee, or only an easement, in said right of way.

It is true that said railway company might have acquired the fee by grant, and that a title by adverse possession is as good as the best title known to the law, yet, unless all distinction in the law of adverse possession between the acquirement of the fee in land and the acquirement of an easement therein is to be lost sight of, consideration must be given to the nature of the user. The soundness of a title is one thing. The extent of it is quite another. A prescriptive right, where there is no color of title, cannot be broader

than the claim which the user evidences. Brookville, etc., Co. v. Butler, 91 Ind. 134; Peoria, etc., Co. v. Attica, etc., Co., 154 Ind. 218, 56 N. E. 210; Indianapolis Water Company v. Kingan & Co., 155 Ind. 476, 58 N. E. 715. Ordinarily, at least, there is no user by a railroad company beyond a user for the purposes of a right of way. A corporation which is organized under the general railroad statute is authorized to condemn only an easement. If it enters without title and constructs its main line, the landowner cannot eject it, but is confined to the remedy given to procure an assessment of his damages. These considerations lead us to the conclusion that in such a case as this nothing more than an easement is acquired. See Elliott on Railroads, § 402; 23 Amer. & Eng. Ency. of Law, 704. In Manufacturers', etc., Co. v. Indiana, etc., Co., 155 Ind. 461, 57 N. E. 912, 50 L. R. A. 768, recognition was given to the doctrine, as natural gas can be obtained only by the drilling of wells, that the surface proprietors have such a qualified property in the gas in the limited reservoir below that they may enjoin an act which is in its nature destructive of their interests in the common property; but we are not prepared to affirm that, because of the right of a proprietor to draw gas from the common reservoir, he could enjoin a third person from obtaining gas therefrom for the mere reason that the latter did not have a right to drill the necessary well. For such a violation of law it appears that the wrongdoer's accountability is only to the proprietor who has a standing to complain of the trespass involved in the drilling of the well. It follows from this consideration that the plaintiff below could not enjoin the putting down of the well unless it further appears that said plaintiff had a proprietary right in the land over which the right of way extends.

As before stated, in effect, the gas company, by virtue of its lease, had every right in the whole tract of land in respect to the drilling of oil wells, except to the extent that the existence of the railroad easement prevented the enjoyment of such right. The possession of the company which owned the easement was so far exclusive that the gas company was not authorized to enter upon the right of way for the purpose of drilling a gas well, but, in case the easement should be abandoned while the gas company's lease continues in force, such company would then have the right to drill gas wells upon said strip of land. The gas company, as respects the right to drill for gas, stands in the position of an owner of the fee. The mere fact that such an owner may not enter and enjoy will not destroy his property rights in the servient tenement. State v. Pottmyer, 33 Ind. 402, 5 Am. Rep. 224; Julien v. Woodsmall, 82 Ind. 568. In a case of this kind, where the gas company may draw off the gas in the common reservoir from a point without the right of way, it hardly seems to

admit of debate that the proprietary interest of such company was about to be invaded by the drilling of the gas well on the right of way. Under the evidence in the case, it must be inferred that one of the purposes of a gas company in leasing a large tract of land for gas purposes is that the flow of gas in such wells as it sinks thereon may not be diminished by the sinking of wells by third persons within the area covered by the lease. Under the facts above disclosed, we do not doubt the right of the gas company to an injunction restraining the drilling of wells upon that part of the right of way which extends across the tract leased by it. See *Indianapolis, etc., Co. v. Kibbey*, 135 Ind. 357, 35 N. E. 392; *Westmoreland, etc., Co. v. De Witt*, 130 Pa. 235, 18 Atl. 724, 5 L. R. A. 731.

The mere fact that the complaint disclosed that the gas company was using a pumping station in the winter time, at a point some six miles from the land in question, for the purpose of overcoming the friction incident to the flow of gas through many miles of pipe, does not stamp such company as a lawbreaker. There is nothing to suggest that by means of such pumping station the natural pressure of the gas at the wells was increased, or that the pressure in the pipe exceeded 300 pounds per square inch. See *Richmond, etc., Co. v. Enterprise, etc., Co.* (Ind. App.) 66 N. E. 782.

The question remains as to the propriety of the action of the lower court in refusing to enjoin the construction of a pipe line by the glass company within the limits of said right of way. It appears that at the time this suit was commenced the glass company had about completed the laying of a line of eight-inch pipe along said right of way from its plant, which is some four miles south of the land in question, to the town of Summitville, which is situated about four miles north of said land. The line of pipe was at that time entirely connected, except at the point on said right of way where said glass company was boring said well. It further appears that said company had taken a number of gas leases about Summitville, and that it was its purpose to use said line in the transportation of gas from such field to its glassworks. The expenditure of said company on account of the putting in of said main at that time amounted to about \$5,000. We think that the action of the trial court in refusing to enjoin the completion of said pipe line was correct. The damage to the gas company, since it could not use the right of way for the purpose of transporting its own gas, and since it was not the holder of the fee, was not considerable, and, so far as appears, could have been fully compensated by damages. The absence of any right upon the part of said company, aside from a rather dry and technical one, for which damages would be an adequate salve, and the hardship which the granting

of an injunction would impose on the glass company at that stage of its enterprise, made the case of such a character that the court below was fully justified in refusing to extend to the gas company the extraordinary remedy of injunction to prevent the completion of the gas main. *Kincaid v. Indianapolis, etc., Co.*, 124 Ind. 577, 24 N. E. 1066, 8 L. R. A. 602, 19 Am. St. Rep. 113; *Whitlock v. Consumers', etc., Co.*, 127 Ind. 62, 26 N. E. 570.

We find no error in the record. Judgment affirmed.

(161 Ind. 478)

BOARD OF COM'RS OF HARRISON COUNTY v. HUNTER.

(Supreme Court of Indiana. Nov. 24, 1903.)

INSANE PERSONS—PAUPERS—GUARDIAN—COMPENSATION—STATUTES—REPEAL—LIABILITY OF COUNTY.

1. Acts 1855, p. 134, c. 65, § 4 (Burns' Rev. St. 1901, § 6991; Rev. St. 1881, § 5146; Horner's Rev. St. 1901, § 5146), provides that, on the determination of the insanity of a poor person by a justice, he shall appoint some person to take charge of the insane person, for which the guardian shall receive reasonable compensation from the commissioners of the county. The county reform law (Acts 1899, p. 354, c. 154, § 33; Burns' Rev. St. 1901, § 5594m1) provided that thereafter the county commissioners should have no authority to make any allowance for voluntary services, or to pay any money for the relief of any poor person not at the time an inmate of some county institution, and such statute repealed all laws conferring any authority to make such payment. *Held*, that the latter provision repealed section 4 of the act of 1855, so far as it provided for compensation for care of an insane person, and one caring for an insane person under appointment pursuant to the act of 1855 could not recover for services after the taking effect of the act of 1899.

Appeal from Circuit Court, Harrison County; Wm. C. Utz, Special Judge.

Action by Jane Hunter against the board of commissioners of Harrison county. From a judgment in favor of plaintiff, defendants appeal. Reversed.

Ed. D. Mitchell, for appellant. Wm. Ridley, for appellee.

MONKS, J. It appears from the special finding of the court, made at the request of appellant: That in 1895 one Addie Hunter, an adult, was adjudged to be "insane, and dangerous to the community if suffered to remain at large," by a justice of the peace of Harrison township, Harrison county, Ind., in a proceeding brought under the act of 1855 (Acts 1855, p. 133, c. 65; being sections 6987-6995, Burns' Rev. St. 1901; sections 5142-5150, Rev. St. 1881; sections 5142-5150, Horner's Rev. St. 1901). That said justice of the peace appointed appellee, a resident of said county, to take charge of and confine said Addie Hunter. Said justice filed in the office of the clerk of the Harrison circuit court a transcript of the proceedings had before him in said cause, as required by section 6991

(5146), supra, and at the September term, 1896, of the Harrison circuit court, said cause was again tried, and the jury found against said Addie Hunter, and said court confirmed the appointment of appellee made by said justice of the peace, as provided in section 6991 (5146), supra. That appellee took charge of and confined said Addie Hunter. Afterwards appellee filed claims against appellant for taking care of and confining said Addie Hunter and for boarding, lodging, and clothing her from June 4, 1901, to September 5, 1901, and for the same from September 4, 1901, to January 8, 1902 (in all, 31 weeks), at \$2.50 per week (in all, \$77.50), which claims were disallowed and rejected by said board of commissioners. That in February, 1902, appellee commenced this action to recover on the claims so disallowed by appellant, and the court found that appellee had charge of and confined said Addie Hunter from the 4th day of June, 1901, to January 8, 1902, a period of 31 weeks, and that she boarded, lodged, and clothed her during said period, and that said service, boarding, lodging, and clothing for said period were worth \$77.50. That no part of the same has been paid. It appears from the said finding that said Addie Hunter had no family or property, was a poor person, and that she was not an inmate of any county institution. The court stated as a conclusion of law that appellee was entitled to recover the sum of \$77.50 and costs, to be paid out of the county treasury, to which conclusion of law appellant excepted. Final judgment was rendered in favor of appellee. The errors assigned challenge the correctness of said conclusion of law. This case was appealed since the taking effect of the act of 1903 (Acts 1903, pp. 280, 281, c. 156). The said act of 1855, supra (being sections 6987-6995, Burns' Rev. St. 1901, sections 5142-5150, Rev. St. 1881, sections 5142-5150, Horner's Rev. St. 1901), was held by this court to be constitutional in Board v. Moore (this term) 68 N. E. 905. It will be observed that appellee sued in this action for services rendered, and clothing, board, and lodging furnished, after the taking effect of the act of 1899 known as the "County Reform Law" (Acts 1899, pp. 343-364, c. 154; being sections 5594g-5594e2, Burns' Rev. St. 1901). Section 33 (page 354) of said act (being section 5594m1) expressly provided that "hereafter the board of county commissioners, or any authority, shall have no power whatever to make any allowance for voluntary services, or for things voluntarily furnished, and no power to pay, or cause the same to be paid for, out of the county treasury; they shall have no power to allow, pay or cause to be paid any money out of the county treasury to or for the relief or support of any pauper or poor person whatever, or liable to become such, if such person be at the time not an inmate of some county institution. They shall have no power to contract for services of any physician to attend upon any

poor of the county other than inmates of the county institutions. * * * All laws or parts of laws conferring power upon any authority to make payment out of the county treasury for any of the matters mentioned in this section, are hereby repealed." It is evident that so much of section 4 of the act of 1855—being section 6991 (5145), supra—as provided for the payment of a reasonable compensation out of the county treasury to the person having charge of such insane person, when such insane person was a poor person, was repealed by said section 33 (5594m1), supra, unless such person was an inmate of a county institution. Appellee was bound to take notice of the law, and, as said Addie Hunter was a poor person, all services rendered, and board, lodging, and clothing furnished, after said county reform law took effect, in 1899, were voluntary, and for which she cannot recover. *Turner v. Board, etc.*, 158 Ind. 166, 63 N. E. 210; *Board, etc., v. Mowbray*, 160 Ind. —, 66 N. E. 46, 47; *Board, etc., v. Pollard*, 153 Ind. 371, 375, 55 N. E. 87. It follows that the conclusion of law was erroneous.

Judgment reversed, with instructions to restate the conclusion of law in accordance with this opinion, and to render judgment in favor of appellant.

(161 Ind. 435)

WEIR et al. v. STATE ex rel. WORL.

(Supreme Court of Indiana. Nov. 24, 1903.)

PUBLIC SCHOOLS—TRANSFER TO OTHER DISTRICT—REFUSAL OF ADMISSION—MANDAMUS—PROPER PARTIES—ALLEGATIONS OF WRIT—SUFFICIENCY—CONSTITUTIONAL LAW—DETERMINATION.

1. Under Burns' Rev. St. 1901, § 5958 (Rev. St. 1881, § 4472; Horner's Rev. St. 1901, § 4472), which gives the benefit of the public schools to unmarried persons between the ages of 6 and 21 years, an alternative writ of mandamus for admission of relatrix into the public schools must aver that she is unmarried.

2. An averment in an alternative writ of mandamus for the admission of relatrix into the public schools that an order "entitled relatrix to attend the public schools of the school town of N." states a mere conclusion of the pleader.

3. The provision of Burns' Rev. St. 1901, § 5959 (Rev. St. 1881, § 4473; Horner's Rev. St. 1901, § 4473), requiring notice of transfer of persons for educational purposes to be given by the transferring school corporation to the transferee, was not repealed by Acts 1901, p. 448, c. 204 (Burns' Rev. St. 1901, §§ 5959a-5959e), which makes further regulations as to the transfer, payment of tuition, etc., and appeals to the county superintendent may be taken by the school corporation to which the transfer is made within 30 days after notice of transfer, under Burns' Rev. St. 1901, § 6028 (Rev. St. 1881, § 4537; Horner's Rev. St. 1901, § 4537), the same as before the act of 1901 took effect.

4. Since, under Acts 1901, p. 448, c. 204 (Burns' Rev. St. 1901, §§ 5959a-5959e), a child is transferred for educational purposes, instead of the parent, as formerly, under section 5959, mandamus to compel the admission of the transferred child to the school of the town of the transfer is properly brought on the relation of the child.

5. The court will not decide a constitutional question when the case can be decided on other grounds.

Appeal from Circuit Court, Henry County; W. O. Barnard, Judge.

Mandamus by the state, on the relation of Nellie Worl, by her next friend, against J. Crawford Weir and others. From a judgment for a peremptory writ, defendants appeal. Reversed.

D. W. Chambers and Forkner & Forkner, for appellants. Bundy & Morris, for appellee.

MONKS, J. This proceeding was brought by the relatrix to compel by writ of mandamus the school town of New Castle, Ind., and J. Crawford Weir, the superintendent of the schools of said town, to admit relatrix to the schools of said town. An alternative writ of mandamus was issued, to which appellants demurred for the following causes: "(1) Defect of parties, in this: that Nellie Worl is not the proper relatrix, but that John M. Worl is the only proper relator; (2) that the relatrix has no capacity to sue; (3) that the alternative writ does not state facts sufficient to constitute a cause of action." This demurrer was overruled by the court. A trial of said cause resulted in a finding, and, over a motion for a new trial, a judgment and order for a peremptory writ of mandamus against appellants.

It is averred in the alternative writ that the relatrix is under 21 years of age; that her true age is 16 years, and that she resides with her father in Liberty township, in Henry county, Ind.; that she had graduated from the common schools of said township, within which there was no high school; that her father secured for her an order of transfer from the township trustee of said township to the school town of New Castle, "which order for transfer entitled said relatrix to attend the schools of the school town of New Castle"; that J. Crawford Weir was the superintendent of the schools of said town; that at the end of the first and second months of her attendance in said town he demanded of her \$1 as tuition for one month, "said sum of one dollar per month being in excess of and additional to the tuition of two dollars per month provided by law to be paid by the school township from which she was transferred," which she paid; that she again demanded \$1 from her at the end of the third month, which she refused to pay, upon which he sent her home, and refused to permit her to enter said school until she should pay said sum of \$1 per month as tuition; that she applied to said school town to make an order requiring said Weir to admit her, which was refused unless she should pay said sum. A writ of mandamus was asked, requiring the defendants to admit the relatrix to the public

schools of said town without charge to her for tuition.

Only unmarried persons between the ages of 6 and 21 years are to be enumerated and have the benefit of the common schools, and each of such persons is to be enumerated in the township where he resides. Section 5958, Burns' Rev. St. 1901 (section 4472, Rev. St. 1881; section 4472, Horner's Rev. St. 1901). The complaint should have averred that the relatrix was unmarried. It was as essential to allege and prove that she was unmarried as to allege and prove that she was under 21 and over 6 years of age. Draper, Trustee, v. Cambridge, 20 Ind. 268. Unless she possessed all these qualifications, she was not entitled to admission to the schools of the township in which she and her father resided, nor to the schools of the school corporation to which she alleges she was transferred. It is well settled that, when one claims a right under a statute, he must, by allegation and proof, show that he comes within its provisions. Harrison v. Stanton, 146 Ind. 366, 370, 371, 45 N. E. 582; Hodges v. Standard Wheel Co., 152 Ind. 680, 693, 52 N. E. 391, 54 N. E. 383; Blanchard v. Wilbur, 153 Ind. 387, 392, 55 N. E. 99.

Counsel for the relatrix insist that as the alternative writ contained the averment that said order of transfer "did entitle said Nellie Worl to attend the school of the school town of New Castle, Indiana," an allegation that she was unmarried was unnecessary; citing Draper, Trustee, v. Cambridge, 20 Ind. 268. If counsel are correct in this contention, it was not necessary to allege facts showing that the relatrix was over 6 and under 21 years of age. There is a wide difference between the averment suggested in the case cited by counsel for relatrix and the allegation which they claim renders the alternative writ sufficient in this case. But if said allegation in this case could be held the equivalent of the one suggested in that, we would be compelled to disapprove the one suggested. The averment that the order of transfer "entitled relatrix to attend the schools of the school town of New Castle" was the mere conclusion of the pleader, and not the allegation of a fact. Facts, not conclusions, must be averred. Foland v. Town of Frankfort, 142 Ind. 546, 549, 550, 41 N. E. 1031; Gum Elastic, etc., Co. v. Mexico, etc., Co., 140 Ind. 158, 161, 39 N. E. 443, 30 L. R. A. 700, and cases cited; Davis v. Clements, 148 Ind. 605, 609, 610, 47 N. E. 1056, 62 Am. St. Rep. 539, and cases cited. While some of the provisions of section 5959, Burns' Rev. St. 1901 (section 4473, Rev. St. 1881; section 4473, Horner's Rev. St. 1901), are repealed by the act of 1901 (Acts 1901, p. 448, c. 204; being sections 5959a-5959e, Burns' Rev. St. 1901), it is clear that the provision of said section 5959, supra, requiring that notice of transfer for educational purposes be given by the school corporation making the transfer to the school corporation to which the transfer is

† 5. See Constitutional Law, vol. 10, Cent. Dig. § 43.

made, remains in force; and that the school corporation to which such transfer is made may, within 30 days after notice of transfer, appeal to the county superintendent, under section 6028, Burns' Rev. St. 1901 (section 4537, Rev. St. 1881; section 4537, Horner's Rev. St. 1901), the same as before said act of 1901, *supra*, took effect. On the trial of said cause on appeal, the county superintendent determines whether or not the child can be better accommodated by the transfer. *Edwards v. State ex rel.*, 143 Ind. 84, 87-91, 42 N. E. 525.

Cases like the one before us have been brought in this state by the father as relator as well as by the child. *Draper v. Cambridge*, 20 Ind. 268; *State ex rel. v. Gray*, 93 Ind. 303; *Cory v. Carter*, 48 Ind. 327, 17 Am. Rep. 738; *Edwards v. State ex rel.*, 143 Ind. 84, 42 N. E. 525. See, also, *Clark v. Board, etc.*, 24 Iowa, 266; *Smith v. Board, etc.*, 40 Iowa, 518; *Dove v. Independent School Dist.*, 41 Iowa, 689; *Perkins v. Board, etc.*, 56 Iowa, 476, 9 N. W. 356; *People v. Board of Education of Detroit*, 18 Mich. 400; *High on Ex. Rem.* § 438. It will be observed that under section 5959 (4473), *supra*, the person in charge of the child or children was transferred, while, under the act of 1901 (Acts 1901, p. 448, c. 204; being sections 5959a-5959e, Burns' Rev. St. 1901), the child is transferred. We think that this action was properly brought on the relation of Nellie Worl, by her father as next friend.

For want of an allegation that the relatrix was unmarried, the alternative writ was clearly insufficient to withstand the demurrer for want of facts.

It is settled that the court will not decide a constitutional question when the case can be decided upon other grounds. *Hart v. Smith*, 159 Ind. 182, 199, 64 N. E. 661, 58 L. R. A. 949; *State v. Reardon* (last term) 68 N. E. 169, 170, and cases cited.

Judgment reversed, with instruction to sustain said demurrer, and for further proceedings not inconsistent with this opinion.

(161 Ind. 457)

LEVIN et al. v. FLORSHEIM & CO. et al.

(Supreme Court of Indiana. Nov. 24, 1903.)

RECEIVERS—APPOINTMENT—GROUNDS—SUFFICIENCY.

1. Under Burns' Rev. St. 1901, § 1236, providing that a receiver may be appointed in all actions where the property in controversy is in danger of being materially injured, and in such other cases in which it may be necessary to secure ample justice, the court did not abuse its discretion in appointing a receiver to take charge of the property in dispute until the determination of the action, where there was evidence of a probable right in plaintiffs in the property; that defendants, who had purchased the property, were nonresidents, and were making sales thereof, and were about to remove the same from the jurisdiction of the court; that

numerous persons had instituted suits to enforce liens; and that the sellers, against whom plaintiffs held claims, were totally insolvent.

Appeal from Circuit Court, Vigo County; James E. Piety, Judge.

Action by Florsheim & Co., a corporation, and others, against Barnard Levin and others. From an order appointing a receiver, defendants appeal. Affirmed.

Frank Lindley and Davis, Reynolds & Davis, for appellants. Henry, Crane, Miller & Miller, Higgins & Cavins, and R. R. Harold, for appellees.

JORDAN, J. This is an appeal by the appellants from an interlocutory order of the lower court appointing a receiver pendente lite. The principal action was instituted on January 5, 1903, by the plaintiff Florsheim Company, a corporation duly organized under the laws of the state of Illinois. Appellants Barnard, Henry, and Max Levin, partners, doing business under the firm name of B. & H. Levin Bros., together with Peter J. Kaufman, Rachel Goldenberg, and Aaron Goldenberg, her husband, were made defendants in the action. The complaint is in three paragraphs. The third was filed during the hearing of the application for a receiver. The first paragraph seeks to recover against the defendants Kaufman and Goldenberg upon a common count for goods and merchandise sold and delivered to the amount of \$27,500. The second and third paragraphs of the complaint are similar, and the following, among others are, in substance, the facts therein averred: Prior to December 31, 1902, Rachel Goldenberg was the owner of a large stock of goods and merchandise consisting of boots and shoes, etc., situate in a store in the city of Terre Haute, Ind. and was therein engaged in selling said stock at retail. In August, 1902, the plaintiff Florsheim Company sold to Peter J. Kaufman goods and merchandise to the amount of \$2,683.05, which sum is alleged to be due and unpaid, and the payment thereof had been unreasonably delayed. Kaufman, when he purchased the goods in question, represented to the plaintiff that he was buying the same for himself, and on his own account, but in truth and in fact in said transaction he was the agent of his codefendant Rachel Goldenberg. She received the goods purchased by Kaufman, and placed them in her said store in Terre Haute, and they became a part of the stock therein. On December 31, 1902, said Rachel Goldenberg sold in bulk to the appellants herein her said entire stock, including the goods sold to her by plaintiff. Neither she nor appellants at any time previous to said sale, made any inventory of the stock so sold and purchased in bulk, showing the quality and cost price of any of the articles thereof. Appellants, as such purchasers, did not at or prior to the said sale make any inquiry of the owner of the stock in regard to the names and places of business of any

¶ 1. See *Receivers*, vol. 42, Cent. Dig. §§ 24, 28, 27, 30.

of the creditors to whom said Rachel, the owner and seller of the stock, was indebted for portions thereof, nor as to any amount whatever which was owing by her as an indebtedness for a part of the stock so sold and purchased. Appellants at the time they bought the stock did not in any manner notify the plaintiff or any of the creditors of said Rachel Goldenberg, to whom the latter was indebted for a part of the stock of goods sold, in regard to the proposed sale and purchase. It is further disclosed that at the time appellants purchased the stock in dispute they knew that the seller was indebted to the plaintiff, and also to a large number of other persons, for the greater portion of the stock of goods embraced in the said sale. The defendants Goldenberg, at the time they sold the goods to appellants, were each insolvent, and so continued to be at the time the action was commenced. It is further charged that Kaufman was insolvent, and was secretly disposing of his property for the purpose of putting the same beyond the reach of his creditors; that a large number of persons other than the plaintiff, to whom said Rachel Goldenberg was indebted for goods constituting a portion of the stock in controversy, and whose rights were similar to those which the plaintiff was asserting and claiming, were threatening to institute suits to establish their claims and liens against said stock of goods. Appellants are non-residents of the state of Indiana, being residents of the state of Illinois, and it is charged that they are in possession of the goods in question, and are selling them at prices lower than the cost of manufacturing the same, and are disposing of said stock as rapidly as possible, in order and for the purpose of placing the goods beyond the reach of plaintiff and other creditors, and are threatening to transfer and remove the goods beyond the jurisdiction of the court before the plaintiff can have its claims and rights determined in the action. It is alleged that the stock is of the value of \$15,000 and that appellants obtained the same for the price of \$5,000. It is finally charged that the interest and rights of plaintiff and of all other persons, creditors and parties concerned in said stock, will be best subserved by the appointment of a receiver to take charge thereof until the final hearing, and hold and preserve said property for the use and benefit of such persons as may be found by the court to have a proper interest and right therein and claim thereto, etc.

The prayer of the second and third paragraphs of the complaint is for a personal judgment against defendants Peter J. Kaufman and Rachel Goldenberg for \$2,750, with interest, and that the sale of the goods to the defendants Levin & Levin be declared and adjudged null and void as against plaintiff's claim, and that the same be declared to be a lien on the said stock, and that a receiver be appointed to take charge thereof

to hold and preserve the goods until the final determination of the suit, and for all other and proper relief. The second and third paragraphs are each verified. Appellants appeared to the action, and filed an answer to so much of the complaint as sought to secure the appointment of a receiver. A hearing was had on the application. Plaintiff, in support of its application for a receiver, introduced in evidence each of the paragraphs of its complaint, and also numerous affidavits. Appellants, in opposition thereto, introduced in evidence various affidavits. All of the documents so introduced have been brought before us by a bill of exceptions. The court, after hearing and considering the evidence, sustained the motion, and entered an order appointing Josiah F. Walker, and fixed his bond at \$25,000. He filed his bond to the approval of the court, and otherwise duly qualified, and was thereupon directed by the court to take charge of the goods in controversy, and to hold and preserve the same until the final determination of the principal action. After the appointment of the receiver, the court, upon its own motion, ordered that some 10 other suits be consolidated, tried, and determined along with plaintiff's action. These suits were instituted by various persons against the same defendants, and were pending at the time in the Vigo circuit court, and the claim of each plaintiff therein was similar to that of Florsheim Company, and the same relief was demanded. The plaintiffs in these suits are all made appellees in this appeal. After the court had consolidated the suits in question, it heard and considered the application in each for the appointment of a receiver, and ordered that said Walker be appointed, and he was directed to act accordingly in each case.

The alleged errors discussed by counsel for the appellants are to the effect that the court was not justified in appointing a receiver, and it is insisted that the interlocutory order must in all things be reversed. It is asserted by appellants' counsel that the second and third paragraphs of the complaint in the action each proceeds upon the theory that the sale of the goods in bulk by Rachel Goldenberg to appellants ought to be set aside, because such sale was made in violation of section 6637a, Burns' Rev. St. 1901, and therefore is to be deemed fraudulent and void. It is further contended that, in the absence of this statute, no such actual fraud, under the facts, is disclosed as will warrant a court of equity in setting aside the sale in controversy, and thereby disturb appellant's title to the property. It is insisted that the statute is unconstitutional and void for various reasons, and therefore cannot avail appellee in its application for the appointment of a receiver.

The act in question was passed by the Legislature on March 11, 1901 (Acts 1901, p. 505). It is provided therein that "a sale of

an entire stock of merchandise in bulk will be fraudulent and void unless the seller and purchaser shall at least five days before the sale, make a full and detailed inventory showing the quantity, and so far as possible with the exercise of reasonable diligence, the cost price of each article included in the sale," etc. This law was expressly repealed by an act entitled "An act to prevent the fraudulent sale of merchandise, etc.," approved March 9, 1903 (Acts 1903, p. 276, c. 153). Counsel for appellee insist that the validity of the act of 1901 is prematurely raised in this appeal, and they contend that, if appellants desire to challenge its validity, they must do so in the principal suit, as it is not involved in the interlocutory order appointing the receiver. We recognize the rule for which counsel for appellee contend, which affirms that the sufficiency of the complaint in the principal action to constitute a cause of action and the plaintiff's right, under the facts in the case, to an ultimate recovery, are not questions which can be properly raised or considered in an appeal from an order appointing a receiver pendente lite. *Gray v. Oughton*, 146 Ind. 285, 45 N. E. 191, and cases cited; *Goshen Woolen, etc., Co. v. National Bk.*, 150 Ind. 279, 49 N. E. 154; *Supreme Sitting, etc., v. Baker*, 134 Ind. 293, 33 N. E. 1128, 20 L. R. A. 210; *Mead v. Burk*, 156 Ind. 577, 60 N. E. 338; *Sheridan Brick, etc., Co. v. Marion Trust Co.*, 157 Ind. 292, 61 N. E. 666, 87 Am. St. Rep. 207; *Chicago, etc., Co. v. Kenney*, 159 Ind. 72, 78, 62 N. E. 26; *Woolen's Spec. Proc.* § 2280, and cases cited in note 41. If it could be held that the validity of the statute in dispute was involved in this appeal—a question which we do not decide—it is not necessary that we consider or pass upon the validity thereof in order to determine whether the lower court was warranted in appointing a receiver, for, aside from the statute in question, we are of the opinion that the evidence fully justifies the action of the court in the premises. By section 1236, *Burns' Rev. St. 1901*, it is declared that: "A receiver may be appointed by the court or judge thereof in vacation in the following cases: * * * Third: In all actions when it is shown that the property, fund, or rents and profits in controversy is in danger of being lost, removed or materially injured. * * * Seventh: In such other cases * * * where in the discretion of the court or judge thereof in vacation, it may be necessary to secure ample justice to the parties." In *Mead v. Burk*, supra, we said: "The court, by its order appointing a receiver pendente lite, does not thereby determine or attempt to determine any right or title of the litigants to the property in controversy, as the appointment is made for the benefit of all. The rule in ordinary practice is to appoint a receiver with the sole view of securing or preserving the property, and not to inquire into the merits of the principal action. [Citing authority.] But, inasmuch as the

granting of an application for a receiver under the facts in each case rests within the sound discretion of the trial court, the latter may, and properly so, if deemed necessary, take into consideration all the facts and circumstances in the case, and may thereby be influenced in its judgment by the existence of a reasonable probability that the plaintiff applying for a receiver will ultimately succeed in his suit upon the merits of the case. [Citing authorities.]" In the same appeal, in construing clause 7, § 1236, we further said: "Under its authority a receiver may be appointed in any case in which, according to the established rules of equity, the appointment may be necessary 'to secure ample justice to the parties,' without regard to the form or character of the principal action." The case at bar, under the facts therein, is so thoroughly ruled by the decisions in the appeals of *Mead v. Burk* and *Sheridan Brick Works v. Marion Trust Co.*, supra, and the authorities cited therein, that nothing further in addition thereto need be said in regard to the law governing the lower court in this case in the appointment of the receiver.

There was evidence introduced in behalf of the plaintiff which may be said to establish, among others, the following facts: (1) That plaintiff had at least a probable right or interest in and to the property for which it sought to have a receiver appointed. *Sheridan Brick Works v. Marion Trust Co.*, 157 Ind. 298, 61 N. E. 666, 87 Am. St. Rep. 207. (2) That appellants purchased the stock of goods for about one-third of their actual value. (3) That they were nonresidents of the state of Indiana, and were selling the goods in controversy, and were about to remove them from the city of Terre Haute to a place beyond the jurisdiction of the court. (4) That numerous persons seeking to enforce liens against the stock of goods in controversy had commenced suits in the Vigo circuit court for that purpose. (5) That Kaufman and Rachel Goldenberg and her husband are each wholly insolvent. In our opinion, under all of the facts and circumstances in this case, there is nothing to show that the lower court, in appointing the receiver to take charge of the property in dispute, and preserve it until the determination of the principal action, abused the sound discretionary power with which it is invested in such matters.

We find no available error presented upon any of the rulings of the lower court, and the order appointing the receiver is therefore in all things affirmed.

(161 Ind. 471)

KERSEY et al. v. CITY OF TERRE HAUTE.

(Supreme Court of Indiana. Nov. 24, 1903.)
VEHICLE TAX ORDINANCE—ACTION TO ENJOIN
—COMPLAINT—CONSTITUTIONAL LAW.

1. An ordinance imposing a license tax on vehicles using the streets of a city, by omitting

to tax street cars, automobiles, and vehicles of nonresidents, does not, in violation of Const. art. 1, § 23, grant to any citizen privileges or immunities which on the same terms may not equally belong to all citizens, or deny the equal protection of the laws in violation of Const. U. S. 14th Amend.

2. An ordinance imposing a license tax on vehicles using the streets of a city does not, by omitting to tax street cars, automobiles, and vehicles of nonresidents, violate Const. art. 4, § 22, prohibiting local or special laws for the assessment and collection of taxes.

3. A complaint by several persons to enjoin the enforcement of a vehicle tax law does not state a cause of action in all of plaintiffs relative to the tax on bicycles, it alleging not that all of plaintiffs, but that nearly all of them, own bicycles.

4. A complaint to enjoin the enforcement of a license tax on vehicles using the streets of a city should allege that plaintiffs' vehicles are used thereon.

Appeal from Superior Court, Vigo County; O. B. Harris, Judge.

Action by William P. Kersey and others against the city of Terre Haute. Judgment for defendant. Plaintiffs appeal. Affirmed.

John S. Jordan and Elliott, Elliott & Littleton, for appellants. P. M. Foley and S. D. Royse, for appellee.

GILLET, C. J. Appellants, seven in number, commenced this action to enjoin the enforcement of a vehicle tax ordinance. In their several paragraphs of complaint they claim to sue not only for themselves but for all others similarly situated. A demurrer was sustained to each paragraph of said complaint, and appellants prosecute their appeal from the final judgment which followed.

The facts averred are so far similar to the facts alleged in *City of Terre Haute v. Kersey*, 159 Ind. 300, 64 N. E. 469, as to suggest the query whether this is not in effect an attempt to obtain a rehearing of that case. However, as the questions here involved have at their root the consideration as to whether the ordinance invidiously discriminates against the property of appellants and those on whose behalf they claim to sue, and as the complaint in its several paragraphs appears to have been drafted with a purpose of manifesting the inequalities in the operation of the ordinance, we shall pass on the questions presented for our consideration.

The opinion in the case of *City of Terre Haute v. Kersey*, supra, contains a very full statement of the averments of fact found in the complaint therein involved, and as all of its averments are, in substance, found in the complaint we are about to consider, we refer to such opinion as containing a statement of the averments of fact which are common to the two cases. Building upon said common facts, the complaint herein is constructed with a view to manifest particular local conditions which it is claimed make the ordinance invidious in its operation. Disregarding the particular forms of the averments, it may be said that the com-

plaint assails the ordinance because it is so framed that the following vehicles are not taxed: Street cars; vehicles, similar to those of appellants, belonging to many nonresidents who habitually use the streets of the city; and automobiles. It is further objected that bicycles, which, it is alleged, are noninjurious to the streets, are taxed at the same rate as certain vehicles having steel tires.

It is claimed by counsel for appellants that the ordinance violates section 23 of article 1, and section 22 of article 4, of the state constitution, and that it amounts to a denial of the equal protection of the laws within the prohibition of the fourteenth amendment to the federal Constitution.

We think that we may consider the first and third objections as involving what are to a large extent kindred questions. No doubt exists as to the power of cities to pass proper ordinances for the taxation of vehicles using the streets. The ordinance may therefore be said to represent the judgment of the municipal legislature that such ordinance contains a proper classification of the subjects of taxation, and while such ordinance may be void on constitutional grounds, or if it be a palpably improper exercise of a granted power, yet due consideration must be given to the fact that we have before us a scheme of municipal taxation, and that in the exercise of the authority granted there must be classification, in order that the burden of raising a special fund for the repair of the streets may rest in due proportion upon those who ought to bear such burden. It is to be recollected that we do not have before us a question as to the proper construction of section 1 of article 10 of the state Constitution, for that section relates to the assessment of taxes on property according to its value. *City of Terre Haute v. Kersey*, supra; and see, also, *Bank v. City of New Albany*, 11 Ind. 139; *Hamilton v. City of Fort Wayne*, 40 Ind. 491. For this reason the power to tax, so far as constitutional objections are concerned, would seem to be in this instance untrammelled, except that invidious discrimination will not be countenanced. As applied to a case arising as does the one before us, it may be said: "There is no imperative requirement that taxation shall be equal. If there were, the operations of government must come to a stop from the absolute impossibility of fulfilling it. The most casual attention to the nature and operation of taxes will put this beyond question. No single tax can be apportioned so as to be exactly just, and any combination of taxes is likely in individual cases to increase, instead of diminishing, the inequality." *Coolley on Taxation* (3d Ed.) 254. "A just and perfect system of taxation," as was said by Chancellor Kent, "is yet a desideratum in civil government." It was stated by Sharewood, J., in *Grim v. School District*, 57 Pa. 433, 98 Am. Dec. 237, that "perfectly equal

taxation will remain an unattainable good as long as laws and government and men are imperfect." The power to tax is essentially legislative in its character, and it is not required, under the constitutional provisions we are now considering, that there should be such an exact exclusion and inclusion of the subjects of taxation as to meet fully the approval of the judicial mind as to what is reasonable. *De Pauw v. New Albany*, 22 Ind. 204; *State Board of Tax Commissioners v. Holliday*, 150 Ind. 216, 49 N. E. 14, 42 L. R. A. 826; *McCulloch v. State*, 4 Wheat. 316, 4 L. Ed. 579; *Providence Bank v. Billings*, 4 Pet. 514, 7 L. Ed. 939; *Delaware R. Tax Cases*, 18 Wall. 206, 21 L. Ed. 888; *Rees v. Watertown*, 19 Wall. 107, 22 L. Ed. 72; *Heine v. Levee Commissioners*, 19 Wall. 655, 22 L. Ed. 223; *State R. Tax Cases*, 92 U. S. 575, 23 L. Ed. 663; *Thomas v. Gay*, 169 U. S. 264, 18 Sup. Ct. 340, 42 L. Ed. 740; *People v. Mayor*, 4 N. Y. 419, 55 Am. Dec. 266; *Maltby v. Reading, etc., R. Co.*, 52 Pa. 140; In the *Matter of Dorrance Street*, 4 R. I. 230; *Plumer v. Board*, 46 Wis. 163, 50 N. W. 416; *McHenry v. Downer*, 116 Cal. 20, 47 Pac. 779, 45 L. R. A. 737. It is only palpable abuses of the power that the courts assume to overthrow. *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 18 Sup. Ct. 594, 42 L. Ed. 1037; *Veazie Bank v. Fenno*, 8 Wall. 533, 19 L. Ed. 482; *Meriwether v. Garrett*, 102 U. S. 472, 26 L. Ed. 197; *State v. Bridge Proprietors*, 21 N. J. Law, 384; *Crafts v. Ray*, 22 R. I. 179, 46 Atl. 1043, 49 L. R. A. 604; *Sears v. Cottrell*, 5 Mich. 251; *Robertson v. Commissioner*, 44 Mich. 274, 6 N. W. 659; *Pence v. Frankfort*, 101 Ky. 534, 41 S. W. 1011; *Cooley on Taxation* (3d Ed.) 47, 77.

It has been declared by the Supreme Court of the United States "that the fourteenth amendment was not intended to compel the state to adopt an iron rule of equal taxation" (*Giozza v. Tierman*, 148 U. S. 657 [13 Sup. Ct. 721, 37 L. Ed. 599]), and also that "that amendment was not intended to subvert the systems of the states pertaining to general and specific taxation." *Cass Farm Co. v. Detroit*, 181 U. S. 396, 21 Sup. Ct. 644, 645, 45 L. Ed. 914.

We do not mean to assert that cases might not arise of such palpable abuse in the exercise of the power of taxation as to call on the court to apply either or both of the constitutional provisions now under consideration. We are not concerned, however, with the ascertainment of the last outpost in which the discretion of the municipal council can intrench itself. The question is whether the particular ordinance is open to objection. We think it too plain to need elaboration that in the exercise of the power of classification the council was authorized to exclude from its scheme of taxation electric street cars and automobiles. These vehicles were perhaps omitted because the common council concluded that their use did not cause any substantial wear upon the pavements.

So far as automobiles are concerned, we are not advised, and there is no averment, that they were in common use at the time of the enactment of the ordinance.

As to the omission to tax generally the vehicles of nonresidents, a question of a little more difficulty is presented. It is to be observed that section 2 of the ordinance does impose a tax upon such vehicles as are used by persons living without the city in hauling ice, coal, brick, sewer pipe, or tiling, or in peddling milk, over and upon the streets of the city. Although the complaint avers that many nonresidents of the city constantly use upon the streets thereof the same kinds of vehicles for the use of which appellants are taxed, yet we do not think that this will overthrow the ordinance. Nonresidents, as a class, it may be presumed, use the streets of the city less than residents; some nonresidents use such streets much less than other nonresidents; and the extent of the user of such streets by nonresidents must, in the nature of things, be ever varying. There seems to have been an attempt, in the ordinance under consideration, to subject certain vehicles of nonresidents to a tax, and, as to the untaxed vehicles of nonresidents, we think that the difficulty of classifying them on a reasonably just and equal basis afforded a sufficient reason, in the discretion of the council, for the omission complained of.

The ordinance in question purports to be an exercise of a delegated power of taxation. As shown, the exercise of such a power involves the duty of classification, and it is our judgment that a scheme of classification in such an ordinance that does not radically depart from what is reasonable is not to be subjected to judicial condemnation by facts dehors the ordinance. It was said in *Citizens' Gas, etc., Co. v. Town of Elwood*, 114 Ind. 332, 16 N. E. 624, that the word "ordinance" means "a local law, prescribing a general and permanent rule." "A city council," said Scott, J., in *Taylor v. Carondelet*, 22 Mo. 105, "is a miniature general assembly, and their authorized ordinances have the force of laws passed by the Legislature of the state." In *Hopkins v. Mayor of Swansea*, 4 M. & W. 621, 640, Lord Abinger said: "The by-law has the same effect within its limits, and with respect to persons upon whom it lawfully operates, as an act of Parliament has upon the subjects at large." It would be unfortunate, if not wholly inconsonant with the character of a local law, that the question as to its validity should, in suits for its enforcement, become a mixed matter of law and fact, to be sometimes upheld by juries and sometimes overturned by them, and that shifting local conditions should be an element to be considered in determining its validity at different times. It may be that some ordinances might be overturned by averment and proof manifesting that in their actual application, although

fair upon their face, they were plainly calculated to deprive arbitrarily a citizen or a class of citizens of some fundamental right. The case of *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220, may possibly carry with it this intimation, and this would perhaps be a proper holding in some extreme cases if rights guarantied in the very structure of government are to be upheld as against the forms of law; but it would take a stronger case than the one at bar to induce us to hold that extrinsic facts could be averred and proved to show that a scheme of classification, devised by a city council for the purposes of taxation, impinging upon constitutional right.

The power to enact the particular ordinance, if it exists at all, must be said to be by virtue of the act of March 2, 1897 (Laws 1897, p. 113, c. 70), which purports to grant to "license, tax and regulate vehicles." The prohibition of section 22 of article 4 of the state Constitution seems to be directed in terms to the enactment of statutes upon a certain class of subjects, but even if the prohibition extends to ordinances providing for taxation, since the power to tax on the part of the municipality is a derivative one, we do not think that a classification that may be otherwise upheld as within the scope of the power to classify in the selection of the subjects of taxation offends against said section. See *Palmer v. Stumph*, 29 Ind. 329.

As to the matter of bicycles, it might be admitted that the ordinance was invalid, without affecting the other provisions thereof; but, as the averment is that nearly all of the plaintiffs own bicycles, we think that this objection may be disposed of by the suggestion that a cause of action is not shown in all of the appellants in this particular. It may also be suggested that it is not averred that any of said bicycles are used upon the streets of said city, so as to be subject to the tax. It was held in *City of Terre Haute v. Kersey*, supra, that the ordinance in question was a taxing ordinance. For this reason we have no occasion to consider the power of the city to license and regulate vehicles under the act of 1897.

Judgment affirmed.

(31 Ind. App. 685)

JOHN C. GROUB CO. v. SMITH.

(Appellate Court of Indiana, Division No. 2.
Nov. 24, 1903.)

HUSBAND AND WIFE — MARRIED WOMEN — PROMISSORY NOTES — INDORSEMENT FOR BENEFIT OF HUSBAND — SURETYSHIP — LIABILITY.

1. Under Burns' Rev. St. 1901, § 6964 (Horner's Rev. St. 1901, § 5119), providing that a married woman shall not contract as surety in any manner, and such a contract as to her shall be void, whether a married woman is principal or surety will be determined not from the form of the contract, but upon the fact whether the wife did or was to receive in person or in

benefit to her estate the consideration on which the contract rests.

2. Under said section, where the facts set out in the answer of defendant, a married woman, showed that the indorsement by her of the note sued on was solely for her husband's benefit, and that the consideration in no way moved to her or for her benefit, she was the surety of her husband, and not liable.

Appeal from Circuit Court, Lawrence County; W. H. Martin, Judge.

Action by the John C. Groub Company against Zipporah Smith. Judgment for defendant, and plaintiff appeals. Transferred from the Supreme Court. Affirmed.

Brooks and Brooks, for appellant. B. K. Dye and W. R. Martin, for appellee.

COMSTOCK, J. Appellant brought this action against appellee upon her indorsement to appellant of a promissory note in her favor not payable in bank. The complaint was in two paragraphs. The first alleged: That on the 7th of July, 1900, one Eli Kinser, by his promissory note, promised to pay defendant \$353.28. That before maturity the defendant, for value received, by indorsement in writing, assigned said note to plaintiff. That on the 8d day of May, 1901, plaintiff brought his suit on said note against said Kinser in the circuit court of Lawrence county, being the county wherein said maker then resided. On the 24th day of September, 1901, said action was tried, and determined by said court, and judgment rendered against this plaintiff for costs, and that he take nothing by said suit. That said note had been executed without any consideration, of which fact the plaintiff had no knowledge until said action was tried and determined adversely to it in said court. That defendant was a party to said action, and had due notice thereof and of the defense made in said action. That there is due and unpaid the plaintiff on said note and on said indorsement the sum of \$200, etc. The second paragraph omits the allegation contained in the first "that said note was executed without any consideration, of which plaintiff had no knowledge until said action was tried and determined," and contains the following averment not in the first paragraph: "That said note was fully paid before indorsement to this plaintiff, of which fact plaintiff had no knowledge." Said paragraphs are in other averments identical. Appellee answered in six paragraphs, each addressed separately to each paragraph of the complaint, the first being a general denial; the second that the indorsement was without any consideration whatever; third, payment prior to the bringing of this action; fourth, that at the alleged date of said indorsement plaintiff was, and still is, a married woman, the wife of Elza Smith; that the note was indorsed by her, and delivered to said plaintiff in payment of a debt of her husband to Smith; that no part of the consideration

¶ 2. See *Husband and Wife*, vol. 26, Cent. Dig. §§ 350, 630.

of said indorsement moved to her, nor did she derive in any way the benefit of any part of the consideration thereof; that said indorsement was solely for the debt of her husband, of which plaintiff had notice at the time of said indorsement. The fifth paragraph, in addition to the averments of the fourth, alleges that said note was not payable in bank; that the same had been fully paid except \$85; that after the indorsement of the same a suit was brought on said note by plaintiff herein against the maker, Eli Kinser, and that in answer to said complaint the maker pleaded a set-off of \$85, which set-off was sustained on the trial of said cause; that the existence of said set-off was known to plaintiff at the time of said indorsement, and that the same was accepted by plaintiff with full knowledge of the fact that the maker of the note claimed said set-off. The sixth paragraph, payment to plaintiff before the bringing of the suit, excepting \$85. Appellant replied in two paragraphs, the second being a general denial. To the first appellee successfully demurred. A trial resulted in a finding and judgment in favor of appellee for costs.

The assignment of error challenges the action of the court in overruling appellant's demurrer to the fourth and fifth paragraphs of answer and sustaining the demurrer to the first paragraph of appellant's reply. Said first paragraph of reply is as follows: "That one Eli Kinser on the 7th day of July, 1900, was the owner of certain real estate of the net value above incumbrances of \$2,786.72. That one Elza Smith, mentioned in said paragraph of answer, the husband of defendant, was the owner of a stock of goods of the value of \$3,140. That on said day the said Elza and said Eli exchanged said property, whereby there was a difference due said Elza Smith of \$353.28, for which the said Kinser executed the note mentioned in plaintiff's complaint. That the said Elza, at the request of the defendant herein, caused the conveyance of said real estate to be made to the defendant, and caused said Kinser to execute to this defendant the note sued on. All of which was accordingly done. Said Elza Smith was indebted to plaintiff on account of goods sold him in the sum of \$353.28, whereupon, and after said date, but before the maturity of said note, the defendant, in payment of said indebtedness, and in consideration that plaintiff would discharge the said indebtedness and release the said Elza Smith, indorsed the said note to plaintiff. But plaintiff says that said note has been fully paid to defendant before said indorsement, of which plaintiff had no knowledge until the trial of the cause described in the complaint herein."

Burns' Rev. St. 1901, § 6964 (Horner's Rev. St. 1901, § 5119), reads: "A married woman shall not enter into any contract of suretyship whether as endorser, guarantor or in any other manner; and such contract as to her shall be void." The statute recognizes the fact that one may assume the relation of surety to a

contract in the form of guaranty and indorsement and in other ways. It declares the contract of suretyship of a married woman executed in any manner as invalid. An indorser of a promissory note warrants that it is a genuine and valid note, and that the maker is able to pay it. *Baldwin v. Threlkeld*, 8 Ind. App. 313, 34 N. E. 851, 35 N. E. 841; *Clark v. Trueblood*, 16 Ind. App. 98, 44 N. E. 679; *Nichol v. Hays*, 20 Ind. App. 369, 50 N. E. 768. By the contract of suretyship the surety engages to be answerable for the debt of another. Whether a married woman is principal or surety will be determined not from the form of the contract, nor from the basis upon which the transaction was had, but from the inquiry was the wife to receive in person or in benefit to her estate, or did she receive the consideration upon which the contract rests? *Vogel v. Lechner*, 102 Ind. 55, 1 N. E. 554; *Field v. Noblett*, 154 Ind. 357, 56 N. E. 841; *Nixon v. Whitely, Fasler & Kelly Co.*, 120 Ind. 360, 22 N. E. 411; *Vorels v. Nussbaum*, 131 Ind. 267, 31 N. E. 70, 16 L. R. A. 45; *Cook v. Buhrlage* (Ind. Sup.) 64 N. E. 603. The facts set out in said fourth paragraph show that the indorsement was solely for the benefit of the husband of appellee; that the consideration in no way moved to her or for her benefit. Under the definition given by the decisions cited she was the surety of her husband. The Supreme Court, in *Nixon v. Whitely, Fasler & Kelly Co.*, supra, say: "It is not to be overlooked that this section (section 5119, Rev. St. 1881; section 6964, Burns' Rev. St. 1901) expressly prohibits a married woman from being either a guarantor or indorser; thus interpreting the statute as meaning that a contract of indorsement is one of surety. The consideration for the indorsement is averred in the reply to be the discharge of a debt of her husband, Elza Smith, the appellant. The consideration did not in any way move to her or to the benefit of her estate. We find no error.

Judgment affirmed.

(31 Ind. App. 660)

GEORGE et al. v. HURST.

(Appellate Court of Indiana, Division No. 1.
Nov. 24, 1903.)

EVIDENCE—HEARSAY—WITNESSES—LAWYER'S CLIENT—PRIVILEGED COMMUNICATION.

1. In an action on a note, defended on the ground that plaintiff was not the owner thereof, a letter to defendant, written by a third person, who defendant alleged was the owner, but under whom plaintiff did not claim, is hearsay and inadmissible.

2. Under Burns' Rev. St. 1901, § 505, subd. 3, providing that attorneys shall not be compelled to testify to confidential communications made to them professionally, defendant in an action on a note defended on the ground that plaintiff was not the owner thereof cannot be compelled to testify when she told her attorneys that the note belonged to some one else.

Appeal from Circuit Court, Sullivan County; O. B. Harris, Judge.

Action by Dennis Hurst against Flora George and another. Judgment for plaintiff, and defendants appeal. Reversed.

S. R. Hamill, A. J. Kelley, and Buff & Stratton, for appellants. Hughes & Caldwell, C. D. Hunt, J. O. Piety, and Hays & Hays, for appellee.

COMSTOCK, J. This action was instituted in the Vigo circuit court by the appellee against the appellants upon a promissory note for \$450, claimed to have been executed by appellants to the appellee. To the complaint the appellant Flora George filed an answer in two paragraphs; in the first pleading want of consideration, in the second non est factum. The appellant Alice Hunter filed her separate answer in three paragraphs; in the first pleading want of consideration; in the second that she executed the note as surety for her codefendant Flora George, and received no consideration therefor, and that at the time she so executed said note she was, and still is, a married woman; in the third non est factum. Appellee replied to the separate answer of Flora George by a general denial, and to the separate answer of Alice Hunter he filed two paragraphs of reply. The first is a general denial. In the second he admits that at the time said Alice Hunter signed the note sued on she was, and still is, a married woman, but that the note was executed as evidence of a loan of money made by him and paid to her at the time for her own use and benefit. At this stage of the proceedings the venue was changed from the Vigo circuit court to the Sullivan circuit court, in which last-named court the appellants filed a joint answer, in which they alleged, in substance, that at the time they signed the note one Wright L. Kidder was alive; that a note was signed by the appellants, with the name of the payee left blank, at the request of the said Wright L. Kidder; that said note was executed in consideration of the sum of \$450, money advanced to the appellant Flora George by the said Wright L. Kidder; that said Flora George was principal in said note, and the said Alice Hunter surety thereon; that subsequent to the signing of said note the name of appellee was written in said note without the knowledge or consent of the appellants. The said joint answer further alleges that on the 8th day of August, 1901, Wright L. Kidder departed this life, leaving as his only heirs at law his widow, Elizabeth Kidder, and two sons, Frank L. and Edson W.; that Edson W. and Elizabeth Kidder were, by the Vigo circuit court, duly appointed administrator and administratrix of the estate of said Wright L. Kidder; that said estate has been finally settled, and the administratrix and administrator finally discharged; that all the debts of said estate have been fully paid; that on the 11th day of January, 1902, Edson W. Kidder departed this life, leaving as his only heirs

at law his widow, Kate Kidder, and two children, Katherine and Margaret; that Kate Kidder has been duly appointed administratrix of the estate of Edson Kidder, and said estate is now pending settlement in the Vigo circuit court. Appellee replied to the joint answer by general denial. A trial by the court without the intervention of a jury resulted in a judgment in favor of the appellee for \$624.80. The overruling of appellants' motion for a new trial is the only error assigned.

The first reason for a new trial discussed is the exclusion as evidence of an envelope addressed to Flora George, Indianapolis, Ind., with post mark dated June 27, 1897; the second, exclusion of the letter identified by appellant as the one received by due course of mail, and inclosed in said envelope addressed to her at Indianapolis, at which place she was then residing. It appears from the evidence that appellee introduced appellant George to one Wright L. Kidder, by whom he had been formerly employed. The testimony tends strongly to show that subsequently, for a number of years, improper relations existed between said Kidder and said George. The testimony also tends strongly to show that in delivering the money for which the note in suit was executed, appellee was acting as the agent of Kidder, and retained \$50 out of the \$450 furnished by Kidder for procuring the money. Appellant George testified that appellee told her that Kidder was going to get her the money; that subsequently it was done, and the note which appellee testified had been filled out by Kidder was signed; that when the note was signed it did not contain the date of payment nor the name of the payee. Appellant Hunter testified that she could not read nor write. She signed the note with a cross-mark. They both testified that when the note was presented for signature appellee told them it was not necessary that it should have the time of payment or the name of the payee, that he only wanted their signatures that Mr. Kidder might know that he (appellee) had delivered the money. Appellants testified that appellant Hunter got no part of the money, and signed the note as surety for appellant George. Appellants were married women. There was a conflict in the testimony as to the condition of the note when it was signed, as to the amount of the money paid over, and to whom it was delivered. Appellants testified that the money was delivered to Mrs. George; appellee, that \$200 of it was given to Mrs. George and \$200 to Mrs. Hunter. Upon appellee's own testimony appellant Hunter was surety for \$200 of the consideration of the note. The letter sought to be introduced was not signed, but Mrs. George testified that the address on said envelope was in the handwriting of Kidder. The letter tended to show that the writer had furnished the money, and was the owner and holder of the note in question. Appellants

contend that the letter should have been admitted in evidence as "a declaration in disparagement of the title of the declarant" and for the purpose of showing that appellee was the agent of Kidder. We think it was not competent for either reason. Kidder was not a party to the action, and appellee was not claiming under him. The letter amounted to no more than a statement of a third person, made out of court, not under oath, and not in the presence of appellee. It was hearsay.

Exceptions were taken to the following questions put to the appellant George on cross-examination, while testifying as a witness: "Q. Will you tell the court whether or not before that time, December 12, 1901, you had told your attorneys that this note belonged to Kidder? Q. Did you tell your attorneys this note belonged to Kidder before you swore to this answer here? Q. What is your best judgment as to whether you told your attorneys Kidder owned this note before or after you signed this affidavit? Q. Did you tell your attorneys this was Kidder's money before you had signed that answer? Q. Did you tell the attorneys all about it before you filed the answer?" As a general rule, the communications of a client to his attorney are privileged. The evidence in the case at bar does not bring it within the exception. *Reed v. Smith*, 2 Ind. 160; *Borum v. Fouts*, 15 Ind. 50; *Bowers v. Briggs*, 20 Ind. 139; *Oliver v. Pate*, 43 Ind. 132; *Ins. Co. v. Wiler*, 100 Ind. 92, 50 Am. Rep. 769. Subdivision 3, § 505, Burns' Rev. St. 1901, provides that attorneys, as to confidential communications made to them in the course of their professional business and as to advice given, shall not be compelled to testify. The same rule has been applied where the client was on the witness stand. *Bigler v. Reyher*, 43 Ind. 112; *Hemenway v. Smith*, 28 Vt. 701; *Bobo v. Bryson*, 21 Ark. 387, 76 Am. Dec. 406. See, also, cases collected in footnote to *O'Brien v. Spalding*, 66 Am. St. Rep., beginning on page 213; *Citizens' Street Railway Co. v. Shepherd* (Ind. App.) 65 N. E. 765, and cases cited; *Harris v. Rupel*, 14 Ind. 209; *Excelsior Mutual Soc. v. Riddle*, 91 Ind. 84; *Ins. Co. v. Wiler*, 100 Ind. 92, 50 Am. Rep. 769.

Under the foregoing and many other cases that might be cited the testimony was incompetent. The judgment is reversed, with instructions to sustain the motion for a new trial.

(32 Ind. App. 9)

TEREBA v. STANDARD CABINET MFG.
CO. et al.

(Appellate Court of Indiana, Division No. 1.
Nov. 24, 1903.)

JUDGMENT—ACTION TO REVIEW—LIMITATIONS
—FRAUD—JOINDER OF PARTIES.

1. An action to set aside a judgment rendered 2½ years previously cannot be sustained under Burns' Rev. St. 1901, § 399, authorizing a court to relieve a party from a judgment taken through his mistake, surprise, or excusable neglect on complaint within 2 years.

2. Under the express provision of Burns' Rev. St. 1901, § 572, an application for a new trial for a cause discovered after the term at which a judgment was rendered must be made within one year after the final judgment.

3. There being no fraud in the method of procuring a judgment, it cannot be set aside for fraud in the controversy adjudicated.

4. Under Burns' Rev. St. 1901, § 627 et seq., authorizing a complaint for review of a judgment for new matter discovered since its rendition, a complaint 2½ years after such rendition does not show such diligence as is required, though it states that the complainant did not know and could not know of certain material matter at the time of the judgment, and that he used due diligence in filing his complaint as soon after gaining knowledge thereof as possible.

5. Where a judgment was rendered against a corporation and several persons individually, these should be joined as parties in an action by a stockholder to review the judgment.

Appeal from Circuit Court, Miami County;
J. T. Cox, Judge.

Action by Joseph Tereba against the Standard Cabinet Manufacturing Company and others. From a judgment sustaining a demurrer to the complaint, complainant appeals. Affirmed.

W. E. Mowbray, for appellant. Loveland & Loveland, for appellees.

BLACK, J. The appellant filed a complaint in which he prayed the court to set aside and reverse a certain decree, and all sales, conveyances, and transfers made in virtue of and under the same. A demurrer to the complaint, for various causes, filed by the Standard Cabinet Manufacturing Company, Jacob Theobald, and Catherine Beck, executrix of the will of John M. Beck, deceased, who were defendants, was sustained, and the ruling is assigned as error.

The complaint showed that December 11, 1896, a decree was entered by the court below in a matter then below that court, "in which John Knuchel et al. were the plaintiffs, and the Standard Cabinet Manufacturing Co. et al. were defendants, and the same Standard Cabinet Manufacturing Company, in a cross-complaint filed, were cross-complainants, and John Knuchel et al. were cross-defendants, and in another cross-bill filed, in which Jacob Theobald et al. were cross-complainants, and the Standard Cabinet Manufacturing Company was cross-defendant, a certified copy of said decree hereto being attached, and hereby made a part of this complaint, and marked 'Exhibit A,' and the record thereof marked 'Exhibit B,' and that in this said decree, hereto attached, certain rights were established, as will more fully appear in said certified copy of said decree." It was alleged that the appellant was a resident of "this city and state," and a stockholder of said company "of this city," a corporation doing business under the laws of this state; that the appellant was not personally represented in the proceedings leading to said decree, but was a party to the suit

¶ 3. See Judgment, vol. 30, Cent. Dig. § 735.

in his capacity as a stockholder of that company; that he is and was a party interested in the subject-matter of the proceeding; that he "did not make default, or was guilty of any negligence on his part whatsoever," but his rights and interests were not represented or protected by the default made by that company, and he had no means of preventing that default, as he was no officer of the corporation; that he was greatly wronged and materially damaged by the decree; that he "is now in a position to introduce new, material matter, which he did not know of and could not know of at the time of the rendering and enrolling of said decree, however vigilant he may have been of his rights at said time, and that this said knowledge was conveyed to him a very short time preceding the filing of this complaint; and that your complainant used due negligence in filing this complaint as soon after gaining said knowledge as it was possible for him to do." It was further alleged "that this new matter is of such a nature as to materially affect, alter, and change the rights and interests as they were adjudicated in said decree"; that, upon information, he "verily and truly believes that the following matters not brought out in the proceedings heretofore mentioned are facts." It is then stated that a contract filed with the cross-bill in said proceeding by Jacob Theobald and John H. Beck, which purported to be an agreement between them and said company, was obtained on a false pretense, for the malicious and unlawful purpose of wrecking that company, and was obtained without the consent of the majority of the directors of the company, as its by-laws and constitution provided in case of any transfer, bargain, or sale of any property of the corporation. It was further alleged, upon information, that John Knuchel, one of the directors of the company, was wrongfully and unlawfully coerced by Theobald and Beck into transferring to Theobald the interest of Knuchel in certain mortgages upon the property of the corporation, as appears in the decree, which transfers were made without any valuable or other consideration; that certain stockholders named, being John Knuchel and 22 other persons, not parties to the suit at bar, were wrongfully and maliciously coerced by Theobald and Beck, defendants, into transferring said stockholders' stocks, or a portion thereof, amounting to more than 30 shares, or thereabouts, to Theobald, which transfer was not in accordance with a provision of the by-laws set out, to the effect that no person should hold more than 10 shares of stock, and that no transfer or sale of stock should be valid unless made on the books of the corporation, and no person should be permitted to sell, assign, or transfer his stock while owing the corporation any amount. It was further alleged that the defendants in this action willfully and fraudulently changed the entries in the books of the corporation so as to make it appear to be insolvent; that they credited themselves, by fraudulent entries in the com-

pany's books, to amounts to which they were not entitled, with the fraudulent intent to defraud the stockholders of certain amounts of money; that the goods shipped by the corporation amounted to \$32,000 in 1895, whereas the ledger only showed \$22,000, which latter amount was given by the defendants herein upon accounting; that the account of a stockholder not named, and not a party to the case at bar, was given by the defendants as delinquent, when, in 1898, "upon another trial before another court," it was proved that the stock of that stockholder was all paid up; that the liabilities of the corporation amounted to \$8,800 for the years 1895 and 1896, but the defendants fraudulently and willfully changed the books of the corporation to make the amount of \$8,800 read for the year 1895, and \$12,000 for 1896, thereby causing the damage of the appellant and the other stockholders to the latter amount. It was alleged that the aforesaid fraudulent transactions of the defendants were not known to the appellant at the entering of the judgment, or when the cause of Knuchel against the Standard Cabinet Manufacturing Company et al. was heard, and could not have been known to him, and this suit was begun "as soon as practical" after said facts became known to the appellant.

The case before us was commenced more than 2½ years after the rendition of the judgment herein questioned. This cannot be regarded as a suit to relieve a party from a judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect, under section 399, Burns' Rev. St. 1901, which provides for such relief on complaint or motion filed within two years.

Nor can it be upheld as an application for a new trial for cause discovered after the term at which the verdict or decision was rendered, under section 572, Burns' Rev. St. 1901, which provides for such application by complaint filed not later than the second term after the discovery; the application, by the terms of the statute, not to be made more than one year after the final judgment was rendered.

It cannot be treated as a suit to set aside a judgment for fraud, because, if for no other reason, the allegations by which it is sought to charge fraudulent conduct relate to matters which, if of any avail, would constitute only grounds of relief to be set up and litigated in the cause in which the judgment was rendered, and which are now urged because, if set up in that case, they would have induced a result different from the judgment rendered. There is no charge of fraud relating to any act in securing jurisdiction, or to anything done concerning the judicial proceeding which would be a fraud by which the judgment was obtained; but the conduct charged was connected with transactions involved in the litigation, and to be remedied by being set up therein.

The proceeding seems to have been intended as one for the review of the former judgment, for material new matter discovered since the

rendition thereof, under section 627 et seq., Burns' Rev. St. 1901. In the exhibit filed with the complaint, it appears as a part of the former adjudication that personal judgments were rendered against a number of persons who are not made parties to this proceeding. Some of the specifications of reasons in the demurrer related to the failure to make these persons parties to this suit. We think the complaint fails to show such diligence on the part of the appellant as is required of one who seeks to review a judgment for new matter discovered after its rendition. The requirements in this respect are very well established. We do not deem it proper to take space for discussion of this or other features of the pleading. The persons against whom the judgment was rendered, above mentioned, who were not made parties, had such an interest in the cause that they should have been brought before the court.

Judgment affirmed.

(31 Ind. App. 673)

DUNN et al. v. DILKS.

(Appellate Court of Indiana, Division No. 2.
Nov. 24, 1903.)

JUDGMENTS—MERGER—REVIVAL—SCIRE FACIAS—ACTION ON FOREIGN JUDGMENT—JURISDICTION—COMITY.

1. Where judgment was recovered on a note which was thereafter revived by several writs of scire facias, the note was merged into the original judgment, and that judgment into each succeeding one as the same was entered in pursuance of the writ.

2. A suit cannot be maintained in Indiana on the doctrine of comity, on a judgment recovered in Pennsylvania without personal service on or appearance by the defendant on returns of nihil to two successive writs of scire facias issued to revive a previous judgment of the Pennsylvania courts, where the defendant at the time of the issue of the writs was a non-resident of the state of Pennsylvania, and out of the jurisdiction of the court rendering the judgment.

Appeal from Circuit Court, Marion County; H. C. Allen, Judge.

Action by R. W. Dunn and others against Eleanor Dilks, as executrix, etc. From a judgment in favor of defendant, plaintiffs appeal. Affirmed.

Ayres, Jones & Hollett, G. W. Blair, and J. H. Osmer & Sons, for appellants. Gavin & Davis, for appellee.

WILEY, P. J. A demurrer for want of sufficient facts was sustained to appellants' amended complaint, and, they refusing to plead over, judgment was rendered against them for costs. Overruling their demurrer to the amended complaint is assigned as error. The complaint, together with the exhibits and exemplifications, is voluminous, but the facts as stated in the complaint upon which the decision must rest may properly be stated in few words. On August 11, 1871, the deceased, John H. Dilks, and Robert Sut-

ton executed their joint note, payable to James S. McCray, now deceased, due 90 days after date, for \$1,025. This note contained the following clause: "And we empower any attorney of record in this commonwealth, or elsewhere, to appear for us and confess judgment against us for the above sum, together with the 10 per cent. additional, with cost of suit, release of errors and without stay of execution." The note shows on its face that it was executed in the commonwealth of Pennsylvania. At the time of the execution of said note there was, and ever since has been, in force in the commonwealth of Pennsylvania, the following statute: "It shall be the duty of the prothonotary of any court of record within this commonwealth on the application of any person being the original holder, or assignee of such holder, of a note, bond or other instrument of writing in which judgment is confessed, or containing a warrant for an attorney of law or other person, to confess judgment, to enter judgment against the person or persons who executed the same, for the amount which, from the face of the instrument, may appear to be due, without the agency of an attorney, a declaration filed with such stay of execution as may be therein mentioned for the fee of one dollar, to be paid by the defendant, party entering in his docket the date and tenor of the instrument of writing on which the judgment may be filed, which shall have the same force and effect as if the declaration had been filed, and judgment been confessed by an attorney or judgment been obtained in open court, and in term time." The note referred to was not paid at maturity, and on the 20th day of August, 1872, the holder of the note presented it to a prothonotary of the court of common pleas of Crawford county, in the commonwealth of Pennsylvania, and such prothonotary entered judgment thereon against the makers. On the 11th day of October, 1876, the judgment so entered had not been satisfied, and on that date it was transferred to the court of common pleas of Venango county, in said state, in accordance with the statute then in force, which statute is as follows: "In addition to the remedies now provided by law, hereafter, any judgment in any district court, or court of common pleas of Pennsylvania, may be transferred from the court in which they are entered, to any other district court, or court of common pleas in this commonwealth, by filing of record in said other court a certified copy of the whole record in the case. And any prothonotary receiving such certified copy of record, in any case in which judgment has been entered by another court or in another court by transcript from justices of the peace, shall file the same, and forthwith transcribe the docket entry thereof into his own docket; and the case may then be proceeded in and the judgment and costs collected by executions, bill of discovery or attachment, as prescribed by the act

¶ 1. See Judgment, vol. 30, Cent. Dig. §§ 1079, 1662.

entitled 'An act relating to executions,' passed the 16th day of June, 1836; and as to lien, revivals, executions, and so forth, it shall have the same force and effect, and no other, as if the judgment had been entered, or the transcript been originally filed in the same court to which it has thus been transferred." On the 11th day of August, 1871, there was in force in the commonwealth of Pennsylvania, and ever since has been, the following statute: "Upon all judgments already entered, or which may be hereafter entered in any court of record within this commonwealth, it shall be lawful to sue out a writ of scire facias to revive the same according to the provisions of this act, and the act of which this act is a supplement, or to revive the same by agreement of the parties filed and docketed as aforesaid, notwithstanding the day of the payment of the money for which such judgment may be rendered, or any part thereof, may not have arrived at the time of suing out such writ of scire facias, or the revival of such judgment by agreement, as aforesaid, and notwithstanding any other condition or contingency may be attached to such judgment or any execution may have been issued to such judgment; and moreover, no order or rule of court, or any other process or proceeding thereof, shall have the effect of obviating the necessity of the revival in manner herein prescribed, of any judgment, whatever." On March 7, 1882, in accordance with the provisions of the statute last cited, a writ of scire facias was issued by the prothonotary of the court of common pleas of Denango county, Pa., to revive said judgment and placed in the hands of the sheriff of said county for service. Said scire facias writ was returned indorsed by the sheriff that the defendants could not be found. Thereupon, and in accordance with the statute then in force in said state, proclamation was made by the court crier of said court, calling upon all persons interested to show cause why such judgment should not be revived. The statute to which reference was last made is as follows: "All such writs of scire facias shall be served upon the terre tenants, or persons occupying the real estate bound by the judgments; and also where he or they can not be found, or the defendant or defendants, his or their feoffee or feoffees, or on the heirs, executors or administrators of such defendant or defendants, his or their feoffee or feoffees, and where the land or estate is not in the immediate occupation of any person, and the defendant or defendants, his or their feoffee or feoffees, or their heirs, executors or administrators can not be found, proclamation shall be made in open court, at two succeeding terms, by the crier of the court in which such proceedings may be instituted, calling upon all persons interested to show cause why such judgment should not be revived. And no proof of the due service thereof, or no proclamation having been made in the manner hereinbefore set forth,

the court from which the said writ may have issued shall, unless sufficient cause to prevent the same is shown, at or before the second term, subsequent to the issue of the writ, direct and order the revival of any such judgment during another period of five years against the real estate of such defendant or defendants. And proceedings may, in like manner, be had again to revive any such judgment at the end of the said period of five years, and so from period to period as often as the same may be found necessary." At the time said scire facias writ was returned indorsed "Not found" as to the defendants, nor at any time since, has any one interposed any objection to the revival of said judgment. May 2, 1883, a second scire facias writ was issued for the revival of said judgment, which was also returned "Not found" as to the defendants. Proclamation was again made by the court crier, and no one appeared, nor has since appeared, and interposed any objection to the revival of the judgment. September 10, 1883, judgment was entered and liquidated in said court of common pleas against the makers of said note in the sum of \$1,763. May 31, 1899, James S. McCray, the original payee of said note, died, and the appellants were appointed executors of his estate, and on May 31, 1899, such executors had another scire facias writ issued to revive said judgment, and said writ was returned "Not found" as to said defendants, and upon such return the court crier made proclamation in court as required by statute. On August 1, 1899, an alias scire facias writ was issued to revive said judgment, placed in the hands of the sheriff for service, and was also returned "Not found." Proclamation was made in like manner, and no one at that time or since interposed any objection to the revival of said judgment. And on April 3, 1900, judgment was entered and liquidated against the defendants in said court of common pleas in the sum of \$3,499.53. At the time of the execution of the original note both of the makers were residents of, and domiciled in, the commonwealth of Pennsylvania. It is observable that this proceeding is not based upon the original note, nor the original judgment as entered by the prothonotary, for the principle is well defined that the note was merged into the original judgment, and that that judgment was merged into the succeeding one, and so on until the judgment last entered on April 3, 1900, and that is the basis of this action.

Some technical objections are made to the complaint, but from the view of the law which we have taken we deem it unnecessary to even refer to such technical objections, and will determine the rights of the parties upon their merits. It is the theory of appellants, as disclosed by their brief and in oral argument, that the complaint affirmatively shows that the original judgment and all subsequent revivals thereof were in strict accordance with the laws of the common-

wealth of Pennsylvania, and the courts of this state are bound thereby under that provision of the federal Constitution which says: "Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of any other state." Const. U. S. art. 4, § 1. On the contrary, counsel for appellees contend that the original judgment is not within that constitutional provision, because it is not a judgment of a court, nor of any judicial officer, but merely the act of a ministerial officer, which does not rise to the dignity of a judgment within the provision of the Constitution. It is also contended that the original note authorized an attorney to appear and confess judgment, and, as this was never done, the courts of this state are not required to enforce against a citizen of this state a judgment by virtue of such warrant of attorney, and without any appearance by him or for him. It is also contended that a *scire facias* judgment rendered in the state of Pennsylvania without service of process or appearance cannot be enforced in this state, notwithstanding it might, under the laws of that state, be a valid and binding judgment, and enforceable against the judgment defendant. In the case of *Thornman v. Frame*, 176 U. S. 350, 20 Sup. Ct. 446, 44 L. Ed. 500, Chief Justice Fuller said: "It is thoroughly settled that the constitutional provision that full faith and credit shall be given in each state to the judicial proceedings of other states does not preclude inquiry into the jurisdiction of the court in which the judgment was rendered over the subject-matter, or the parties affected by it, or into the facts necessary to give jurisdiction." In the decision of this case, our inquiry need not go farther than to determine whether or not the common pleas court of Venango county, Pa., by the proceedings under the *scire facias* writ, acquired jurisdiction over the person of the defendant, so as to render a judgment binding on him in this state. It certainly did not acquire jurisdiction over him by virtue of the warrant of attorney expressed in the note, for that power or warrant was exhausted in the rendition of the original judgment. It did not acquire jurisdiction over him by the issuing and service of any process known to the law, for by the facts exhibited it is expressly shown that this was not done. If jurisdiction was acquired, it was by virtue of the return of the sheriff of two successive *scire facias* writs, showing that the defendant was not found, and by proclamation of the court crier. To conclude that jurisdiction of the person was acquired, we must declare as a legal rule that two returns of nihil to *scire facias* writs under the Pennsylvania statute is equivalent to personal service or appearance by the defendant. This we cannot do. The rule is fundamental that jurisdiction of the person is obtained in two ways: First, by service of process duly issued; and second, by appearance in court. In this case ju-

risdiction was not obtained over the person of Dilks either by process duly served or by his voluntary appearance. If the original judgment of the *scire facias* judgment were valid and binding in that state, it was by virtue of the statute cited, peculiar to that jurisdiction. In the decision of this case it is necessary for us to determine the validity of these revival judgments within the jurisdiction of the commonwealth of Pennsylvania. The controlling question here is whether such judgment, thus rendered in that state, against a person not a resident of the state where rendered, is valid and binding on a citizen of this state, and enforceable by our courts. The case of *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565, is illustrative of the principle under consideration. That was an action to recover possession of real estate situate in the state of Oregon. The defendants claimed to have acquired the premises under a sheriff's deed, made upon a sale of the property on execution issued upon a judgment recovered against the plaintiff in one of the circuit courts of that state. When the action was commenced and judgment rendered, the defendant was a nonresident of Oregon. He was not personally served with process. He did not appear to the action, and judgment was rendered against him upon his default in not answering the complaint upon a constructive service of summons by publication. The Civil Code of Oregon provides for such service when an action is brought against a nonresident and absent defendant and he has property within the state. The question involved was the validity of a money judgment rendered in one state in an action upon a simple contract against a resident of another state, without personal service of process upon him or his appearance therein. In speaking of the validity of the judgment in the state where rendered, the Supreme Court, by Mr. Justice Field, said: "Be that as it may, the courts of the United States are not required to give effect to judgments of this character when any right is claimed under them. Whilst they are not foreign tribunals in their relation to the state courts, they are tribunals of a different sovereignty, exercising a distinct and independent jurisprudence, and are bound to give to the judgment of the state courts only the same faith and credit which the courts of another state are bound to give them. Since the adoption of the fourteenth amendment to the federal Constitution the validity of such judgments may be directly questioned, and their enforcement in the state resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court had no jurisdiction do not constitute a due process of law. * * * To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit; and,

if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the state, or his voluntary appearance." In that case the court announces the rule in specific terms how jurisdiction is to be obtained as follows: "As stated by Cooley in his treatise on Constitutional Limitations, 405, for any other purpose than to 'subject the property of a nonresident to valid claims against him in the state 'due process of law would require appearance or personal service before the defendant could be personally bound by any judgment rendered.'" In the case of *Weaver v. Boggs*, 38 Md. 255, it was held that suit could not be maintained in the courts of Maryland upon a judgment of a court of Pennsylvania, rendered upon returns of nihil to two successive writs of scire facias issued to revive a Pennsylvania judgment, where the defendant at the time of the issuing of the writs was a resident of Maryland, and out of the jurisdiction of the court that rendered the judgment. In the case of *Grover, etc., Co. v. Radcliffe*, 137 U. S. 287, 11 Sup. Ct. 92, 34 L. Ed. 670, the Supreme Court quoted approvingly from the Maryland case the following: "It is well settled that a judgment obtained in a court of one state cannot be enforced in the courts and against a citizen of another, unless the court rendering the judgment has acquired jurisdiction over the defendant by actual service of process upon him, or by his voluntary appearance to the suit and submission to that jurisdiction. Such a judgment may be perfectly valid in the jurisdiction where rendered, and enforced there even against the property, effects, and credits of a nonresident defendant there situated; but it cannot be enforced or made the foundation of an action in another state." The court said, in referring to the *Weaver-Boggs Case*, supra, where the judgment, as here, was entered by a prothonotary, that: "Upon its face, then, the judgment was invalid, and to be treated as such when offered in evidence in the Maryland court. * * *

The courts of Maryland were not bound to hold this judgment obligatory either on the ground of comity or of duty, thereby permitting the law of another state to override their own." In *Du Pont v. Abel* (C. C.) 81 Fed. 534, it was said: "A personal judgment is without validity if rendered in a state court in an action upon a money demand against a nonresident upon whom no personal service within the state was made, and who did not appear. Such a judgment may be perfectly valid in the jurisdiction in which it was rendered, and enforced, even against the property, effects, and credits of the nonresident there situated; but it cannot be enforced or made the foundation of an action in another state." In the case of *Brooks v. Dunn* (C. C.) 51 Fed. 138, there is an exhaustive review of the authorities, and it was there held that the authority given by a bond given

to an attorney of a court of record to confess judgment did not authorize the prothonotary of the court to do so. Since the decision of the case of *Pennoyer v. Neff*, supra, the question there decided has been before the Circuit Courts of the United States in various forms, and their decisions have been uniformly adverse to the validity of service in such cases as this without personal service of the defendant in the state where the suit is brought, or his voluntary appearance therein. See *Brooks v. Dunn*, supra, and authorities there cited.

The case most directly in point, and one which covers every debatable question here involved, is *Owens v. Henry*, 161 U. S. 642, 16 Sup. Ct. 693, 40 L. Ed. 837. The facts upon which the case was decided were, in substance, these: A judgment was duly recovered in a Pennsylvania court against Henry, while he was a citizen of that state. Subsequently scire facias was issued to revive the judgment, and judgment was rendered for want of appearance on two returns of nihil to two successive scire facias writs. This was in accordance with the provisions of the Pennsylvania statute above cited. Upon such scire facias judgment suit was brought against Henry in the United States Circuit Court for the District of Louisiana, to which state he had removed, and where he resided until his death. Chief Justice Fuller, in delivering the opinion of the court, said: "Viewed as a new judgment rendered as in an action of debt, it has no binding force in Louisiana, as Henry had not been served with process or voluntarily appeared. And, considered as in continuation of the prior action and a revival of the original judgment, for purposes of execution on two returns of nihil, it operated merely to keep in force the local lien, and could not be availed of as removing the statutory bar of the *lex fori* for the same reason." *Betts v. Johnson*, 68 Vt. 549, 35 Atl. 489, was also an action on a scire facias judgment rendered in Pennsylvania. It was there held that, while full credit is to be given in the courts of Vermont to the judgments of a sister state, whether the court rendering such judgment had jurisdiction is always open to inquiry, and that a personal judgment upon a money demand, entered without personal service within the state or a voluntary appearance, is invalid. It was also held that a power contained in a note to appear and confess judgment was exhausted by the confession of judgment, and does not extend to subsequent proceedings on such judgment. In the same case it was held that, when a judgment was entered in Pennsylvania against a defendant upon a note containing such warrant, and subsequently, without any notice, a second judgment was entered in scire facias proceedings for want of an appearance, the second judgment being quod recuperet, such second judgment was not valid in Vermont. The court there said: "In whatever view we look at the proceedings in Pennsylvania, the plaintiff is entitled to no

relief; for, if he stands upon the judgment entered in January, 1895, that is invalid, as rendered without notice and without appearance." The Supreme Court of Pennsylvania, under whose statutes appellants rely to uphold the judgment sued on, repudiates the doctrine so earnestly contended for here that one state must, under the federal Constitution, enforce a judgment rendered in another state, where by the laws of such state such judgment is enforceable there. In *Steel v. Smith*, 7 Watts & S. 447, quoting from the syllabus, that court declared the rule to be that: "The act of Congress made to carry out the fourth article and first section of the federal Constitution, which declares that judicial records proved in the manner prescribed shall have such faith and credit given to them in any court within the United States as they have by law and usage in the courts of the state from whence they are or shall be taken, does not preclude inquiry into the jurisdiction of the court or the right of the state to confer it. Held, therefore, that a judgment in foreign attachment affecting to bind not only the property attached, but the persons of defendants, not citizens or within its precincts at the time, is to be treated as a nullity by a court in another state, though it would bind the persons of the defendants in the courts and by the laws of the state in which it was rendered." It is but fair to say that in some of the states a contrary rule prevails, but the great weight of authority and the sounder principle are in harmony with the conclusion we have reached.

Judgment affirmed.

(31 Ind. App. 689)

COURT OF HONOR v. BANKERT.

(Appellate Court of Indiana, Division No. 2.
Nov. 24, 1903.)

APPEALS—TRANSCRIPT—FILING—VACATION APPEAL—NOTICE TO APPELLEE—NON- APPEARANCE—DISMISSAL.

1. Burns' Rev. St. 1901, § 650, provides that the transcript on appeal shall be filed with the clerk of the Supreme Court within 60 days after the filing of a bond; and court rule 1 (29 N. E. iv) provides that when an appeal is taken in term time, but the transcript is not filed within the time limited, the appeal as of term shall be deemed abandoned, and if the transcript is filed within the time allowed by law, but after the time limited for appeals in term, the appeal shall be deemed to be taken as of the time the transcript is filed. *Held*, that where the transcript on a term appeal was not filed within the 60 days required by section 650, and appellant took no steps to bring the appellee into the Supreme Court by notice, as required in vacation appeals, and the appellee did not appear, the appeal will be dismissed, as required by rule 35 (27 N. E. vii).

Appeal from Circuit Court, Shelby County; Douglas Morris, Judge.

Action by Alice B. Bankert against the Court of Honor. From a judgment in favor of plaintiff, defendant appeals. On motion to dismiss. Motion granted.

Tindall & Tindall and W. B. Risse, for appellant.

WILEY, P. J. Appellee has appeared especially in this cause, and moved to dismiss under rule 35 (27 N. E. vii) of this court. The record shows that the judgment was rendered November 7, 1902. November 15, 1902, appellant's motion for a new trial was overruled, and 90 days given to file bill of exceptions embodying the evidence. An appeal was prayed to this court, and 30 days given to file bond. The penalty of the bond was fixed by the court, and the surety suggested approved. On December 12, 1902, the appeal bond was filed, and on February 11, 1903, the bill of exceptions embodying the evidence was filed. The transcript of the proceedings below was filed in the clerk's office on May 23, 1903. Section 650, Burns' Rev. St. 1901, provides that "the transcript shall be filed in the office of the clerk of the Supreme Court within 60 days after filing the bond." The transcript not having been filed within 60 days after the filing of the bond, the appeal as of term, under rule 1 (29 N. E. iv) of this court, shall be deemed to be abandoned, and the appeal must be held to be taken as of the time the transcript is filed. Burns' Rev. St. 1901, § 650; Ewbanks' Manual, §§ 91, 102; Elliott's Appellate Procedure, §§ 246, 247. Under these authorities, the appeal in this case must be held to be a vacation appeal. The case having been appealed in vacation, and having been on the docket more than 90 days, and there being no appearance by the appellee, except for the purposes of this motion, and no steps having been taken to bring her into court, it is the duty of the clerk, under rule 35 (27 N. E. vii) to enter an order of dismissal. A defective attempt to take a term-time appeal must be followed by notice, or it will be dismissed, under this rule. *Michigan Mutual Life Ins. Co. v. Frankel*, 151 Ind. 534, 50 N. E. 304; Ewbanks' Manual, § 91.

The motion to dismiss is sustained.

(32 Ind. App. 24)

GOVERNMENT BUILDING & LOAN INST. v. RICHARDS.

(Appellate Court of Indiana, Division No. 1.
Nov. 24, 1903.)

TAXATION—PURCHASER AT FORECLOSURE— PAYMENT OF TAXES—RECOVERY FROM REDEMPTIONER.

1. Burns' Rev. St. 1901, § 8595, authorizes any person who has a lien on any lands returned for the nonpayment of taxes to pay the taxes, the receipt therefor to constitute an additional lien, etc. *Held*, that the holder of a certificate of purchase at a foreclosure sale, during the year of redemption, was neither the holder of the legal or equitable title, nor a lienor within the above statute, but that taxes paid by him were voluntarily paid, and could not be recovered from the redemptioner.

Appeal from Circuit Court, Allen County; E. O'Rourke, Judge.

Action by George Richards against the Government Building & Loan Institution. Judgment.

¶ 1. See *Mortgages*, vol. 25, Cent. Dig. §§ 1554, 1738.

ment for plaintiff, and defendant appeals. Reversed.

Hart & Jackman and W. H. Latta, for appellant. Branyan & Feightner and Sommers & Kennerk, for appellee.

HENLEY, C. J. The only question presented by this appeal arises out of the ruling of the trial court in overruling the demurrer to the complaint. Appellee was the plaintiff below. The material averments of his complaint were that appellant is an Indiana corporation; that one Tennings was, on the 1st day of November, 1895, the owner of certain real estate in Huntington county, Ind., which the complaint particularly describes; that on the 12th day of November, 1895, the said Tennings executed a mortgage on said real estate to the Robinson Manufacturing Company of Richmond, Ind., which mortgage was duly recorded in mortgage record 41, at page 80 of the Mortgage Record in the recorder's office of said county; that said mortgage was foreclosed, and the sale of said real estate ordered thereunder; that appellee held a mortgage on the same premises, executed on the 15th day of June, 1896, to secure the payment of \$1,300, and was made a defendant to the action commenced by the Robinson Manufacturing Company, and at the sheriff's sale made on the 22d day of May, 1898, this appellee purchased said real estate, and on said day received a certificate of purchase thereof from the sheriff of said county; that on the 22d day of May, 1899, the appellee demanded of the sheriff a deed for said real estate, and said sheriff executed to him a deed for said real estate; that said deed is wholly inoperative and void, for the reason that appellant, prior to the expiration of the year of redemption, paid into court the amount of appellee's judgment; that to preserve and protect the security of his lien represented by his certificate of purchase, he did in the month of May, and after the certificate of sale was issued to him, pay the taxes on said real estate, amounting to \$62, and in the following year, prior to the expiration of the year of redemption, he paid other taxes thereon to the amount of \$24; that all of said taxes so paid by him were assessed against and were a lien upon said real estate, as appeared by the tax duplicate in the treasurer's office in said county; that a copy of such tax receipts are filed with and made a part of the complaint; that appellant is the owner of the said real estate, having received a deed therefor from the said Tennings; that the taxes paid by appellee are a lien upon said real estate; and that appellant has derived and received all the benefit from appellee's payment. Appellee asks that he be subrogated to the rights of the state of Indiana in its lien for taxes, and that he have judgment for \$100 and interest, and a foreclosure of the lien, and an order of sale of the real estate to satisfy such lien. The demurrer to the complaint having been overruled, appellant refused to plead fur-

ther, and judgment was thereupon rendered against appellant in the sum of \$106.64, and declaring the same a lien upon the real estate, and ordering it sold to satisfy the lien and costs. The question presented by the demurrer to the complaint is whether or not the holder of a certificate of sale issued by a sheriff can, during the year for redemption, pay the accruing taxes on the land so sold, and thereby obtain a lien upon the premises for the amount of the taxes so paid.

The holder of a sheriff's certificate of sale is not a lienholder within the meaning of section 8595, Burns' Rev. St. 1901, such as to entitle him to pay the taxes on the land described in his certificate and add the amount of the taxes to the amount which would be necessary for a redemptioner to pay into court for the purpose of redeeming from the sale by virtue of which the certificate was issued. A sheriff's certificate of sale of real estate conveys no title; it is an obligation only upon which title may be obtained by the holder thereof if the land is not redeemed. *Hasselman et al. v. Lowe*, 70 Ind. 414.

The holder of the certificate has no claim or right, during the year of redemption, other than to be repaid the amount of his bid, with the legal rate of interest added. *Bodine v. Moore*, 18 N. Y. 347; *Neff v. Hagamen*, 78 Ind. 57; *Brown v. Cody*, 115 Ind. 484, 18 N. E. 9; *Robertson et al. v. Van Cleave*, 129 Ind. 217, 26 N. E. 899, 29 N. E. 781. He is a mere lienholder, without any title, either legal or equitable, until he has received a deed from the sheriff. *Robertson v. Van Cleave*, supra, and cases cited. The case of *Semans v. Harvey*, 52 Ind. 331, is strongly in point here. The Supreme Court in that case, by Downey, C. J., said: "It seems to be settled that the mortgagee may pay taxes on the premises, prior to foreclosure, to preserve the security, and, in such case, have the same allowed to him in the judgment as a part of his claim against the mortgaged premises. This is no more than he can do as to any other valid prior incumbrance, which is necessary for him to pay in order to preserve his security. Citing cases. But not having taken this course, but having purchased the land with the incumbrance on it, it may be presumed that he took the incumbrance into account in determining the amount which he would pay, and that he bought the land with the understanding that he would have to discharge the incumbrance, in addition to the amount bid by him at the sale of the premises."

The lien represented by appellee's certificate of sale was the lien of the judgment upon which the sale was made to him. *Robertson v. Van Cleave*, supra. There is no way by which appellee can tack the amount of the taxes paid by him, after the sale and before the year of redemption has expired, to the amount of his lien as represented by the certificate of sale. The taxes so paid must be regarded as voluntarily paid by him, and as such

not recoverable. *McCrosen v. Harris*, 35 Kan. 178, 10 Pac. 583; *Nopson v. Horton*, 20 Minn. 239; *Raynsford v. Phelps*, 43 Mich. 342, 5 N. W. 403, 38 Am. Rep. 189.

The judgment is reversed, with instruction to the trial court to sustain appellant's demurrer to the complaint.

(32 Ind. App. 338)

CASTO et al. v. SHEW.¹

(Appellate Court of Indiana, Division No. 1.
Nov. 24, 1903.)

JUDGMENTS—MOTION TO SET ASIDE—AFFIDAVITS ON APPLICATION—DETERMINATION—EVIDENCE.

1. Under Burns' Rev. St. 1901, § 390, providing for the granting of relief from a judgment because of mistake, inadvertence, surprise, or excusable neglect, affidavits in support of a motion for such relief partake of the nature of depositions and parol testimony, and not of documentary evidence, and are governed by the rules applicable to parol testimony.

2. Where, upon a complaint or motion to set aside a judgment, affidavits and counter affidavits are heard, the settled rule is that the decision of the court will not be interfered with in case it is supported by any evidence.

Appeal from Circuit Court, Vermillion County; A. F. White, Judge.

Action by Lyssander Shew against Irene Casto and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Josiah T. Walker and Conley & Conley, for appellants. Joseph W. Amis and Daniel C. Johnson, for appellee.

ROBINSON, J. Appellee sued appellants and others for damages for breach of a replevin bond. Appellants each filed answer of general denial. There was a trial by the court, and judgment rendered in appellee's favor. Appellants' motion to be relieved from the judgment because of their mistake, inadvertence, surprise, or excusable neglect (Burns' Rev. St. 1901, § 390) was overruled. This ruling presents the only question sought to be reviewed. The motion is not to set aside a default. It appears by the bill of exceptions that on the day set for trial appellants were present by counsel, who filed an answer, and it does not appear that any objection was made to proceeding with the trial, or any effort made to secure a continuance. Affidavits were filed in support of the motion, also counter affidavits by appellee, and an affidavit by one of the appellants in reply. It is unnecessary to set out these affidavits and counter affidavits. Upon some of the questions they are conflicting. Whether they showed mistake or inadvertence or excusable neglect was a question of fact. And in determining whether the ultimate fact of mistake, inadvertence, or excusable neglect was shown the trial court not only considered the facts set out in the affidavits, but also the legitimate inferences to be drawn from such facts. Affidavits in such cases partake of the nature of depositions and parol testimony, and not of the nature of docu-

mentary evidence, and the rules applicable to parol testimony must be applied to them. It is not made to appear that there was any concealment or surprise, or that appellants were misled. The trial court could have properly concluded that the condition from which appellants asked to be relieved resulted from their inattention. In *Williams v. Grooms*, 122 Ind. 391, 24 N. E. 158, where an application to be relieved from a judgment was denied, the court said: "Where, upon a complaint or motion to set aside a default, affidavits and counter affidavits are heard, the settled rule is that the decision of the court will not be interfered with in case it is supported by any evidence."

Judgment affirmed.

(31 Ind. App. 654)

RUBLE v. BUNTING.

(Appellate Court of Indiana, Division No. 1.
Nov. 24, 1903.)

SLANDER—FORGERY—SUFFICIENCY OF ALLEGATIONS—ACTIONS—INSTRUCTIONS—EVIDENCE—ADMISSIBILITY—HARMLESS ERROR.

1. In a complaint for slander in charging the forgery of a check, it is not necessary to allege the place where the check was given.

2. A charge of forgery is slanderous per se.

3. To constitute slander in charging forgery, a strict affirmative charge is not necessary, but, if the words used are calculated to cause the hearer to suspect that the person charged was guilty of the crime, they are actionable.

4. In an action for slander, where the complaint alleged a charge of forgery of a check on a certain bank, made at a certain place, an instruction that the charge was the forgery of a check on said bank, but omitting reference to the place where this charge was made, was not objectionable as incompletely presenting the issues.

5. In an action for slander in denying the execution of a check, it was not error to admit in evidence the check alleged to have been forged.

6. In an action for slander in charging the forgery of a check, the record entry of a judgment in a previous action between the parties, in which the subject of the check was brought up, and at the time of trial of which the charge of forgery was made, was competent at least to show the date of the charge.

7. While for other purposes the evidence was immaterial, it was harmless.

8. In an action for slander in charging the forgery of a check, it was not error to admit evidence of defendant's testimony, in another action between the parties, denying the giving of the check.

Appeal from Circuit Court, Knox County; O. H. Cobb, Judge.

Action by John M. Bunting against Samuel P. Ruble. From a judgment for plaintiff, defendant appeals. Affirmed.

B. M. Willoughby and James M. House, for appellant. Cullop & Shaw and John T. Goodman, for appellee.

COMSTOCK, J. Appellee (plaintiff below) brought this action against appellant for slan-

¹ 2. See *Libel and Slander*, vol. 22, Cent. § 42.

der. The complaint was in four paragraphs. The trial was had on the second. The answer thereto was a general denial. A trial resulted in a verdict and judgment for appellee for \$1,000. The assignment of errors questions the sufficiency of the said second paragraph and the action of the court in overruling appellant's motion for a new trial. The paragraph in question, as originally certified in the transcript by the clerk of the Knox circuit court, is as follows:

Paragraph 2. "The plaintiff, further complaining of the defendant, says: That he has heretofore borne a good name for honesty and integrity, and that the same was never questioned prior to the grievance hereinafter mentioned. That on the — day of October, 1901, in a certain conversation had and held with one James Sanders at the county of Knox in the state of Indiana, the defendant did speak of and concerning the plaintiff maliciously and falsely and following defamatory manner to wit: Said Sanders spoke to said defendant and said, 'Bunting cashed that seven hundred dollar check which you gave him at Petersburg,' and then said Ruble then said he (the plaintiff meaning) had no check on me for seven hundred dollars or any other sum, and never did have one, and if he did have and cashed it 'he forged it'—thereby charging the plaintiff and intending to charge him with the crime of forgery, and that said Sanders so understood in said conversation that said Ruble was charging and intending to charge the plaintiff with the forgery of a check for seven hundred dollars. That said defendant, then and there, knew that on the 19th day of December, 1892, he had given a check for seven hundred dollars, payable to the plaintiff on the First National Bank of Vincennes, Indiana, and that the same had been by said bank paid, and that the said defendant then and there knew that he was charging the plaintiff with the crime of forgery, and that said Sanders so understood him to be charging the plaintiff with the forgery of the check aforesaid. That on account of the defendant using said false and defamatory language aforesaid, he has suffered greatly in his reputation for honesty and integrity, has been damaged in his business, has been greatly humiliated, has suffered both in mind and body and damaged in the sum of five thousand dollars."

The paragraph was incorrectly certified. Upon proper application the phrase "following defamatory manner" was changed to "following defamatory matter."

Appellant designates as a defect in the complaint that it does not allege "that the slanderous words were either spoken, published, or written by the defendant; the allegation is that the defendant spoke 'of and concerning the plaintiff maliciously and falsely and following defamatory manner, to wit.'" In other words, that it does not purport to give the slanderous words, but only the manner in which they were spoken. The

language quoted originally appeared in the transcript. As corrected, the objection does not apply.

The other objection to the paragraph is that whatever was said was in reference to a \$700 check alleged to have been given by Ruble to Bunting, at Petersburg; and that the complaint should also allege that the defendant at some time gave the plaintiff a \$700 check at Petersburg, without such averment the charge could not have been slanderous. The charge is that the check was given on the First National Bank of Vincennes. The place where given is not charged, nor is it material. The controlling facts were that it was given, and the circumstances and the conditions set out, and the charges made with reference to it. The gist of the charge is that appellee forged a check for \$700 on the First National Bank of Vincennes, Ind., in the name of the appellant. A charge of forgery is slanderous per se. Burns' Rev. St. 1901, § 375, provides: "In an action for libel or slander it shall be sufficient to state, generally, that the defamatory matter was published or spoken of the plaintiff, and if the allegation be denied, the plaintiff must prove, on the trial, the facts showing that the defamatory matter was published of him." A strict affirmative charge of forgery is not necessary. If the words used are calculated to cause the hearer to suspect that the plaintiff was guilty of the crime, they are actionable. *Drummond v. Leslie*, 5 Blackf. 453; *Seller v. Jenkins*, 97 Ind. 431; *De Pew v. Robinson*, 95 Ind. 111; *Branstetter v. Dorrough*, 81 Ind. 529; *Hotchkiss v. Olmstead*, 37 Ind. 82; *O'Conner v. O'Conner*, 24 Ind. 221; *Harrison v. Findley*, 23 Ind. 271, 85 Am. Dec. 456; *Proctor v. Owens*, 18 Ind. 22, 81 Am. Dec. 341.

Appellant claims that the verdict is not sustained by sufficient evidence, upon the ground that it wholly fails to show that the said slanderous words were spoken to James Sanders. To quote from appellant's brief: "James Sanders does not say that the words were addressed to him, or spoken in a conversation with him." The record shows that James Sanders, being recalled as a witness, testified as follows: "Q. Were you at the trial between Bunting and Ruble? A. Yes, sir. * * * Q. Did you see John T. Goodman and S. P. Ruble in the side room in the courthouse that day? A. Yes, sir. Q. Did you have a conversation with S. P. Ruble in the side room that day? A. Yes, sir. Q. You may state what he said to you concerning John M. Bunting and the \$700 check there. A. Well, as well as I can recollect on the subject, him and Mr. Bunting was in a quarrel or quarreling in there. Q. Go on and state what he said to you on that subject. A. Well, there was two or three in there, and he says if Bunting ever had a check on him for \$700 he forged it. * * * Q. Who else was in the room at that time? A. John T. Goodman. Q. Anybody else? A.

Tom Bunting. Q. That was on the day of the trial between S. P. Ruble and the Buntings in January, 1901? A. Yes, sir, in the evening about 3 or 4 o'clock, on the day of the trial. Q. Where did it occur? A. In this cloakroom out here [indicating]. His testimony was corroborated by that of John T. Goodman and Thomas Bunting.

Complaint is made of instruction No. 4, given by the court of its own motion, upon the ground that it does not correctly state the issues formed on said second paragraph. Said instruction is as follows: The said second paragraph of plaintiff's complaint substantially avers that the defendant falsely and maliciously slandered plaintiff by saying, of and concerning him, to one James Sanders that "he (the plaintiff, Bunting meaning) had no check on him, Ruble, for seven hundred dollars (\$700), or any other sum, and never did have one, and, if he did have and cashed it, he forged it, when in fact said defendant had given said plaintiff a check for seven hundred dollars (\$700) on the First National Bank of Vincennes, Ind., and that said bank had paid said check, and that plaintiff on account thereof suffered greatly in his reputation for honesty and integrity, and has been greatly humiliated thereby, and suffered in mind and body, and thereby has been damaged in the sum of five thousand dollars (\$5,000)." It is argued that as the complaint charges the speaking of the words in reference to a check given by the defendant at Petersburg, and the instruction states the allegations of said paragraph were in reference to a check given on the First National Bank of Vincennes, the issues were not fully and correctly stated. The objection to the instruction cannot be sustained. The charge was forging a check on the First National Bank of Vincennes. Appellant said that he had given no such check, and if the appellee had such check he had forged it. Where the check was cashed was not of the essence of the charge.

Instruction No. 2 given at the request of appellee is claimed to be erroneous, because, while undertaking to set out the material facts necessary to maintain the action, it does not set out all of them. The instruction makes no reference to the fact that the alleged slanderous words were spoken concerning a check alleged to have been given by the defendant to the plaintiff at Petersburg. Said paragraph may fairly bear the construction of charging that the check was cashed at Petersburg.

The third, fourth, fifth, and sixth instructions given at the request of the plaintiff are objected to as each assuming that the fact of the existence of and the giving of a certain check for \$700 was established.

The language of said third instruction is: "In determining whether the said defendant Ruble said to James Sanders that the plaintiff forged the seven hundred dollar check (\$700), you may take into consideration the

testimony of other persons, if any such there were who were present at the time and heard what was said, if the evidence shows anything was said."

The fourth, fifth, and sixth each began: "If you find from the evidence that the defendant," etc.

The court permitted plaintiff to give in evidence the check dated December 19, 1892, on the First National Bank of Vincennes, signed by S. P. Ruble, and payable to John M. Bunting, and to testify concerning the check. It was the check concerning which the charge of forgery was made, the check which the appellant said that he had never given the appellee. It had been cashed at Petersburg by appellee, and sent from Petersburg to Vincennes for collection. Appellant admitted its execution after its introduction in evidence. The evidence was proper. The court permitted the plaintiff, over the objection of the appellant, to introduce the record entry of a judgment in the case of Ruble (appellant here) v. John and Thomas S. Bunting. The giving of the check was incident to a partnership matter with which the appellee and appellant were concerned, in 1892. In 1901 a trial was had in which Ruble was plaintiff and the Buntings were defendants, and judgment was rendered in appellant's favor. The subject of the check came up in evidence, and Ruble denied having given it. On the day of the trial, in the cloakroom of the courthouse (heretofore referred to by witness), the appellant first made, as claimed, the charge of forgery. A number of witnesses testified in the case at bar concerning the testimony of Ruble in the former trial. The introduction of the record of this judgment is the one of which appellant complains. The record entry of the judgment would be competent, at least, to show the date. It was not error to admit it for that purpose. For any other purpose it was immaterial, but we cannot say that it was harmful. There was no error in permitting proof of appellant's testimony, on the former trial, denying the giving of the check.

We find no error for which the judgment should be reversed. Judgment affirmed.

(32 Ind. App. 22)

GOUGH et al. v. STATE ex rel. PETERS.

(Appellate Court of Indiana. Nov. 24, 1903.)

APPEAL—JOINT ASSIGNMENTS OF ERROR—NEW TRIAL—MOTION—SUFFICIENCY OF ASSIGNMENTS—INTOXICATING LIQUORS—CIVIL DAMAGE ACTS—DAMAGES—MITIGATION.

1. The motions for a new trial by a principal and by the sureties on his bond, when jointly sued as defendants, being separate motions, no question is presented for appellate review on the court's ruling on such motions by a joint assignment of error by all defendants.

2. On a motion for a new trial, an assignment that the court erred in refusing to permit a witness named to answer the following question, followed by the question asked, was sufficient to call the attention of the trial court to

the particular evidence alleged to have been erroneously rejected.

3. Under Burns' Rev. St. 1901, § 7238, giving a right of action to a wife for injury or damages sustained by the illegal sale of liquor to her husband, that the wife had abused and assaulted her husband and had attempted to demolish defendant's saloon with a hatchet is not evidence in mitigation of damages in an action against the liquor dealer.

Appeal from Circuit Court, Hamilton County; John F. Neal, Judge.

Action by the state, on the relation of Vina Peters, against William S. Gough and others. From a judgment for relator, defendants appeal. Affirmed.

Flippen & Purvis and Kane & Kane, for appellants. Daniel Waugh and Edward Daniels, for appellee.

ROBINSON, J. Suit by appellee against Gough, principal, and appellants Qualters, Frisz, and Innis, sureties on Gough's bond, to recover damages occasioned by the illegal sale of liquor to the husband of relatrix. The motion of appellant Gough for a new trial was overruled, as was also the joint motion of the sureties. All the appellants have jointly assigned error that the court erred in overruling Gough's motion for a new trial, and also the motion of the sureties for a new trial. Appellant Gough separately assigns error that the court erred in overruling his motion for a new trial.

It is first argued that no question is presented upon the errors assigned on the matters discussed in appellant's brief. The motion by appellant Gough and the motion by the sureties for a new trial being separate motions, no question is presented upon the court's ruling on these several motions by a joint assignment of error by all the appellants. Ewbank's Manual, § 138; Elliott's App. Proc. § 318. The only questions argued under the separate assignment of error by appellant Gough relate to the rejection of certain evidence. In his motion for a new trial he stated a number of grounds therefor, and in each it is stated in substance that the court erred in refusing to permit a witness named to answer the following question, this being followed simply by the question that was asked. We think this sufficient to call the attention of the trial court to the particular evidence which it was alleged had been erroneously rejected. See Ewbank's Manual, § 50, and cases cited; Clark v. Bond, 29 Ind. 555; Meyer v. Bohlring, 44 Ind. 238.

The only question presented as to this offered evidence is whether it was admissible in mitigation of damages. The offered evidence, so far as the brief points out the places in the record where it may be found, was with reference to certain conduct of the relatrix at different times; that, at a time not stated, she had abused her husband on the street, and had assaulted him; that at another time she went to appellant's saloon

and attempted to demolish it with a hatchet; that during the months when the sales were alleged to have been made to the husband she would go downtown and whip her husband on the way home. The statute upon which the action is based (section 7288, Burns' Rev. St. 1901) gives a right of action to relatrix for injury or damages sustained to her person or property or means of support. The record does not disclose that the matters sought to be inquired about by the offered evidence had any connection with the injurious acts resulting in relatrix's injury. They were not matters of mitigation, and were not relevant to the issues being tried. Moreover, it is argued that each exception taken was taken by all the appellants, and that such exceptions are not available in a separate assignment of errors by one of the appellants. In each instance the record shows that the "defendants except." This objection seems to be well taken under the ruling in City of South Bend v. Turner, 156 Ind. 418, 60 N. E. 271, 54 L. R. A. 396, 83 Am. St. Rep. 200.

Judgment affirmed.

(69 Ohio St. 196)

STATE ex rel. SMITH v. SMITH.

(Supreme Court of Ohio. Nov. 17, 1903.)

SALE OF MILK—REGULATION—AFFIDAVIT AS TO NATURE OF FOOD—JURISDICTION OF JUSTICE—RIGHT TO MANDAMUS.

1. The sale of milk containing 10.61 per cent. of solids, and no more, is punishable under the act of April 10, 1889 (86 Ohio Laws, p. 229), to regulate the sale of milk, and the affidavit need not allege that milk is an article of human food.

2. Unless such affidavit charges the particular sale to be a second or subsequent offense, imprisonment cannot be imposed as a part of the punishment, and a justice of the peace with whom the affidavit is filed has jurisdiction to try the accused without the intervention of a jury. Inwood v. State, 42 Ohio St. 186, approved and followed.

3. Mandamus will lie to compel the exercise of such jurisdiction. In re Turner, 5 Ohio, 542, and State ex rel. v. McCarty, Judge, 39 N. E. 1041, 52 Ohio St. 363, 27 L. R. A. 534, approved and followed.

(Syllabus by the Court.)

Application by the state, on the relation of J. A. Smith, for a writ of mandamus to Roger V. Smith, justice of the peace. Writ allowed.

An alternative writ of mandamus has been allowed upon a petition of which the following is a copy:

"The relator says that he is an inspector of the dairy and food department of the state of Ohio; that the defendant, Roger V. Smith, is a duly elected, qualified, and acting justice of the peace within and for Springfield township, Clark county, Ohio. On the 11th day of August, A. D. 1903, this relator filed his affidavit with the said justice of the peace, charging one Oliver M. Townsley with selling adulterated milk under the provisions of an

act entitled 'An act to regulate the sale of milk,' passed April 10, 1889, which said affidavit was in words and figures as follows, to wit:

"State of Ohio, Clark County—ss.: Before me, Roger V. Smith, a justice of the peace in and for Springfield township, Clark county, Ohio, personally appeared J. A. Smith, an inspector of the Ohio dairy and food department, who, being first duly sworn, says that on or about the 5th day of August, A. D. 1903, one Oliver M. Townsley did, at the county of Clark aforesaid, sell unto him, the said J. A. Smith, a certain quantity of milk, to wit, one-half pint, which said milk was adulterated, in this, to wit, that said milk did then and there contain 10.61 per cent. of solids, and no more, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Ohio. [Signed] Roger V. Smith.

"Signed and sworn to before me this, the 11th day of August, A. D. 1903. [Signed] Roger V. Smith, Justice of the Peace."

"Thereafter, to wit, on the 4th day of September, the said Oliver M. Townsley appeared before the said Roger V. Smith and waived examination, and asked to be recognized to be and appear before the next term of the court of common pleas to be holden in and for Clark county, Ohio, but said defendant refused to so bind over and recognize the said Townsley. Thereupon the said Oliver M. Townsley was arraigned upon said affidavit, and to the charge therein entered his plea of not guilty. This relator thereupon demanded that said defendant, as such justice of the peace aforesaid, proceed to hear and finally determine the cause presented by said affidavit between the state of Ohio and the said Oliver M. Townsley without the intervention of a jury, with which demand the said defendant, Roger V. Smith, refused and still refuses to comply.

"Your relator has no other adequate remedy, and therefore prays that a writ of mandamus issue, compelling the said Roger V. Smith to proceed to hear and finally determine, without the intervention of a jury, the questions at issue between the state of Ohio and the said Oliver M. Townsley on the affidavit of the relator, and the said plea of not guilty interposed by said Townsley, and your relator prays for all such orders, decrees, and judgments as he may be entitled to."

The defendant demurs to the petition generally.

Roscoe J. Mauck, for plaintiff. Roger V. Smith, M. T. Burnham, and Stafford & Arthur, for defendant.

SHAUCK, J. (after stating the facts). It is said that the defendant properly refused to proceed with the trial of Townsley because the affidavit before him did not charge an offense. If this point were well taken, it might not be available to the defendant in the present action. But very clearly the point is not

well taken. The act under which the affidavit is filed, being the act of April 10, 1889 (86 Ohio Laws, p. 229), "to regulate the sale of milk," provides: "Whoever * * * sells * * * adulterated milk, * * * shall, for a first offense, be punished by a fine of not less than fifty nor more than two hundred dollars; for a second offense by a fine of not less than one hundred nor more than three hundred dollars, or by imprisonment in the workhouse for not less than thirty nor more than sixty days; and for a subsequent offense, by a fine of fifty dollars, and by imprisonment in the workhouse of not less than sixty days nor more than ninety days." The fourth section of the act provides that milk which contains less than 12 per cent. solids shall be deemed to be adulterated. Counsel for the defendant do not demonstrate, nor does it appear to be demonstrable, that the act charged, to wit, selling milk which contained 10.61 per cent. of solids, and no more, is not a violation of the statute.

It is further urged that the defendant, as justice of the peace, is without jurisdiction to try the accused without the intervention of a jury. The affidavit does not charge the sale as other than a first offense, and therefore imprisonment could not, under the provisions of the statute above quoted, be a part of the punishment. Not only would this conclusion follow the rule applicable to such cases, that every fact relied upon to increase a penalty or punishment must be charged, but it is required by the express terms of section 3718a, Rev. St. 1892: "And provided further, that where, in any such laws, after the first offense, a different punishment is provided for subsequent offenses, the information or affidavit, in order to avail the state of the benefit of such additional punishment, shall so charge that it is the second or subsequent offense, and unless such special charge is so made, the punishment shall in all cases be as of the first offense." Since *Inwood v. State*, 42 Ohio St. 186, it has not been disputable in this state that the General Assembly may provide for the trial, without the intervention of a jury, of offenses of the character of this, where imprisonment is not a part of the punishment. By section 3718a, Rev. St. 1892, jurisdiction of these cases has been conferred upon justices of the peace. *State of Ohio v. Ruedy*, 57 Ohio St. 224, 48 N. E. 944. There is no provision of the statute for summoning a jury, except upon the condition prescribed in the section referred to: "In any such prosecution where imprisonment may be a part of the punishment, if a trial by jury be not waived," Since the defendant, as a justice of the peace, was vested with jurisdiction to try the accused, and was without authority to call a jury for the trial of the charge preferred by this affidavit, his refusal to try the accused without a jury is a refusal to exercise his jurisdiction.

In support of the demurrer, it is further insisted that mandamus will not lie to compel the performance of the suggested duty, be-

cause the defendant has decided that he is without jurisdiction, and that decision, if erroneous, can be corrected only by a proceeding in error. No statute authorizing a proceeding in error for the reversal of such a decision has been pointed out, nor does this view of the subject admit the well-recognized office of the writ of mandamus. Formerly the writ of procedendo ad iudicium was awarded by a court of superior jurisdiction to compel an inferior tribunal to proceed in cases where it refused to act because doubtful of its jurisdiction, or satisfied that it had none. It was, in substance, a writ of mandamus, though having a peculiar name because of its office in the particular case. But in modern practice the distinction in name has disappeared, and mandamus is allowed, not to control discretion, but to compel its exercise. In *re Turner*, 5 Ohio, 542; *State ex rel. v. McCarty*, Judge, 52 Ohio St. 363, 39 N. E. 1041, 27 L. R. A. 534.

Demurrer overruled, and peremptory writ allowed.

BURKET, C. J., and SPEAR, DAVIS, PRICE, and CREW, JJ., concur.

(69 Ohio St. 211)

STATE v. ARATA.

(Supreme Court of Ohio. Nov. 17, 1903.)

PURE-FOOD LAW—SALE OF OLEOMARGARINE—AFFIDAVIT

1. An affidavit which charges a person with selling and delivering oleomargarine, which, when so sold, contained coloring matter, to wit, butter yellow, sufficiently charges a violation of sections 4200-18, 4200-19, 4200-20, Bates' Ann. St., notwithstanding it contains descriptive words which partially, but not wholly, bring the substance sold within the statutory definition of oleomargarine.

(Syllabus by the Court.)

Exceptions from Court of Common Pleas, Hamilton County.

Nicholas J. Arata was prosecuted before a justice of the peace of Hamilton county under the pure-food laws, and was found guilty by a jury, as charged in the affidavit, of selling oleomargarine containing coloring matter. Thereupon, on the same day, judgment was given on the verdict, and the defendant was fined in the sum of \$50 and costs. The affidavit charged that "on or about the twenty-fifth day of February, A. D. 1901, at the county of Hamilton and state of Ohio, one Nicholas J. Arata unlawfully did sell and deliver to the said Anthony Sauer, dairy and food inspector of the state of Ohio, one-half ($\frac{1}{2}$) pound of oleomargarine, said oleomargarine being a substance not pure butter, and containing only three and seventy-seven hundredths (3.77) per cent. of butter fats, which said oleomargarine, when so sold as aforesaid, contained coloring matter, to wit, butter yellow, contrary to the statute in such case made and provided, and against the peace and dignity of the state of Ohio." On petition in error in the court

of common pleas the judgment of the justice of the peace was reversed on the ground that the affidavit filed with the justice of the peace, charging the offense, was defective, and that the justice of the peace committed error in overruling the demurrer of the defendant thereto. To this the state of Ohio, plaintiff in error here, excepted. Exceptions sustained.

Scott Bonham, for the State. Edward M. Ballard, for defendant.

PER CURIAM. The affidavit is not defective. It charges Arata with having sold oleomargarine which contained coloring matter, to wit, butter yellow. This is all that is required, because the meaning of the word "oleomargarine," as used in the statute, is defined by the statute itself. The descriptive words contained in the affidavit do not wholly describe oleomargarine as defined in the statute, but do not contradict the charge as made. Therefore, whether they completely describe the substance sold, or not, these words neither add to nor subtract from the meaning of the charge. They are surplusage.

Exceptions sustained.

BURKET, C. J., and SPEAR, DAVIS, SHAUCK, PRICE, and CREW, JJ., concur.

(69 Ohio St. 184)

NORTHERN OHIO RY. CO. v. RIGBY.

(Supreme Court of Ohio. Nov. 17, 1903.)

TRIAL—INSTRUCTIONS—INJURY TO EMPLOYÉ—DIRECTIONS OF FOREMAN—DISCRETION OF EMPLOYÉ—CONTRIBUTORY NEGLIGENCE

1. A special charge to the jury requested by a party to an action, which is based on the assumption that a material fact exists in the case, but which fact is in dispute between the parties, is properly refused.

2. In the trial of an action brought by an employé against a railway company to recover for injuries sustained by the explosion of a car heater on a passenger coach while he was attempting to thaw out the frozen water pipes while the car was standing in the yards of the company, and where the evidence tends to prove that the heater was without a steam gauge, to the knowledge of the employé, and that the explosion was caused by the use of a solid plug in the drum of the heater, instead of a safety valve, which plug was put in by the employé a few days before the explosion by direction of his superior, and where the evidence further tends to prove that the employé was an experienced foreman of car repairers, and familiar with the system of heating used on said car, and with the proper method and means of thawing out the water pipes when frozen, and where the only order from the superior was a telegram to get the car ready for use, to charge the jury, without further explanation, that "if you find at the time of the explosion, and for several days prior thereto, there was no safety valve in the drum of the Baker heater in car 22; that said safety valve had been removed and replaced by a solid plug, and that Rigby knew of these facts when he attempted to thaw out said heater at the time of the explosion complained of; and, further, if you find that said explosion resulted wholly from the fact that said drum had a solid plug, instead of a safety

valve—then Rigby would nevertheless be entitled to recover in this action, if you find by a preponderance of the evidence that, in attempting to thaw out said heater as he did, he was acting in obedience to a positive order of his superior; that a person of ordinary prudence would, under the circumstances, have obeyed such order; and that in obeying such order he used ordinary care”—is misleading and erroneous.

3. Where the superior, while absent, sends an order to an employé to perform certain work or duty, but leaves to such employé the selection of the means and manner of performing the service, the doctrine of *Van Dusen Gas & Gasoline Engine Co. v. Schelies*, 55 N. E. 998, 64 Ohio St. 298, does not apply.

(Syllabus by the Court.)

Error to Circuit Court, Summit County.

Action by one Rigby against the Northern Ohio Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

On or about the 4th day of December, 1895, the defendant in error was severely injured in the yards of the plaintiff in error at Delphos, Ohio, by the explosion of what is commonly known as the "Baker Car Heater," which was in passenger coach No. 22, owned and operated by the railway company. The plaintiff below was an employé of the plaintiff in error, as he alleges, in the capacity of foreman of car repairers at the shop of the company on its line of railroad at Delphos, and that his duty was to make and cause to be made such repairs of the cars of the defendant as he might be ordered to make from time to time. The evidence tends to prove that Rigby, plaintiff below, had several years' experience as foreman of car repairers on the line of defendant company, and on other railroads, before engaging with the defendant, and that he also had considerable knowledge of, and experience with, the Baker car heater, and, as a mechanic, possessed a fair knowledge of its construction and mode of operation. The evidence further tends to show that, in the discharge of his duties, he had experience as to the proper method of thawing out the pipes of this system of heating cars when the water circulating therein from the heater had become frozen. This heating system, when in proper condition, was furnished not only with a pressure gauge, but also a safety or pop valve. The safety or pop valve is connected with the drum of the heater on the roof of the car, and its purpose is to furnish relief from excessive pressure. There is evidence tending to prove, and it is not seriously in dispute, that on or about November 25th, preceding the explosion, and while this car No. 22 was standing in the Delphos yards, Rigby was directed to get it ready to go out upon the road, and it was found that the drum of the heater was without the safety or pop valve. The master mechanic, Marshall, was informed of this fact; and, after some discussion, Rigby was told by the master mechanic to put in a plug where the safety valve should be, until valves which had been ordered should arrive. This was done by Rigby, and a solid plug was put in the vent of the drum. The heater was then filled

with water, and fired up ready for the road. It turned out that the car was not needed at once, and the fire was drawn from the heater. The car then stood for several days out of doors in the open yard, in severe, cold weather, and such water as remained in the pipes froze. On the day of the explosion, December 4th, it became necessary to get car No. 22 ready for use on the road the next morning. The evidence shows that Marshall, as master mechanic, telegraphed to Rigby, "Get car 22 ready." In pursuance of this direction or order, Rigby set about to thaw out the pipes, while the pressure gauge was absent, and the plug was in the vent of the drum, instead of a safety or pop valve; and in so doing the explosion occurred, and he was seriously injured. The negligence complained of in the plaintiff's petition, in substance, consists in the company failing to furnish the safety or pop valve as its master mechanic had promised should be put in, and in ordering plaintiff to proceed with the plug in, which, with the weak and defective condition of the heater, caused the explosion and his injuries. The answer of the company denies any defective or weakened condition of the heater, and all negligence on its part, and charges that the plaintiff had full knowledge of the danger of attempting to thaw out the pipes without a safety valve, and negligently proceeded with the work under the circumstances, well knowing the dangers to be encountered, and thus contributed to his injuries.

The defendant company requested the court to give the jury certain instructions, some of which were substantially embraced in the general charge, and others were given in the language requested. The seventh request was not so given, and for this, error is assigned. The request is as follows: "(7) If you find from the evidence that the talk between Marshall and Rigby about putting in the plug in the heater was merely determining the best mode of putting the same in condition for use until the 'pop valves' came, they having equal knowledge of the defect, and the safety of using the same in that condition, and that Marshall telegraphed Rigby to get car No. 22 ready for use, and, under Marshall's order, Rigby went ahead and used the heaters, assuming all the direction as to its use in that condition, the mode of building the fire, and thawing out of the pipes, and had sole charge of the work, then I say to you that the doctrine of promise to repair defective machinery would not apply to him. Under such a state of facts, and in that case, he should be held to assume the risk of the use of such defective heater, and he cannot recover in this case. The promise to repair the defective heater, claimed in this case, must have been made for the benefit of the plaintiff, and to induce him to continue work, and not simply in the interest of the defendant. And if you find from the evidence that it was merely a talk between Marshall and Rigby as to the best way to prepare the car for use—to put a plug in until the pop valves came—both having equal knowledge of

the safety and its use, and was not intended for an order to Rigby to use it against his judgment, then I say to you that the doctrine of promise to repair defective machinery, and continued use by an employé, does not apply, and Rigby would be held to have assumed the risk of the use of the heater in such condition, and he cannot, under such circumstances, recover in this case." Exception was taken to the refusal to give this instruction, as well as to others not given. After argument, the court charged the jury, and special and general exceptions were taken. The jury found for the plaintiff. Defendant's motion for new trial was overruled, and judgment entered on the verdict, which was affirmed by the circuit court, and error is prosecuted here to reverse the judgments of both courts. The questions raised on the general charge are stated in the opinion.

Tibbals & Frank, for plaintiff in error. E. F. Voris and Charles Baird, for defendant in error.

PRICE, J. (after stating the facts). It is disclosed by the record that this case has been thrice tried to a jury, each trial resulting in a verdict and judgment for the plaintiff. The judgments rendered on the first and second verdicts were reversed by the circuit court, but it affirmed the last judgment, and we have the controversies of the last trial before us on the petition in error and a bill of exceptions, which contains all the evidence and the numerous questions of law which arose during the trial.

The assignments of error are many, and they have received our careful consideration. We discover no substantial error in the admission or exclusion of evidence, and all proper instructions asked by the railway company were either given in terms or in substance in the general charge. They were not asked to be given before argument to the jury commenced, and therefore no legal right of plaintiff in error in that respect has been violated.

Defendant's special instructions 4 and 7 were not given as requested, nor can it be said that their substance is embraced in the general charge. But the omission is not error, because the principle sought to be impressed by each request seems to be predicated upon the assumption of an important fact which was in dispute between the parties. This prominently appears in request 7, found in the statement of this case. It opens as follows: "If you find from the evidence that the talk between Marshall [the master mechanic] and Rigby about putting in the plug in the heater was merely determining the best mode of putting the same in condition for use until the pop valves came—they having equal knowledge of the defect, and the safety of using the same in that condition—and that Marshall telegraphed Rigby to get car No. 22 ready for use, and, under Marshall's order, Rigby went ahead and used the heaters, assuming all the direction as to its

use in that condition, the mode of building the fire, and thawing out of the pipes, and had sole charge of the work, then I say to you that the doctrine of promise to repair defective machinery would not apply to him. * * * " The railway company introduced evidence tending to prove that Rigby had skill and knowledge concerning the system of heating equal and even superior to that of Marshall, the master mechanic, and that he was able to act, and in this case did act, on his own knowledge, skill, and judgment. However, the plaintiff denied this, and asserts that his knowledge and skill are inferior, and that he relied on the judgment and directions of Marshall. Hence it would have been error for the court to assume that they had equal knowledge on the subject, and on that assumption base an instruction calculated to materially affect the verdict.

We now come to the general charge of the court. To this charge counsel for the railway company have devoted much criticism, and urge that the law applicable to the issues and facts of the case was not given the jury, and that improper rules were submitted for its consideration, bearing on the risks assumed by Rigby, the duties of the railway company touching the same subject, the charge of contributory negligence made in its answer, and the promise of the superior to the employé to replace the plug with a safety valve. We are of the opinion, however, that the charge does not justly deserve all that has been said about it; and, if the court had left it with the jury when it seems to have reached a proper close, we could find no sufficient reason for a reversal of the judgment. But the court did not stop where the charge properly ended. This language follows: "Now, gentlemen, this case has occupied a number of days, and the evidence covers a wide field of inquiry, and, as you see from the somewhat lengthy instruction I have given you, that numerous questions of law arise. I have endeavored to give you them as clearly as I possibly could, but, in view of their length, it is possible that men not familiar with the examination of legal questions might not readily apprehend them. Therefore, in connection, I will summarize what I have thus said, and make it, as near as I can, applicable to the particular case before you." The summary was made, and, after being introduced by the foregoing language, it would be quite natural for the jury to lose sight of much that had been said during the progress of the long charge, and look to the attempted summing up of the whole matter within a much smaller compass, and which it would more readily grasp and remember. If the summary was free from fault, this would be well. On the other hand, if it embraces the virus of serious error, the same became the more conspicuous and controlling with the jury. Less than two pages of the printed record contain the summary, of which we find the following on page 531:

"If you find at the time of the explosion, and for several days prior thereto, there was no safety valve in the drum of the Baker heater in car 22; that said safety valve had been removed and replaced by a solid plug, and that Rigby knew of these facts when he attempted to thaw out said heater at the time of the explosion complained of; and, further, if you find that the said explosion resulted wholly from the fact that said drum had a solid plug, instead of a safety valve—then Rigby would, nevertheless, be entitled to recover in this action, if you find by a preponderance of the evidence either that, in attempting to thaw out said heater as he did, he was acting in obedience to a positive order of his superior; that a person of ordinary prudence would, under the circumstances, have obeyed such order, and that in obeying such order he used ordinary care, or that Rigby informed his superior of the want of a safety valve in said drum, and that said superior ordered him to put in a solid plug, and to use said drum with a solid plug, and then promised Rigby to have said solid plug promptly replaced by a proper safety valve, and that Rigby, in reliance upon such promise, continued in the employ of the Northern Ohio Railway Company, and that a reasonable time to replace said plug had not elapsed between said promise and said explosion; and that, in getting said car 22 ready for the road at the time of the explosion, he used reasonable and ordinary care, unless you find that no ordinarily prudent man would, under all the circumstances, have continued in such employment, and obeyed such order."

To say the least of this paragraph, it is very much involved, and, if there was any confusion in the preceding instructions, it became worse confounded in this summary. The jury was told that if there had been no safety valve in the drum of the heater for several days; that it had been removed, and replaced by a solid plug, of which facts Rigby had knowledge when he attempted to thaw out the heaters, and if the explosion resulted wholly from the fact that the drum had a solid plug, instead of a safety valve—"then Rigby would nevertheless be entitled to recover," if the jury should find, from a preponderance of the evidence, either that in attempting to thaw out the heater he was acting in obedience to a positive order of his superior, which a prudent person, under the circumstances, would have obeyed, or that if the jury find that Rigby had informed his superior of the want of a safety valve, who informed him to put in the solid plug, and so use the heater until the plug could be replaced by a safety valve, and Rigby relied on the promise, and continued in the employ of the railway company, and a reasonable time in which to replace the safety valve had not elapsed at the time of the explosion, provided he used ordinary care, unless the jury found that no ordinarily prudent man

would have continued in the service and obeyed such order.

We have endeavored to analyze this paragraph, and place the component parts in such juxtaposition with each other as to convey a clear meaning, but without success. It starts abruptly, and as it is unfolded it becomes more complex. The premises for the principle inculcated are laid after its assertion, and the paragraph ends with a qualification which reflects no light on what precedes it. The evidence at least tends to prove that Rigby had taken the safety valve from car 22, and put it on the drum of the heater of another car, and this, too, several days prior to the explosion. True, it was done after consultation with Marshall, and by his directions. Another fact which the evidence tends to prove is that there was no steam pressure gauge on the heater in car 22, and had not been for several days, which fact was well known to Rigby. The evidence further tends to prove that Rigby, beside the knowledge of this condition of the heater, possessed large experience as foreman of car repairers, and also had considerable experience with the Baker system of heating, and the method of thawing out the pipes when frozen. Such being the state of the evidence, the court, in its summary, in effect, says that, although Rigby knew of the absence of the valve, he might "nevertheless recover, if he was acting in obedience to a positive order of his superior," where a person of ordinary care would have obeyed such order. The order relied on as inducing Rigby's conduct on the day of the explosion came by wire from Marshall: "Get car 22 ready." We are not directed to any other order, and we discover none other in the record. It seems to be conceded that such was at least the substance of the order. The court speaks of this as a positive order, obedience to which enters into one of the conditions of recovery. It may be a positive order to get the car ready, but it is silent as to the means to be used in that behalf. It prescribes no means or method, and it may be quite true that Marshall, at the time the message was sent, was not aware that the pipes were frozen. The order may have implied thawing out of the pipes, if necessary to get the car ready, but Rigby was left to use his own judgment as to the manner of performing the duty. The natural tendency of the instruction was that the order to get the car ready implied the use of the means which Rigby adopted in thawing out the pipes. To prevent such misunderstanding on the part of the jury, the court should have been more explicit on the vital and perhaps turning point in the case. The balance of the paragraph stating the other condition of recovery is equally unfortunate in its language, and we think, as a whole, it is erroneous and misleading.

Without further comment, we very reluctantly conclude that for this error the

judgment must be reversed, and the cause remanded for another trial. Judgment reversed.

BURKET, O. J., and SPEAR, DAVIS, SHAUCK, and CREW, JJ., concur.

(205 Ill. 370)

METROPOLITAN LIFE INS. CO. v. PEOPLE.*

(Supreme Court of Illinois. Oct. 26, 1903.)

APPEAL FROM APPELLATE COURT — ASSIGNMENT OF ERRORS—NECESSITY OF APPEARANCE IN RECORD.

1. Where, on appeal from the Appellate Court, no assignment of errors appears in the record, the case cannot be reviewed; and it is immaterial that the abstract shows such an assignment.

Appeal from Appellate Court, Fourth District.

Action by the people against the Metropolitan Life Insurance Company and another. From a judgment of the Appellate Court, Fourth District (106 Ill. App. 516), affirming a judgment for plaintiff, defendant company appeals. Dismissed.

Whitnel & Gillespie, for appellant. David J. Cowan, for the People.

PER CURIAM. This was a penal action of debt brought by the state's attorney of Johnson county against the Metropolitan Life Insurance Company and P. A. Johnson, its agent, for the alleged violation of the provisions of the statute prohibiting discrimination and distinctions between insureds of the same class and equal expectation of life. The trial court found against the defendant insurance company, and an appeal was taken to the Appellate Court for the Fourth District, where the judgment of the court below was affirmed. The case comes here by further appeal from the judgment of the Appellate Court.

A careful examination of the entire record fails to disclose any assignment of errors on the record of the Appellate Court. Such omission leaves this court without authority to proceed. The assignment of errors stands in the place of a declaration, and a judgment of this court in the absence of such assignment would be erroneous. The abstract of record contains an assignment of error, but the abstract is not a true abstract of the record, for the reason that the record contains no such assignment. It is not sufficient that the abstract shows an assignment which is not in the record. *Ditch v. Sennott*, 116 Ill. 288, 5 N. E. 395; *Benneson v. Savage*, 119 Ill. 135, 11 N. E. 66; *Ætna Life Ins. Co. v. Sanford*, 197 Ill. 310, 64 N. E. 377; *Hall v. People*, 197 Ill. 567, 64 N. E. 543.

The appeal will be dismissed. Appeal dismissed.

*Rehearing denied December 9, 1903.

(206 Ill. 15)

Appeal of WILMERTON.

(Supreme Court of Illinois. Dec. 16, 1903.)

TAXATION—BOARD OF REVIEW—ASSESSMENT OF PROPERTY OMITTED FROM ASSESSMENT—APPEAL.

1. Hurd's Rev. St. 1899, p. 1452, c. 120, § 35 relating to the assessment of property, and providing for an appeal from an assessment if the board of review shall decide that property claimed to be exempt is liable to be taxed, limiting the appeal to the single question whether the property assessed is exempt from taxation, does not authorize the court to review the action of the board in making assessments for personal property subject to taxation, and alleged to have been omitted from assessment for preceding years, though the owner had been assessed for the same kind of property during such years; the matter coming under the head of double assessment, and not raising the question of exemption from taxation.

2. Laws 1895, p. 301, § 29a (Hurd's Rev. St. 1899, p. 1398), requires the stockholders of building and loan associations to list for taxation, with the local assessor where such stockholders reside, the number of shares of stock owned by them, and the value thereof; section 29b relates to the taxation of nonresident stockholders; section 29c provides for the determination of the value of the stock; and section 29d provides that the shares of stock and property of every such building and loan association shall be assessed as herein provided, and not otherwise. *Held*, that these sections, enacted after the decision in 1894, holding that Laws 1887, p. 131, and Laws 1891, p. 88, exempting from taxation shares of stock in building and loan associations, is unconstitutional, do not authorize the board of review to assess the stock against the individual stockholder for preceding years as omitted property.

Appeal from Mercer County Board of Review.

William Wilmerton appeals from an assessment by the board of review of Mercer county. Action of board sustained in part and reversed in part.

Appellant is, and has been for many years, a resident and taxpayer of Pre-emption township, Mercer county. In 1902 he was cited before the board of review of that county, and inquired of concerning his personal property subject to assessment. After a hearing covering parts of several days, and at which many witnesses were heard, the board found and decided that certain assessments should be, and were accordingly, made against appellant for personal property omitted from assessment for the years 1890 to 1901, inclusive, and entered their order specifically designating the property so alleged to be omitted. It is not necessary that we set out the order in extenso, but the properties so assessed, and the years, are as follows: Homestead Building & Loan stock for the year 1890, \$17,000; for the year 1891, \$34,000; for the year 1892, \$50,000; for the year 1893, \$34,000; for the year 1894, \$17,000. On personal promissory notes and promissory notes secured by mortgage, for the year 1890, \$57,743; for the year 1891, \$52,203; for the year 1892, \$48,124; for the year 1893, \$8,722; for the year 1894, \$32,726; for the year 1895, \$42,303; for the year 1896, \$60,634; for the year 1897, \$70,606; for

the year 1898, \$65,079; for the year 1899, \$82,440; for the year 1900, \$13,405; for the year 1901, \$18,748. On cash in bank for the year 1900, \$7,866. After setting forth the above properties in clear and apt language, the board of review made the following order relative thereto: "Which assessments for omitted personal property for the years as above set forth were accordingly made by the board of review, and the same ordered to be placed on the assessor's book for the township of Pre-emption for the year A. D. 1902, against the said William Wilmerton. In each case the total valuation is given in the foregoing amounts." The assessment as made by the supervisor of assessments for the year 1902 was not changed by the board. An appeal was prayed, and the matter duly certified to the auditor, and through him to this court.

McCaskrin & McCaskrin and Connell & Thomason, for appellant. H. J. Hamlin, Atty. Gen., W. J. Graham, State's Atty., and McArthur & Cooke, in support of decision of board of review.

RICKS, J. (after stating the facts). By the appeal before us many questions are presented which we are not permitted to consider. The right of appeal is purely a statutory one, and in this case is limited to the single question whether the board has decided that property exempt from taxation is liable to be taxed. *Hurd's Rev. St. 1899*, p. 1452, c. 120, § 35; *Keokuk Bridge Co. v. People*, 185 Ill. 276, 56 N. E. 1049; *Dutton v. Board of Review*, 188 Ill. 386, 58 N. E. 953. So far as relates to the personal promissory notes and notes secured by mortgage, which matters are classed by statute as "credits," and as to the cash in bank, there is nothing for us to consider. These properties are such as may properly be assessed against appellant, and the only question made is as to that portion that may be classed "credits."

As to such portion, it is said by appellant that, if it be conceded that the board had the right and power to assess omissions in years prior to 1902, still the character of property assessed is not such as can be reviewed; that the property assessed as being omitted is confined to notes, mortgages, bank account, and building and loan stock; that no personal property, such as cattle, horses, hogs, and other effects, was included, but if the assessor of Pre-emption township attempted to go back and assess for former years he could not go back and pass upon the acts of his predecessor on notes, loan stock, etc.; that the board of review is not vested with greater power than that possessed by the assessor prior to the creation of said board. In support of this contention appellant cites the case of *Allwood v. Cowen*, 111 Ill. 481. It may first be remarked that the stock of building and loan associations and cash in bank are not among the properties authorized to be listed as "cred-

its," and that as to such properties as are authorized to be listed as "credits" this court expressly held in *Sellars v. Barrett*, 185 Ill. 466, 57 N. E. 422, that where such property was omitted it could be added and assessed as omitted property at any subsequent time or year; the only distinction being that if, during any or each of the years for which the omitted credits were assessed, it should be made to appear that the objector had in fact been assessed for credits during any one or all of such years, then the assessor who made the assessment for credits having exercised a semijudicial authority, or having exercised a discretion in making such assessment on credits, his acts in subsequent years are not reviewable by other assessors or the board of review. If the position contended for is conceded to be sound, it would still not be a matter we could consider on appeal. It would come under the head of double assessment, and not upon the question of exemption from taxation.

Touching the matter of the building and loan association stock assessed for the years 1890 to 1894, inclusive, we are disposed to the view that if it shall appear to be the law that during such period the property in question could not, under the law or under any conditions, have been assessed to appellant, then it is such property as would come within the definition of exempt property, within the rule laid down in *Dutton v. Board of Review*, supra. By the act relating to building, loan, and homestead associations, as amended in 1887 (*Laws 1887*, p. 131) and 1891 (*Laws 1891*, p. 88), by section 11 the stock of such associations was declared to be not subject to taxation, and such remained both the law and practice, with reference to such stock, until the decision in the case of *People's Loan & Homestead Ass. v. Keith*, 153 Ill. 609, 39 N. E. 1072, 28 L. R. A. 65, wherein it was held that such attempted exemption was in violation of the requirement of the Constitution and void, and that such property should be listed by the corporation and taxed to it. In that case the stock was assessed to the association, and it sought to enjoin the collection of the tax, and relied upon the exemption as declared in the acts of 1887 and 1891, above mentioned. After holding that the property could not be exempted by the act of the Legislature, it was said (page 621, 153 Ill., page 1075, 39 N. E., 28 L. R. A. 65): "In view of these facts, the Legislature, under the power conferred by the Constitution to regulate the manner of ascertaining the fair valuation of property subject to taxation and the mode to be adopted in the assessment, has provided, by general law, that the whole assessment shall be made against the corporation. In doing this the Legislature did not intend to exempt any property from taxation, and no property was exempted from taxation. The Legislature, in order to avoid confusion and complication in the assessment, determined, as it had the right to do, that the whole tax

should be collected from the corporation itself. In adopting this mode of assessment no property was exempted from taxation, but the whole burden was cast on the corporation, leaving it to adjust the matter between itself and its stockholders, as it might think best."

The above opinion was filed at the October term, 1894. In April, 1895, following the decision in the above case, the revenue law was amended by adding certain sections, designated by the act as 29a, 29b, 29c, 29d (Laws 1895, p. 301; Hurd's Rev. St. 1899, pp. 1398, 1399). By section 29a the stockholders of such association are required to list for taxation with the local assessor where such stockholders reside the number of shares of stock of such association owned by them, respectively, and the value thereof. Section 29b relates to nonresident stockholders, 29c as to the determination of the value of the stock, and 29d provides: "The shares of stock and property of every such mutual building, loan and homestead association shall be assessed as herein provided and not otherwise." This is the first legislative declaration authorizing or requiring stock in such associations to be listed and taxed to the stockholder. All the stock listed by the board of review against the appellant as omitted property is for years prior to the year 1895. Although under the authority of the Keith Case, *supra*, the stock prior to 1895 could and ought to have been assessed to the association, we cannot say that it could or ought to have been assessed to the appellant. The amendment of 1895 to the revenue act does not purport to be, and we think cannot be held to be, retroactive in its operation, and authorize or require property that theretofore was assessable to the corporation, even though omitted, to be, after its passage, assessed against the individual stockholder as omitted property.

Such being our view, the action of the board of review, except in so far as it relates to the building association stock, is approved and sustained; but in so far as such building association stock is sought to be assessed as omitted property against appellant it is disapproved, and not sustained.

Action of board sustained in part.

(206 Ill. 133)

DUNFEE et al. v. MUTUAL BLDG. & LOAN ASS'N.

(Supreme Court of Illinois. Dec. 16, 1903.)
BUILDING ASSOCIATIONS—MORTGAGE FORECLOSURE—JUDGMENT BY DEFAULT—APPEAL—EXTENT OF REVIEW.

1. Where, in a suit to foreclose a building association mortgage, a decree pro confesso was entered against appellants, the bill was sufficient to authorize the decree and was supported by the findings of the master, to whose report no exceptions were filed, and the decree was in accordance with the averments of the bill, appellants were not entitled to a reversal on the ground that the amount of the decree was excessive.

2. Where, in a suit to foreclose a building association mortgage, appellants made default,

they were not entitled to a reversal of a decree on the ground that it included \$700 premium paid by the mortgagor at the time the loan was granted, which was deducted from the principal sum by the association and never received by him, such objection being a matter resting in pais, and not renewable.

Appeal from Appellate Court, First District.

Bill by the Mutual Building & Loan Association against Jonathan Dunfee and others. From a decree in favor of complainant, affirmed by the Appellate Court (101 Ill. App. 477), defendants appeal. Affirmed.

Lloyd G. Kirkland, for appellants. F. Wm. Kraft, for appellee.

RICKS, J. The record in this case discloses the following facts: Jonathan Dunfee, one of the appellants, being a member of the Mutual Building & Loan Association, which association is organized under the laws of the state of Illinois, procured a loan of \$3,800, to secure the payment of which he, jointly with his wife, Virginia Dunfee, executed a bond, further secured by a mortgage upon certain real estate, in favor of appellee. The contract between the parties, as evidenced by said bond and mortgage, contained the customary provision stipulating for the prompt payment of the principal, interest, premium, and any fines levied or becoming due according to the by-laws of the association; that in the event of default in the payment of such installment of principal, interest, or premium for six months, then the whole of the indebtedness thereby secured might, at the option of the association, become immediately due and payable, and that an attorney's fee of 10 per cent. should be added in case legal proceedings should be instituted on said bond and mortgage. A breach of the condition of said bond and mortgage having occurred by reason of default in payment of dues and interest, a bill was filed by appellee in the superior court of Cook county, in which proceedings appellants and Ellis B. Fitch were defendants. The bill sets up in detail the making of said loan, the execution of the bond and mortgage (fully describing them), with the specific averment "that there now remains due and unpaid on account of the said indebtedness the amount of said loan, interest on the same, fines levied on said stock, and attorney's fees, as above set forth." Appellants did not appear, but allowed their defaults to be entered. Ellis B. Fitch entered his appearance and filed an answer making a general denial, but did not set up any new matter. Replication was filed and the cause referred to a master in chancery, and a report was made by the master recommending a decree for sale, as prayed in the bill. The court entered a decree for sale, which recited, *inter alia*, that it was entered upon the bill of complaint taken as confessed by said Jonathan Dunfee and Virginia Dunfee, the answer of Ellis B.

Fitch, the replication thereto, and the report of the master. A writ of error was sued out of the Appellate Court by Jonathan and Virginia Dunfee to review the record made by the trial court, and upon a hearing in the Appellate Court a judgment was entered affirming the decree, and an appeal is prosecuted to this court.

The only error assigned is of the Appellate Court affirming the decree of the superior court, and in not reversing and remanding the cause.

The only proposition argued by appellant is that the judgment is too large; that the chancellor should have reduced the amount of the decree \$144.40 on account of fines erroneously assessed; also the solicitor's fee of \$346.47, and premium of \$700—making a total of \$1,250.87 claimed by appellant as being in excess of what the decree should have been.

The bill alleges that Jonathan Dunfee applied to and obtained a loan of \$3,800; and further alleges that the by-laws of said association provide that every member should pay a fine of 5 cents per share for each delinquency in the payment of monthly installments and 10 cents per share for each delinquency in the payment of interest, and that the fines should be doubled at the expiration of six months; that said mortgage provides, in the event of its foreclosure, for an addition to the amount of indebtedness of 10 per cent. of said principal, interest, and costs for solicitor's fees; that there now remain due and unpaid, on account of said indebtedness, the amount of said loan, interest on the same, fines levied on said stock, and attorney's fees, as above set forth.

The master's report shows the whole of the principal amount of \$3,800 due and unpaid, and fines for nonpayment of interest and installments to the amount of \$144.40; and further finds that the mortgage provided for 10 per cent. additional to the amount of the indebtedness for attorney's fees, which amount would be \$346.47; and recommended a decree of foreclosure in accordance with the bill and findings. No exceptions were made to the master's report, and the decree is in accord with the findings of the master. "Under a decree pro confesso a defendant cannot, on error, allege the want or insufficiency of the testimony, or the insufficiency or amount of the evidence that may have been heard by the court entering the decree. Where the defendants are persons not under disability, and a default is entered, a decree pro confesso follows as a matter of course. Such decree, if warranted by the averments of the bill, is unassailable." *Monarch Brewing Co. v. Wolford*, 179 Ill. 252, 53 N. E. 583; *Roby v. Chicago Title & Trust Co.*, 194 Ill. 228, 62 N. E. 544. The averments of the bill are supported by the findings of the master, and the evidence supports the master's findings, and the decree being in accord with the averments of the

bill, and such averments being sufficient to authorize the decree, we would not be warranted in reversing the decree.

Appellants' contention that the decree should be reversed for the reason \$700 included in the decree was the premium bid by him at the time the loan was granted, and was deducted from the principal sum by the association and never received by him, is a matter that rests in pais, and, appellants having made default, the question is not open for our consideration.

Finding no error in the record, the judgment of the Appellate Court is affirmed. Judgment affirmed.

(206 Ill. 42)

PEOPLE, to Use of MASTERSON, v. HATHAWAY.

(Supreme Court of Illinois. Dec. 16, 1903.)

EXECUTION—CIVIL ARREST—BAIL—ORDER DISCHARGING PRISONER—EFFECT—PETITION FOR EXONERATUR—DENIAL—RES JUDICATA.

1. Hurd's Rev. St. 1901, c. 16, § 24, provides that when any defendant in a civil action has been discharged as an insolvent debtor, or under any federal bankrupt law, and the certificate of the authority lawfully granting the same is produced to the court, the bail of such defendant shall be entitled to have an exoneretur entered, which shall operate as a discharge from the bond, the same as if he had surrendered his principal. *Held*, that the denial of an exoneretur sought on the ground of the principal's discharge in bankruptcy, and refused because the judgment on which the capias had issued did not represent a debt embraced in the discharge, was not res judicata of the bail's general liability on the bond, though the petition had also prayed that an order might be entered discharging the bail from liability and for other relief.

2. An order directing the discharge from arrest of a debtor who has taken the benefit of the insolvent law releases his bail bond, since it terminates the right of the bail to arrest and surrender him; and the fact that the order of discharge is afterwards reversed on appeal, and the debtor ordered to surrender himself, is immaterial.

Appeal from Appellate Court, First District.

Action by the people, to the use of E. S. Masterson, against Carrie B. Hathaway. From a judgment of the Appellate Court (102 Ill. App. 628) affirming a judgment in favor of defendant, plaintiff appeals: Affirmed.

This is an appeal from a judgment entered by the Appellate Court for the First District affirming a judgment rendered by the circuit court of Cook county in an action against appellee on a bond.

The facts, stated in the main as they were by the Appellate Court, are as follows: William C. Furman was arrested on a capias ad satisfaciendum upon a judgment obtained against him, in the circuit court of Cook county by E. S. Masterson, for \$400 and costs. Furman sought to be discharged by petition filed in the county court under the insolvency act, offering to schedule all of his assets, claiming that malice was not the gist of the

action. Pending a hearing of his petition the county court admitted him to bail, and on the 5th of July, 1899, the appellee, Carrie B. Hathaway, became his surety, and he was released from custody pending a hearing of his petition. The condition of the bond of appellee is that Furman shall appear before the county court on the 6th day of July, 1899, at 10 o'clock in the forenoon, and from day to day thereafter, until said matter shall be finally disposed of by said court, and shall make an assignment and surrender his assets, if required, and, if not required to make assignment, shall surrender himself to the officer into whose custody he may be ordered by the court, and abide the order of the court. The hearing of the petition was continued from day to day until the 26th of July, 1899, when the county court found that malice was not the gist of the action wherein the capias issued, and ordered that Furman be discharged from arrest and custody. Thereupon, and by the same order, Masterson, the creditor, appealed from that order. An appeal was allowed on his filing, on or before September 12, 1899, a bill of exceptions and bond in the penal sum of \$250, with sureties thereon to be approved by the court. On the 11th day of September, 1899, on the motion of Masterson, it was ordered that the time for him to file a bond and bill of exceptions be extended 10 days. On the 20th of September, 1899, the appeal bond of Masterson was approved and filed. The Appellate Court, upon hearing of the appeal, found that malice was the gist of the action, and reversed the order of the county court, and on the 19th of June, 1900, the cause was redocketed in the county court, and upon due notice to Furman an order was entered that the body of William C. Furman be remanded to the custody of the sheriff of Cook county in accordance with the writ of capias ad satisfaciendum, which writ was set out in the order, and it was further ordered that Furman surrender himself into the custody of the sheriff of Cook county, Ill., instant. On the 27th day of June, 1900, appellee filed in said cause her petition, setting forth substantially the foregoing. The petition further states that Furman was on the 19th day of July, 1899, discharged in bankruptcy, and prays that exoneration be entered, in accordance with section 24, c. 16, of the Revised Statutes of Illinois (Hurd's Rev. St. 1901), and prays that such exoneration may be entered upon the records of the court, that an order may be entered discharging her from liability under her bond, and for such other relief as to the court may seem meet and proper. An answer was filed and a hearing had on said petition, and on the 27th day of June, 1900, the prayer of appellee's petition was denied, which judgment was, on writ of error to the Appellate Court, by the Appellate Court affirmed. Demand having been made of Carrie B. Hathaway to surrender the body of William C. Furman or pay the amount of the judgment against him, and she having refused

to do either, suit was brought upon the bond given in the county court on July 5, 1899.

Appellant contends that Carrie B. Hathaway applied to the county court to discharge her from the bond she had given, that the county court decided the matter against her, that that order has never been reversed, and therefore the question of her right to discharge and her liability under the bond is now *res judicata*, and she cannot have a second hearing on the same matter in this court. Appellant also contends that the condition of the bond has not been performed, and that Carrie B. Hathaway is liable, irrespective of the question of former adjudication. Appellee contends that the question of her liability on the bail bond sued on is not, by reason of the denial of her petition praying that an exoneration be entered thereon in the county court, *res judicata*; and also that by the appearance of Furman in court on July 26, 1899, the condition of the bond was performed.

The case was tried before a judge, without a jury, upon a stipulation of facts. The trial court found the issues for, and rendered judgment in behalf of, appellee, defendant below.

Masterson, Haft & Dandridge, for appellant. Herbert J. Davis and Percy B. Davis, for appellee.

RICKS, J. (after stating the facts). The propositions argued by appellant in support of this appeal are: (1) That the question of the right to a discharge, as bail, by appellee, is *res judicata*, and cannot here be insisted upon by appellee as a defense to the present action; (2) that the condition of the bond has not been performed.

As to the first proposition, the contention of appellant is that the petition filed by appellee in the county court, by means of which application was made for appellee's discharge as bail, presented to that court the same matters that are now relied on as a defense, and appellee having been unsuccessful in that petition, and an exoneration having been denied, the questions there raised and decided adversely to appellee became *res judicata*. In that proceeding the petition specifically prayed that an exoneration be entered under section 24 of chapter 16 of the Revised Statutes (Hurd's Rev. St. 1901), which is as follows: "When any defendant in any civil action shall have been discharged as an insolvent debtor, agreeably to the laws of this state respecting insolvent debtors, or under any bankrupt law of the United States, and a certificate from the authority lawfully granting the same shall be produced to the court, the bail of such defendant shall, in all cases, be entitled to have an exoneration entered upon the records of the court, which shall, thereupon, operate as a discharge from the bond in the same manner as if he had surrendered his principal in court, or to the sheriff, as hereinbefore directed: provided, that judgment shall not have been recov-

ered against him as the ball of such defendant."

As we regard it, the only question presented to the court on the application of appellee just mentioned was whether appellee, according to the provisions of said section, was entitled to an exoneretur, and, though it was there adjudged that appellee was not entitled to such discharge, she is not now precluded, in another and different action, from setting up matters of defense improper to be urged on the application addressed to the county court. The decision of the court in that proceeding was limited to the finding that on the showing there made, and under the provisions of said section, an exoneretur must, in the opinion of the court, be denied. As a defense to the present suit on appellee's bond, other matters may legitimately be urged that would not be proper in support of a petition for an exoneretur under the section above referred to.

We are inclined to the view, contended for by appellee, that the only thing which became *res judicata* by reason of the refusal of the county court to enter an exoneretur on the bail bond, as prayed, was the question of the right of appellee to urge the discharge in bankruptcy of the principal in defense to an action on the bond, and the closing prayer of the petitioner in that application, "that an order may be entered discharging her from liability under said bond, and for such other relief as to the court may seem meet and proper," was simply a formality of pleading, and surplusage, and called for an exercise of power not conferred upon the court by said section. The right to an exoneretur under said section is confined to the bail of "any defendant in any civil action [who] shall have been discharged as an insolvent debtor, agreeably to the laws of this state respecting insolvent debtors, or under any bankrupt law of the United States, and [when] a certificate from the authority lawfully granting the same shall be produced to the court." The order of discharge of William C. Furman discharged him "from all debts and claims which are made provable by said acts against his estate," etc. This order was made a part of appellee's petition to the county court, and it was by virtue of it and the provisions of section 24, *supra*, that the petitioner claimed to be entitled to the relief prayed. On the hearing of that petition the exoneretur was denied, and on writ of error to the Appellate Court the judgment of the county court was affirmed. The opinion of the Appellate Court (102 Ill. App. 628) on said writ of error recites: "The petition of plaintiff in error sets forth that William C. Furman had been discharged from all debts and claims, * * * except such debts as are by law excepted from the operation of a discharge in bankruptcy. * * * It does not appear that the judgment against him in favor of Masterson is one of the debts from which Fur-

man was discharged." The court further held that there was no occasion for the granting of the exoneretur under said petition, for the reason that petitioner (appellee) had a good defense to a suit against her as bail, which suit was at that time pending. Thus it will be seen that in the proceeding for an exoneretur the court did not assume to pass upon, as we think it had no right to do, matters that in this proceeding are now urged as a defense, hence the position as to *res judicata* taken by appellant in this action cannot be sustained.

The only other point that it is necessary for us to consider in this case is whether appellee fulfilled the obligation of her bond, or, in other words, was she for any cause relieved of that undertaking? As set forth in the statement preceding, on the trial in the county court on the petition of appellee's principal, William C. Furman, for discharge from arrest, that court entered an order July 5, 1899, that the petitioner be released on bond, and the cause, having been continued from time to time, was finally disposed of, so far as the bail was concerned, on July 26, 1899, on which day said court entered an order which was, in substance, that petitioner's prayer be granted, and that he (William C. Furman) be discharged from arrest on the ground that malice was not the gist of the action in the judgment on which petitioner was arrested, and that he had made a fair and complete schedule of his personal estate, etc. The effect of this order, in our view, was to release appellee from obligation, as bail, to thereafter have her principal, William C. Furman, before said court and surrender him to the custody of its officers. The obligation of the bail in this class of cases is to produce the principal before the court upon demand, and at any and all times surrender him up in accordance with its mandates. But this obligation is one of which the bail may be relieved at any time by a voluntary surrender of the principal. In contemplation of law the principal is in the custody of his bail, who may take him where he pleases, and detain him or surrender him in court into the custody of the sheriff, who has process against him, or, if the bail concludes his principal meditates flight, or for any reason desires no longer to be held responsible for the appearance of the principal, he may cause him to be imprisoned in the common jail of the county, and thus exonerate himself from his obligation. *Parker v. Bidwell*, 3 Conn. 84; *Ruggles v. Corey*, Id. 419.

In *Lockwood v. Jones*, 7 Conn. 432, in speaking of the obligation assumed by and the rights of one who becomes special bail for the surrender of a principal, the court said: "The technical final judgment before the termination of the suit ought not in any respect to impair the right of the bondsman for prosecution, but by this event the right of the bail over the principal is destroyed.

He has stipulated to surrender him, but the law steps in and makes the surrender of the principal by the bail impossible. After this, the law is not so unjust as to require of the bail to perform an impossibility of its own creation, but it effectually protects him by its established principle that 'in all cases where a condition of a bond, recognizance, etc., is possible at the time of the making of the condition, and before the same can be performed the condition becomes impossible by the act of God or of the law, etc., there the obligation is saved.'"

When the county court rendered its judgment discharging Furman from arrest, he was not then subject to arrest by his bail. When the bail bond in this case was signed, Furman became the prisoner of appellee. She was entitled to keep him in custody, or she had a right to terminate her liability at any time by surrendering him to the sheriff. By the order of the county court discharging Furman from arrest, appellee's right to his custody, as her security, was taken away. She could not touch him without becoming a trespasser. When the right of the bail to arrest the principal ceases, the relationship of bail and principal also ceases, for the right to custody, and necessarily of arrest, is an inseparable incident to that relationship. In the stipulation of facts on which this case was submitted to the court, it is agreed that on the day of the entry of the order of the county court discharging Furman from arrest he was present in court and subject to its mandates. The obligation of appellee's bond was then performed, and the law, which by that order deprived appellee of her security as bail for William C. Furman, cannot afterwards subject her to a penalty for not doing something which it had made impossible or illegal for her to do. This doctrine is well laid down and amplified in the case of *Steelman v. Mattix*, 38 N. J. Law, 247, 20 Am. Rep. 389, and the citations therein alluded to, wherein the court says: "The cases almost uniformly recognize the rule that, where the condition of a bond or recognizance becomes impossible of performance by the act of God, or of the law, or of the obligee, the obligation is saved. *People v. Manning*, 8 Cow. 297 [18 Am. Dec. 451]; *Taylor v. Taintor*, 16 Wall. 366 [21 L. Ed. 287]; *Hillyard v. Mutual Ben. Ins. Co.*, 35 N. J. Law, 415. The rule is thus stated in *Tidd's Practice*, 293: 'Whenever, by act of the law, a total impossibility or temporary impracticability to render a defendant has been occasioned, the court will relieve the bail from the unforeseen consequence of having become bound for a party whose condition has been so changed by operation at law as to put it out of their power to perform the alternative of their obligation without any default, laches, or possible collusion on their part.'"

Very pertinent, in this connection, is the case of *Whipple v. People*, 40 Ill. App. 301. There a debtor was arrested, as here, and

petitioned the county court for his discharge, and gave a bond. The hearing, as here, was continued from time to time, and finally, on November 22, 1889, it was ordered that the petitioner be discharged. On December 5, 1889, which was still in the November term, the court ordered the case reinstated on the trial calendar. On January 10, 1890, which was in the December term, the default of the debtor was entered, and the petition was dismissed, and the debtor was ordered to the custody of the sheriff. Some question being made as to the effect of the order of December 5th and that of November 22d, it was deemed by the court as immaterial, and it was held: "The substantial ground, however, for reversing this judgment [that is, a judgment in an action on the bond], is that the condition of the bond had been once performed. The principal had appeared and by the order of the court been discharged." And as to the rights of the bail in such cases, the court said: "Now, these common-law rights, necessary to the appellant for his own security, were taken from him by the action of the court. Whatever may be the effect of the order of December 5, 1889, there was the period between that and the previous order, during which, if the appellant had touched Cooper against his will, the appellant would have been a trespasser, liable to an action as such"—citing *Baker Mfg. Co. v. Fisher*, 35 Kan. 659, 12 Pac. 20; *Duncan v. Tindall*, 20 Ohio St. 567.

In *Baker Mfg. Co. v. Fisher*, *supra*, one Knotts, being sued and arrested, executed a bail bond, signed by one Fisher and others as sureties, and was released. The order of arrest was, for certain defects, vacated. The plaintiff, being refused permission to cure the defect by amendment, sued out a writ of error to the Supreme Court, where the ruling of the lower court was reversed. Subsequently, in the lower court, the plaintiff recovered judgment, and, the defendants in the original action not being found, suit was brought on the bail bond. The court, in that case, in reference to the order of discharge, spoke as follows: "No stay of the ruling of the district court was obtained by the plaintiff, and from March 22, 1882, until September 6, 1883, the bail had no legal right to arrest or surrender the defendant. The sheriff had no right to hold him even for an instant, and had no right to accept his surrender from the bail. Therefore the right to arrest and surrender their principal, given by the statute to the bail as their security, was by the statute taken away when the defendant, Knotts, was discharged on March 22, 1882. The sureties executed the undertaking signed by them upon the faith of the provisions of the law that permitted them at any time to arrest and surrender the defendant. The discharge of the defendant on March 22, 1882, exonerated the bail. At that time the defendant, Knotts, was entitled to his immediate discharge, and neither the bail

nor the sheriff had any custody or control of him."

In *Duncan v. Tindall*, supra, it is said: "And if the right to arrest and surrender their principal was given by the law to the bail as their security, and afterward is taken away by the act of the law, they should not be bound by an undertaking which was entered into upon the faith of that security."

What has been said we think sufficient to make clear our views upon the point under consideration, and, entertaining the views we do, we think appellant is in error in his insistence that the obligation of appellee, as bail, was not performed, and must hold that appellee was discharged from her undertaking, as bail, by the order of the county court discharging the principal from arrest.

Some other points are advanced by counsel in their argument, but after what has already been said it is unnecessary to prolong this opinion in the consideration of such matters.

The judgment of the Appellate Court is affirmed. Judgment affirmed.

(206 Ill. 136)

FLANNER et al. v. FELLOWS et al.

(Supreme Court of Illinois. Dec. 16, 1903.)
TESTAMENTARY TRUST—TRUSTEE'S POWER OF DISPOSITION—INTERESTS OF BENEFICIARIES—DEFINITENESS OF TRUST—PERPETUITY.

1. Under a will directing that a portion of testator's estate, which consisted in part of unimproved realty, should be invested by the trustee in good bonds or mortgages, the interest to be paid to certain beneficiaries, the trustee took the legal title with power of sale.

2. Under a will directing that a portion of the estate be invested by the trustee and the interest paid to testator's sister during her life, and afterwards "to her children * * * or held in trust and paid over to them when they are of legal age," at the trustee's option, "the principal may be paid over to said children * * * when they are twenty-five years of age, provided my sister is dead, but not otherwise," or the trustee "may hold this interest in trust longer, and may provide for a trustee for this fund after his death, principal and interest included," the sister takes an equitable life estate, with a vested equitable remainder in the children, subject to open and let in after-born children.

3. The estate vesting on the death of the testator, and only possession being postponed, no perpetuity was created.

4. A clause in a will creating a testamentary trust, providing that the trustee may "provide for a trustee for this fund after his death, principal and interest included," is not objectionable as creating a trust void for indefiniteness.

Appeal from Superior Court, Cook County; Axel Chytraus, Judge.

Bill by Norman J. Fellows, as executor and trustee under the will of Frank Fellows, deceased, against Frank Fellows Flanner and others. From the decree, certain defendants appeal. Reversed.

This is a bill in chancery filed in the superior court of Cook county by Norman J. Fellows, as executor and trustee, against the heirs and devisees of Frank Fellows, de-

ceased, to obtain a construction of the will of said Frank Fellows, which reads as follows:

"I, Frank Fellows, make and declare this to be my last will: To my wife, Emma, I will all our household effects, furniture, etc., and the use of the house we now live in during her life, she to pay the taxes on same, at her death said house and lot to go to my brother, N. J. Fellows; to my wife, Emma, I will absolutely my life insurance and one-half of the balance of my estate, both personal and real.

"One-quarter of my estate (after above settlement) I will to my brother, N. J. Fellows, absolutely, and hereby appoint said N. J. Fellows, without bond, my administrator and also trustee of the balance of my estate, said balance being a one-quarter of my entire estate, (except house and lot, insurance, furniture, etc., same being set aside before a division is made,) said one-quarter to be invested by said N. J. Fellows, trustee, in good bonds or mortgages, the interest on said investment to be paid over to my sister, Harriet Flanner, during her life, and after her death to be paid (said interest) to her children, share and share alike, or held in trust and paid over to them when they are of legal age, at the option of my said brother, the principal may be paid over to said children, share and share alike, when they are twenty-five years of age, provided my sister is dead, but not otherwise; or my said brother may hold this interest in trust longer, and may provide for a trustee for this fund after his death, principal and interest included.

"Dated at Chicago Heights, Illinois, this 5th day of January, 1901.

"Frank Fellows.

"Witness: N. W. Stephens, C. M. Rigby."

The testator died childless March 5, 1902, leaving Emma Fellows, his widow, and the complainant, his brother, and Harriet Flanner, his sister, his sole heirs at law. Probate of the will was had on March 18, 1902, and letters testamentary were granted to the complainant. At the date of the death of the testator Harriet Flanner had five children, all of whom were minors. The estate consisted of both personal property and real estate, and was of the value of about \$70,000, a portion of the real estate being unimproved. There were no debts other than funeral expenses, etc. This appeal is prosecuted by the children of Harriet Flanner.

Abbott, Buchholz & Abbott, for appellants. Loesch Bros. & Howell, for appellee.

HAND, C. J. (after stating the facts). It seems clear from a consideration of the entire will that the testator (after deducting his household furniture, homestead, and life insurance) intended that his estate should be divided into four equal parts; that his widow should receive two parts, his brother one part.

and his sister and her children one part; that the widow and brother should receive the portions given to them absolutely, and that the brother, as trustee, should convert the remaining one-fourth into money and invest the proceeds in interest-bearing securities, and pay the income therefrom to the sister during her lifetime; that the interest upon the fund, upon the death of the sister, should be paid to her children, or held by the brother until they were of legal age and then paid to them, but that the principal should not be paid to them, in any event, until they were 25 years of age, respectively; and in case the brother thought advisable to not pay to said children, or either of them, the principal upon their reaching the age of 25 years, he might continue to hold the property belonging to all or to any of said children, and for the purpose of preserving the fund might appoint a successor in trust to act after his death. We find nothing in the will, however, which indicates that the testator intended the fund should be held in trust for a period beyond the death of the mother and her children.

While the will in express terms does not invest the legal title to the one-fourth set aside for the benefit of Harriet Flanner and her children in Norman J. Fellows as trustee, and confer upon him a power of sale with reference thereto, we think it clear that such is its legal import. The evidence shows a large portion of the estate to consist of real estate, much of which is unproductive. The direction to Norman J. Fellows to invest the portion of the estate set aside by the testator for the benefit of his sister and her children, as "trustee, in good bonds or mortgages," could not be complied with by the complainant unless he had the legal title and could convey the fee. In *Hale v. Hale*, 146 Ill. 227, 33 N. E. 858, 20 L. R. A. 247, on page 246, 146 Ill., page 863, 33 N. E., 20 L. R. A. 247, it was said: "The rule is familiar that, where a will contains no words expressly creating a trust or devising the legal title to the executors or trustees, such devise may be implied where the powers conferred and duties imposed on the executors are of such a character that a legal title is necessary to their proper exercise or performance."

In view of the doctrine announced in the foregoing case, which is in accord with a long line of decisions in this state, the legal title to the portion of the estate set aside for the benefit of Harriet Flanner and her children vested in Norman J. Fellows, and full power and authority were by implication conferred upon him to sell and convey the fee title thereto. If such were not the case, the trust would wholly fail by reason of the inability of the trustee to execute the trust. The testator intended that one-fourth of his estate, after deducting his household furniture, homestead, and life insurance, should go to his sister and her children. The law favors the vesting of estates rather than that the title should be in abeyance. In

Scofield v. Olcott, 120 Ill. 362, 11 N. E. 351, on page 374, 120 Ill., page 354, 11 N. E., it was said: "It has long been a settled rule of construction in the courts of England and America that estates, legal or equitable, given by will, should always be regarded as vesting immediately, unless the testator has by very clear words manifested an intention that they should be contingent on a future event." And in *Kellett v. Shepard*, 139 Ill. 433, 28 N. E. 751, 34 N. E. 254, on page 443, 139 Ill., page 754, 28 N. E.: "Where it is a remainder after a life estate, it is regarded as a vested remainder, and the possession only is postponed. *Abbott v. Bradstreet*, 3 Allen, 587. The fact that the gift or devise must open to let in after-born children is not inconsistent with the vesting of the estate in interest at the testator's death, though the vesting in possession is deferred to the period of distribution." And in *Scofield v. Olcott*, supra, on page 370, 120 Ill., page 352, 11 N. E.: "An estate is vested when there is an immediate right of present enjoyment, or a present fixed right of future enjoyment."

In view of the rules above announced, we think it clear that while the legal title, at the date of the death of the testator, vested in the trustee, the equitable title vested in Harriet Flanner and her children; that is to say, Harriet Flanner took a life estate therein, and the remainder vested in her then living children, which remainder was liable to open to let in any children which might be subsequently born to her. *Kellett v. Shepard*, supra.

It is urged that the clause, "or my said brother may hold this interest in trust longer, and may provide for a trustee for this fund after his death, principal and interest included," found in the last paragraph of the will, is void, for the reasons, first, that it violates the principle that trusts must be certain and definite, and, second, that it creates a perpetuity; and it is insisted that the trust will terminate upon the death of Harriet Flanner and so soon as her children attain the age of 25 years, respectively. While we do not pass upon the question whether or not a court of chancery might anticipate the time of payment in case the trustee should insist on holding together the body of the estate devised to Harriet Flanner, and her children after her death, if said children had attained the age of 25 years, respectively, and it was made to appear that it was necessary to use the body of the estate for the maintenance of said children, or some one of them (*Rhoads v. Rhoads*, 43 Ill. 239), we are of the opinion said clause of the will is not void for the reasons suggested. It has been held, if the terms by which a trust is created are so vague and indefinite that a court of equity cannot clearly ascertain either its objects or the persons who are to take, the trust will fail. 2 Story's Eq. Jur. par. 979a. Here the persons to take are Harriet Flanner and her children, and the trust is of such a

character that its execution can readily be enforced by a court of equity, hence the trust created does not fall within the rule above announced. Neither does the will create a perpetuity. Perpetuities have been defined to be "grants of property wherein the vesting of an estate or interest is unlawfully postponed." 2 Washburn on Real Prop. 652. And again: "Any limitation tending to take the subject of it out of commerce for a longer period than a life or lives in being and twenty-one years beyond, and, in case of a posthumous child, a few months more, allowing for the term of gestation." 2 Bouvier's Law Dict. p. 326. In this case the estate vested upon the death of the testator, and only the possession was postponed. The inhibition is against the postponement of the vesting of estates, and not against the postponement of possession. In *Lunt v. Lunt*, 108 Ill. 307, on page 313, it was said: "Was the vesting of this estate unlawfully postponed? * * * This will depend upon whether the estate vested in the daughters. If the title to the property became vested in the two daughters upon the death of the testator, with the full enjoyment thereof postponed to a future day, the will would not be regarded obnoxious to the rule of law for the prevention of perpetuities." Mr. Lewis, on page 144 in his work on Perpetuities, says: "The remoteness against which the rule is directed is remoteness in the commencement or first taking effect of limitations, and not in the cesser or determination of them. An estate that is to arise within the prescribed period may be so limited as to be determined on the happening of any event, however remote." See, also, *Johnston's Estate*, 185 Pa. 179, 39 Atl. 879, 64 Am. St. Rep. 621.

The decree of the superior court, not being in accord with the views herein expressed, will be reversed, and the cause remanded to that court for further proceedings in accordance with the views expressed in this opinion.

Reversed and remanded.

(206 Ill. 252)

PEOPLE ex rel. DUNN v. ATCHISON, T. & S. F. RY. CO.

(Supreme Court of Illinois. Dec. 16, 1903.)

TAXATION—RAILROAD BRIDGES—ASSESSMENT.

1. Under Hurd's Rev. St. 1899, p. 1457, c. 120, § 354, declaring that all bridge structures across any navigable streams forming a boundary line between Illinois and any other state shall be assessed by the township or other assessor in the county or township where the same is located as real estate, and Laws 1871-72, p. 13, § 42, providing that railroad rights of way shall be assessed by the state board of equalization, a county assessor has no authority to assess a bridge owned by a railroad company and used by it as a part of its right of way, although a part of the bridge is used by teams and pedestrians.

2. Hurd's Rev. St. 1899, p. 1362, c. 114, § 218, permitting the sale and conveyance of railroad and toll bridges, and providing that the railroad

company purchasing any such bridge shall operate and hold the property subject to all the rights, powers, privileges, duties, and obligations prescribed by law for the regulation and governmental taxation of railroads organized under the law, does not require the assessment by the state board of equalization of an entire bridge purchased by a railroad company and used by it partially as a right of way and partially as a toll bridge for teams and pedestrians, inasmuch as the "general railroad law" referred to in the statute divides railroad property into "railroad track," assessable by the state board of equalization, and "real estate other than railroad track," assessable by local assessors.

Appeal from Hancock County Court; W. C. Hooker, Judge.

Application by the people, on the relation of Thomas F. Dunn, the county treasurer of Hancock county, against the Atchison, Topeka & Santa Fé Railway Company, for a judgment against certain of respondent's property for delinquent taxes. From a judgment sustaining objections to the application, applicant appeals. Affirmed.

This was an application by the county treasurer and ex officio collector of Hancock county, Ill., to the county court of that county, for a judgment against what is commonly called the "Fort Madison Railroad and Toll Bridge," for delinquent taxes of 1901, assessed by the local assessor. The Atchison, Topeka & Santa Fé Railway Company filed objections to the rendition of the judgment, claiming to be owner of the bridge, and that it was part of its railroad track; "and as such had been returned by it to the state board of equalization; that the state board of equalization had assessed the same as part of the railroad track" of the railway company, and that it had paid the taxes so assessed.

A stipulation signed by the counsel contained the following salient facts: The defendant railway company is a corporation organized and existing under the laws of Kansas, operating its line of railroad from Chicago, Ill., extending through Hancock county, over the bridge in question, and on to Kansas City and other points. The Mississippi River Railroad & Toll Bridge Company was a corporation duly organized and existing under the laws of the state of Illinois, and under its franchise erected its bridge, having thereon the railroad track, and on either side of the railroad track a tollroad for the use of teams and foot passengers in crossing. The bridge and approaches constitute one continuous property. Prior to June 1, 1900, the railway company, under a lease, used the line of railway for its railway purposes, and the bridge company operated the toll bridge. On June 1, 1900, the railway company purchased, under and by virtue of the statute of this state, the said bridge, approaches, and other property rights and franchises. The railway company, for the year 1901, in accordance with chapter 120, Hurd's Rev. St. 1899, made out and filed with the county clerk of Hancock county and the Auditor of

Public Accounts of this state the written statements or schedules, duly verified, showing all the matters required by statute to be shown. In these statements so returned by the railway company the property in question was returned as being a part of the main track of the railway company, and the state board of equalization valued and assessed, for the year 1901, the property in question as being a part of the main track of the railway company, and all the taxes, general and special, were thereupon accordingly levied and extended against the property as a part of the main track, upon the valuation made by the state board of equalization, which taxes have been paid by the railway company to the county collector and ex officio treasurer of Hancock county. The assessor for Ap-panoose township, for the year 1901, also made and returned his alleged valuation and assessment of said property in question as a separate and distinct property, placing his valuation at \$400,000 and the assessed value for taxation at \$80,000, and, on this valuation returned by the local assessor, the taxes, general and special, amounting to \$2,216, were extended against the property in question, and for which the application for judgment is made.

The objections of the defendant company were sustained by the county court, and judgment was refused, from which judgment sustaining the objections this appeal was perfected.

Charles H. Garnett, State's Atty. (Apollos W. O'Harra, of counsel), for appellant. Robert Dunlap, John D. Miller, and Lee F. English, for appellee.

RICKS, J. (after stating the facts). The question presented for our consideration is whether a local assessor was authorized by law to place an assessment on a bridge over a navigable stream forming the boundary line between the state of Illinois and the state of Iowa, which bridge was owned by the defendant railway company, and by it used as a part of its main track and for a toll bridge.

The statute of 1873 provides that "all bridge structures across any navigable streams forming the boundary line between the state of Illinois and any other state shall be assessed by the township or other assessor in the county or township where the same is located, as real estate." Hurd's Rev. St. 1889, p. 1457, c. 120, § 354. This court, in construing the above provision, said: "It appears in the case that there were in 1873 eight bridges spanning the Mississippi river, all of which, except the one in question and that at Rock Island, were erected by bridge companies, and have ever since been, respectively, the property of such bridge companies, and not the property of any railroad company. Such bridges of bridge companies had been regarded as personal property, and

as not liable to be sold for delinquent taxes so as to convey a good title thereto, and to meet a necessity in that respect the statute was passed, and for no other purpose. * * * It was not the purpose of the act to change the method of taxing railroad property or the mode of assessing it. It was of the system of taxation of railroad property to distribute the tax upon the main track of railroad among all the counties in the state through which the road runs, by a certain rule of proportion. The assessment or taxation of railroad property, as such, was not in the mind of the Legislature, and, there being no intention to make any change in the system of the taxation of railroad property, we must hold that no change therein as to the mode of assessment and taxation of the main track of railroad was effected by the act; that, broad as are its terms, 'all bridge structures,' it did not include the bridge in question, it being railroad track. As such, it was alone assessable by the state board of equalization, and the assessment of it by the local assessor was without warrant of law." *Anderson v. Chicago, Burlington & Quincy Railroad Co.*, 117 Ill. 26, 7 N. E. 129.

It is insisted by appellant that this decision has no application here, for the reason that in the case at bar the bridge is used by the railway company not only for its railroad track, but also for a toll bridge, while in the case above quoted the bridge was used by the railroad company exclusively for its railroad track. We are not called upon to determine in this case whether the state board of equalization acted within warrant of law in assessing the entire bridge. If this were the question, it would become necessary to determine whether the decision in *Anderson v. Chicago, Burlington & Quincy Railroad Co.*, applying to a bridge used exclusively for railroad purposes, also disposed of the question where the railroad company operates a toll bridge on either side of its main track. This question before us is whether the local assessor had authority to assess the entire structure, and upon this point the *Anderson Case* is undeniably controlling, because it pointedly holds that the act of 1873, providing for assessment of bridges by local assessors, does not make any change in the system of taxation of railroad property. This being so, we are not concerned with the provisions of the above act of 1873, and confine ourselves merely to the question whether, under the system of taxation of railroad property in this state, the local assessor had the authority to assess the entire structure, including the railroad track.

The revenue law of 1872 (*Laws 1871-72*, p. 13, § 42) provides that "such right of way, including the superstructures of main, side or second track and turn-outs, and the station and improvements of the railroad company on such right of way, shall be held to be real estate for the purposes of taxation, and denominated, 'railroad track,' and shall

be so listed and valued." Section 48 provides that the railway company shall return to the Auditor of Public Accounts sworn statements or schedules, first of the property denominated "railroad track"; and section 50 provides that "the Auditor shall, annually, on the meeting of the state board of equalization, lay before said board the statements and schedules herein required to be returned to him; and said board shall assess such property in the manner hereinafter provided."

By the above sections the state board of equalization had the exclusive authority to assess that part of said bridge which comes within the meaning of "railroad track," and the assessment of such part by the local assessor was without authority of law. Just how much of the bridge may be denominated "railroad track," and whether the local assessor was warranted in assessing any portion of the bridge, are questions which we are not by this appeal called upon to decide. As we have pointed out, the question before us is whether a judgment should be entered for the taxes of 1901 assessed by the local assessor, and it is undoubtedly true that the local assessor acted without authority in assessing so much of the bridge as falls within the meaning or definition of "railroad track," as the same is understood under the revenue law of this state. This is obviously a sufficient irregularity to require us to sustain the court below in its refusal to enter the judgment for which application is made. If we should assume that a portion of the bridge would not be denominated "railroad track," and that as to that portion the local assessor was warranted in making the assessment, it would be impossible, constitutionally and practically, for the court to apportion the taxes and render judgment for the amount it should find due upon the property that might not be denominated "railroad track." *Chicago & Alton Railroad Co. v. People*, 98 Ill. 350; *Wabash Railroad Co. v. People*, 196 Ill. 606, 63 N. E. 1084.

It is urged by the appellee that a provision of the statute under and by virtue of which the railroad company purchased the bridge required the state board of equalization to assess such entire bridge property. *Hurd's Rev. St. 1899*, p. 1362, c. 114, § 218. The statute referred to permits the sale and conveyance in fee simple, or otherwise, from the one to the other corporation, of a railroad and toll bridge, and provides "that the railroad company or corporation which purchases any railroad, or railroad and toll bridge in this state shall operate such railroad or railroad and toll bridge situated within this state, and hold such property situated within this state, and the franchises so acquired, subject to all the rights, powers, privileges, duties and obligations prescribed by the general railroad laws of this state for the regulation, governmental taxation or control of railroads organized, or

which may be organized, under the laws of this state." This statute, as applied to the case at bar, merely provides that such railroad shall hold and operate such property subject to the laws of Illinois for the taxation of railroad property. The law of Illinois for the taxation of railroads divides all real estate into "railroad track" and "real estate other than that denominated 'railroad track.'" "Railroad track" is assessable by the state board of equalization, and "real estate other than railroad track" is assessable by the local assessors. It is clear, then, that the statute referred to by counsel for appellee does no more than to require the bridge property to be taxed according to these laws. If the entire bridge may be denominated "railroad track" under the statute and decisions of the state, then the state board would be required to assess the entire bridge; but if a portion of the bridge cannot be denominated "railroad track," then that portion must be assessed locally.

A consideration of the question whether the entire bridge may be denominated "railroad track" under the statute and decisions of this state is not necessary to a determination of the case before us, and we are not disposed to take it up, in view of the fact that the record contains no evidence whatever concerning the details of the bridge and its operation. It is asserted by counsel for appellant, in his argument, that the toll feature of the bridge is very prominent, and that the defendant "is receiving a constant and large revenue from the tolls collected from those using it for other than railroad purposes," and by counsel for appellee "it is confidently asserted that there is in fact a loss" in maintaining the toll part of the bridge; but the record does not contain a syllable of evidence on these or any other detailed matters which would be of assistance to a court in determining whether the entire bridge shall be denominated "railroad track" or "real estate other than railroad track." We find, however, that a portion of the bridge in question was railroad track, and was assessable only by the state board of equalization. The assessment of the entire bridge by the township assessor was without warrant of law.

The judgment of the county court is accordingly affirmed. Judgment affirmed.

(205 Ill. 570)

HAMER v. PEOPLE.

(Supreme Court of Illinois. Dec. 16, 1903.)
INTOXICATING LIQUORS—SALE TO MINORS—
SUFFICIENCY OF ORDERS OF PARENTS—
CONSTRUCTION OF STATUTES.

1. Written orders addressed to the keeper of a dramshop, signed by the parents of minors, as follows: "Please let my son Ed have what he wants," and "Let Charley R. have what he wants to drink until you hear from us," purporting to confer on the minors complete right to determine for themselves how frequently they may partake of intoxicating liquors, are

not sufficient to authorize a sale of liquor to the minors within Dramshop Act (2 Starr & C. Ann. St. 1896, p. 1590, c. 43, § 6), prohibiting the sale of "intoxicating liquor to any minor without the written order of his parent."

2. The rule that a penal statute must be strictly construed does not prevent the court from giving effect to the legislative intent expressed in Dramshop Act (2 Starr & C. Ann. St. 1896, p. 1590, c. 43, § 6), prohibiting the sale of intoxicating liquors to any minor without the written order of his parent, and to require that the written orders shall control minors in the use of intoxicating liquors and not permit them to determine for themselves how frequently they may partake of intoxicants.

Error to Appellate Court, Third District.

Fredericus Hamer was convicted of selling liquor to minors, and he brings error to review the conviction affirmed by the Appellate Court (104 Ill. App. 555). Affirmed.

Payson & Kessler and C. S. Schneider, for plaintiff in error. H. J. Hamlin, Atty. Gen., George B. Gillespie, Asst. Atty. Gen., and A. L. Phillips, State Atty., for the People.

BOGGS, J. The plaintiff in error was convicted in the circuit court of Ford county of the offense of selling intoxicating liquor to five minors, two of them being Edward Jordan and Charles Robbins. The Appellate Court for the Third District affirmed the judgment of conviction, and this writ of error was sued out to obtain a review of the record in this court.

That the plaintiff in error made the sales of intoxicating liquor to the minors was proven without dispute. The defense sought to be made was as to the sales made to said Edward Jordan and Charles Robbins, it being contended that the sales to each of these boys were on the written order of his parent or parents. The plaintiff in error offered, but the court refused to receive in evidence, an instrument in writing signed by the father of said minor Edward Jordan, as follows: "Mr. Fred Hamer—Please let my son Ed have what he wants. C. A. Jordan." And the court also refused to permit to be given in evidence an instrument in writing signed by the father and mother of said Charles Robbins, viz.: "Mr. Hamer—Let Charley Robbins have what he wants to drink until you hear from us. Mr. Levin Robbins, Mrs. L. Robbins."

The refusal of the court to admit these writings is the only alleged error assigned as ground for reversal. We think they were each properly excluded. Section 6 of chapter 43, entitled "An act to provide for the licensing of and against the evils arising from the sale of intoxicating liquors" (2 Starr & C. Ann. St. 1896, p. 1590), commonly called the "Dramshop Act," is as follows: "Whoever, by himself, or his agent or servant, shall sell or give intoxicating liquor to any minor without the written order of his parent, guardian, or family physician, or to any person intoxicated, or who is in the habit of getting intoxicated, shall, for each offense,

be fined not less than twenty dollars (\$20), nor more than one hundred dollars (\$100), or imprisoned in the county jail not less than ten nor more than 30 days, or both, according to the nature of the offense: provided, this act shall not affect any prosecution pending at the time this act takes effect, but in every such prosecution the accused shall, upon conviction be punished in the same manner in all respects as if this act had not been passed."

The title to the act declares the design of the legislation is to provide against the evils arising from the sale of intoxicating liquors. Section 6 of the act discloses that it was the legislative view that the use of intoxicating liquors by those who were incapable of appreciating the evils resulting from the use or abuse of such intoxicants should be abridged and controlled. Said section specifies three classes of persons deemed so incapable, and to whom those licensed under other provisions of the act to sell intoxicants should not be permitted to sell or give intoxicating liquors. The three classes of persons so regarded as incompetent to determine for themselves whether they may indulge in intoxicating liquors are (1) minors, (2) persons who are at the time intoxicated, and (3) those who are in the habit of getting intoxicated. The section prohibits sales to persons of the first class (minors) at all times other than when the parent, guardian, or family physician of the minor shall deem it proper or necessary that the minor should drink intoxicating liquor, and shall, in writing, authorize the minor to be supplied with the same. The statute was enacted on the theory that these classes of persons are not capable to determine for themselves when they should partake of intoxicating drinks. The prime purpose of this statute, so far as it relates to minors, is to prevent them from indulging in the use of intoxicating liquors when or as often as prompted by their appetites or desires to do so, and to control them in such indulgence according to the more mature judgment and discretion of their parents, guardian, or family physician. The written instruments here relied upon abdicate all right and duty of parental restraint, and purport to confer on the boys complete right to determine for themselves how frequently they should partake of intoxicants. The statute denies such right or privilege to the minors, and the law cannot be abrogated by the written direction of their parents. The written orders were properly excluded.

It is urged the statute is highly penal in character, that violations of its provisions are to be punished by heavy fines or imprisonment, or both, and that it is the long-established rule of construction that all such statutes shall be construed strictly; that the statute only requires the written order of the parent to authorize a sale to the minor, and that to construe the act to require a special or particular kind of an order is to

depart from the precise words employed and to interpolate other words therein, and give the enactment a liberal construction against one charged with its violation. We recognize as a cardinal rule that penal statutes are to be strictly construed, but, as was said by Justice Swayne in *United States v. Hartwell*, 6 Wall. 395, 18 L. Ed. 830: "Whenever the rule is invoked it comes attended with qualifications and other rules not less important. It is by the light which each contributes that the judgment of the court is to be made up." The object of construing penal and all other statutes is to discover and give effect to the true legislative intent, and the rule against strict construction of penal statutes is not to be applied with such unreasonable strictness as to defeat the true intent and meaning of the enactment. *Meadowcroft v. People*, 163 Ill. 56, 45 N. E. 303, 35 L. R. A. 176, 54 Am. St. Rep. 447; 23 Am. & Eng. Ency. of Law (1st Ed.) 377, and many cases cited in note 2. "The rule that statutes of this class are to be construed strictly is far from being a rigid and unbending one, or, rather, it has in modern times been so modified and explained away as to mean little more than that penal provisions, like all others, are to be fairly construed according to the legislative intent as expressed in the enactment." *Sedgwick on Construction of Statutes*, 282. The fundamental consideration is to ascertain and give effect to the legislative intention, and it has become axiomatic that that which is "within the intention is within the statute, though not within the letter." The requirement that a strict construction shall be given to penal enactments does not here prevent the operation of the intent of the lawmaking body.

The judgment must be and is affirmed. Judgment affirmed.

(205 Ill. 511)

BORGGARD v. GALE.

(Supreme Court of Illinois. Dec. 16, 1903.)

LANDLORD AND TENANT—NUISANCE ON PREMISES—INJURY—LIABILITY OF LANDLORD.

1. A landlord is not liable to his tenant's wife for injuries she may sustain, after the tenant takes possession under the lease, by stepping into a hole in the floor, though the premises are let in the condition from which the injury is received, unless through "fraud or concealment" of the landlord the tenant is induced to take possession without knowledge of such defect.

Error to Appellate Court, First District.

Action on the case by Anna M. Borggard against Stephen F. Gale. From a judgment of the Appellate Court (107 Ill. App. 128) affirming a judgment of the superior court in favor of defendant, plaintiff brings error. Affirmed.

James H. Hooper, for plaintiff in error.
Haynie R. Pearson and Samuel W. Jackson, for defendant in error.

HAND, C. J. This is an action on the case, brought by the plaintiff in error in the su-

perior court of Cook county against the defendant in error to recover damages for an alleged injury caused to her by reason of her stepping into a hole in the floor of certain premises rented by her husband from the defendant in error for a store. A trial resulted in a judgment in favor of the defendant in error, which has been affirmed by the Appellate Court for the First District, and a writ of error has been sued out from this court to review the judgment of the Appellate Court.

The only ground relied upon in this court for a reversal which we can consider is the giving of the second and third instructions offered upon behalf of defendant in error. The second instruction informed the jury that the defendant was not liable to the plaintiff for any injuries which she may have sustained after her husband took possession of the premises under the terms of the lease, even though said premises were let with a nuisance upon them by means of which the injury was received, unless, through the fraud or concealment of the defendant, the husband was induced to take possession of the premises without knowledge of the existence of such nuisance. The only criticism made upon the instruction is that it states the defendant is not liable unless by "fraud or concealment" practiced by him the husband was induced to take possession of the premises without knowledge of the existence of the defective condition of the floor. The lease which was in force at the time of the injury contained the following clause: "That he [plaintiff's husband] has examined and knows the condition of said premises, and has received the same in good order and repair, and that no representation as to the condition or repair thereof has been made by the party of the first part or his agents, prior to or at the execution of this lease, that is not herein contained or herein endorsed; that he will keep the said premises in good repair during this lease at his own expense." The plaintiff testified that there was a hole 6 by 12 inches in size in the floor of a small room opening off of the storeroom when her husband took possession of the premises, the existence of which was unknown to her or her husband; that a day or two thereafter she unavoidably stepped into said hole, and was severely injured. One Locke, defendant's agent, who leased the premises to plaintiff's husband through the plaintiff in error, testified that prior to the injury the plaintiff pointed out to him the hole in the floor, and he agreed to have the same repaired; that the carpenter was engaged in making repairs upon the premises at the time the injury occurred; and that he had requested the plaintiff and her husband not to occupy the premises until the repairs were completed, but that they moved into the same before the repairs were completed. The testimony of the plaintiff and Locke was all the evidence bearing upon the subject.

The general rule is that a landlord is not

bound to make repairs unless he has assumed such duty by express agreement with the tenant. An exception to the rule, however, exists where there are defects in the demised premises, attended with danger to an occupant, which a careful examination would not disclose, which are known to exist by the landlord and are not known to the tenant. In such case a duty rests upon the landlord to notify the tenant of such defects. *Sunasack v. Morey*, 196 Ill. 569, 63 N. E. 1039. The duty resting upon the landlord to notify the tenant of a defect in the premises which a careful examination would not disclose, but of which the landlord has notice while the tenant has not, we think may well be placed upon the ground, in many cases, that a failure to make such disclosure would be a fraud upon the tenant. For instance, if the premises were infected with a contagious disease, as was the case in *Snyder v. Gorden*, 46 Hun, 538; or impregnated with sewer gas, the presence of which was denied by the landlord, as in *Sunasack v. Morey*, supra. But the instruction given in this case did not require that the plaintiff should prove fraud before a recovery could be had, but only concealment of the defect, as the disjunctive "or" was used in the instruction between the words "fraud" and "concealment," so that, if the evidence showed the hole in the floor to have been a latent defect, that the landlord had notice of its existence, and the husband of the plaintiff had not such notice, and the landlord concealed the defect by failing to perform his duty by notifying him of its presence, unless the plaintiff had actual notice thereof there might be a recovery; and this much proof seems to be required by all the authorities to entitle the plaintiff to recover. *Sunasack v. Morey*, supra; *Cowen v. Sunderland*, 145 Mass. 363, 14 N. E. 117, 1 Am. St. Rep. 469; *Anderson v. Hayes*, 101 Wis. 538, 77 N. W. 891, 70 Am. St. Rep. 930; *Coke v. Gutkese*, 80 Ky. 598, 44 Am. Rep. 499; *Moore v. Parker* (Kan. Sup.) 64 Pac. 975, 53 L. R. A. 778; *Kern v. Myll*, 80 Mich. 525, 45 N. W. 587, 8 L. R. A. 682; *Snyder v. Gorden*, supra. We do not think the giving of said instruction constituted reversible error.

We have examined the third instruction, and think, in view of the evidence, it states the law correctly, and that the objection made thereto is hypercritical, and without force.

Finding no reversible error in this record, the judgment of the Appellate Court will be affirmed. Judgment affirmed.

(205 Ill. 544)

MCDAVID v. SUTTON.

(Supreme Court of Illinois. Dec. 16, 1903.)

SPECIFIC PERFORMANCE—INEFFECTIVE SUBSEQUENT AGREEMENT—EFFECT—DEFENSE—FAILURE TO PLEAD—REVIEW.

1. In a suit for the specific performance of a contract for the sale of land, a subsequent

agreement between the parties, which never became effective because the conditions on which it was to take effect were not complied with, cannot be interposed as a defense.

2. A defense which the abstract does not show was set up in the answer cannot be considered on appeal.

Error to Circuit Court, Moultrie County: E. P. Vail, Judge.

Suit by Frank Sutton against A. B. McDavid. Decree for plaintiff, and defendant brings error. Affirmed.

R. M. Peadro, for defendant in error. Raymond D. Meeker and Mills Bros., for plaintiff in error.

WILKIN, J. Frank Sutton, defendant in error, obtained a decree against A. B. McDavid, plaintiff in error, in the circuit court, for the specific performance by the latter of a contract to convey certain lands in Allentown, Moultrie county. McDavid sued out this writ of error to reverse the decree.

The contract sought to be enforced was in the form of a bond made by McDavid to Nora A. and Frank Glover, dated May 7, 1891, conditioned that if said Glovers should pay their certain promissory note on the same date, for \$200, payable to him four years after its date, at 7 per cent., he would execute and deliver to them a good and sufficient deed conveying said lots to them clear of all incumbrances. The Glovers took possession of the lots, and held them until February 2, 1895, when they sold and assigned the bond and all their interest in the lots to A. W. Sutton, a brother of defendant in error. While the Glovers held the bond they made payments to McDavid, which it was agreed should be credited on their note to him given for the purchase money. It was found by the court below that after deducting the amount so paid there remained due on the note only the sum of \$100.81, and we think that finding was justified by the evidence. The preponderance of the testimony is that before filing his bill the defendant in error purchased from his brother, A. W. Sutton, the bond in question, and, after obtaining it, offered to pay McDavid the balance due on the note given by the Glovers for the purchase money, and demanded a deed to the lots, as provided in the bond, but that McDavid refused to make the deed unless he (Frank Sutton) would pay \$40 in addition, which he claimed he had lost through some act (not disclosed by the evidence) of Frank Glover, one of the obligees in the bond. The defendant in error thereupon filed this bill on August 8, 1895.

The defense relied upon in the answer, as shown by the abstract, was a general denial that the complainant ever paid anything for the bond, or that he or any one else ever tendered to the defendant anything, or the balance due him on the note or bond; also that, while A. W. Sutton held and was the owner of the bond for the conveyance of the lots, he and McDavid entered into another agree-

ment whereby said bond was annulled, and the said A. W. Sutton was to satisfy a mortgage which he had given on the lots to Glover, and release to McDavid three of said lots, and McDavid was to convey one of the lots to A. W. Sutton. The evidence shows that the new alleged agreement, with A. W. Sutton's notes which he was to give, and McDavid's deed for the one lot, were deposited with one Mathers, not to be delivered until Glover's release could be obtained, and if it should not be obtained there was to be no trade and the new agreement was to be of no force. The release was not obtained, and the papers so deposited were never exchanged, and A. W. Sutton regained possession of the bond for the deed, and assigned, as before stated, to his brother, the defendant in error. It seems clear that the alleged new agreement, as found by the circuit court, never became effective because the conditions upon which it was to take effect were not complied with, and, that being the case, it follows, necessarily, that the new agreement cannot be successfully interposed as a defense to the specific performance of the obligations of the bond.

Something is said by counsel for plaintiff in error, in their argument, about a mortgage said to have been given by A. W. Sutton to Frank Glover on the lots, to secure a note for \$210 given by him (Sutton) for additional purchase money when Glover sold and assigned to Sutton, and which, it is claimed, McDavid purchased from Glover, the contention being that the decree below should have saved such mortgage lien from its operation and the deed required to be made under it. We are unable to find from the abstract that any such defense was set up in the answer, and it cannot therefore be considered in this decision.

We are of the opinion that the decree below is in conformity with the law and the evidence applicable to the case, and it will accordingly be affirmed. Decree affirmed.

(205 Ill. 531)

CONSOLIDATED COAL CO. OF ST. LOUIS v. PEERS.

(Supreme Court of Illinois. Dec. 16, 1903.)

MINING LEASES—TRANSFER—ACTION AGAINST
TRANSFEREE—PRIVITY OF ESTATE—PLEADING—
WRIT OF INQUIRY—DECLARATION—
COUNTS—ABANDONMENT.

1. Plaintiff alleged the execution of a coal lease reserving a certain rent or royalty by the A. Co.; that the lessee entered and mined coal on the land until August 11, 1886, when by its deed it transferred to defendant the coal under the land leased, subject to the lease, and agreed with defendant that it was seised of a title free from incumbrances except those mentioned; and that defendant took possession of the property, and thereafter controlled the same until September 20, 1894, during which time \$3,600 in rents accrued and was unpaid. The declaration also alleged that the A. Co. transferred, in addition to such lease, all its other property, to the end that defendant should become its successor, and that after the conveyance the A. Co. was

succeeded in business, and in all its unexecuted contracts, by defendant, and thereby became liable to pay plaintiff the royalties reserved in the lease. *Held*, that the first part of the declaration, alleging facts showing that defendant was in privity of estate with regard to the lease, and was therefore bound, was not matter of inducement or surplusage, and that the declaration stated a sufficient cause of action as against a general demurrer on that ground.

2. Where, in an action to recover royalties under a mining lease, a judgment in favor of defendant was rendered on the second count of the declaration, and, after judgment against defendant as by default on the third count, the court, by the consent of both parties, heard a writ of inquiry, and assessed plaintiff's damages on the third count without a jury, without disposing of the first count of the declaration, such consent amounted to an abandonment of the first count.

Error to Appellate Court, Fourth District.

Action by Joshua S. Peers against the Consolidated Coal Company of St. Louis. From a judgment in favor of plaintiff affirmed by the Appellate Court (97 Ill. App. 188), defendant brings error. Affirmed.

The following is the third count of the declaration referred to in the opinion:

"That the plaintiff, on the 17th day of December, 1870, was the owner of the coal underlying the southwest quarter of the northwest quarter and west half of the southwest quarter of section four (4) in township two (2) north, range eight (8) west, in St. Clair county, Illinois, and the Abbey Coal & Mining Company, of that county, was a corporation existing and doing business under the laws of the state of Illinois, and was then and there engaged in the business of mining and operating coal; that the plaintiff on the day and year aforesaid, together with Adeline C. Peers, his wife, who is since deceased, by their lease of that date set over and assigned to the Abbey Coal & Mining Company, for the term of twenty-five years, the sole and exclusive right of mining and operating in coal in the said tracts of land, in consideration whereof the lessee agreed to begin mining within twelve months from the date of the lease, and guaranty a yearly royalty of not less than \$1,200 per year after the expiration of twelve months from the date last aforesaid; that in and by the said lease it was further provided that if, after the expiration of a year from the date thereof, no coal should be mined from the said tract of land, the lessee should pay the monthly installments of \$100 on its guaranty of \$1,200 per year, and said payments should be considered as advanced royalty, and the lessee was to have the right to mine coal sufficient to make the amount of coal mined equal to the royalty paid, provided the royalty paid should not be less than \$100 per month; that the lessee should carry on the work in a good, workmanlike manner, and take as much coal from the land as the safety of the mine would admit, and pay the plaintiff a royalty of three-eighths of a cent per bushel of eighty-five pounds for all coal mined, except for the coal taken from the

shaft, entries, and courses, and coal used for the engines, which was to be free from rent; that the said royalty should be paid monthly, on the 28th day of each month, for all the coal mined during the preceding month. The plaintiff further avers that afterwards, on the day and year aforesaid, the lessee entered upon the land and sunk a shaft and began mining the coal under the said lease, and so continued to do until the 11th day of August, 1886, when, by its deed of that date, the said Abbey Coal & Mining Company granted, bargained, sold, assigned, transferred, and set over to the defendant the coal underlying said tracts of land, with all the rights, privileges, and appurtenances thereunto appertaining and belonging, as the same were conveyed and assured by the said lease, and subject to the performance of the agreements therein mentioned to be performed by the lessee, and thereby covenanted and agreed to and with the defendant that it was seised of a perfect title, and that the same was free from all other and prior incumbrances except those specifically mentioned therein, and that it would warrant and defend the same to the defendant and its successors forever; that the defendant thereupon took possession of the property by the said deed conveyed to it, and from thence until the commencement of this suit has had the use, control, and enjoyment thereof, and during that time, from the 20th day of September, 1891, until the 20th day of September, 1894, there accrued to the plaintiff, under the provisions of the said lease, for and on account of the royalty guaranteed as aforesaid, and which had not been paid or recovered, the sum of \$3,600, the same consisting of the monthly sums of \$100 per month which the lessee covenanted and agreed to pay according to the tenor and effect of the lease aforesaid, which said aggregate sum neither the said Abbey Coal & Mining Company nor the defendant company has ever paid to the plaintiff. And plaintiff avers that in and by the said deed of the said Abbey Coal & Mining Company it granted, bargained, sold, assigned, and set over to the defendant company, besides the leasehold interest and estate it had in and to the coal underlying the said tracts of land above described, all coal and coal rights and all real estate owned by it at the time of the making of the said deed, and all tools, machinery, implements, live stock, personal property, and fixtures theretofore owned and used by it in carrying on mining operations, and that it made the said deed with intent to retire from business, and after winding up its affairs by paying its liabilities then existing, incurred previous to that time for current and temporary purposes, and to the end that the defendant company should become its successor in said business, and have, hold, own, possess, enjoy, and use all its property, real, personal, and mixed, and theretofore held, owned, possessed, used, or enjoyed by the said Abbey Coal & Mining Company in carry-

ing on coal operations and mining coal from the tracts of land aforesaid, and that, immediately after the execution of the said deed to the said Abbey Coal & Mining Company, it ceased to carry on coal or mining operations and to do business of any kind, except to wind up its affairs as aforesaid, and was succeeded in business by the defendant company, which not only succeeded to the ownership of the property as aforesaid, real, personal, and mixed, but also to all the rights and obligations of the said Abbey Coal & Mining Company under all contracts made by it, and then unexecuted, in whole or in part, for the sale of coal and the products of its mines in the market in which said last-mentioned company had theretofore dealt. And plaintiff avers that prior to the 11th day of August, 1886, said Abbey Coal & Mining Company and the Ellsworth Coal Company, both corporations organized under the laws of the state of Illinois, and both engaged in mining coal, and leasing, buying, holding, and working coal mines in the state of Illinois, and selling the products of their mines in the markets, and divers other companies, corporations, and persons organized under the laws of Illinois and doing business within the state, to wit, seventy corporations, companies, and persons besides those above named, were merged into and consolidated into one company, for the purpose and object of forming a general combination to do away, as far as possible, with competition in the markets between them theretofore existing, the result of which was that the defendant company was organized to succeed the said Abbey Coal & Mining Company and the said Ellsworth Coal Company, and the other companies, corporations, and persons aforesaid, in the business of mining, marketing, selling, handling, dealing, and operating in coal on all the lines of railroad in the state of Illinois terminating at or near or within the limits of the city of East St. Louis; that, after the organization of said defendant company for the objects and purposes aforesaid, to the end that the defendant company should gain, as far as possible, the control of the markets, and exclusive control of all the business previously carried on by the said Abbey Coal & Mining Company and the said Ellsworth Coal Company, and the other companies, corporations, and persons aforesaid, the deed above mentioned from the Abbey Coal & Mining Company to the defendant company was executed; and it also obtained other deeds conveying all the coal, coal rights, coal land, mining properties, and holdings of the said companies, corporations, and persons, and became their successor in the business of mining and operating in coal and selling coal in the markets in which said several corporations and companies had previously dealt, and from thence until the commencement of this suit has continued to carry on the business of mining coal, and selling, dealing in, and handling

coal in the markets aforesaid, whereby a consolidation of all the properties of the said corporations, companies, and persons used for mining purposes was effected, and the defendant gained control of the same, and became the successor of the said corporations, companies, and persons under contracts previously made by them for the sale of coal in the markets aforesaid, and to all right and interests of said corporations, companies, and persons in the coal-mining business, so far as it was in their power to transfer and convey the same. And the plaintiff avers that after the formation of the defendant company, and the transfer to it of the properties of the corporations, companies, and persons, the said last-named corporations, companies, and persons ceased to do business, and have not been engaged in business since then, and that Charles Ridgely, who was president of the said Ellsworth Coal Company, and one of the largest stockholders in it, and George T. Cutts, who was secretary of the same company, and a stockholder in it, became president and secretary, respectively, of the defendant company at the organization thereof; that E. J. Crandall, who was president of the Abbey Coal & Mining Company, became the general manager of the defendant company at its organization, and was a large stockholder in both of said companies, and that one Thomas D. Price, who was the treasurer in said Abbey Coal & Mining Company, and its principal stockholder, became a large stockholder in, and the treasurer of, the defendant company; and that all of the members of said constituent companies above named also became the controlling members of the defendant company at its organization, and continued to operate and manage it for a long space of time thereafter, and the said Ridgely and Cutts, from thence until the commencement of this suit. By reason whereof, and by force of the statute in such case made and provided, the plaintiff avers the defendant became and is liable to pay the plaintiff the said sum of \$3,600 above mentioned, for and on account of the monthly royalties aforesaid; and, being so liable, the said defendant afterwards, etc., undertook and promised to pay the plaintiff the said sum of money, but has not done so, to the plaintiff's damage of \$4,000."

This is an action of assumpsit brought by the appellee against the appellant in the circuit court of Madison county to recover certain royalties alleged to be due upon a mining lease bearing date December 17, 1870, made by the appellee to the Abbey Coal & Mining Company, and assigned by said coal and mining company on August 11, 1886, to the appellant. A judgment was rendered against the appellant for the sum of \$3,600, which has been affirmed by the Appellate Court for the Fourth District, and a further appeal has been prosecuted to this court.

The litigation growing out of the execution and assignment of said lease has been pro-

tracted, this being the third time the question of the liability of the appellant thereon has been before this court. The first case is reported in 150 Ill. 344, 37 N. E. 937, where a judgment against the appellant for \$1,200 was affirmed. The present case is reported in 166 Ill. 361, 46 N. E. 1105, 38 L. R. A. 624, where a judgment against the appellant for \$3,600 was reversed by reason of an error of the trial court in striking from the files a plea filed by appellant in that court. After the case was remanded to the circuit court, a new declaration in lieu of the one upon which the case had before that time been tried was filed, which contained three counts. A plea was filed to the first count, which concluded to the country, to which the similitur was added, and the issue on which remains undisposed of upon the record by any affirmative action of the court. To the second count two pleas were filed. A replication was filed to the pleas, a rejoinder was filed to the replication, and a demurrer was interposed to the rejoinder, which was overruled. A judgment was rendered against the appellee for the costs accruing on the second count, and the appellee has assigned no cross-errors. A general demurrer was overruled to the third count, and, the appellant having refused to plead over, judgment *nil dicit* was rendered in favor of the appellee. A writ of inquiry was executed by the court without a jury, by consent of the parties, and appellee's damages were assessed at \$3,600, and judgment was rendered in his favor on that count for said sum.

Two grounds are urged for a reversal of the judgment: First, the court erred in overruling appellant's demurrer to the third count of the declaration, and in rendering judgment for appellee for \$3,600; and, second, the court erred in rendering judgment for appellee on the third count without disposing of the issue made on the first count of the declaration.

Charles W. Thomas, for plaintiff in error. John G. Irwin and William H. Krome, for defendant in error.

PER CURIAM. The Appellate Court, in disposing of the first contention of the appellant, used the following language: "As to the error which brings in question the judgment of the court in overruling appellant's demurrer to the third count of plaintiff's declaration, it is insisted by counsel for appellant that much of the count is mere inducement, and that the essential ground of the action is the claimed consolidation of the Abbey Company with appellant, and that, if the pleading fails to show that there was such a consolidation, then the demurrer was wrongfully overruled. Whether matter alleged in a pleading is inducement or surplusage must be determined by a sound construction of the entire pleading. * * * The allegations that the Abbey Company made

a deed to appellant, containing certain agreements, which deed was accepted by appellant, and that appellant went into possession of the leasehold estate, were all immaterial matters, if the appellee was grounding his action on the claimed consolidation, only. In no sense can they be taken to be in necessary explanation of the main groundwork of the count, if construed as a count for consolidation, only. Ought these allegations to be considered as mere surplusage? The allegation that the deed contained an agreement 'subject to the performance of the agreements therein mentioned to be performed by the lessee' shows that the pleader relied upon the privity of contract that the law, in a proper case, may say exists; and the fact that the pleader says 'that the defendant thereupon took possession of the property by said deed conveyed to it, and from thence until the commencement of this suit has had the use, control, and enjoyment thereof,' etc., shows that the pleader was relying for a recovery on the grounds of privity of estate existing between appellee and appellant as the assignee of the lessee, the Abbey Mining Company. To denominate that kind of pertinent allegations as surplusage, when they are attacked in no way except by a general demurrer, merely because there is in the same count an attempt to hold appellant liable on the theory of a consolidation, would be to construe away essential allegations without authority of law. We are of the opinion that the count should be regarded as presenting a double, or possibly a treble, ground of liability for a single demand. In other words, the count must be regarded as containing the fault known in pleading as 'duplicité,' and such a fault can be reached only by special demurrer. * * * By the allegations already quoted, appellant is admitted to have received an assignment of the leasehold estate from the Abbey Company, and the demurrer admits that appellant was in possession of the estate from September 20, 1891, to September 20, 1894. An assignee of a lessee is bound, by reason of the privity of estate, to a performance of all express covenants which run with the land. *Consolidated Coal Co. v. Peers*, 160 Ill. 361, 46 N. E. 1105, 38 L. R. A. 624; *Sexton v. Chicago Storage Co.*, 129 Ill. 318, 21 N. E. 920, 16 Am. St. Rep. 274; *Webster v. Nichols*, 104 Ill. 160."

We have examined the third count of the declaration, which is set out in full in the opinion of the Appellate Court (97 Ill. App. 188), and agree with the reasoning and conclusion of that court, and are of the opinion that, while the count is inartificially drawn, it is not vulnerable to a general demurrer, but states sufficient facts to entitle the appellee to recover, and that the court properly overruled the demurrer to said count.

As to the second contention, we agree that the court erred in rendering judgment in favor of the appellee on the third count with-

out disposing of the issue made on the first count, but are of the opinion that such error was invited by the appellant, and that it waived the right to take advantage of such error. The correct practice upon the appellant refusing to plead over, except for the agreement of the parties, would have been for the court to have entered a judgment as by nil dicit on the third count, and then to have impaneled a jury to try the issues of fact upon the first count, and on that trial to have submitted the assessment of damages under the judgment by nil dicit to the same jury, so that there would be but one judgment. *Keeler v. Campbell*, 24 Ill. 288; *Klein v. Wells*, 82 Ill. 201. The record shows, however, that the court, upon overruling the demurrer to the third count, gave judgment nil dicit in favor of the plaintiff, and awarded a writ of inquiry to ascertain the plaintiff's damages, whereupon, "the said writ of inquiry coming on to be heard before the court without a jury; by consent of parties, the court, after hearing the evidence, finds the plaintiff's damages to be the sum of three thousand six hundred dollars (\$3,600)," and adjudged that the plaintiff have and recover of and from the defendant the said sum, etc. The appellant having agreed that the court might proceed to execute the writ of inquiry without a jury, and the damages of the appellee having been assessed and judgment rendered in his favor by virtue of such agreement, we are at a loss to know upon what principle appellant can now ask a reversal of that judgment in this court by reason of such action of the court.

The parties having waived a jury, and agreed that the court might assess the damages under the third count, such action amounted to an abandonment of the first count. The first and second counts of the declaration having been eliminated, the third count was the only count of the declaration undisposed of at the time judgment in favor of the appellee was rendered upon that count. The judgment of the Appellate Court will therefore be affirmed. Judgment affirmed.

(205 Ill. 639)

YORTY v. WEBSTER.

(Supreme Court of Illinois. Dec. 16, 1903.)

WILL—PROBATE—UNDUE INFLUENCE—EVIDENCE.

1. Evidence on the probate of a will examined, and held not to show undue influence.
2. The mere fact that a testatrix has sought advice, which is properly given, does not indicate undue influence.
3. Inequality in the distribution of property by will is not conclusive evidence of undue influence, but is merely a circumstance tending in that direction.
4. On the probate of a will contested on the ground of undue influence, where it appeared that testatrix's nephew, whose undue influence was alleged, prepared, as her amanuensis, a memorandum for the will, evidence of testatrix's statement to a niece that her nephew was going to make her will, and of a conversation

between the niece and nephew in testatrix's presence in which the nephew said that testatrix had remembered the niece in her will, is properly excluded.

Appeal from Circuit Court, Lee County; Jas. S. Baume, Judge.

Proceedings by Annie E. Webster for the probate of the will of Barbara E. Leech, deceased, in which John Yorty appears as contestant. From a judgment for the proponent, the contestant appeals. Affirmed.

A. C. Bardwell, for appellant. A. F. Wingert, for proponent.

RICKS, J. This is a petition filed in the county court of Lee county for the probate of the last will and testament of Barbara E. Leech, deceased. The case was before us at a former term, and is reported in 194 Ill. 408, 62 N. E. 907, to which reference is made for a more complete statement. The errors assigned are in the court granting proponent's motion to direct the jury to find a verdict for the proponent, and in refusing to admit competent evidence to go to the jury in behalf of the contestant.

Appellant filed no brief as required under the rules of this court, but simply files a statement, with a lengthy argument, contending that Charles E. Hicks, a nephew, was in position to, and thereby did, use undue influence over the deceased, and also argues that Nancy Brown, a niece, who had lived with the testatrix a portion of the time, did not receive anything under the testatrix's will, but does not cite a particle of evidence to sustain his position with reference to undue influence exercised by Hicks. The evidence shows that Hicks went to live with the deceased and her husband when he was 13 years of age, and made his home with them, as a member of the family, until about the time he was of age (Mrs. Leech never having had any children), and during the time he lived with them he worked for them the same as if he was their child, and for a few years was a partner with Mr. Leech in a store, and had the management of the entire business. Hicks later on moved to the state of Nebraska, where he has ever since made his home. After the death of her husband, which was about two years prior to her death, the testatrix depended upon Hicks altogether for advice, being in constant correspondence with him; and Mr. Leech made him the executor of his will, but, being a non-resident, he was unable to act. Hicks returned about the time of his uncle's death, and remained with his aunt for a month or more, and during that time assisted the testatrix in probating her husband's will and settling up the business, and, during the time he was there, accompanied his aunt, together with the niece, Nancy Brown, to the city of Dixon (being the county seat), to attend to some business in reference to the estate, and to probate the will of Mr. Leech, in which Hicks was a legatee; and during the day

they went to an attorney's office, and left a memorandum with the attorney, from which he was directed by Mrs. Leech to draw the will in question. The memorandum was in Hicks' handwriting, but the attorney took it and went over it very carefully, and interrogated the testatrix with reference to the amount each of the legatees was to receive, which information she gave without any hesitancy, and without reference to the memorandum furnished. There were 34 bequests in her will—to her brothers and sisters and nephews and nieces; Charles E. Hicks receiving the greater part of the estate, which was valued at something over \$20,000. The attorney drafted the will as directed by the testatrix and mailed it to her at her home, and in about three days afterwards she had witnesses called in to witness the same. It is admitted by appellant that Mrs. Leech was of sound mind, and the evidence shows her to have been a woman of strong mind, and positive in her views; and, when she once made up her mind in reference to a thing, it was hard to change it.

We are unable to find any evidence in the record tending to support appellant's contention that the testatrix was influenced by anything that was said or done by Hicks in making the disposition she did of her property. The evidence shows that she was very much attached to him, and frequently spoke of him in high esteem, and it is true she depended upon him for advice; but advice sought, and properly given, does not indicate undue influence. "It has often been decided by this court that mere persuasion or advice, however importunate, will not justify the setting aside of a will. * * * Undue influence, to justify the setting aside of a will, must be such as will deprive the testator of his or her free agency." *Taylor v. Pegram*, 151 Ill. 106, 37 N. E. 837; *Francis v. Wilkinson*, 147 Ill. 370, 35 N. E. 150; *Thompson v. Bennett*, 194 Ill. 57, 62 N. E. 321. In our former opinion we found: "There was no evidence of any specific acts or efforts by Hicks to influence her to make the will as it was made. * * * The evidence, without contradiction, established that she was neither imposed upon in the terms of the will, nor ignorant of what she was doing, but that she understood exactly what the will was, and intended to make it as she did." The evidence being practically the same as it was upon the former trial, we see no reason for changing our views from the above findings.

It is further argued that the property was not equally distributed among the legatees. But we have repeatedly held that inequality in distribution of property by will is not of itself conclusive evidence of undue influence, but that it is only a mere circumstance tending to show undue influence in connection with the proven circumstances. If there was evidence in the record which, taken with all reasonable intendments and inferences, fairly

tended to show that the making of the will in question was the result of undue influence exercised over the testatrix by Charles E. Hicks, then the instruction directing the jury to find for the proponent should not have been given; but we have carefully examined the record with this proposition in mind, and are satisfied that there is no such evidence. The evidence in the record is abundant to show that the testatrix favored Charles E. Hicks, but unless the benefit received by him was the result of some fraud, misrepresentation, deceit, or other improper conduct on the part of said Hicks, it cannot be said that the will or its provisions was or were the result of undue influence. When one, from long acquaintance, upright conduct, and kindly acts, or even by reasonable persuasion, induces another to favor him in the disposition of his or her property by will, he is entitled to such benefit. The law does not attempt to make wills for people, but its policy is to uphold wills made by them. The testatrix had the unquestioned right to bestow her bounty where and on whom she pleased. This is so even where there are children, and much more so where those claiming adversely to the provisions of the will stand as collateral heirs.

Much of the evidence in the case and the argument of counsel was directed to the proposition that Nancy Brown, a niece, who was about 27 years of age, had for a number of years lived with and had been very attentive to the testatrix and her husband, rendering both valuable services, and was held in high esteem by them, and was frequently spoken of by them in terms of praise in conversations with their neighbors. Mr. Leech, by his will, left her \$500; and it is contended that the fact that the testatrix left her nothing is strong evidence that the provisions of her will and the lack of recognition were the result of undue influence of Charles E. Hicks. There is not a word of evidence in the record showing or tending to show that Hicks ever had or showed any hostility towards Nancy Brown, or that he had at any time sought to induce the testatrix to treat her otherwise than she had previously done, or to ignore her in her will. As we have said, Charles E. Hicks was, at the best, but a few weeks with the testatrix after the death of her husband. The testatrix lived nearly two years after her husband's death, and Nancy Brown continued to be with her and render her service. If this were an action for services of Nancy Brown, the evidence relative to the services rendered would be applicable, and carry with it much force; but, as tending to show that Charles E. Hicks exercised undue influence over the testatrix, and thereby procured the making of the will in question, we cannot see that it has any force.

The appellant offered to prove by Nancy Brown that while she and Mrs. Leech were in the cemetery upon the day they were in Dixon, and the day that the will was made, Mrs. Leech said to her, "Charlie is going to

make my will," also, after the return from Dixon, that she had a conversation with Hicks, in the hearing of Mrs. Leech, in which he said, "You want to be good to your aunt, for she has remembered you in her will." This evidence was excluded. We see no objection to the refusal to admit this testimony. If it had been introduced, it would have proved nothing; and there is no evidence that Charles did make her will, or had anything to do with the making of it, except the making of the memorandum from which the will was made. The evidence shows very clearly that his act in that regard was no more than that of a clerk or amanuensis. When the memorandum was presented to the attorney, Mrs. Leech went over the whole matter of her bequests, and stated to the attorney, independently of the memorandum, just the disposition she had in mind and desired, and then directed the attorney, then and there, to copy the memorandum, and use his own copy for his guidance, that she might, as she did, take the original copy away with her. It was three or four days after the directions for the preparation of the will were given the attorney before it was prepared and mailed to the testatrix, and when she received it she called one witness herself, and sent Hicks for two others, and executed it. It is not reasonable to believe she was so under the influence of Hicks that if she had, upon reflection, concluded the terms were more favorable to Hicks than she wished, or the provisions as to any of her kin less favorable than she intended, she could not at any time within the three or four days have had it changed to suit her; or, if it be possible that the presence of Hicks so operated on her mind that she was not a free agent, it is inconceivable that after he left and returned to his home in Nebraska, and the testatrix was away from him and surrounded by and near to those now complaining, it would not have occurred to her she had done some others and herself an injustice by the will she had made, and which was still in her possession and control, and either by a new will or codicil have made the changes she desired. These considerations move us to the conclusion that the will in question was as the testatrix desired it should be, and that it should have been, and was properly, admitted to probate.

The judgment of the county court is in accord with the views we have herein expressed, and it is affirmed. Judgment affirmed.

(206 Ill. 261)

DEMPSTER v. ROSEHILL CEMETERY CO. et al.

(Supreme Court of Illinois. Dec. 16, 1903.)

CORPORATIONS—STOCK—ISSUANCE—ACTION TO COMPEL ISSUANCE—LOST STOCK—EVIDENCE—SUFFICIENCY—SUIT BY ASSIGNEE.

1. Where a stockholder pledges his stock to obtain money for the corporation, and the stock is lost, because of failure of the corporation to pay, the stockholder is not entitled to have its

value in new stock issued to him in lieu thereof, but stands merely as a creditor of the corporation.

2. In a suit against a corporation to compel it to issue to plaintiff shares of stock which he claimed to be entitled to under a resolution of the corporation, but which he claimed had never been issued to him, evidence considered, and held to show that he had received more stock than he was entitled to.

3. Where, in an action against a corporation to compel it to issue to the plaintiff stock which he claimed to be entitled to under a resolution of the corporation, the books of the corporation showed that he had received more stock than he was entitled to, the burden was on him to show that he had not received it.

4. In an action by an assignee against a corporation to compel it to issue to him stock which he claimed his assignor to have been entitled to under a resolution of the corporation, the burden was on the assignee to make out his case by the same weight of evidence that would have been required if the assignor had sued.

5. Where, in an action by a stockholder against a corporation to compel it to issue to him certain stock which he claimed to have been entitled to under a resolution of the corporation, and to issue 6 shares in lieu of other shares which he claimed to have lost, the evidence showed that he had received \$5,000 more of stock than he was entitled to, a court of equity would not require the issuance of the additional shares in lieu of those lost, save on clear proof that the shares in excess of the number to which he was entitled were not issued in fulfillment of any of his rights under the resolution or as a stockholder.

6. An action by a stockholder against a corporation to have issued to him certain stock which he claimed to have been entitled to under a resolution of the corporation, and to have shares issued in place of certain ones lost by him, commenced 40 years after the resolution, and after the last man familiar with the facts was dead, and after he had failed to set up his claim in a suit wherein he might have made it, was barred by laches.

Appeal from Appellate Court, First District.

Suit by G. W. Dempster against the Rosehill Cemetery Company and others. From a judgment of the Appellate Court affirming a decree in favor of defendants, complainant appeals. Affirmed.

Cannon & Poage and Harvey Lantz, for appellant. Edwin Burritt Smith, Robert F. Pettibone, and William S. Freeman, for appellees.

RICKS, J. This is an appeal from a judgment of the Appellate Court for the First District affirming a decree of the superior court of Cook county, wherein appellant was complainant and appellees were defendants. Appellant filed his bill as assignee of one Andrew T. Sherman to the latter's interest in certain stock issued and not issued in the appellee cemetery company, asking that the appellee company and certain of its officers be required to issue to him $12\frac{1}{2}$ shares of the original capital stock of said company, the allegation being, in substance, that at the organization of the company said Sherman was entitled to 150 shares, of the par value of \$15,000, of the capital stock, and that of such number of shares $6\frac{1}{2}$ had never been

issued to him, and that other 6 shares of said stock had been issued to him and the certificate of stock so held by him had been lost. Appellant claimed as assignee under a general assignment of all of Sherman's interest in the stock of said corporation, and sought to have the original certificate issued for the $6\frac{1}{2}$ shares for which no certificate had ever issued, and a reissue of the certificate of 6 shares the certificate of which is alleged to have been lost. Appellees, by their answer to the bill, raised five defenses, viz.: (1) That the company has already issued to Sherman, complainant's assignor, more stock than he is entitled to; (2) *res judicata*; (3) laches; (4) champerty; (5) that complainant, Dempster, acquired said claim as the agent of and in trust for the appellee company. The master to whom the cause was referred found in his report that three of the defenses set up, viz. (1) the overissue of stock to Sherman, (2) laches, and (3) the agency of Dempster in the purchase of the claim for appellee company, were established, but that the other two defenses, viz., *res judicata* and champerty, were not established. Objections were filed to the master's report by appellant (appellees filing no objections), and were overruled by the master, and upon exception to the report before the court were again overruled by the chancellor, and the report of the master confirmed, and complainant's bill dismissed for want of equity.

The Rosehill Cemetery Company was incorporated by special act of the Legislature of Illinois in 1859, with a capital stock of \$150,000. By resolution of its board of managers, adopted November 2, 1859, the entire capital stock was apportioned between three persons, as follows: To Francis H. Benson \$115,000, to James V. Z. Blaney \$20,000, and to Andrew T. Sherman \$15,000, the shares of stock being each \$100. Francis H. Benson was the original promoter and organizer of the corporation, and in fact was the owner of the entire capital stock of the company, having transferred to said company his equity in certain lands to be used by the company for cemetery purposes, and receiving said stock in consideration therefor, and it was through said Benson that the shares of stock were respectively ordered to be issued to Blaney and Sherman. This suit was begun on the 19th day of October, 1899, lacking but a few days of 40 years from the time of the order or resolution directing the issuance of the stock to the three persons above named. Many witnesses were examined, and many exhibits introduced in evidence. The cause was referred to the master to take the proofs and report his findings. Much oral and documentary evidence was introduced, and the record is very voluminous, containing approximately 1,300 pages, and covering the period of time from 1859 to the filing of the bill. Upon every material point there is a strong conflict of evidence. By reason of the lapse of time the memories

of men have failed; death has intervened; records and accounts that, when inspected by those who made them, could have been understood and readily explained from the current history contained in them, have by flight of time and the death of those acquainted with the details, from the barrenness of their statements, and the imperfect manner in which they were kept, become of doubtful value and uncertain indices of the transactions they were intended to preserve. With such a record, and under such circumstances, we do not feel called upon to go into an extensive review of the evidence, and must content ourselves with the expression of the views and conclusions reached, upon the material points, from a careful and thoughtful review of the evidence.

The decree was grounded upon three propositions: First, (a) that the stock to which Sherman, the assignor of appellant, under the original resolution was entitled, had been fully issued; (b) that the stock that had been issued, the certificate of which it was alleged was lost, and for which another certificate was sought, was not sufficiently shown to have remained in Sherman, the assignor; in other words, that from the whole evidence the conclusion was reasonable that the six shares, of which it was claimed the certificate was lost, had either been assigned by Sherman, or surrendered to the company for indebtedness from him to it; secondly, that appellant was barred from relief by the laches of his assignor; and, thirdly, that appellant had purchased the claim of Sherman as the agent of the Rosehill Cemetery Company, and hence held it as trustee, and could not be allowed, in equity, to assert his individual claim to the stock.

There is no controversy about the right of Sherman originally to have had 150 shares of this stock, and it is further shown, without dispute, that, outside of the stock to which he was entitled under the resolution, he purchased one certificate of 5 shares that was issued to one of the other stockholders. In relation to the stock for which it is claimed no certificate was ever issued, the conclusions must be drawn from general facts. The master found that there had been, in fact, issued to Sherman shares to the value of \$20,630, including the \$500 that it is practically conceded was stock really belonging to Benson and by Benson assigned to Sherman, and deducting from this amount of stock \$15,000 in value, to which Sherman was entitled, and it would appear that there was \$5,130 more stock issued to him than was his right under the resolution through which he claims. Appellant contends, however, that the master is in error in the conclusion reached as to the amount of stock that was issued to Sherman, and insists that the evidence shows that \$4,100 of the stock that was issued and with which he is charged was not the individual stock of Sherman, but was issued to him for the benefit of the company,

and that he might hypothecate or pledge the same for a loan of \$1,000 which it is claimed was made through John L. Beveridge, who executed his note and pledged the stock to Dr. Banks for the money. This same contention was made before the master and chancellor, and upon it they held adversely to appellant. The record shows that this stock was issued to Sherman in August and September, 1859, and the loan obtained by Beveridge upon the stock was not until the year 1861, about the time he was going into the army. He testifies that he paid the loan after he returned from the army, and the stock was given to him by Benson, who was one of the principal stockholders, for having paid the loan, and he afterwards sold it back to the company for 5 or 10 cents on the dollar. The stock was in three certificates, numbered 63, 65, and 66, respectively. No. 63 was for 30 shares, and No. 65 was for 5 shares, and they were assigned on the 23d day of August, 1859, to Banks. No. 66 was for 6 shares, and was assigned the 8th day of September, 1859, to Ferguson, and the record shows that afterwards these shares were, upon the order of Banks and Ferguson, issued or reissued in the name of Beveridge. There is no order or resolution shown authorizing or recognizing the authority of Sherman to procure a loan upon this stock for the benefit of the corporation. The corporation, as a matter of fact, had no stock upon which it could secure a loan. There was no treasury stock held in reserve for purposes of procuring loans, nor was there any unsubscribed stock. If the proceedings of that corporation were regular, every share that was issued belonged to Benson, Blaney, or Sherman, and if Sherman saw fit, at the request of Blaney or his co-stockholders, to pledge the stock that was his individual property for the purpose of obtaining money for the benefit of the corporation, and that stock should, in the operation, be lost because of the failure of the company to pay, Sherman would not thereby be entitled to other stock of the same value and to the same amount, but would stand as a creditor of the company to the amount of the sum advanced to it; and as the stock, when issued, was regularly charged upon the books of the company to Sherman, we are satisfied with the conclusion of the master and chancellor holding that this theory of a loan for the benefit of the company cannot operate so as to relieve Sherman's account from the charge of so much of the capital stock of the company as is shown by those certificates. In addition to that, the record shows that along about the time of the organization of this company Sherman was conducting a banking business, and that for the convenience of issuing stock, which was then of little value, the president and secretary signed the stock certificates in blank, and left them at the bank of Sherman. Sherman failed in business. He had transactions with a certain

bank designated as the Bank of Waupun, of Wisconsin, and was indebted to it. It is shown by both his bank ledger for 1859, and his admissions, that \$1,500 of the stock of this company was pledged to the bank for his indebtedness to it. During the time within which these transactions were taking place, and covering the period during which the stock was issued to Sherman, he was the secretary of the company, kept its journals, and was entirely familiar with every detail of its proceedings. If transactions that on their face value amounted to thousands of dollars were going upon the books of the association against him individually, when, in fact, the transactions were for some other member of the company or for the benefit of the company itself, it would seem that he would have looked to it that the books so showed.

From about the year 1860 to 1896 this company was in the hands of its creditors and bondholders, who had gotten control of the majority of the stock, and the original organizers of it were practically debarred from any connection with it. In 1882 a suit was brought by the minority stockholders to restore the company to the stockholders and redeem its property from the incumbrances upon it. Sherman was active in that proceeding. His children and family, to whom he had assigned stocks, were materially interested. The case reached a point in 1885 when evidence was taken, and Sherman then testified that he no longer held any of the \$15,000 of scrip that was awarded to him by the board in 1859; that he was entitled to one share, if he knew where it was, but that he did not know. He then proceeded to show where and to whom he had assigned the stock issued to him. It did not occur to him then that there were $6\frac{1}{2}$ shares of the stock that had never been issued to him, and he did not so state, and while it may be true that the evidence touching this matter is not as plain and conclusive as it might be, still we think, in view of the length of time intervening between these transactions and the time this attempted account of them is being made, and considering the vicissitudes of all those actually concerned in the organization of the company and of the company itself during this period, it is as satisfactory as courts may ordinarily expect to find in such transactions. The books of the company show clearly that there was more stock issued to Sherman than he was entitled to have. He has not, as we think, made such explanation as relieves his account from the charges as found in the books, and the contention of counsel for appellant that it is the duty of appellees to explain the transactions as appear from the books is not tenable. Appellant is insisting upon certain relief which is covered by the status of Sherman's account with this company, and to entitle him to that relief the burden rests upon him.

The records of the cemetery company show

that on or about the 21st of December, 1859 there had been issued to Sherman certificates numbered 45, 46, 48, 49, 50, and 51, of one share each, of the stock of said company, and it is now strenuously urged by the learned counsel for appellant that the record clearly shows that these shares of stock were lost, and that appellant, as assignee of Sherman, was entitled to have a reissue of these certificates. In 1881 or 1882, when Sherman was engaged in forming the syndicate to prosecute the suit of Higgins v. Lansingh, 154 Ill. 301, 40 N. E. 362, which was for the express purpose of establishing the rights of the stockholders in said company, he, with other members of the syndicate, executed a written contract, in which was set out the extent of stock interests of the various members of the syndicate, and in that contract Sherman stated that he was the owner of \$500 of stock, par value, under certificate No. 41. Sherman was a witness in that case, and with reference to his holdings of stock testified: "I no longer hold any of this \$15,000 of scrip that was awarded me by the board November 2, 1859. I am entitled to one share of \$100, if I knew where it was, but I don't know where it is." The witness then continued to detail where he had disposed of the stock, and among the dispositions was \$1,500 that was surrendered to the company and canceled to pay a dividend upon the stock held by him. As a matter of fact, the dividend that he paid was \$1,280, and was paid in stock, but the number of the certificates of stock thus used is not shown. It also appears that \$1,500 of the stock was turned over by him to the Waupun Bank, and the number of the certificates of these shares does not appear. Upon the present trial, touching the certificates now contended for, Sherman testified: "The stock at first was not worth a great deal. I was careless of my stock, and the certificate I held by some means got into the rag-bag, and my wife was selling rags, and in taking them up I discovered some of these certificates. Nos. 45, 46, 50, and 51 I never found. My mind has never been clear about certificate No. 48. I don't remember whether I lost it or not. I never sold it, to the best of my recollection."

It appears clearly from the record that stock was issued to Sherman largely in excess of the stock to which he was entitled under the resolution of the board. This is a proceeding in equity, and though it might appear that these shares had been issued to Sherman and had not been assigned by him, yet, before his assignor would be entitled to have certificates for those shares issued upon the theory of lost stock, it would be incumbent upon appellant to make the same showing that Sherman would be required to make if he were complainant in the bill, and we apprehend that, with the record showing that he already had shares to the extent of \$5,000 more than he was entitled to, a court of equity would not require an additional

six shares to be issued to him by the company, except upon clear proof that the shares in excess of the number to which he was entitled were not in fulfillment of his rights under the resolution, but were by some other arrangement between him and the other holders of stock in the company. In other words, it must affirmatively appear that Sherman has not received the benefit of all the stock to which he is entitled under that resolution. With the certificates assigned to the company in payment of its demand of \$1,200, no record of the certificates of which was kept, and the 15 shares that were sold or delivered to the Waupun Bank with no record of their certificate number, we are unable to see how the court could reach the conclusion that appellant had shown, by a clear preponderance of the evidence, that he, as the assignor of Sherman, was entitled to have a reissue of any stock.

Much stress is laid by appellant upon certain memoranda made by the experts, Vercoe and Furber, who, it appears, went over the books of the company, after the termination of the Lansingh and Higgins suit, with a view of straightening out its list of stockholders. In the list made by them, certificates Nos. 45, 46, 49, 50, and 51 were listed as standing in the name of Sherman, and it purports to be founded upon the decree in the Higgins Case. The minute was made in accordance with the finding of the master, but exceptions were filed to the report of the master in that case upon the point relating to the certificates and others, and, while the court overruled the exceptions, it expressly declared that "the parties claiming under them are not entitled to any right by reason of the finding of the master concerning such certificates, nor shall any other party in interest be prejudiced by such finding of the master, and all parties are left as free to contest any claim made on such certificates of interest * * * as though no such finding had been made." As a matter of fact, that question was not before the master, and the court declined to decree anything in regard to it. The evidence does not show that Vercoe and Furber were authorized to make admissions that should be binding upon the company, but were simply to go over its books at the request of a syndicate of stockholders, and was grounded upon the fact that there was no showing in the books of the company that the certificates had been transferred, and upon the statement of Mr. Sherman. That report is shown to have been erroneous in many respects, and was based, in many instances, on mere rumor and the statements of parties interested adversely to the company, and the record shows that whenever the company was called upon to reissue this stock it denied the right of Sherman, before the assignment, and of appellant, his assignee.

Upon the question of laches, and after reviewing the conduct of Sherman with refer-

ence to this entire transaction, the master says: "He slept upon such rights as he may have had for forty years, and after the last man [Francis H. Benson] who was familiar with the facts died, in 1895, he filed his bill in the suit at bar. Sherman and his assignees are guilty of laches. He did not even make his claim in said Lansingh suit, which was begun two years after he discovered he had lost certain certificates, and when the value of the certificates had begun to be apparent. One important principle involved in the term 'laches' is that, after a long lapse of years, during which testimony is impaired or destroyed, witnesses remove or die, their recollection is dimmed or lost, and papers, letters, documents, books, records, etc., are lost or destroyed, or, if not lost or destroyed, are in the hands of persons not familiar with their contents, liable to misinterpret them, unable to supply their defects, or correct the same, or explain them from the memory of living witnesses, the defendant is at the complete mercy of any claimants who may wish to take advantage of the situation. Time impairs and destroys evidence of the true facts, and makes it practically impossible to meet positive testimony of the complainants, whether the same be true or untrue. A court of equity, therefore, finding itself unable to render substantial justice between the parties, asserts the principle of laches on the ground of public policy and for the repose of property rights." This declaration of the master is in entire harmony with our view of what is shown by this record and the law applicable to it.

The proposition that appellants stood in such fiduciary relation to the cemetery company that the purchase by him of this right of action must be held to have been for the benefit of the company, and that equity would not permit him to prosecute the suit in his own behalf, we deem it unnecessary to review or pass upon. Sufficient has been said to make it incumbent upon us to affirm this decree.

The judgment of the Appellate Court is affirmed. Judgment affirmed.

(206 Ill. 68)

BODELSEN v. SWENSEN.

(Supreme Court of Illinois. Dec. 16, 1903.)

DEEDS—MENTAL INCOMPETENCY OF GRANTOR—EVIDENCE—SUFFICIENCY—FINDINGS OF CHANCELLOR—REVIEW ON APPEAL.

1. Where the evidence is heard by the chancellor in open court and is conflicting, his findings of fact will not be reversed unless clearly and palpably erroneous.

2. Evidence, in a suit to set aside a deed procured by the grantee when the grantor was mentally incompetent to execute a deed, examined, and held to support a finding that the grantor was incompetent.

Appeal from Superior Court, Cook County; Axel Chytraus, Judge.

Suit by John Swensen against Genevieve G. Bodelsen and another. From a decree in

favor of plaintiff against defendant Genevieve G. Bodelsen, she appeals. Affirmed.

The bill in this case was filed June 24, 1902, by appellee, John L. Swensen, against Genevieve G. Bodelsen and Olaf H. Ahlgren, to set aside two certain deeds to property therein described, said deeds being executed, respectively, the 13th and 16th of September, 1901, there being three different pieces of property, known as the "Lake View," "South Side" and "West Side" properties. The bill alleged, among other things, that appellee was delirious, and unconscious of what he was doing, at the time of making the deeds; that there was no consideration to support the instruments; and that their execution was induced by fraud, misrepresentation, etc. Appellant and Olaf H. Ahlgren both interposed sworn answers. The original answer of Genevieve G. Bodelsen, among other things, declared that the deeds were made for the purpose of enabling her to raise money on said property to pay the interest due on mortgages given to secure notes for money raised on said property, and for money to pay taxes then due and unpaid on the said property. Subsequently an amended answer was filed, in which she claimed to be the owner of the property by virtue of said deeds.

The undisputed facts are that on and prior to September 13, 1901, John L. Swensen was the owner in fee of a house, barn, and two lots on Roscoe street, in Chicago, known as the "Lake View Property," a house and lot on La Salle street, described as the "South Side Property," and an undivided one-fourth interest in four houses and lots on the West Side of Chicago, known as the "West Side Property," the latter interest being subject to the life estate of Catherine Swensen therein. The Lake View and the South Side properties were incumbered, respectively, for \$2,500 and \$1,000, and the value of the former was variously estimated by the witnesses at from \$6,500 to \$10,000, while the value of the last-named piece was placed at from \$1,000 to \$3,500. The West Side property was unincumbered, and the value of appellee's interest therein is alleged in the bill of complaint to be \$3,000. Appellee was receiving as rental from the Lake View property, in September, 1901, the sum of \$28 per month, while the South Side property yielded a monthly rental of \$20. One of the flats in the Lake View property was occupied by Henry Bodelsen, father of appellant, Ebba Bodelsen, her mother, and appellee. Ebba Bodelsen is the daughter of appellee Swensen, and appellant is his granddaughter. In consideration of the use and occupancy of such flat the Bodelsen family supplied appellee with his meals and took care of the room which he occupied. The only other property owned by appellee was a few articles of household furniture used in common by the members of the household. This arrangement had continued from the time of the death of appellee's wife, four years prior to September, 1901. In the summer of 1901 ap-

pellee became sick, and so remained until October, 1901, when he began to improve. On the 13th of September, 1901, a deed of the Lake View and South Side properties was made by appellee to appellant. Three days later another deed was obtained, purporting to convey to appellant the West Side property. By the terms of the latter deed a life estate in the property therein described was reserved to appellee. At that time the West Side property was in the possession of Catherine Swensen, a life tenant under the will of John Swensen, deceased. In the first deed the consideration is recited as "\$100 and other good and valuable consideration," while in the second deed it is stated to be "one dollar and other good and valuable consideration." No money was paid to the grantor by the grantee in consideration of said deeds. After the making of said deeds Genevieve G. Bodelsen, the grantee therein, conveyed the South Side property to her cousin, Olaf H. Ahlgren, one of the defendants, and received in consideration therefor the sum of \$400, which deed was dated October 15, 1901. At the time of making the deeds appellant was without property or income, engaged in no business, and was being supported by her father, Henry Bodelsen, who was in receipt of a salary of \$75 per month. Appellee, who is 70 years of age, is the grandfather of appellant. As consideration for the deeds, appellant claimed an agreement for the support of appellee, entered into between appellee and Henry Bodelsen, the father of appellant, of which agreement appellant had no notice or knowledge until after the execution, delivery, and acceptance of the deeds, and to which she has never become a party. In October, 1901, appellee denied the existence or validity of the deeds by demanding the right to collect and receive the rents arising from the property, which demand was refused. Appellee then filed the present bill.

A trial was had before the court, resulting in the dismissal of the bill against the defendant Ahlgren and the South Side property, being the property conveyed to Ahlgren by appellant, and the setting aside of the deeds to the Lake View and West Side properties.

F. M. Williams, for appellant. Vocke & Healy, for appellee.

RICKS, J. (after stating the facts). The contention of appellant is that the evidence does not warrant the finding of the circuit court and does not sustain the decree rendered. The evidence was heard by the chancellor in open court, and was in many respects contradictory and irreconcilable. As to the mental condition of the grantor at the time of the execution of the deeds in question, 13 witnesses testified—6 in behalf of appellee and 7 in behalf of the appellant. Those testifying in behalf of appellee, besides himself, seem to be entirely without any special or pecuniary interest in the matter, while those testifying in behalf of ap-

pellant, with but possibly one or two exceptions, occupied positions that might, at least, tend to render them susceptible of bias.

The scriveners who drew and acknowledged the deeds testified that they believed that at the time of the execution of the deeds the grantor understood the nature of the act, or they would not have taken the acknowledgment. However, Claud B. Davis, by whom the first deed was prepared and acknowledged, testified that he prepared the deed at his office, at the request of Mr. Bodelsen, father of appellant; that at the time the deed was signed by appellee he was very much run down, was thin and haggard, and seemed to be very weak physically; that he had not seen appellee for some three, four, or five weeks prior to that time, and when he saw him on that day he was very much surprised to see his physical condition. Witness further stated that at the time of the signing of the deed the grantor was very nervous; that some one got a sheet of paper, and grantor tried to write his name on it; that he was so nervous he would write a part of it and then go clear off; that he did not seem to be able to write legibly at all; that in these various attempts he did not go further than the first name, and the rest would be a scrawl; that his pen would fly off the line, and he would decide he was too nervous to write, and the deed was finally signed by mark. The deed of September 16th was drawn and acknowledged by L. D. Condee, and was also signed by mark. This witness testified that he thought appellee a very sick man; that his mind seemed to be strong enough, but his body seemed to be in a pretty bad shape.

Henry Davis, witness to the first deed, testified that appellee was, at the time of signing the deed, sick and feeble; and in response to the question of whether witness believed, on the occasion of the signing of the deed, there was any question as to the grantor's mental ability to execute the instrument, witness replied that such a possibility never entered his mind, and that he went over there as a friend, and thought he was favoring Capt. Swensen, the appellee. Witness further stated that at the time it was very hard for appellee to write, and after making several attempts he finally said he could not do it, and made his mark.

Ebba Bodelsen, appellant's mother, another witness on behalf of defendant, testified, in response to the inquiry of whether she thought appellee was, during the period from June, 1901, to October, 1901, of sound and disposing mind and memory, that "he did not seem to care very much how things went."

The testimony introduced by appellee, taken as a whole, was to the effect that in July and August, 1901, appellee was treated for gastritis and rheumatism, at which times, and in October, 1901, he was in a dazed condition of mind, not recognizing persons

whom he met; that he had albumen in the urine, and reabsorption would act, so as to paralyze the nerve centers, and the mind was affected in the way of coma or paralysis; that at and about the time in controversy appellee did not know or recognize persons with whom he was well acquainted, when he met them; that at and prior to such times appellee was very sick and feeble, and some of the witnesses declared him to be of unsound mind. Appellee testified that he was very sick for a period of three months during the fall and summer of 1901; that much of that time he was out of his mind; that he did not remember of signing the deeds in question; that he first learned about the deeds when he began to get well, in October, 1901, when he protested at not receiving the rent. This suit was commenced in June, 1902.

On the question of consideration there is no evidence of any money being actually paid, and the evidence as to the alleged agreement for support and care of appellee by appellant is contradictory and unsatisfactory. Appellee was about 70 years of age, and surrounded by persons, at the time of making the deeds, whose interest in the present controversy makes them adverse and hostile to him now.

We deem it unnecessary to make further comment upon the evidence in this case. Enough has been said to clearly show, as we think, that the decree rendered by the chancellor below was not manifestly against the weight of the evidence, and, unless it was, we would be departing from a long and well established rule should we now disturb the finding of the trial judge who had before him the witnesses; and the means and conditions for judging as to the proper weight to be given to the testimony of the various witnesses was much more favorable than is the inspection of a record. As was said in *Elmstedt v. Nicholson*, 186 Ill. 580, 58 N. E. 381: "The chancellor saw and heard the witnesses, knows their manner of testifying while on the stand, and is better qualified than we to judge of the weight to be given to their testimony. In chancery cases, where the evidence is conflicting and heard in open court, the error in finding as to fact should be clear and palpable to authorize a reversal." And again, as was said in *Fabrice v. Von Der Brelle*, 190 Ill. 460, 60 N. E. 835: "It is contended that the evidence does not warrant the finding of the circuit court and does not sustain the decree rendered. The evidence was heard by the chancellor in open court, and was conflicting in many particulars. In such case, to authorize us to reverse as to a finding of fact, the error must be clear and palpable."

In this case, the facts found by the trial court we think reasonable deductions from the evidence offered, and the testimony fully sustains the decree, which is now affirmed. Decree affirmed.

(206 Ill. 283)

CONSOLIDATED FIREWORKS CO. OF AMERICA v. KOEHL.

(Supreme Court of Illinois. Dec. 16, 1903.)

TRIAL—INSTRUCTION FOR DEFENDANT—APPEAL—SCOPE OF REVIEW—NEG-LIGENCE—SERVANTS.

1. Where a peremptory instruction for defendant has been refused, the court on appeal from a judgment for plaintiff will not weigh the evidence, but will merely determine the sufficiency of the evidence to support the verdict.

2. Where a firm contracted for a certain sum to furnish fireworks, and the services of two of their men to discharge them, and the purchaser did nothing in connection with the fireworks more than to locate the stand where the display took place, the men sent by the seller conducting the display and the seller paying their expenses, such men were, in discharging the fireworks, the servants of the seller, who was liable for their negligence.

Appeal from Appellate Court, Second District.

Action by Frederick Koehl against the Consolidated Fireworks Company of America. From a judgment of the Appellate Court (108 Ill. App. 152) affirming a judgment in favor of plaintiff, defendant appeals. **Affirmed.**

This case was begun in the circuit court of La Salle county. A trial was had before a jury in the month of November, 1899. Upon this trial, at the close of the plaintiff's testimony, the plaintiff dismissed his suit as to the city of La Salle. Motions to exclude the plaintiff's testimony and for peremptory instructions were thereupon made on behalf of appellant and the fireworks committee, the remaining defendants. Appellant's motion was denied, but the motion of the fireworks committee was sustained. The jury found a verdict for appellee against the appellant, the Consolidated Fireworks Company, and assessed plaintiff's damages at \$4,000. Judgment was rendered on this verdict, and appeal taken to the Appellate Court for the Second District, where the judgment was affirmed. On appeal to this court the judgment was reversed, on the ground that the rights of appellant were prejudiced by the action of the trial court in excluding the testimony as to members of the committee, and in the giving on their behalf of a peremptory instruction. The case was subsequently reinstated in the circuit court of La Salle county, where trial was again had before a jury, in November, 1901. The case was submitted to the jury as to all the defendants, but as to the fireworks committee the verdict was not guilty. Appellant was found guilty, and appellee's damages assessed at \$4,000. Upon the second trial no instruction was asked by appellee. No complaint is made as to the admission or exclusion of evidence, and there is no serious complaint made as to the modification of appellant's instructions. The case was appealed to the Appellate Court for the Second District, where the judgment of the circuit court was affirmed.

Some little additional proof was offered on each side at the second trial, but the case is

now substantially the same as when it was previously before this court (190 Ill. 145, 60 N. E. 87), to which reference is made for a more complete statement of facts.

Weart & Weart (Thompson & Jenks, of counsel), for appellant. H. M. Kelly and Lincoln & Stead, for appellee.

RICKS, J. (after stating the facts). Appellant's assignments of error and argument are upon the theory that there is not sufficient evidence in the record to support the judgment against it. A peremptory instruction having been asked, at the close of all the evidence, directing a verdict for defendant, and said instruction having been refused, the legitimate field of inquiry in this court is confined to the single question whether there was evidence tending to support the verdict, notwithstanding the fact that appellant, by its argument and assignments, seeks to have this court weigh the evidence. The weight of the evidence is not a matter to be considered by this court in cases of this kind. *Cleveland, Cincinnati, Chicago & St. Louis Railway Co. v. Hornsby*, 202 Ill. 138, 66 N. E. 1052; *McLean County Coal Co. v. Simpson*, 196 Ill. 258, 63 N. E. 626.

Twelve witnesses, besides appellee, were called by plaintiff, and gave testimony as to the conditions existing at the time and place of the accident out of which this suit grows. These witnesses were uninterested bystanders and onlookers. They testified that, during the time that Barber and Rowden were sending off rockets and shells, showers of sparks and embers were falling around the place; that the boxes out of which the fireworks were being taken by Barber and Rowden were left uncovered and unprotected; that loose fireworks were taken out of the boxes, and laid either on the ground or on the lids of the boxes, within a few feet of the point where the fireworks were being fired. The testimony of these witnesses was not contradicted.

On the question of whose servants Barber and Rowden were, the evidence is conflicting. Appellant contends that they were in the employ of the fireworks committee; appellee contends that they were in the employ of appellant. Mr. Guthman, chairman of the fireworks committee and purchaser of the goods, testified, in substance, as follows: "I told him [Mr. Beech, assistant manager of the appellant company] that we had corresponded with other fireworks companies and that their prices were about the same, and they all had said they would send men to take charge of the fireworks, and that was the reason I was there, as there were none of us knew anything about fireworks, and we wanted the people to take charge of the show. He sold me the fireworks and men to take care of the show. I told him he could ship the fireworks to the bank, or to the committee, or to myself. I told him that if they agreed to send down men to fire off this show I could

almost promise him this bill. Beech replied, "All right, we will do it." Mr. Voorhees, manager of the appellant company, by his testimony tended to corroborate the statements made by Mr. Guthman. Mr. Voorhees said: "Mr. Guthman said, while our prices were a little higher than he had been offered by a competitor, that they had also offered to send a man to fire the display free of charge. If we would do the same, while he could not give the order then, when he got home he would see the committee and see that the order was sent to us." On June 30th Guthman wrote appellant in regard to some paper mortars which had been charged to him, closing his letter as follows: "Please answer at once when your man will be here to take charge of the fireworks, as agreed." In reply to this letter, appellant said: "We will give you credit for them [meaning the mortars] when they are returned. The man that comes down to fire the show will see to returning them. We will send two men tomorrow night, and will report to you early Thursday morning." The two men who were sent were Barber and Rowden. Their wages were paid by appellant; also their expenses, hotel bills, and railroad fare.

We deem it unnecessary to go into more elaborate detail as to the evidence. We think it clear that the character of the evidence is such as to render futile the contentions of appellant. Nor do we think it necessary to review the authorities cited by appellant's counsel. They are applicable to cases where one who is the general servant of another is loaned or hired by his master to another for some special purpose, and, as we regard them, are inapplicable to the case before us. The main case cited by the appellant seems to be that of *Wyllie v. Palmer*, 137 N. Y. 248, 33 N. E. 381, 19 L. R. A. 285. There the men who discharged the fireworks were sent by the company to the committee, who took them to the hotel, paid their expenses, and the committee not only directed where the display should take place, but directed as to the time and place of firing particular pieces, and had a member of the committee on the platform assisting and directing in the discharge of the particular piece that wrought the injury. In the case at bar the committee made a contract for \$223.20. That included the cost of the fireworks, and the service and expenses of the men sent to discharge them. The evidence shows that, other than to locate the stand where the display was to take place, the committee exercised no acts in connection with it; that appellant sent the men, paid their wages, expenses, and hotel bills, and the men so sent took charge of and conducted the display. We do not think the case of *Wyllie v. Palmer*, supra, applicable to or controlling under the facts in the case at bar.

The jury found that Barber and Rowden were servants of the appellant, and the Appellate Court reached the same conclusion,

which we think there is not only evidence tending to support, but by the evidence is clearly established. We do not see how it can be seriously contended that there was not evidence tending to support plaintiff's case, and, as that is the only question we are authorized to consider, the questions of the weight of the evidence and of fact having been conclusively settled by the judgment of the Appellate Court, we find it is our duty to affirm the judgment entered by the Appellate Court in this case, and it is accordingly so ordered.

Judgment affirmed.

(205 Ill. 51L.)

MOMENCE STONE CO. v. TURRELL.

(Supreme Court of Illinois. Dec. 16, 1903.)

MASTER-INJURIES TO SERVANT—SAFE PLACE TO WORK—NOTICE OF DEFECT—TO MASTER—TO SERVANT—ACTIONS—INSTRUCTIONS—RELEASE.

1. In an action for injuries to a servant caused by a car falling from the tracks on an incline, evidence that at the place of the accident the rails were some three inches nearer together than the wheels of the car, and that four of the ties under one rail were not properly supported, was sufficient to warrant the jury in finding that defendant failed to provide a reasonably safe place for plaintiff to work.

2. In an action for injuries to a servant caused by a car falling from the tracks on an incline by reason of the rails being too close together, evidence examined, and *held* sufficient to show that the dangerous condition was not one of which plaintiff had, or should have had, knowledge.

3. It was the duty of a master, where a car, in ascending an incline, had been but a short time before overturned at the same place, to ascertain the condition of the track and the surface of the incline at that place, before sending a servant there for the purpose of replacing the car, and if, on such investigation, the place was found unsafe to advise the servant of its condition before he went there to do the work of replacing the car, so that he could assume the risk, or not, at his pleasure.

4. In an action for injuries to a servant caused by the overturning of a car on an incline, evidence examined, and *held* sufficient to warrant the jury in finding that the master, in the exercise of ordinary care, would have had knowledge of the defect in the track which caused the injury.

5. A servant, on being directed by his master's manager to replace a car which had fallen from an incline, had the right to believe that his master had performed his duty, and provided him a reasonably safe place in which to do the work which he was directed to do.

6. A master's liability for a servant's injuries is fixed by evidence showing that the place in which the servant was working was not reasonably safe; that the master, in the exercise of ordinary care, would have had knowledge of the defects; and that the servant did not know of the defects, and did not have equal opportunities with the master of knowing of them.

7. On the issue of a release given by a servant for injuries, an instruction to find for defendant if the jury should find that the "release in question was the act and deed of the servant" was properly refused, where there was no instruction explaining the quoted language.

8. On the issue of a release for injuries to a servant, where plaintiff's evidence was that the persons procuring the release represented that

they were acting for fellow servants who were raising a benefit for him, and the release itself showed that they were acting for an accident insurance company, which was not otherwise shown to be connected with the case, an instruction for defendant that the causes of action would be discharged by the release if plaintiff signed the same "without any fraud on the part of defendant or those acting for it in such transaction" was properly denied, in that it assumed that the persons procuring the release were acting for defendant.

Appeal from Appellate Court, Second District.

Action by Frank Turrell against the Momence Stone Company. From a judgment of the Appellate Court affirming a judgment for plaintiff (for opinion, see 106 Ill. App. 160), defendant appeals. Affirmed.

This is an action of trespass on the case for personal injuries, commenced in the circuit court of Kankakee county by Frank Turrell, appellee, against the Momence Stone Company, appellant, where, upon a trial before a jury, appellee was awarded damages in the sum of \$1,200. A motion for a new trial was overruled, judgment was entered on the verdict, and appellant appealed to the Appellate Court for the Second District, where the judgment of the circuit court was affirmed. This appeal is from that judgment of affirmance.

The errors relied upon by appellant for a reversal in this court are that there is no evidence tending to prove a cause of action against appellant, and that the trial court erred in refusing appellant's fourteenth instruction.

The first count of the declaration charges that the plaintiff was employed by the defendant to break stone, and that while engaged in that work the defendant negligently ordered the plaintiff to go upon a railway track and replace a car that had been derailed; that the defendant negligently and wrongfully allowed said track to be in an unsafe condition, in this: that the rails thereof were bent and worn, and the ties loose and broken, and the rails too close together to allow the cars to pass over and upon them; that, after replacing said car upon said track, and while exercising due care, the said car fell from the track upon the plaintiff, because of the defective condition of the track, permanently injuring the plaintiff. The second count differs from the first, in that it charges that the car was drawn along the track by means of a cable controlled by machinery operated by persons who were not fellow servants of the plaintiff; that the defendant negligently permitted the cable to become loose and give, causing the car to move, lose its balance, and fall from the track upon the plaintiff, causing the injuries. The third count charges that the manager of the defendant negligently ordered the plaintiff to go upon the track and replace the car, and that while obeying such order the cable was loosened, causing the car to start and fall from the track upon the plain-

tiff. The other four counts charge that the plaintiff was ignorant of the dangers attending the work which he was ordered to do, and that it became the duty of the defendant to warn him of such dangers, and that it was negligent in not doing so.

At the close of the plaintiff's evidence, and again at the close of all the evidence, the defendant entered a motion to exclude the evidence and to instruct the jury to find a verdict for the defendant, and also submitted to the court an instruction directing the jury to find the defendant not guilty. The motion was overruled, and the instruction refused in each instance.

The evidence tends to prove the following facts: The Momence Stone Company is a corporation engaged in excavating and crushing stone at Momence, Ill. At this place it has a stone quarry, and also a building in which the stone is crushed. The quarry and the house in which the crushing is done, referred to as the "crusher," are connected by a narrow-gauge railway track, over which are run small cars, which carry the stone from the quarry to the crusher, and over which the empty cars are returned to the quarry. Leading from the quarry to the crusher is an incline for a distance of from 75 to 100 feet, the angle of which is about 45 deg. When a car is loaded at the quarry, it passes down a slope to the foot or heel of this incline, where a cable is fastened to the front of the car, and it is drawn up the incline and to the crusher by means of this cable, which is operated by machinery in the crusher. Because of the continual excavation of stone in the quarry, this track is shifted, lowered, and changed on this incline and in the quarry every two or three days, and sometimes oftener. The men working at the quarry make these changes when ordered so to do by the manager. The plaintiff was injured December 16, 1899, at this quarry, where he had been employed about a month, by a car tipping or falling off the track, on the incline above referred to, upon him. His duty while at the quarry consisted in doing any kind of work which was to be done there. A day or two before the injury the men were ordered to change the track. The plaintiff assisted in this work, but did not assist in any of the work above the heel of the incline. His testimony is that he did not work at all on or around the incline; that his work in changing the track on this occasion was all done out in the field. The testimony further shows that, during the laying of the track on the incline, either Beale, the manager of appellant, or Groves, its foreman, was present all the time. The relaying of the track was completed about five minutes before noon on the day of the injury, at which time Beale ordered the men to load a car and run it over this track to test the track. From the quarry, where the cars were loaded, to the heel of the incline, it appears there was a slope, so that a car could be started down

the slope, and the momentum of the car would cause the car to run up the incline a short distance. In accordance with this order of Beale's, a car was started down the slope, and, without the cable being attached, it ran up the incline for a distance of 7 or 8 feet, at which point it stopped and tipped over backwards. Beale ordered the plaintiff to remove the stone from the car and track as soon as he had eaten his dinner. Plaintiff found the car, and the stone which had fallen out of it, right at the foot of the incline. He removed the stone as directed, and the car was replaced on the track. Plaintiff then resumed work, breaking stone in the quarry. While engaged in this work the car was reloaded, and was started toward the crusher. When it reached the heel of the incline the cable was attached, and the car was drawn 7 or 8 feet up the incline, when the front wheels left the track. Beale ordered the plaintiff to go, with others, and replace this car on the track. Plaintiff, with a man named Jensen, replaced the front wheels, which were off, on the track; and plaintiff looked to see whether all the wheels were properly on the track, and observed that they were. At this time the cable was still attached to the car. Plaintiff then stepped off the track, on the west side thereof, and started back to his work down the incline. After going a short distance, he looked back, and observed the car move back about a foot and suddenly stop; and then it fell off the track, on the west side thereof, upon the plaintiff, causing the injuries complained of in this suit. The evidence shows that, in starting the machinery which controls the cable, the cable is always at first loosened, permitting a car to go back a short distance, if on the incline.

The evidence further tends to prove that the cars which were run on this track were of 29-inch gauge; that the rails for some distance were too close together; that this condition started about 2½ feet from the heel of the incline, and extended to a point about 8 feet above; that there was a joint at the first-mentioned point, and that the space between the rails there was about 3 inches narrower than the space between the wheels of the cars; that this was the narrowest place, and the space gradually widened as it extended up the incline, for about 8 feet, at which point the gauge was about right; that the gauge of the track should be about 30 inches, but that in places it was only 27 inches; that the effect of running a car over the track at this narrow place would be that it would not follow the track—it would climb the rails; that at a place about 7 or 8 feet up the incline the track was not blocked for a distance of 4 or 5 ties—it was loose and swinging, and one tie was not spiked at all; that the east ends of four of these ties were on a solid bed, while the west ends had nothing under them, and were 3½ to 4 inches above the solid bed, and the

track on that side would be depressed by the loaded car passing over it.

The evidence further tends to prove that, after the injury, Pitman, vice president of the appellant company, and one of its other employes, visited appellee at his home, and obtained a release from him for the injury sustained by him on the occasion above referred to. The release, on its face, is to the London Guarantee & Accident Company, releasing it from all liability; but Pitman testified that he informed appellee that it was a release to the Momence Stone Company, and that appellee signed it as such, in consideration of \$25, which was paid to him at the time of signing the instrument. Appellee, however, testified that nothing was said about a release; that he could not read, and that the paper was not read to him; that Pitman told him that the men at the quarry had raised the money among themselves for him, and that they wanted Pitman to take a receipt to show that he had given the money to appellee; that he signed it for such receipt, and not for a release of his cause of action for the injuries sustained; and that he did not know that it was a release he had signed until appellant introduced it in evidence on the first trial of this cause.

William J. Miles and F. J. Canty, for appellant. E. P. Harney, T. F. Donovan, and T. W. Shields, for appellee.

SCOTT, J. (after stating the facts). There is evidence in this record, the substance of which appears in the foregoing statement, from which the jury might reasonably infer that the appellant failed to provide a reasonably safe place for the appellee to work in, when it sent him to assist in putting the car back on the track at the time he received the injury, and that appellant knew, or ought to have known, of the danger existing there at the time it directed appellee to go there; and the evidence also warrants the inference that the risk was not one which appellee assumed as an incident of his employment. The jury might well conclude that the danger and the injury were occasioned by the fact that the rails were too close together at a place on the incline a few feet above the heel of the incline, and by the fact that four of the ties under the west rail at the same place were not properly supported.

It is argued that appellee, having taken the stone out of the car when it fell over backward on the first trip, must or ought to have known of the danger. The place where the stone was taken out of the car on that occasion was at the heel of the incline. All the knowledge that appellee could be reasonably held to have acquired from what he saw and what he did at that time was that, for some reason, which, no doubt, appeared to be the sharpness of the incline, a loaded car, not drawn by the cable, and to which the cable was not attached, if started up the

incline by momentum acquired in coming down the slope leading to the incline, would stop and tip backward. The evidence does not warrant the conclusion that appellee had, or ought to have had, any knowledge that the rails were too close together, or that the west ends of several of the ties were unsupported at a place a few feet above the heel of the incline. The injury was occasioned by the car tipping over sidewise when it was attached to the cable, and after it had been drawn several feet up the slope by that agency, and the front wheels, when they went off the track, were 7 or 8 feet further up the incline than the point at which appellee had removed the rock from the track and car on the earlier occasion. The cable was attached to the car before it started up the incline on the second trip, and it was drawn to the point which it reached at that time by the cable. We do not think it can be said that the dangerous condition of the place, which resulted in appellee's injury, was a condition of which he had, or ought to have had, knowledge. On the other hand, the manager of appellant saw the overturning of the car on the first occasion, and saw that it refused to go up the incline when attached to the cable, on account of its being derailed on the second occasion. Without making any investigation in regard to the condition of the track at the place where the car was derailed, he sent appellee there to get it back on the track. It was the duty of appellant, in the exercise of ordinary care, when the car was derailed, especially in view of the fact that it had been overturned at or near the same place shortly before that, to ascertain the condition of the track and the surface of the incline at that place before sending appellee there for the purpose of replacing the car, and if, on such investigation, the place was found unsafe, to advise appellee of its condition before he went there to do the work of replacing the car, so that he could assume the risk, or not, as he saw fit. Here the master, by its manager, superintended the laying of the track. Had the track on the incline been properly inspected after the work was done—and ordinary care on the part of the master required such an inspection—the defects would have been discovered; and as the master, through the manager, exercised supervision over the work of laying the track on the incline, its opportunity of learning of the defects was better than those of the servant. When appellant's manager directed appellee to replace the car, the latter had the right to believe that appellant had performed its duty, and provided him a reasonably safe place in which to do the work it then directed him to do. Had appellee been directed to ascertain what the defect was, the situation would be different. The doctrine of assumed risk does not apply. Presuming, as we must, that the evidence for plaintiff is true, it warrants the jury in finding, first, that the place was not reasonably safe; sec-

ond, that the master, in the exercise of ordinary care, would have had knowledge of its defects; third, that the servant did not know of the defects, and did not have equal opportunities with the master of knowing of them. The case is therefore within the rule fixing the master's liability which was laid down by this court in *Lake Erie & Western Railroad Co. v. Wilson*, 189 Ill. 89, 59 N. E. 573.

It is said, however, that the rule requiring a master to provide and maintain a safe place for the carrying on of his work does not apply where the place is being constantly changed by the work there carried on. If appellee had received an injury at the place where he was quarrying stone, and where the work of blasting or otherwise loosening the stone and taking it away constantly changed his surroundings, and the injury had resulted from the fact that the place was unsafe, this argument would be proper for our consideration; but he was injured on the incline, alongside the track of appellant. This track was not being constantly changed, but, when once put down, was left in the same place for two or three days, and was not being changed at the time that the injury occurred. The work of changing it had just been completed, and, in the ordinary course, it would not be again changed for several days.

The court properly refused to direct a verdict for the defendant.

Appellant asked, and the court refused, the following instruction: "The court instructs the jury that one of the defenses offered by the defendant in this case is that the injuries charged by the plaintiff in his declaration to have been received by him were fully released and discharged by him. If you find, from the evidence, that the release in question was his act and deed, then it is unnecessary for you to consider or determine to what extent he was injured, or what amounts of money, if any, he expended, or what time, if any, he lost, or what pain or suffering, if any, he endured. Nor is it proper for you to determine whether the amount paid him as a consideration for the execution of said release was a sufficient amount. If you believe, from the evidence, that the release in question was executed by the plaintiff while he was in the possession of his ordinary mental faculties, and with a full understanding of what he was doing, and without any fraud on the part of the defendant or those acting for it in such transaction, then all the above causes of action would be discharged by said release." Appellant had the right to have the jury instructed that if it appeared from a preponderance of the evidence that appellee had, for a valuable consideration, compromised and satisfied his claim against appellant, growing out of the injury complained of, then he could not recover. We think, however, that the instruction was liable to mislead the jury. By it they would be told that, if "the release in question was the act and deed" of appellee,

It was unnecessary to determine the extent of his injury or the amount of his damages. A jury unlearned in law would be very apt to think that, if the appellee signed the instrument in question, then it would be his act and deed; and, without an instruction explaining to the jury the language last above quoted, we do not think it was error to refuse it. Further, the last sentence of the instruction assumes that those who obtained the release were acting for the defendant. This was assuming a fact the existence of which was denied. The testimony of appellee indicated that these persons were acting for certain charitably disposed individuals whose sympathies had been aroused by his misfortunes. The release itself, which they took at the time, shows that they were acting for the London Guarantee & Accident Company, which is not otherwise shown to have had any connection with the case. To make this assumption by the instruction was clearly wrong. *Germania Fire Ins. Co. v. Klewer*, 129 Ill. 599, 22 N. E. 489. The instruction was properly refused.

The judgment of the Appellate Court will be affirmed. Judgment affirmed.

(205 Ill. 647)

**MERCHANT LOAN & TRUST CO. v.
WELTER.**

(Supreme Court of Illinois. Dec. 16, 1903.)

**PLEDGE BY AGENT—BONA FIDES OF PLEDGEE—
NOTE.**

1. A pledgee of a note, taking it from an agent who had no authority to pledge it, has the burden to show, as against the true owner of the note, that he took it in good faith, for value, and before maturity.

2. Where the agent of the owner of a note extended it without authority, and fraudulently transferred it to another, such other acquired it after maturity.

Appeal from Appellate Court, First District.

Action by N. K. Welter against the Merchant Loan & Trust Company. From a judgment for plaintiff, affirmed by the Appellate Court, defendant appeals. Affirmed.

George N. Stone, for appellant. James Hibben, for appellee.

WILKIN, J. The appellee brought trover in the Cook county circuit court against the appellant to recover damages for the conversion of a certain promissory note for \$2,000, with a credit thereon of \$800, and a deed of trust securing the same, and certain interest notes, abstract of title, an insurance policy, and papers relating to the principal note and deed of trust. The trial was before the court without a jury, and judgment was given for the plaintiff for \$1,469.50. On appeal the Appellate Court affirmed the judgment, and the defendant below then took this its further appeal to this court.

The note bore date March 7, 1892, and was made by Gottlieb Bender, payable to his own order five years after date, and by him in-

dorsed. It was secured by deed of trust on real estate executed by said Bender and his wife to Theodore H. Schintz, trustee. Schintz was the attorney for Mary Ann Welter, who was the owner of the notes, and for whom he held the note and deed of trust, and the other papers accompanying the same, and collected the interest. After the death of Mary Ann Welter, appellee, her son, became the owner of the note, and, shortly before it became due, agreed with Bender that the \$800 should be paid on the note, and the time of payment of the balance extended three years, but that new papers should be drawn. Welter and Bender went to Schintz's office on March 6, 1897, where the transaction was to be completed by preparing and delivering the necessary papers; but Bender's wife was not present to execute the new deed of trust, and it was put off until the next day. On March 7th Bender and his wife went to Schintz's office to execute the necessary papers, but Emil Schintz, a clerk in the office of Theodore H. Schintz, and to whom the latter had directed the parties, drew up an agreement extending the old note and deed of trust for three years, and Bender and his wife signed it; but appellee, having gone to Indiana, was not present, and did not sign the agreement. At the same time Emil Schintz indorsed a payment of \$800 on the note, with the statement, "The balance, \$1,200, extended for three years, as per agreement attached hereto," which statement was left unsigned.

There is a conflict in the evidence as to what was said by appellee and Emil Schintz on March 6th, the day before the papers were signed; but, in so far as it is important to the decision of the case in this court, it must be assumed that appellee did not consent to the extension of the old note and deed of trust, but that his understanding and instructions were that new papers were to be drawn for the \$1,200, to be paid after three years, secured by a deed of trust on real estate, as before. On or before March 10th appellee applied to Schintz for the new papers which he supposed had been executed, but was informed by Emil Schintz that the papers were in the vault, and that he did not have time to get them. Appellee then stated that he ought to have something to show for them, and Emil Schintz gave appellee this receipt: "Received of Nicholas K. Welter note of Gottlieb Bender for balance of twelve hundred dollars (\$1,200). Theodore H. Schintz, by E. H. S." Appellee never succeeded in getting his papers from Schintz, although he asked for them several times, but was put off with excuses. Theodore H. Schintz was indebted to the appellant company upwards of \$25,000, and in June, 1897, pledged appellee's paper, together with other collaterals, to the company, in lieu of other notes which he withdrew, to secure his debt to the company. The company's cashier testified that he received with the note the extension agreement and deed of trust and accompanying papers,

without any knowledge that appellee had any interest in them, or that Schintz was not the owner of them. The papers themselves contained nothing showing who owned them, the deed of trust showing only that Theodore H. Schintz was the trustee; but, without any extension of them, they were overdue when Schintz pledged them to appellee. The legal title was not, and did not appear to be, in Schintz; hence the case of *Y. M. C. A. Gymnasium Co. v. Rockford Nat. Bank*, 179 Ill. 599, 54 N. E. 297, 46 L. R. A. 753, 70 Am. St. Rep. 135, is not an authority favoring appellant; but the case of *Hide & Leather Bank v. Alexander*, 184 Ill. 416, 56 N. E. 809, is practically on all fours with this case, and is decisive of it. There, as here, the note was fraudulently put in circulation; and we held it devolved on the pledgee or holder to show that it took the paper in good faith, for value, before maturity, in the usual course of business. The extension agreement not having been signed by appellee, but having been made only by the Benders, and without his consent, the time of payment of the note was not extended, but, as before said, it was past due when appellant took it.

Counsel for appellant has argued the case upon the facts as well as the law, but, as all controverted questions of fact have been decided in favor of appellee by the Appellate Court, we need not follow him in his discussion any farther than is deemed necessary to a clear presentation of the case. Indeed, we might well have refused to consider the questions of law discussed, because no ruling of the court in refusing to hold appellant's propositions as law in the decision of the case is pointed out in appellant's brief and argument. Appellee submitted no propositions, and appellant should have pointed out some one or more submitted by it which the court erroneously refused to hold. We have, however, considered the case upon its merits, and reached the conclusion that no error of law was committed.

The judgment will therefore be affirmed. Judgment affirmed.

(206 Ill. 346)

CICHOWICZ v. INTERNATIONAL PACKING CO.

(Supreme Court of Illinois. Dec. 16, 1903.)

MASTER AND SERVANT—INJURY—ASSUMPTION OF RISK.

1. Where an employé in a packing house had been thoroughly familiar for several years with the condition of a catch-basin and its lids, and, without any order, attempted to pass over it, when he might have gone a safer way, he assumed the risk of his injury from falling into the basin, though it was possible for the employer to have furnished safer appliances.

Appeal from Appellate Court, First District.

Suit by John Cichowicz against the International Packing Company. From a judgment of the Appellate Court (107 Ill. App.

234) reversing a judgment of the superior court in favor of the plaintiff, he appeals. Affirmed.

David K. Tone and H. M. Ashton, for appellant. Frank J. Cauty and Americus B. Melville, for appellee.

CARTWRIGHT, J. Appellant fell into a catch-basin, containing hot water and grease, in the packing house of appellee, in the city of Chicago, in which he was employed. He was scalded, and brought this suit in the superior court of Cook county to recover his damages, charging appellee, in the various counts of his declaration, with negligently removing, or permitting to be removed, the lids or coverings from the catch-basin, and permitting it to remain open; with failing to inspect the premises for the purpose of seeing that the catch-basin was properly covered; and with permitting it to remain unguarded and without a cover. Appellee pleaded the general issue.

Appellant was the only witness to the accident, and testified on the trial that he had worked in the packing house six or seven years; that the catch-basin was four by five feet in dimensions, and about three feet deep; that it was partially covered by boards or lids about a foot wide—one on the south side, and one on the north side—and between these there was an open space; that one of his duties was to skim from the catch-basin the grease, which was put in barrels standing near by; that, when skimming the grease off the surface of the water, he took the lids off, and, after skimming, replaced them, but the place in the middle was always open; that, during the six years he had worked there, he had gone across the catch-basin five or six times a day; that at the time of the accident there were small electric lights, and there was a good deal of steam, and that he walked over the catch-basin, and, in attempting to step over the open center to the board, which was further south, the board tilted, and he fell in. There was another way to go to the vat, which was not dangerous. He obtained a verdict and judgment, and the judgment was reversed by the Appellate Court for the First District.

The Appellate Court incorporated in its judgment the following finding of facts: "The court finds that for years prior to the time of the accident the defendant in error knew and was thoroughly familiar with the condition of the catch-basin in question, and its lids or covers, and that, without any order or direction, and without any necessity therefor, he attempted to pass over said catch-basin, and that he voluntarily assumed the risk of the condition of the catch-basin, and of its lids or covers, and of passing over the catch-basin." From the judgment of the Appellate Court this appeal was prosecuted.

Counsel for appellant understand that the

finding of facts by the Appellate Court is binding upon us, and that we can only decide whether the law was correctly applied by that court to the facts as found; but they contend that the court erred in its application of law to such facts, for the following reasons: The judgment contains no finding that appellant was guilty of any want of ordinary care for his own safety, or that he knew and appreciated the danger to which he was exposed by reason of the condition of the catch-basin, which the court found that he knew and was familiar with, and it is contended both of these facts were necessary to defeat the action. The argument is that, inasmuch as the evidence tended to show the appellee to be guilty of negligence, appellant did not assume any risk occasioned by such negligence unless he was guilty of a want of ordinary care for his own safety, and that, although he knew of the condition of the catch-basin, and of the defect in the place where he was working, he did not assume the risk, unless he knew, or in the exercise of ordinary care could have known, of the danger to which he was thereby exposed.

It is the long-established and often-repeated rule of law that every person may choose his own appliances, and conduct his business in his own way, provided he does not violate the law of the land, although another method and other appliances might be less hazardous; and if a servant, knowing the hazards of his employment as the business is conducted, is injured while engaged therein, he cannot maintain an action against his master for the injury merely on the ground that there was a safer mode in which the business might have been conducted. A servant who knows that there are dangerous defects on premises where he works, and does not make complaint, and ask for repairs or improvements necessary for his safety, assumes the risk involved, whether he acquires the knowledge before he enters the service or afterward. In either case he cannot continue in the employment and encounter the dangers without complaint, or any assurance of safety or promise to repair or remedy the defect, and, in case of injury, hold his master liable. *Camp Point Mfg. Co. v. Ballou*, 71 Ill. 417; *Simmons v. Chicago & Tomah Railroad Co.*, 110 Ill. 340; *Herdman-Harrison Milling Co. v. Spehr*, 145 Ill. 329, 33 N. E. 944; *Swift & Co. v. O'Neill*, 187 Ill. 337, 58 N. E. 416; *Bailey on Master's Liability for Injuries to Servants*, 197; 1 *Shearman & Redfield on Law of Negligence* (4th Ed.) § 209. In *Browne v. Siegel, Cooper & Co.*, 191 Ill. 226, 60 N. E. 815, it was said that even if the master failed in his duty to furnish the servant a place ordinarily safe in which to work, and there are, to the knowledge of the servant, defects which render their use hazardous, he is held to have assumed the risk, for he cannot go on, with knowledge of the danger, without complaint, until he

is injured, and then hold the master liable. This rule does not depend upon the care or want of care of the servant, but grows out of the contract of employment or continuance in the service with knowledge of the defect and without objection. *Chicago & Eastern Illinois Railroad Co. v. Heerey*, 203 Ill. 492, 68 N. E. 74; *Cooley on Torts*, 541.

In another sense, the servant does not assume the risks arising from the negligence of the master. The master assumes the obligation of exercising ordinary care that the business, by the method adopted, and the buildings, machinery, and appliances in use, shall not cause injury to a servant who is guilty of no neglect of prudence on his part. The master may be liable for his own negligence in exposing the servant to dangers of which he did not know, and which he had no reason to look for, or in neglecting to use ordinary prudence in inspecting and discovering defects, where machinery or appliances are liable to become defective, or in negligently ordering the servant into danger. The servant does not assume the risks arising from such acts of negligence, and may recover for an injury resulting therefrom if he has not been guilty of any want of ordinary care on his own part. In *Chicago & Alton Railroad Co. v. House*, 172 Ill. 601, 50 N. E. 151, the cause of danger was unknown to the servant, and resulted from negligence of the master. In *Western Stone Co. v. Muscial*, 196 Ill. 382, 63 N. E. 664, 89 Am. St. Rep. 325, there was evidence of an order by the foreman to work in a dangerous place, and the servant obeyed the command. The question was whether the servant was guilty of negligence, or whether he acted as a reasonably prudent person would, in view of the command and the duty of obedience. In *Swift & Co. v. O'Neill*, supra, there was a promise to remedy the defect complained of, and in such a case the servant is only barred by his own contributory negligence. If the risk is no greater than that under which a prudent person would continue the employment, he may recover in case of injury. Where the question is one of negligence on the part of the servant, then the rule is that he must not only know of the defect, but know that it renders the employment dangerous. *Union Show Case Co. v. Blindauer*, 175 Ill. 325, 51 N. E. 709; *Chicago & Eastern Illinois Railroad Co. v. Knapp*, 176 Ill. 127, 52 N. E. 927. No such question is involved in this case. The condition of the catch-basin and its covers had been the same during his long employment, and the finding of the Appellate Court is that for years prior to the accident he knew and was entirely familiar with the condition of the catch-basin and its lids or covers, and, without any order or direction or any necessity, attempted to pass over it. To say that the servant assumes no risks except such as cannot be obviated by the adoption of reasonable measures of precaution by the master is to abolish the doctrine

altogether. Under such a rule the master is liable in every case where he has been negligent, although the servant knows of the danger, and voluntarily encounters it without objection; and, if the master has been guilty of no negligence, he has a complete defense, regardless of any question of the assumption of risk by the servant. Counsel do not contend that the doctrine of assumed risk has been abolished, but, in effect, insist that every case is excepted from its operation. The facts found in the Appellate Court are conclusive against the right to recover.

The judgment of the Appellate Court is affirmed. Judgment affirmed.

(206 Ill. 142)

VILLAGE OF RUSSELLVILLE et al. v. PURDY et al.

(Supreme Court of Illinois. Dec. 16, 1903.)

VILLAGES — TAXES — APPROPRIATION ORDINANCE — CERTIFIED COPY — FAILURE TO FILE — CORRECTION OF ERRORS.

1. Where a village clerk failed to transmit a "certified copy" of the village ordinance levying the village tax for a particular year to the county clerk, as required by Hurd's Rev. St. 1901, c. 24, par. 111, the county clerk was without authority to extend the tax levied.

2. Where in a suit to restrain the collection of a village tax it appeared that the village clerk had deposited with the county clerk the original appropriation ordinance instead of a certified copy thereof, as required by Hurd's Rev. St. 1901, c. 24, par. 111, and the village clerk as a witness testified that he intended to send the tax-levy ordinance to the county clerk, but made a mistake and sent the wrong ordinance, whereupon counsel for the village asked that the witness "correct his mistake as village clerk," as authorized by Hurd's Rev. St. 1901, c. 120, § 191, the application was properly denied for insufficiency, and because there was nothing to show that a "copy" of the levy ordinance had been filed with the county clerk which could be amended.

Appeal from Circuit Court, Lawrence County; P. A. Pearce, Judge.

Bill by William Purdy and others against the village of Russellville and others to restrain the collection of a tax. From a decree in favor of plaintiffs, defendants appeal. Affirmed.

Gee & Barnes, for appellants. W. F. Foster, for appellees.

SCOTT, J. Paragraph 89 of chapter 24 of Hurd's Revised Statutes of 1901 provides that the boards of trustees in villages shall, within the first quarter of each fiscal year, pass an appropriation ordinance, appropriating such sums as may be deemed necessary to defray the necessary expenses and liabilities of the village. Paragraph 111 of the same chapter requires the board of trustees, on or before the third Tuesday of September of each year, to ascertain the total amount of appropriations for corporate purposes which is to be collected from the tax levy of that fiscal year, and, by an ordinance, to levy the amount so ascertained upon the property sub-

ject to taxation within the village. The same section requires that a certified copy of such ordinance shall be filed with the county clerk, who shall extend the tax levied by the ordinance. The president and board of trustees of the village of Russellville, in Lawrence county, passed the appropriation ordinance, as contemplated by statute, within the first quarter of the fiscal year 1899, and thereafter, within the time prescribed by statute, passed an ordinance levying a tax to meet the amount of the appropriation. The village clerk deposited with the county clerk what appears to be the original appropriation ordinance. No certificate was attached. No other document of any kind was filed with the county clerk for the purpose of authorizing him to extend the tax levied. He, however, extended the amount of the appropriation ordinance as a village tax. Appellees filed their bill in the circuit court of Lawrence county stating the facts as above, except they denied the passage of the ordinance levying the tax, and averred that the county clerk, without any authority of law, extended the village tax against the complainants in the bill, and prayed an injunction against the collector of taxes restraining him from collecting that tax from the complainants. The village was also made a defendant. A temporary injunction was issued. At the May term, 1900, of the circuit court of that county, the defendants answered, trial was had, and a decree was entered perpetually enjoining the collection of the tax. The defendants appealed to this court.

In the absence of a certified copy of the ordinance levying the tax, the county clerk was without authority to make the extension. The certificate of the levy of the tax is jurisdictional. *People v. Chicago & Northwestern Railway Co.*, 183 Ill. 311, 55 N. E. 682; *Indiana, Decatur & Western Railway Co. v. People*, 201 Ill. 351, 68 N. E. 293.

On the trial in the court below the village clerk of Russellville testified that he intended to send the tax-levy ordinance to the county clerk, but made a mistake and sent the wrong ordinance. Counsel for appellants then said, "Then we will ask this gentleman to correct his mistake as village clerk." The chancellor said, in response to this offer, "It is too late now," and this action of the court is assigned as error, and it is urged that the course which appellants sought to follow in the court below was authorized by section 191 of chapter 120, Hurd's Rev. St. 1901, providing that the omission or defective act of any officer connected with the assessment or levying of the tax may be, in the discretion of the court, corrected, supplied, and made to conform to law by the court, or by the person (in the presence of the court) from whose neglect or default the same was occasioned. We think the action of the court below was proper. Waiving other objections, it does not appear, from the request made, precisely what the defendants sought. The

witness said he sent the wrong ordinance; that he intended to send the tax-levy ordinance. This would not have been a compliance with the law, as he should have sent a certified copy of that ordinance. The request was that he be permitted to correct his mistake, which evidently would have meant the substitution of one ordinance for the other. Nothing which purported to be a copy of the levy ordinance had been filed with the county clerk, and there was therefore nothing to amend.

The decree of the circuit court of Lawrence county is in accordance with the law, and will be affirmed. Decree affirmed.

(205 Ill. 525)

WHITE et al. v. KILMARTIN et al.

(Supreme Court of Illinois. Dec. 16, 1903.)

WILLS—VACATION—MINOR HEIRS—GUARDIAN AD LITEM—FAILURE TO APPOINT.

1. Where, in a suit to set aside a will, certain minor heirs would be entitled to a share of the estate if the will was declared void, it was reversible error for the court to take their default for failure to appear, without appointing a guardian ad litem to defend them.

Error to Superior Court, Cook County.

Bill by Bridget White and others against Jerome Kilmartin and others. From a decree in favor of defendants, plaintiffs bring error. Reversed.

Charles E. Hamill, for defendants in error. John C. King and W. J. King, for plaintiffs in error.

RICKS, J. This case comes to this court upon a writ of error to review the record made in the superior court of Cook county, where a decree was entered dismissing a bill filed to contest the will of Catherine Healy, deceased. Various errors are assigned of record, but, taking the view we do of the case, it is not necessary to discuss but the one in reference to the omission of the court to appoint a guardian ad litem for the infant defendants, as, in our judgment, it is fatal to the decree dismissing the bill.

The bill sets up the fact that Catherine Healy, during her lifetime, was married twice; that her first husband, John Prendergast, died in June, 1865; that of said marriage there was born one child only, who died in infancy; that the second husband of Catherine Healy was Bryan Healy; that there was no issue of said second marriage, and that the husband and father of said Catherine Healy are long since dead; that said Catherine Healy, deceased, left, her surviving, several heirs, among whom are John Kilmartin, Mary Kilmartin, and Jerome Kilmartin, who are all minors, and who are the children and only heirs at law of Marie Kilmartin, deceased, who was the only child and heir at law of John Ryan, deceased, the oldest brother of said Catherine Healy. The bill alleges that the above-named defendants

are minors and heirs at law of Catherine Healy. The allegation in regard to minority is supported by the testimony. At a term of the court previous to the trial of the cause the three Kilmartin heirs were defaulted, with other defendants not answering.

The will in question bequeathed the property disposed of as follows:

"Second. I give and bequeath to my sister, Bridget White, the sum of \$200 in cash.

"Third. I give and bequeath all the balance of my property, real, personal or mixed, of whatever kind and wheresoever situated, to my stepdaughter, Kate Flanagan, Delia Reece, my grandniece, Ellen Cahill, wife of Michael Cahill, and Peter Glynn, equally, it being my intention that each of said parties shall have an equal quarter of my estate; the interest, however, devised and bequeathed to Kate Flanagan, my stepdaughter, is to be a life interest; that on her death said quarter interest shall go to her two children, Marie Flanagan and Joseph Flanagan, equally."

Ellen Cahill was the only devisee that was an heir at law of the testatrix. The Kilmartin heirs were entitled to a one-sixth interest in the estate, which was valued at \$13,000, had the will been declared void, and are now joining with the complainants below in suing out this writ of error; and the Kilmartin minors assign the failure of the chancellor to appoint a guardian ad litem to defend them, and the taking of their default, as for error.

We have repeatedly held that it is reversible error to neglect to appoint a guardian ad litem for infants. Counsel for defendants in error cites authorities to support his contention that the error does not render the judgment void, but only voidable, and that a motion to set aside the decree in the trial court was the proper method of procedure in this case; but all the authorities cited are where the attack on the decree of the trial court was collateral. And we have repeatedly held that, where a guardian ad litem is appointed whose interests are in any manner hostile to the interest of the minor, such appointment is reversible error. In this case the decree of the lower court dismissing the bill was certainly hostile to the interests of the Kilmartins, and we would be reversing a well-established rule to permit such a decree to stand. In the case of *Hall v. Davis*, 44 Ill. 494, this court said (page 498): "In the case of *Peak v. Shasted*, 21 Ill. 137 [74 Am. Dec. 83], it was held that a minor could only appear to defend a suit by guardian, and that the plaintiff should, in case a minor defendant failed to so appear, have a guardian ad litem appointed to make defense. It was also held that, if a minor defendant should appear in person or by attorney, it would be error in fact, which may be assigned in the court rendering the judgment; also that a judgment or decree against a minor without a guardian may be set aside,

on motion, in the court rendering it, and let such defendant in to plead. In that case the application was made to the court on motion, and we said that such practice was regular. In this case it appears by the petition that no appearance was entered by Mary J. Davis, either in person, by guardian, attorney, or otherwise, nor does any such appearance appear from the record in the cause. It appears from the petition, verified by the oath of the petitioner, that she was a minor when all of these proceedings were had, and that her rights were not protected in the decree of the court. This, then, brings this case within Peak's Case. The court below should have allowed the petition, and let Mary J. Hall in to defend the suit, and, on a final hearing, have rendered such a decree as should be required by the case made by the parties."

The decree of the superior court of Cook county is reversed, and the cause is remanded to that court for such further action as may be desired, not inconsistent with this opinion. Reversed and remanded.

(206 Ill. 318)

CHICAGO CITY RY. CO. v. CARROLL.

(Supreme Court of Illinois. Dec. 16, 1903.)

CARRIERS—STREET RAILROADS—PASSENGERS—INJURIES—COMPLAINT—ALLEGATIONS OF NEGLIGENCE—PROOF—RES IPSA LOQUITUR—EVIDENCE—WITNESSES—CROSS-EXAMINATION—TRIAL—ORDER OF PROOF—DISCRETION—INSTRUCTIONS—APPEAL—OBJECTIONS—EXCEPTIONS—SUPREME COURT—JURISDICTION—QUESTIONS REVIEWABLE.

1. Where plaintiff was injured by the fall of a trolley pole while he was passing from one street car to another at a junction point, and his evidence that he had a transfer, and that of his son that a transfer was taken from his pocket when he was brought home after the injury, was not contradicted, the fact that the transfer itself was not offered in evidence did not render the proof as to plaintiff's status as a passenger insufficient.

2. Where a passenger on a street car was injured by the fall of a trolley pole as he was alighting at a junction point, proof that plaintiff was a passenger, of the fact of the accident, and the resulting injury, established a prima facie case of negligence, without proof as to what caused the pole to fall.

3. Where, in an action for injuries to a passenger on a street car by the fall of a trolley pole as he was alighting, at least three of the six counts of the declaration charged general negligence, the fact that other counts of the declaration charged specific negligence with reference to the fall of the pole, which was not proved, was not material.

4. Where plaintiff was injured by the fall of a trolley pole from a street car running on a certain avenue in a city, and plaintiff's son testified that cars running on such avenue bore the inscription, "The Chicago City Railway," which was defendant's corporate name, and defendant introduced medical witnesses who testified that on the same day plaintiff was injured they were directed by defendant to make an examination of plaintiff, and were paid by defendant for so doing, such evidence was sufficient to show that defendant owned and operated the cars on such avenue.

5. An objection that plaintiff could not recover, by reason of a variance between the decla-

ration and the evidence, should be denied where the objection failed to point out wherein there was a variance, so that it might be obviated by proper amendment.

6. Where physicians were introduced as witnesses for defendant in a suit for injuries, it was proper to permit them to be asked on cross-examination by whom they had been sent to examine plaintiff, and by whom they were paid, for the purpose of affecting their credibility and the weight of their evidence.

7. Where, in an action for injuries to a passenger on a street car, plaintiff asked leave to recall his son for the purpose of showing the inscription on the cars on the line on which he was injured, after plaintiff had closed his case, the granting of such permission was not an abuse of discretion.

8. Where, in an action for injuries to a passenger, the court permitted plaintiff, after he had rested, to introduce evidence of the inscription on the cars of the line on which he was injured, and, after the witness had retired and plaintiff had rested, defendant's attorney stated that he desired to offer evidence "on the question of the inspection of the cars," etc., whereupon the judge stated that he would receive no evidence, except as to the ownership of the line, at that stage of the case, and defendant thereupon did not put any witness on the stand, or make any offer of proof, it could not claim on appeal that the court erred by its mere statement in refusing to receive the evidence.

9. Where, in an action for injuries to a passenger, plaintiff alleged that he was a carpenter and contractor, evidence as to his general earning capacity prior to the accident was admissible.

10. In the absence of objections and exceptions taken at the time to alleged improper remarks of the trial judge, error cannot be predicated thereon.

11. In an action for injuries, an instruction that, if plaintiff had proved his cause of action as alleged in his declaration, he was entitled to a verdict, was unobjectionable.

12. Where, in an action for injuries to a passenger, plaintiff's evidence as to defendant's ownership and operation of the railroad on which plaintiff was injured was sufficient to establish a prima facie case, and was not contradicted, it was not error for the court to assume such fact in its instructions to the jury.

13. In an action for injuries to a passenger by being struck by a trolley pole, an instruction that the burden was on the carrier to show that it did all that human care, vigilance, and foresight could reasonably do, consistent with the character and mode of conveyance adopted, in the practical prosecution of its business, to prevent accidents and injuries to passengers riding on and alighting from its cars, was not in conflict with other instructions requiring plaintiff to prove that defendant owned and operated the car in question, and requiring defendant to exercise such care as human beings are capable of, consistent with the practical operation of defendant's trains, and that a party charging negligence must prove it.

14. Where a declaration for injuries to a passenger charged that the injury was permanent, it was not error for the court to permit the jury to allow damages for future suffering.

15. Where an instruction submitted a number of matters of fact to the jury, and correctly stated the law applicable thereto, and concluded with a sentence beginning with, "What is the truth, the jury must determine from the evidence only," the instruction was not objectionable on the ground that it did not require the jury to find the matters submitted from the evidence.

16. In an action for injuries to a passenger, objections that the verdict is contrary to the evidence, that the damages are excessive, and that plaintiff is a malingering cannot be reviewed by the Supreme Court.

Appeal from Appellate Court, First District.

Action by Robert Carroll against the Chicago City Railway Company. From a judgment in favor of plaintiff, affirmed by the Appellate Court (102 Ill. App. 202), defendant appeals. Affirmed.

This is an appeal from the Appellate Court for the First District from a judgment obtained by Robert Carroll against the Chicago City Railway Company. The original judgment in the superior court was for the sum of \$5,000. The Appellate Court required a remittitur of \$2,000, and judgment was entered for the sum of \$3,000. The declaration consisted of six counts. Each of said counts alleged that defendant was possessed of, owning, and operating a street railway, and electric street cars thereon, the electricity for which was supplied from the wire overhead through and upon an iron trolley pole attached to the top of the car. Each count contained averments of due care and caution. The first count alleges, also, that plaintiff was at or near the intersection of Wentworth avenue and Thirty-Fifth street, and, without alleging any duty, avers that the defendant, by its servants, so carelessly and negligently propelled and managed its car and trolley pole that the pole broke away from said car, fell, and hit plaintiff upon the head. The second count avers defendant also owned and operated tracks and trolley wires on Thirty-Fifth street, and that it was defendant's duty, when crossing said street, to manage and control the trolley pole on the Wentworth avenue car by a rope attached thereto, so that it should not be caught in the intersecting wires; that while the plaintiff was walking along Wentworth avenue, at or near the intersection of Thirty-Fifth street, defendant, by its servants, so carelessly and negligently managed and operated said car and trolley pole that the upper end thereof was not held in control, and became caught and entangled in said wires, and was thereby torn off the roof of said car, fell, etc. The third count alleges that the trolley pole was connected to the car by a turntable attached or screwed to the car by a bolt, and that it was defendant's duty to provide strong and sufficient bolts; that the pole and turntable were attached by an insufficient and defective bolt; that while plaintiff was walking along Wentworth avenue, at or near its intersection with Thirty-Fifth street, said pole fell by reason of said defective bolt. The fourth count alleges that it was defendant's duty to regularly inspect the pole and turntable, and see that the bolts and screws were in good order and repair; that defendant permitted said bolts and screws by which the turntable and pole were attached to the car to become worn out, rusty, and out of repair; and that while plaintiff was walking along Wentworth avenue, at or near the intersection of Thirty-Fifth street, the trolley-pole fell by reason of the defective

bolt, as aforesaid. The fifth count charges that defendant operated both the Thirty-Fifth street and Wentworth avenue lines, and that passengers were entitled, for one fare, to a continuous ride on both streets, and were given transfer slips entitling them to change cars at Thirty-Fifth street; that plaintiff was a passenger upon a Wentworth avenue car, paid his fare, and received a transfer slip; that he left the Wentworth avenue car at or near the intersection with Thirty-Fifth street to continue his journey upon a Thirty-Fifth street car, and, while he was walking to said car, defendant so carelessly and negligently managed and operated the Wentworth avenue car, and trolley pole attached thereto, that said trolley pole fell, etc. The sixth count differs from the fifth count in the negligence averred, which is that defendant, by its servants, carelessly and negligently permitted plaintiff to be hit upon the head by said trolley pole. The general issue, only, was filed. The only error relied upon is that the Appellate Court erred in affirming the judgment of the superior court, and in not reversing the same; and, based upon this assignment, appellant argues and insists upon error in the court's refusal to direct a verdict for appellant, and in failing to direct the jury that appellee could not recover under the various counts of the declaration, the giving and refusal of instructions, the admission and rejection of evidence, and alleged improper remarks by the court.

Wm. J. Hynes and Samuel S. Page (Mason B. Starring, of counsel), for appellant Steere & Furber, for appellee.

RICKS, J. (after stating the facts). At the close of all the evidence appellant made a motion and offered an instruction to have a verdict directed for it. The court denied the motion and refused the instruction, and for that, error is assigned. If there was evidence in the record fairly tending to support the averments of the declaration, or any count of it, that instruction was properly refused.

As to the manner in which and the circumstances under which appellee received his injuries, no evidence was offered except by appellee. Appellant has no evidence in the record, and examined no witness on any branch of the case, except as to the measure of damages, so that whatever evidence there is in the record tending to establish appellee's case is uncontradicted and undisputed. The undisputed evidence shows that appellee, on the 28th day of January, 1899, between 10 and 11 o'clock a. m., entered one of appellant's electric cars, which was operated by a trolley, at Sixty-Third street and Wentworth avenue, to make a journey over its line thence to Thirty-Fifth street, where appellant had a line running east and west along the latter street, which appellee was to take to carry him west to Parnell avenue, where he resided; that appellee paid his fare,

and received a transfer for the Thirty-Fifth street line; that when Thirty-Fifth street was reached, and as appellee was alighting from, or just as he had alighted from, the Wentworth avenue car to go to the Thirty-Fifth street car, at the junction of these two streets, the trolley pole from the Wentworth avenue car, from which appellee had just alighted or was alighting, fell from that car and struck appellee upon the head and knocked him down, and whatever injuries he did suffer resulted therefrom. Appellee was picked up in a dazed condition, and carried to a store near the car line, and taken thence home in an ambulance.

Appellee testified that he had a transfer, and his son testified that when he was brought home a transfer was taken out of his pocket. No witness denied that he had a transfer, or that he received it in the regular way. It is now urged that because a transfer paper itself was not offered in evidence, and is not in the record, that is fatal to appellee's case. We do not think so. The action was not upon the transfer paper. It was a mere incident to appellee's right. It was sufficient that the undisputed evidence showed, or tended to show, that appellee did receive a transfer, and in consequence of that, and by virtue of it, was a passenger on both lines of appellant while making a continuous journey to his destination. *North Chicago Street Railroad Co. v. Kaspers*, 186 Ill. 246, 57 N. E. 849.

It is further said by appellant that there is nothing to show what caused the trolley pole to fall, or to show that the car was run in a negligent manner with regard to speed, or defectively or wrongly constructed. It was not necessary for appellee to show these matters. As early as 1854, in the case of *Galena & Chicago Union Railroad Co. v. Yarwood*, 15 Ill. 468, this rule was announced (page 471): "By the law they [railroads] are bound to the utmost diligence and care, and are liable for slight negligence. Proof that defendant [appellee] was a passenger, the accident, and the injury, make a *prima facie* case of negligence. This is done, and the burden of explaining is thrown upon the plaintiffs [appellants]." The rule above quoted has, from the time of its announcement to the present time, been adhered to by an unbroken line of decisions in this state. It is the general, recognized rule of this country, and is one application of the rule *res ipsa loquitur*. 3 *Thompson on Negligence*, § 2754; 2 *Wharton on Negligence*, § 661; *Galena & Chicago Union Railroad Co. v. Yarwood*, 17 Ill. 509, 65 Am. Dec. 682; *Pittsburg, Cincinnati & St. Louis Railway Co. v. Thompson*, 56 Ill. 138; *Peoria, Pekin & Jacksonville Railroad Co. v. Reynolds*, 88 Ill. 418; *Eagle Packet Co. v. Defries*, 94 Ill. 598, 34 Am. Rep. 245; *North Chicago Street Railway Co. v. Cotton*, 140 Ill. 486, 29 N. E. 899. The rule as announced by Mr. Thompson in his work on *Negligence*, *supra*, is: "The

general rule may be said to be that where an injury happens to the passenger in consequence of the breaking or failure of the vehicle, roadway, or other appliance owned or controlled by the carrier, and used by him in making the transit, or in consequence of the act, omission, or mistake of his servants, the person entitled to sue for the injury makes out a *prima facie* case for damages against the carrier by proving the contract of carriage; that the accident happened in consequence of such breaking or failure, or such act, omission, or mistake of his servants; and that in consequence of the accident the plaintiff sustained damage." In *North Chicago Street Railway Co. v. Cotton*, *supra*, this court said (page 494, 140 Ill., page 901, 29 N. E.): "The general rule seems to be that proof of an injury occurring as the proximate result of an act which under ordinary circumstances would not, if done with due care, have injured any one, is enough to make out a presumption of negligence. And this is held to be the rule even where no special relation, like that of passenger and carrier, exists between the parties." In that case the further language is used (page 493, 140 Ill., page 901, 29 N. E.): "The evidence of the injury to the plaintiff, and the circumstances under which it was inflicted, were, alone, sufficient to raise a presumption of negligence on the part of the defendant; and, as no evidence was offered to rebut that presumption, a verdict in favor of the plaintiff necessary followed, wholly regardless of the evidence objected to."

Appellant contends that as certain counts in the declaration alleged that the car was not properly inspected, and that other counts alleged that the bolts and connections of the trolley pole were rusty and worn, these were specific charges of negligence, and there was no proof in the record to support them. Appellant, in its argument, seems to overlook the fact that the declaration contained six counts, and that in at least three of them there was no specific negligence charged. But if its contention was sound, as we think it is not, as applied to the counts charging specific negligence, it could not be applied to the counts charging general negligence. Touching this same objection, which was made in the *Cotton Case*, *supra*, this court said (page 495, 140 Ill., page 901, 29 N. E.): "But it seems to be contended that, even admitting that a presumption of negligence arises from mere proof of the plaintiff's injury and its cause, it does not follow that there is any presumption of the specific negligence alleged in the declaration. Even if it be admitted that the presumption is one of negligence generally, and not of any specific negligence, we think it sufficient to throw upon the defendant the burden of rebutting the specific negligence alleged. But the circumstances of the injury do, in our opinion, give presumptive evidence of at least the specific negligence charged in the first count

of the declaration. That charge, as we have seen, is very general, and consists of negligently running and operating its road and the cars propelled thereon." The first count of the declaration charges that appellant "so carelessly and negligently propelled and managed said car and trolley pole that said trolley pole broke away from said car, and fell and hit plaintiff upon the head." The fifth count charges that appellant "so carelessly and negligently managed and operated said Wentworth avenue car, and trolley pole attached thereto, that said trolley pole fell and hit plaintiff upon the head." The sixth or additional count charges that appellant "carelessly permitted plaintiff to be hit upon the head by said trolley pole." Applying the rule as announced in the above case, and as we think it is generally recognized, there can be no doubt but that the evidence in behalf of appellee was sufficient to cast upon appellant the burden of rebutting the negligence alleged in these counts.

Appellant says that, even if it be conceded that the rule *res ipsi* applies, the instruction should have been given, because there was no evidence in the record showing that appellant owned, operated, or controlled the electric car lines in question. There was evidence in the record tending to show that appellant did operate and own the lines in question. Appellee's son testified that the cars running upon the Wentworth avenue line bore the inscription, "The Chicago City Railway." Dr. Babcock, a witness for appellant, testified that on the same day that appellee was injured, and very shortly after the injury, he was directed by appellant to go and make an examination of appellee, and was paid by the appellant for that service. Dr. Moyer, another witness for appellant, testified that he examined appellee on the morning of February 3, 1899, and that he was sent by the appellant to make the examination, and appellant paid for it. Dr. John Leeming testified that he examined appellee on August 4, 1899; that he was sent by appellant to make the examination, and was paid by it for so doing. *Consolidated Coal Co. v. Bruce*, 150 Ill. 449, 37 N. E. 912. Every count in the declaration averred that appellant was possessed of, owned, and operated said electric railroad. In *McNulta v. Lockridge*, 137 Ill. 270, 27 N. E. 452, 31 Am. St. Rep. 362, it was said that the plea of the general issue did not traverse the allegation that the defendant was possessed of and operated a railroad, and appellee invokes this case as authority for the position that it was unnecessary for it to make any proof of that allegation until it was denied. As there was evidence in the record tending to show ownership and operation of this railroad by appellant, the case does not need to be disposed of upon the theory of the presumption arising from the pleadings. The case does not present that question squarely, and we do not now feel called upon to de-

termine just what construction shall be placed upon the language of the court in the *Lockridge* Case. We are clear, however, that where the matter is not made an issue, and is but inducement to the general charge of negligence averred, slight evidence will be sufficient, uncontradicted, to support the allegation.

Appellant, at the close of all the evidence, also offered six instructions asking the court to hold that appellee could not recover under the respective counts of his declaration. The ground of the contention is not stated in the instructions offered, and, if it were upon the theory that there was a variance between the declaration and the evidence, the instruction should have been denied, for the failure to point out wherein there was a variance, so that it might be obviated by proper amendment. *Chicago, Rock Island & Pacific Railway Co. v. Clough*, 134 Ill. 586, 25 N. E. 664, 29 N. E. 184. The theory of appellant as to these instructions seems to be that there was no evidence, or not sufficient evidence, to support any count in the declaration. From what we have already said, it is quite clear that as to at least three counts the instructions were properly refused; and, though there may have been counts that there was no proof to sustain, they were all for the same injury, and any one good count would have been sufficient to support a verdict and judgment. It has not been, and cannot well be, as we think, pointed out, how appellant could be injured by the refusal of these instructions as to particular counts, when other counts must have been permitted to stand to evidence applying to them, and we would not reverse the case for such error if it existed.

It is urged that it was error, on cross-examination, to ask the doctors introduced by appellant by whom they were sent and paid. We do not think so. It is always competent, on cross-examination, to ask a witness if he is in the employ of a party, or if at the time he rendered the particular service he was in the employ of such party, for the purpose of showing his relation to the case, and his interest in it, as affecting his credibility and weight of his evidence. It being proper to ask the question, and the evidence being properly in the record, it could be considered on any proposition it tended to establish.

It is also complained that appellee had closed his case, and appellant had offered its evidence, when appellee was allowed to recall his son John, and show by him the name or the inscription on the cars on appellant's line. This was not error. It is in the discretion of the trial court to allow evidence that has been overlooked or omitted, at any stage of the case; and unless that discretion has been abused, or injury is shown to have resulted from it, it cannot be said to be error. When this son of appellee was recalled, and allowed to testify relative to the name appearing on the cars, the court informed ap-

pellant that, if it so desired, he would bear evidence on its part in denial of what the evidence thus allowed tended to show, but appellant offered no such evidence.

When this witness retired from the stand, appellee announced that he rested his case. Appellant's attorney then said: "We desire to offer evidence, your honor, on the question of inspection of the cars, and so forth." The court replied: "Very well. I won't receive any evidence, except as to the ownership of this line, at this stage." Exception was taken, and it is now urged that, inasmuch as appellee was allowed to show the inscription on the cars, it tended to show ownership, and that appellant should have been allowed to show that it did inspect its cars; that, in the absence of proof of ownership, appellant was not required to prove anything; and that as there was no evidence, until the testimony of this son, of ownership, the court should have opened the case, and allowed proof upon the question of inspection. It may first be said, there was evidence of ownership and operation of the car by appellant already in the record, and it would be a dangerous rule of practice to sustain error upon an assignment such as this. Appellant, in fact, offered no evidence upon the matter. No witness was put upon the stand. No question was asked. Nothing was done, except a mere conversation or talk had between counsel for appellant and the court. Such procedure as that does not amount to an offer of evidence, and the remarks of the court did not amount to a refusal to admit evidence. There can be no refusal to admit that which has not been offered, and counsel cannot, by engaging in a mere conversation with the court, although it may relate to the procedure, by merely stating what he desires to do, get a ruling from the court upon which he can predicate error. If appellant desired to make the contention it now makes, it should have at least put a witness upon the stand, and proceeded far enough that the question relative to the point it is now said it was desired to offer evidence upon was reached, and then put the question, and allow the court to rule upon it, and then offer what was expected to be proved by the witness, if he was not allowed to answer the question asked. It was not stated to the court that appellant did inspect the cars, or could prove that the cars had been regularly inspected or recently inspected, or that the inspection that was made was an examination of the trolley pole or its attachments; and to now hold that the case should be reversed upon the mere statement of counsel that he desired to offer evidence upon the question of the "inspection of the cars, and so forth," would, as we think, be setting a dangerous precedent, and one that would tend to irregularity in such matters. *Stevens v. Newman*, 68 Ill. App. 549; *Beard v. Lofton*, 102 Ind. 408, 2 N. E. 129; *Morris v. Morris*, 119 Ind. 341, 21 N.

E. 918; *Ralston v. Moore*, 105 Ill. 243, 4 N. E. 673; *Smith v. Gorham*, 119 Ind. 436, 21 N. E. 1096; *City of Evansville v. Thacker*, 2 Ind. App. 370, 28 N. E. 559; *Darnell v. Sallee*, 7 Ind. App. 581, 34 N. E. 1020; *First Nat. Bank v. Stanley*, 4 Ind. App. 213, 30 N. E. 799; *Lewis v. State*, 4 Ind. App. 504, 31 N. E. 375; *Huggins v. Hughes*, 11 Ind. App. 465, 39 N. E. 298; 8 Ency. of Pl. & Pr. 236.

Other matters are urged by appellant with reference to the admission and exclusion of evidence, which relate particularly to the examination of the medical witnesses and experts. The objections grow chiefly out of hypothetical questions propounded to witnesses relative to the condition of appellee. The questions are long, and the objection highly technical. We have examined the questions in the light of appellant's argument, and think there was no material error in the ruling of the court in regard to them. One of the matters of evidence objected to is that appellee was allowed to testify as to his wages and earnings previous to the time of the injury, while there is no allegation in the declaration, or any count thereof, that appellee lost any specific wages or earnings, and no allegation of any particular trade or profession. The evidence was that appellee was a carpenter and contractor, and in relation to the wages he received in such lines of business. In *Chicago & Erie Railroad Co. v. Meech*, 163 Ill. 305, 45 N. E. 290, this question was very fully considered, and after a review of the cases of an earlier day, when this court had authority to review both the facts and the law, we said (page 314, 163 Ill., page 293, 45 N. E.): "The rule deducible from the cases in this state is that, in order to recover compensation for inability, to work at the plaintiff's ordinary and usual employment or business, all that is necessary in the declaration is the general averment of such inability caused by the injury, and consequent loss and damage, and that proof of his particular employment or business, and of his ordinary wages or earnings therein, is admissible in evidence under such general averment, but that, when it is sought to recover for loss of profits or earnings that depend upon the performance of a special contract or engagement, then these special and particular damages, and the facts on which they are based, must be set out in the declaration." The evidence did not go to any special or particular damage growing out of the performance of any special contract or engagement which the appellee claimed to have lost, but related solely to his earning capacity as a carpenter and foreman. It did not go into the question of his future or past profits and contracts, and there was no error in its admission.

It is also assigned as error that the court made improper remarks during the progress of the trial. This assignment we cannot consider. An examination both of the abstract and rec-

ord discloses that no objection or exception was taken at the time. In *Hall v. First Nat. Bank of Emporia*, 133 Ill. 234, 24 N. E. 546, we said (page 243, 133 Ill., page 548, 24 N. E.): "Various objections are made to the conduct of the trial judge. It is enough to say that no exceptions appear to have been taken in respect of such conduct. If the trial judge was guilty of impropriety, * * * the party objecting must, by objection and exception, properly preserve the same in the record, if he desires to insist upon the same upon error or appeal." The same rule is recognized and laid down in 8 *Encyclopedia of Pleading & Practice*, 272.

Five instructions were given in behalf of appellee, and all are complained of. The first instruction told the jury that, if plaintiff had proved his cause of action as alleged in his declaration, he was entitled to a verdict. This instruction has several times been before this court, and has been held to be unobjectionable. *Pennsylvania Co. v. Marshall*, 119 Ill. 399, 10 N. E. 220; *Chicago City Railway Co. v. Hastings*, 136 Ill. 251, 26 N. E. 594; *Ohio & Mississippi Railway Co. v. Porter*, 92 Ill. 437; *Race v. Oldridge*, 90 Ill. 250, 32 Am. Rep. 27; *Mt. Olive Coal Co. v. Rademacher*, 190 Ill. 538, 60 N. E. 888.

It is complained that the second instruction assumes that the appellant was the owner of the street railroads mentioned in the declaration. We do not think the instruction assumes anything, but tells the jury that if they believe, from the evidence, the matters stated in the instruction, they shall find for the plaintiff. But if the appellant's construction of the instruction were correct, it would not for that reason alone be error. There was a *prima facie* showing by appellee that appellant owned and operated the railroad which injured appellee, and there was no evidence even tending to contradict it; and it is not error for the court to assume in an instruction that which is established on one side, and not denied on the other.

Appellee's third instruction told the jury that if they found, from the evidence, he was a passenger of appellant, and was struck and injured by the trolley pole falling from appellant's car, and that appellee was using due care, then the burden was upon appellant to show that "it did all that human care, vigilance, and foresight could reasonably do, consistent with the character and mode of conveyance adopted, in the practical prosecution of its business, to prevent accident and injuries to passengers riding upon its cars, or alighting therefrom and leaving the same." It is said this instruction was in conflict with other instructions given for appellant, namely, the sixth, which was that appellee must prove that appellant owned and operated the car in question; the twenty-third, which was that appellant should exercise such care "as human beings are capable of, and such care as is consistent with the practical operation of its trains"; and the thirty-fifth, which was that a

party charging negligence must prove it. We see no conflict. The rule of care is the same in appellee's third and appellant's twenty-third instructions, and, as there were several counts in the declaration, some of which were not upon the relation of carrier and passenger, appellant's thirty-fifth instruction was properly given; but when the relation of carrier and passenger was established, and the injury shown to have resulted from instruments and means wholly within appellant's control, then, *prima facie*, the negligence of appellant was proven. To establish that the relation of carrier and passenger existed, it would naturally follow that it must be shown in some manner, either by admission or evidence, that appellant owned and operated the car in question, and that appellee was a passenger, by having ridden, by being in the car, or in some of the ways by which that relation may arise.

Appellee's fourth instruction is as to the measure of damages, and appellant complains that "it includes the element of prospective suffering and loss of health." The declaration, and at least two of the counts, allege permanent injury, and it was not error to instruct the jury to compensate appellee for not only what he had suffered, but what he would suffer.

It is said the fifth instruction given by the court *sua sponte* did not require the jury to find, from the evidence, the matters submitted, and it required of appellant a higher degree of care than it should. The instruction submits a number of matters of fact to the jury, and correctly states the rule applicable, and concludes with a sentence beginning, "What is the truth, the jury must determine from the evidence only." We do not regard the instruction as bad, from any point of view. It does not state fully the rule as to the care required of appellant, but that is cured by other instructions, and particularly by appellant's twenty-third, which deals with that sole question.

Appellant offered 42 instructions, and 31 were given by the court. It complains that all were not given. We have examined them, and many of them were bad, and should have been refused for that reason. Others are covered by those given, and there was no error in refusing them. Appellant was treated more liberally than was its right in the matter of instructions, and the substantial errors were in its favor, and at its request. The case required no such number, and covered no such field, and we are satisfied appellant has suffered no injustice from the court in that regard.

Appellant has filed no brief in this case, but has filed an argument consisting of 64 pages, most of which is devoted to propositions which we are not authorized to consider in reviewing a case brought from the Appellate Court. For instance, it is urged that appellee is a malingerer, and that he was feigning much of the ailments and injuries to which he testified, and that the verdict is excessive,

and that it is contrary to the evidence. All of these matters were disposed of before this case reached this court. Unless the court has the aid of counsel in pointing out the particular defects, and the law relating to the matter, from the view point of counsel urging objections, it cannot be expected to go through both the record and the whole field of the law to ascertain if some rule may not be applied that will be beneficial to the objector. The rules of this court require a brief, and permit an argument; and the tendency of counsel is to too frequently avail themselves of that which is permissive, and ignore that which is required.

As we view this record, the judgments of the trial and appellate courts should be sustained. The judgment of the appellate court is affirmed. Judgment affirmed.

(206 Ill. 106)

CHICAGO CITY RY. CO. v. McMEEN

(Supreme Court of Illinois. Dec. 16, 1903.)

LIMITATIONS—AMENDMENT OF DECLARATION—CHANGING CAUSE OF ACTION—PLEADINGS—HARMLESS ERROR.

1. To an amended declaration was filed a plea of limitations that the cause of action did not "accrue to plaintiff within two years next before the commencement of this suit, to wit, the filing of said declaration as amended." The first replication thereto averred that the cause of action "did accrue to him within two years next before the commencement of this suit." The second replication alleged that the cause of action in the amended declaration was the same as that in the original declaration. *Held*, that any error in overruling a demurrer to the second replication was harmless, as, under the plea and the first replication, the words of the plea, "to wit, the filing of said declaration as amended," being a mere conclusion, the issue was whether the cause of action accrued within two years of the commencement of the suit, which involved the question for the jury when the injury sued for occurred, and the question for the court whether the suit was commenced when the original declaration was filed, or when the amended declaration was filed; that is, whether the causes of action alleged therein were identical.

2. The original declaration, alleging that plaintiff, at a certain place, became a passenger on a certain train of defendant on the railroad running on State street, and was carried to a point between Thirty-Eighth and Thirty-Ninth streets, on State street, and the amended declaration, substituting "Cottage Grove avenue" for "State street," state the same cause of action, so that the question of limitations is not affected by the amendment.

Appeal from Appellate Court, First District.

Action by Joseph E. McMeen against the Chicago City Railway Company. From a judgment of the Appellate Court (102 Ill. App. 318) affirming a judgment for plaintiff, defendant appeals. Affirmed.

Wm. J. Hynes, Edward C. Higgins, and Watson J. Ferry (Mason B. Starring, of counsel), for appellant. Graham H. Harris, for appellee.

RICKS, J. This was an action on the case, begun on the 6th of January, 1892, by

appellee, McMeen, against appellant, the Chicago City Railway Company, to recover damages for personal injuries alleged to have been received by him on the 28th day of September, 1891, while a passenger on a street car belonging to and operated by appellant. The original declaration alleged that the defendant "was possessed of, using, and operating a certain street railroad extending through the said city of Chicago, from the corner of State and Lake streets, in the said city, and southward along the said State street to Sixty-Seventh street and beyond, in the county aforesaid; * * * that at the said corner of State and Lake streets aforesaid, on the day aforesaid, he then became a passenger on a certain train of the defendant on the said railroad then and there running on said State street, to be carried as said passenger, and was then and there accordingly carried on the said train from thence southward to a point in the block between Thirty-Eighth and Thirty-Ninth streets, on said street aforesaid, for a certain reward to the said defendant; * * * that while the said train upon which plaintiff was a passenger was standing in the middle of the block aforesaid, on the day aforesaid, and while the plaintiff, with all due care and diligence, was seated in the said car on the said train, waiting for the same to be moved forward, the defendant then and there carelessly and negligently so managed and controlled a certain other one of its trains running on the track in the rear of the one upon which the plaintiff was a passenger that the same ran into the rear end of and struck the standing car in which the plaintiff was seated, with great force and violence, and thereby the plaintiff was then and there thrown with great violence and force from off the seat upon which he was seated, upon the seat in front of him," and thereby received the injuries of which he complains. To this declaration the defendant filed the plea of general issue. October 1, 1896, more than two years after the action accrued, the plaintiff filed an amendment to the declaration. The declaration, as amended, charged that the plaintiff was a passenger on the Cottage Grove avenue line, and the place of the accident and injury between Thirty-Eighth and Thirty-Ninth streets, on Cottage Grove avenue. These amendments were made by striking out the portions of the original declaration which referred to State street, and substituting clauses which fixed the line as the Cottage Grove avenue line, and the place at which the accident happened on Cottage Grove avenue between Thirty-Eighth and Thirty-Ninth streets. In other respects the original declaration was not altered. To the amended declaration the defendant filed the general issue, and also a plea of the statute of limitations. To the plea of the statute of limitations plaintiff filed two replications, the first of which tendered issue upon the allegation

of the plea that the cause of action therein mentioned did not accrue to the plaintiff at any time within two years next before the commencement of this suit; and the second alleged that the plaintiff ought not to be barred from maintaining his suit upon the declaration as amended, "because he says that the said several causes of action, and each and every of them, in the said amended declaration mentioned, are the same causes of action, and no other than the said causes of action, in the original declaration mentioned; and this the plaintiff prays may be inquired of by the country." This conclusion to the country was amended, by leave of court, by substitution of a verification. To this second replication the defendant filed a demurrer, which was overruled. Defendant abode by its demurrer. The case was tried on the issues presented by these pleadings, and a verdict and judgment were rendered against defendant for \$1,000. At the close of the plaintiff's evidence, and at the close of all the evidence, defendant offered an instruction directing a verdict in its behalf, but the court refused the instruction. From this judgment an appeal was prosecuted to the Appellate Court, where the judgment has been affirmed. The present appeal is prosecuted from the judgment of affirmance so entered by the Appellate Court.

The appellant argues, first, that the second replication, as amended, containing no averment of fact, was bad, and the demurrer thereto should have been sustained; and, second, that the declaration, as amended, was, in legal effect, the commencement of the suit, because it introduced a new and distinct cause of action from that in the original declaration, and, therefore, the statute of limitations having run before the amendment was filed, this suit is barred.

It is not necessary to determine whether there was error in overruling the demurrer to the second replication, for, granting that there was error, the record shows that it resulted in no injury to this appellant. If the court had sustained the demurrer, the trial could have proceeded on the issue formed by the first replication to the plea, and no different result would have ensued. This will appear more clearly after stating the pleadings. The plaintiff filed an amended declaration, to which the defendant filed the general issue, and also a plea of the statute of limitations, in which it was averred that the cause of action mentioned in the declaration did not "accrue to the plaintiff within two years next before the commencement of this suit, to wit, the filing of said declaration as amended." The first replication filed by the plaintiff then averred that the action "did accrue to him within two years next before the commencement of this suit." By this pleading, issue was joined on the question whether the action accrued within two years next before the commencement of this suit. That issue was a mixed question of

law and fact. It was for the jury to determine when the injury occurred, and for the court to determine whether the suit was commenced at the time the summons issued, or at the time the amendment to the declaration was filed. The jury found that the injury occurred on the 28th of September, 1891, and the court must have found that the suit was commenced at the issuance of the summons; otherwise it would have directed a verdict for the defendant, as requested by the appellant at the close of the plaintiff's case, and again at the close of all the evidence. It does not appear that any harm could have come to the appellant by reason of the court's ruling as to the pleadings. If the objection is that the question of identity of causes of action was submitted to the jury instead of to the court, that objection is without force, in the face of the fact that the court itself passed upon the question when it refused the peremptory instruction.

The appellant insists that the error was not harmless, for the reason that, if the second replication had been held bad, the defendant would have been clearly entitled to an instruction directing a verdict in its favor, because the issues found on the first replication were clearly with defendant. In support of this contention, it is urged that the issues formed by the first replication to the plea of the statute of limitations was whether or not the amendment was filed within two years after the happening of the accident. We do not so consider it. The plea contains the averment that the cause of action did not "accrue to the plaintiff at any time within two years before the commencement of this suit, to wit, the filing of said declaration as amended." In the replication it is averred that the cause of action "did accrue within two years next before the commencement of this suit." That replication does not in any manner aver that the action accrued within two years next before the filing of the amendment, and the plea cannot be considered as declaring the action did accrue within two years next before the filing of the amendment unless it be granted that the filing of the amendment was the commencement of the suit, and that is just the question to be determined. The situation, in short, is this: The defendant, in the plea of the statute of limitations, averred that the action arose more than two years before the commencement of this suit. It then added, "to wit, the filing of said declaration as amended." Of course, this addition implied that in the mind of the pleader the filing of the amendment was the commencement of the suit, and this was a question that he now insists was a matter of law for the court. When the plaintiff's replication was filed, it traversed the averment in the plea, so far as it alleged that the action accrued more than two years before the commencement of the suit, but did not traverse the legal conclusion of the defendant that

the filing of the amendment was the commencement of the suit.

Upon this state of the pleadings, the appellant insists that, because the uncontradicted proof shows that the action accrued more than two years before the amendment was filed, it was entitled to the instruction directing a verdict in its favor. That such a contention hardly deserves the consideration we have given to it will readily appear when we summarize the position of the appellant. It contends that an issue was formed and proved in its favor, when, in truth, the fact that it contends was in issue was not asserted by the plaintiff at all, and unless we give a mere legal conclusion, namely, that the filing of the amendment was the beginning of the suit, the force of a negative averment, there was no such issue. We conclude, therefore, that any error that may have been committed in overruling the demurrer to the second replication was harmless; the issues of fact being properly formed by the general issue, the special plea and the first replication thereto, and the question of law having been passed on by the court in his refusal to give the peremptory instruction requested by appellant.

The principal question for our determination is raised by the second contention of the appellant. It is urged that the amendment to the declaration introduces a new cause of action, and was barred by the statute of limitations, which had run previous to the filing of the amendment. The general rule of law applicable in this state is unquestioned. We have repeatedly held that, where an amendment introduces a new cause of action, it is regarded as a new suit, commenced when the amendment is filed, and the summons issued originally is ineffectual to toll the statute of limitations, if in fact the amendment is filed after the expiration of the statutory period. *Fish v. Farwell*, 160 Ill. 236, 43 N. E. 367. Where, however, an amendment to a declaration introduces no new cause of action, but merely restates in a different form the same cause of action as set up in the original declaration, the suit is commenced at the time of the issuance of the original summons, and the filing of the amendment relates back to the date of the summons, and the statute of limitations is not a bar to the amendment. *Chicago, Burlington & Quincy Railroad Co. v. Jones*, 149 Ill. 361, 37 N. E. 247, 24 L. R. A. 141, 41 Am. St. Rep. 278; *Phelps v. Illinois Central Railroad Co.*, 94 Ill. 548; *Wolf v. Collins*, 196 Ill. 281, 63 N. E. 638; *Chicago & Eastern Illinois Railroad Co. v. Wallace*, 202 Ill. 129, 66 N. E. 1096.

The original declaration in the case at bar states, in effect, that the plaintiff became a passenger on a certain train of the defendant on the railroad running on State street, and was carried to a point between Thirty-Eighth and Thirty-Ninth streets on said State street, at which place the accident occurred. The

amendment substitutes "Cottage Grove avenue" for "State street," so that, as amended, the declaration avers that he was a passenger on the Cottage Grove avenue line, and that the accident occurred on Cottage Grove avenue between Thirty-Eighth and Thirty-Ninth streets. The bare question before us is, did such an amendment introduce a new cause of action?

Counsel for appellant cite numerous cases and text authorities on the proposition that even in transitory actions the allegation of place, if matter of description, is material, and must be proved as laid. This is undoubtedly a correct statement of the law as laid down in *Wabash Western Railway Co. v. Friedman*, 146 Ill. 583, 30 N. E. 353, 34 N. E. 1111, and *Lake Shore & Michigan Southern Railway Co. v. Ward*, 135 Ill. 511, 26 N. E. 520, and would be applicable to the case at bar if we were called upon to determine whether there was a variance between the facts as proved on the trial and the allegations of the original declaration. The question before us is whether a new cause of action was introduced by an amendment which alleged a different place as the occurrence of the injury from that alleged in the original declaration. It might well be true that the facts proved under that amendment were at variance with the allegations of the original declaration, and still it would not necessarily follow that the allegations of the amendment introduced an entirely new and distinct cause of action. This is evident from the nature of a variance. Take the case of several counts in a declaration. The very object of stating the same cause of action in different counts is to prevent a variance. Because the proof corresponds, let us say, to the third count, and is at variance with the first and second, it does not follow that the first and second counts set up a new and distinct cause of action from that contained in the third. We think this will demonstrate clearly that there is a broad distinction between the cases of variance and cases where a new cause of action is introduced. In *Swift & Co. v. Foster*, 163 Ill. 50, 44 N. E. 837, this court said (page 52, 163 Ill., and page 838, 44 N. E.): "The negligence of the defendant, whereby the death of Mullen was caused, might well be stated in different ways in the several counts, in order to prevent a variance between the allegation and proofs, without setting up different and distinct causes of action." The distinction may be illustrated in another way. A plaintiff must allege and prove every element that constitutes his cause of action; and the converse is true—that elements constituting a cause of action are those that must be alleged and proved. In the case at bar the venue was laid with certainty, and it was not necessary to allege with particularity the descriptive matters of place; but having been laid, it was necessary, in order to prevent a variance, that they be proved as laid. An unnecessary

allegation never becomes an element of a cause of action, and yet an unnecessary allegation must frequently be proved as laid, to prevent a variance. The allegation, with particularity, of the street upon which the injury occurred, was altogether unnecessary. The declaration laid the venue in "Cook county, Illinois," and it would have been a legally sufficient statement to have alleged that the injury occurred in the "county aforesaid." Read v. Walker, 52 Ill. 333; St. Louis, Jacksonville & Chicago Railroad Co. v. Thomas, 47 Ill. 116. In St. Louis, Jacksonville & Chicago Railroad Co. v. Thomas, supra, the action was for killing stock at a place where the company was required to fence. The venue was "at the circuit aforesaid"; averring that the defendant was then and there a corporation, and operating a railroad, etc. In that case we said: "The declaration contained three counts, to which a demurrer was filed and special causes were set down. The first is the want of a venue of the injury. The caption or title of the declaration is 'State of Illinois, Morgan County.' The averment is that the company 'was then running divers locomotive engines and railroad cars, operated in and upon said railroad track, by the servants and agents of said railroad company, and the said defendant so operating said locomotives and cars in and upon said railroad track, on the day and year aforesaid, ran said locomotive and cars against and upon one steer, the property of the plaintiffs, and then and there killed said steer.' While this is not accurately formal pleading, we think that the 'then and there' obviously refers to the time and place previously mentioned, and, as but one date and the name of but one place had preceded this averment, they were referred to; and, Morgan county being named in the caption to the declaration, it was thus named as the venue. In the second and third counts the venue is referred to as being at the 'circuit aforesaid.' This answers the rule of pleading that every traversable fact must be laid with a venue. It is true, this is but form; but appellants, as they had a right to do, objected for the want of form, by setting it down as a special cause in their demurrer. This ground of demurrer was not well taken." Upon this question, Tidd, in his Practice (page 432), says: "In an action upon the case for a nuisance, if no place be alleged where the nuisance was committed, the county in the margin shall be intended; and, in stating transitory facts, it is enough to allege a county for a venue, without a parish." In his Pleading, Chitty says (page 249): "But in civil actions in the superior courts, as the jury is no longer de vicineto, the statement of a county alone, or that the contract was made in London, without laying a parish or ward, suffices, unless where a local description is necessary, as in replevin," etc.

The allegation of the particular street, being unnecessary, could not become an ele-

ment of the cause of action, for, as we have already pointed out, only those matters are elements of a cause of action which it is necessary for the plaintiff to allege and prove. The question is therefore narrowed to this: Did an amendment substituting one unnecessary and nonessential allegation for another just as unnecessary and just as nonessential to the cause of action introduce a new and distinct cause of action? We think the answer is clear that it did not. The right, duty, injury, and liability are all precisely the same. It sets up the same right of the plaintiff to be secure from injury, the same duty of the defendant to observe that right, and, in the same words, the same breach of that duty and same violation of that right.

The case of Cicero & Proviso Street Railway Co. v. Brown, 89 Ill. App. 318, was a personal injury case. The original declaration stated that the defendant operated a railway on the streets of Chicago, but did not specify the street on which the line in question was operated. It stated that the injury occurred at the intersection of said railway and Fiftieth street. The first additional count alleged that the line was on Lake street, and that the injury occurred at Fifty-First street. The second additional count alleged that the line was on Lake street, and that the injury occurred at Fiftieth street. The statute of limitations was interposed, it being contended that the additional counts set up a new cause of action. The court said (page 321): "At most, this proof could only amount to a variance from the allegation of the first additional count, and not a failure to prove the substance of the cause of action stated in the declaration. In actions of this class the cause of action is the act or thing done or omitted to be done by the one which confers the right upon another to sue; in other words, the act or wrong of defendant towards the plaintiff which causes a grievance for which the law gives a remedy." In Stevenson v. Mudgett, 10 N. H. 338, 34 Am. Dec. 155, the court says: "The cause of action in both counts is a contract for the delivery of certain cattle, and a breach of that contract. The particulars of time and place set forth in the amended count are materially different from those in the original, and the additional averments are founded upon matter superadded by a further contract between the parties after the original agreement was entered into. But it was upon a breach of the contract as modified that the plaintiff brought his suit, and he asked by his amendment to perfect his declaration, so that he might be able to prosecute it and recover for that breach. In this view of the case, the amendment was rightly admitted. The form of the action is not changed, and the identity of the cause is preserved." In Alabama Great Southern Railroad Co. v. Thomas, 89 Ala. 294, 7 South. 762, 18 Am. St. Rep. 119, the court said: "The various amendments al-

lowed to the complaint do not, in our opinion, introduce a new cause of action, different from that stated in the original count of the complaint. The gravamen of the action is an injury caused to twelve head of cattle shipped by the plaintiff on the defendant's railroad on April 29, 1886, which injury was alleged to be the result of the defendant's negligence. The several amendments each make a case based on some alleged violation of duty growing out of the undertaking to ship these same cattle. They may correct a misdescription of the contract as to the agreed point of destination of the cattle, or otherwise cure an imperfect statement of the same subject-matter, or add new averments of facts more clearly showing the negligence complained of or otherwise altering the grounds of recovery, or varying the alleged mode in which the defendant has violated his duties growing out of the agreement embraced in the bill of lading; but they go no further. The identity of the matter upon which the suit is founded is fully preserved. The amendments all fall within the lis pendens proper, and only subserve the purpose of accomplishing substantial justice between the parties, and of deciding the pending controversy on its real and true merits. This is the main design of all statutes allowing amendments to pleadings. The statute of limitations of one year was, for these reasons, no sufficient answer to the new counts added to the complaint by way of amendment."

In many states an amendment which introduces a new cause of action can never be made. In such states the decisions as to whether an amendment introduces a new cause of action are in point. In Pennsylvania a declaration cannot be amended so as to introduce a new cause of action. *Tatham v. Ramey*, 82 Pa. 130. But an amendment was allowed changing the state in which a contract was alleged to have been made. *Trego v. Lewis*, 58 Pa. 463. And generally, in such states, "amendments which change the alleged date of the contract or the sum to be paid, or correct a misdescription of the contract in other respects, or change any particular of the matter to be performed, or the time or manner of performance, so long as the identity of the matter upon which the action is founded is preserved, are not obnoxious to the rule." 1 Ency. of Pl. & Pr. 558.

We are convinced that the amendment, although varying the details of place of the substantive claim, counted upon precisely the same rights, duties, and violations as were alleged in the original declaration, and that accordingly no new cause of action was introduced.

We have carefully examined the authorities cited and relied upon by appellant, and do not think they are in conflict with the views herein expressed, and are clearly distinguishable from the case at bar. The case of *Wabash Western Railway Co. v. Fried-*

man, supra, is among those relied upon by appellant. The sole question there was one of variance. The action was for a personal injury to a passenger. The averment in the declaration as to the location was that the defendant company was operating a railroad from Kirksville, Mo., to Glenwood Junction, Mo., and that the plaintiff, Friedman, became a passenger at Kirksville to be carried thence to Glenwood Junction. The plaintiff testified that he boarded the train at Moberly, Mo., to go to Ottumwa, Iowa. This evidence was objected to. It was insisted, for the company, there was a variance between the averment and the evidence as to how the relation of passenger and carrier arose, and an instruction to that effect was offered and refused. This court reversed the case, and held there was a variance. In that case, *inter alia*, it is said (page 592, 146 Ill., and page 356, 30 N. E.): "It may be true that plaintiff stated more in his declaration than he might have stated; that he might have relied upon an allegation that he was a passenger upon defendant's cars, being carried for reward, without stating definitely the termini of his journey on defendant's line of road. But, having gone into detail in his allegations, the law requires him to prove them as laid." If the averment of the termini of the journey might have been omitted, and the general statement of the relation been held sufficient, it cannot be upon any other theory than that such averment was not essentially a part of the plaintiff's case. If Friedman, after the evidence was in, had amended his declaration by striking the unnecessary and descriptive part, no assignment of error could have been sustained because of the variance, and his declaration would have supported the verdict. The case of *Wisconsin Central Railroad Co. v. Wleczorek*, 151 Ill. 579, 38 N. E. 678, is not authority in the case at bar. That was an action for an injury to real estate from the construction and operation of a steam railroad in a street in front of and adjacent to the plaintiff's premises; part of the injury charged being the obstruction of the street with trains. The evidence showed that the railroad was not upon the street, or any part of it. It was held by this court that, in an action such as that, the description of the locus in quo is legally essential to and of the substance of the action, for the reason that upon the proximity of the railway to the premises must, in a degree, depend the damage, and that a description must be given from which it could reasonably be inferred that injury might probably ensue to property claimed to be damaged. In the case at bar, the injury of appellee, either in its character or extent, was in no way dependent upon any particular place or street, or along any part of appellant's line or lines of street railway. The distinction made in the above case is also applicable in the case of *Derragon v. Rutland*, 58 Vt. 128, 3 Atl. 332, which was an action for damage

to land from the construction of a sewer. The narr., without particular description of the sewer, averred that a certain sewer constructed by the defendant, the town of Rutland, was built in 1872, etc. The evidence disclosed that there were two sewers built by the defendant near the land of the plaintiff—one constructed in 1872, and one in 1882—and that the latter was the cause of the injury. The locus in quo was material, and there was a variance. And so we might, in each of the cases cited, point out clear distinctions, as we think, from the contested point in this case.

We find no reversible error in the judgment of the Appellate Court, and that judgment is affirmed. Judgment affirmed.

(206 Ill. 124)

SUPREME TENT OF KNIGHTS OF MACCABEES OF THE WORLD v. STENSLAND et al.

(Supreme Court of Illinois. Dec. 16, 1903.)

FRATERNAL INSURANCE—ACTION ON CERTIFICATE—EVIDENCE—PROOFS OF LOSS—CONCLUSIVENESS—ESTOPPEL—SUICIDE—BURDEN OF PROOF—EXPERT TESTIMONY—QUALIFICATION—FORM OF QUESTIONS—TRIAL—QUESTIONS FOR JURY.

1. In an action on a fraternal insurance certificate, evidence considered, and held to present a question for the jury, as to whether insured came to his death by suicide.

2. In an action on a fraternal insurance certificate, a question asked of an expert, after stating the circumstances, "In your opinion, doctor, could the death of this man have been caused by strangulation with suicidal intent?" was properly allowed, when modified by striking out the two concluding words.

3. In an action on a fraternal insurance certificate, physicians who had seen several instances where persons had died from hanging were properly permitted to testify as to whether, in cases of strangulation, there was any discoloration of the skin or distortion of the features, although their experience had been confined to cases in which the deceased were found hanging in the air, and in the case at bar the insured was found with his feet on the floor.

4. Statements in proofs of loss as to the cause of death of insured may be contradicted on the trial of an action on the policy unless the usual elements of equitable estoppel are present.

5. Negligence of the widow of insured in not reading the proofs of loss before signing it is not ground for estopping her from assigning a different cause of death than that stated in the proofs.

6. The fact that a widow, in signing proofs of loss, knew that they stated that insured met his death by suicide from strangulation, does not estop her from assigning a different cause of death at the trial, since such statements in the proofs were merely matters of opinion.

7. That a widow, with no intention to defraud or mislead, signed and swore to a proof of death of insured which assigned as the remote cause of death suicide by strangulation, did not estop her to show a different cause on the trial, where there was no evidence that the insurer relied on the statement, or was in any worse condition because of the same.

8. Where, fully two months before the first trial of an action on a fraternal benefit certificate, the insurer was notified by plaintiff's replication, denying the averments of the plea, that suicide was the cause of death, and before the present trial a special written notice was given

to insurer that the question of suicide would be controverted, it was not error to permit plaintiffs to introduce testimony tending to show that the cause of death, which the proofs of loss stated to be suicide, was not suicide.

9. In an action on a fraternal insurance certificate, where defendant, in a special plea, averred that insured committed suicide, in violation of the terms of the certificate, it thereby assumed the burden of proof of suicide, which was upon it throughout the trial, irrespective of the fact that the proofs of death introduced by plaintiff stated suicide as the cause of death.

Appeal from Appellate Court, First District.

Action by Minnie M. Stensland and others against the Supreme Tent of the Knights of Maccabees of the World. From a judgment of the Appellate Court affirming a judgment for plaintiffs (for opinion, see 105 Ill. App. 267), defendant appeals. Affirmed.

H. H. C. Miller and W. S. Oppenheim, for appellant. Beach & Beach, for appellees.

RICKS, J. This was an action in assumpsit brought by appellees against appellant in the circuit court of Cook county. The appellant issued a benefit certificate to Peter A. Stensland on March 25, 1895. At that time the by-laws of appellant provided that if the insured committed suicide, whether he was sane or insane at the time, no benefit should be paid. In 1897 this by-law was changed by extending the time to five years, so that in case of suicide within five years the insurer should be liable only for the amount of all assessments paid. Peter Stensland was found dead at his home on April 2, 1898. His neck was suspended about six inches above the floor by a rope attached to the door knob. His chest, hips, and legs were resting upon the floor. At the time of his death, Stensland's family was away from home. A man by the name of Bense occupied a room in the flat with the Stenslands, and it was he who notified the police of Stensland's death. The coroner's inquest returned a verdict of "suicide by strangulation," and the proofs of death sent in by appellees stated that the remote cause of death was suicide by strangulation. Appellant refused to pay anything more than the amount of the premium it had received, and this suit was brought upon the certificate.

Appellant interposed a plea of general issue, and a further special plea alleging that the deceased committed suicide. On the trial, appellees showed the death of the insured, and introduced the certificate and proofs of death. The appellant then offered the by-laws which were in force when the certificate was issued and when the deceased died. The appellees put in testimony tending to show that the deceased did not commit suicide, and appellant introduced a rebuttal tending to show that he did commit suicide. The jury brought in a general verdict for the plaintiffs (appellees), and assessed their damages at \$2,000, and also found specially that the deceased did not

come to his death by committing suicide with suicidal intent. From a judgment on the general verdict an appeal was taken to the Appellate Court for the First District, where the judgment was affirmed. This case comes here by a further appeal from that judgment.

The first point made by appellant is that the court erred in not giving the peremptory instruction offered by the defendant after the introduction of all the evidence. The affirmance of this judgment by the Appellate Court leaves this court with only the bare legal question, was there evidence fairly tending to show the plaintiffs' cause of action? We must hold that there was. We cannot disregard the testimony of the three physicians who swear that in case of strangulation the face is distorted and discolored, and there would be marks on the neck at the point of the constricting material, due to the escape of blood from the blood vessels into the tissues. This expert evidence, coupled with the testimony of several witnesses to the effect that there were no marks whatever on the neck, all went to support the plaintiffs' case. A paper was found on the table by the officers. It was in the handwriting of the deceased, partly in Norwegian and partly in English, and, as translated, is, "If you come while I live then then me till hospital," and below this the word "house." We think this is additional evidence tending to show that there was no suicidal intent, for it is unusual for one contemplating self-destruction to provide for the contingency of some one coming while he lives. The following word, "hospital," indicates serious illness at the time the note was written. This is further corroborated by the generally disjointed and incoherent nature of the note. There was also testimony that the deceased had two weeks previously fallen five stories in an elevator. The widow testified that she kept the clothes line hanging on the door in loops, and no one swears that the rope was tied around the neck of the deceased. Upon all this evidence, we believe that reasonable minds might come to a different conclusion on the question of suicide.

The next point reviewed by counsel for appellant is that the hypothetical question propounded to Dr. Reed was inadmissible. The question, after stating the circumstances, concluded with the words: "In your opinion, doctor, could the death of this man have been caused by strangulation with suicidal intent?" The counsel for the appellant questioned the last two words, "suicidal intent," and the court ordered that these two words be stricken. In their argument, counsel for the appellant—for the purpose of fairness, they say—quote this portion of the evidence; but they omit altogether the court's order to strike those words, and attribute to the court certain words spoken, as the record shows, by counsel. It was either careless or reprehensible to misquote the judge's words at this time, for it changes the entire complexion of the

question. We are convinced that the record shows no error in allowing the question as modified by the court.

The contention that the physicians were not experts on the question of strangulation is likewise without merit. The question before these experts was whether, in case of strangulation, there was any discoloration of the skin or distortion of the features. Dr. Reed had seen several instances where persons had died from hanging. Dr. McNamara, the attending surgeon and medical director of the Cook County Hospital, had seen 16 or 17 men hung, and had made several post mortem examinations of people who had died of strangulation. Dr. Craig's testimony agreed with that of the others, and he states that he had read on this question in Taylor on Medical Jurisprudence. The contention is that, although these doctors may know the condition of the face or body in cases of ordinary strangulation or hanging, they are not experts in cases of strangulation where part of the body was suspended and a part resting on the floor. This objection is frivolous. The phenomena connected with strangulation are not so technical as to require a specialist on the subject. Of course, a physician, just because he is a physician, is not necessarily an expert witness on matters that involve difficult questions of chemistry or bacteriology; but we think of no better expert witness, in a case like that under consideration, than a physician who has seen a number of cases of strangulation, whether the persons strangled had their feet on the floor or not.

Plaintiffs, on the trial, introduced the sworn proofs of death which were filed with the defendant, but limited the offer to the purpose of showing appellant received notice of the death of the insured. The proofs were signed by Minnie M. Stensland, the widow, and Christ. Runden, guardian of the minor beneficiary. In this proof it was stated that the remote cause of death was "suicide by strangulation." The plaintiffs were then permitted by the court to introduce evidence contradicting the sworn statement made in this proof of death, that the remote cause of death was suicide by strangulation. It is contended by appellant that the sworn admissions as to the cause of death in the proofs of death were binding, and could not properly be contradicted unless the plaintiffs could show that the statements were made by mistake or obtained by means of fraud. The trial was begun October 8, 1901. On September 26, 1901, appellees gave appellant written notice that, if the written proof of death assigned suicide by any means as the cause of death of the insured, appellees would, on the trial, offer evidence that such proof of death was in that particular erroneous and untrue, and made under misapprehension and in ignorance of the facts, and would show that the insured did not come to his death by suicide. In *Ætna Ins. Co. v. Stevens*, 48 Ill. 31, this court held that

in a suit on a fire insurance policy the failure of the insured to include certain articles in the proof of loss did not estop him from subsequently showing on the trial that these other articles were destroyed, if he satisfied the jury that the omission was from no design or bad purpose. In *Modern Woodmen of America v. Davis*, 184 Ill. 236, 56 N. E. 300, the court says: "Any statement contained in the notice and proofs of death was available to the order as evidence in the nature of admissions made by the plaintiff in the action, but we find nothing in the averments of the plea upon which to base the contention an estoppel arose. That the statement in the proof of loss was made with the intention the order would act upon it, and that the order did act upon it, and changed its position to its injury, was at least essential to the creation of an estoppel." While there may be some slight authority for the contention of appellant, we are convinced that reason and the great weight of authority are with the rule which permits the statements in the proof of loss to be contradicted on the trial, unless it appears that the usual elements of equitable estoppel are present. The rule insisted upon by appellant is that, before the statements in the proof of loss can be contradicted, the plaintiffs must show that they were made by mistake or produced by fraud. The evidence shows that the plaintiffs knew nothing as to the cause of the death. The widow was away from home at the time, and, of course, was no more able to state the cause of death, as a fact, to be suicide, than were the agents of appellant. She swears that the agent of the insurance company prepared the proof of loss, and that she did not read it before she signed it. It was attempted, also, on the trial, to show the circumstances under which she signed, but this was objected to by counsel for appellant. It may be admitted that the widow was negligent in not reading the proof of loss before signing it, but such negligence is by no means reason for applying the doctrine of equitable estoppel. But even granting that she knew and comprehended at the time that the proof of death contained the statement that the death was from suicide, still no estoppel arises, for the reason that the statement that the death resulted from suicide by strangulation was a mere opinion. Moreover, it is not shown that appellant, relying upon her statement, has changed its position or condition in any respect. Before the doctrine of equitable estoppel can apply, it must appear that a party has, by his conduct, willfully made false representations of material facts for the purpose of inducing another person to act upon them, and that the other, not knowing that the representations were false has, because of his reliance upon the conduct, so altered his position that he would suffer a loss if the court should permit the false conduct to be repudiated. These es-

entials are not present in this case. Taking the view most favorable to the appellant, the record shows no more than this: That the widow, with no intention to defraud or mislead, signed and swore to a proof of death in which the statement was made that the remote cause of death was suicide by strangulation, and then, on the trial, introduced testimony tending to show that the death was not caused by suicide. That is the entire matter as shown by the record. There is no evidence that the appellant has relied upon that statement, nor that it is in a worse condition, because of anything stated as to the cause of death, than if the statement had not been made. The closest scrutiny of her entire conduct fails to disclose a single act which could be looked upon as a reason for excluding evidence as to the real cause of death. If there was any fraud whatever in the transaction at the time she signed the proof of death, she certainly was not the perpetrator.

The insured died April 2, 1898. Proof of death was made August 20, 1898. This suit was begun in December, 1898. June 22, 1900, appellant filed a special plea setting up that the insured committed suicide, in violation of his contract. On October 5, 1900, appellees filed a replication denying that the insured committed suicide. There have been two jury trials. The first was had December 14, 1900. It will thus be seen that, more than two months before any trial of the cause was had or entered upon, appellant was fully notified and apprised by the pleadings that it could not rely on the admissions contained in the proof of death, and before the trial resulting in the present judgment a special notice in writing was given by appellees to appellant that the question of suicide would be controverted. We accordingly think that there was no error in permitting the plaintiffs to introduce testimony tending to show that the cause of death was not suicide. *Parmelee v. Hoffman Fire Ins. Co.*, 54 N. Y. 193; *Supreme Lodge K. of P. v. Beck*, 181 U. S. 49, 21 Sup. Ct. 532, 45 L. Ed. 740; *Leman v. Manhattan Ins. Co.*, 46 La. Ann. 1189, 15 South. 388, 24 L. R. A. 589, 49 Am. St. Rep. 343; *Walther v. Mutual Life Ins. Co.*, 65 Cal. 417, 4 Pac. 413; *Home Benefit Ass'n v. Sargent*, 42 U. S. 691, 12 Sup. Ct. 332, 35 L. Ed. 1160; *Keels v. Mutual Ins. Co.* (C. C.) 29 Fed. 198. See, especially, note to *John Hancock Mutual Life Ins. Co. v. Dick*, 117 Mich. 518, 76 N. W. 9, in 44 L. R. A. 846.

The final contention of appellant is that the court erred in refusing to instruct the jury that the beneficiaries could not recover unless they showed, by a preponderance of the evidence, that deceased did not commit suicide. Under the pleadings, we think there was no error in refusing to give this instruction. The defendant filed a special plea in which it averred "that on April 2,

1898, said Peter A. Stensland committed suicide, in violation of the terms of the benefit certificate," etc. By this plea it asserted the affirmative of the proposition, and the burden of proof was upon it throughout the trial, and did not shift. The proof of death had no effect whatever in shifting the burden of proof. It was nothing more than evidence which, standing alone, might be considered prima facie. It was introduced by appellees, and the duty devolved upon them to offer sufficient evidence then to overcome the prima facie case made by the admission, but this did not affect the burden of proof. It was but evidence that could be considered, for the benefit of appellant, upon the proposition, which it asserted, that the insured came to his death by suicide, and upon which appellant was bound to make the burden of proof. In *Egbers v. Egbers*, 177 Ill. 82, 52 N. E. 285, we said (page 88, 177 Ill., page 287, 52 N. E.): "The term 'burden of proof' has two distinct meanings. By the one is meant the duty of establishing the truth of a given proposition or issue by such a quantum of evidence as the law demands in the case in which the issue arises. By the other is meant the duty of producing evidence at the beginning or at any subsequent stage of the trial in order to make or meet a prima facie case. Generally speaking, the burden of proof, in the sense of the duty of producing evidence, passes from party to party as the case progresses, while the burden of proof, meaning the obligation to establish the truth of the claim by a preponderance of evidence, rests throughout upon the party asserting the affirmative of the issue, and unless he meets this obligation upon the whole case he fails. This burden of proof never shifts during the course of a trial, but remains with him to the end." The case of *Fidelity & Casualty Co. v. Weise*, 182 Ill. 496, 55 N. E. 540, cited by appellant, is not in conflict with these views. That was an action upon an accident policy. The only right to recover was upon showing that the death of the insured was accidental, and it was said in that case that the burden was upon the plaintiff to show that the death was not due to suicide. The case at bar, however, is upon a life policy. The issuing of the policy and the making of all of the payments by the insured under it were admitted. The insurer insists that the policy was avoided by a breach of its conditions, and upon that proposition the burden was upon the insurer. *Spencer v. Citizens' Mutual Ins. Co.*, 142 N. Y. 505, 37 N. E. 617; *Supreme Lodge v. Foster*, 26 Ind. App. 333, 59 N. E. 877; *John Hancock Mutual Ins. Co. v. Moore*, 34 Mich. 41; *Home Benefit Ass'n v. Sargent*, 142 U. S. 691, 12 Sup. Ct. 332, 35 L. Ed. 1160.

We think there is no reversible error in the record, and the judgment of the Appellate Court is affirmed. Judgment affirmed.

(206 Ill. 201)

ILLINOIS STEEL CO. v. WIERZBICKY.

(Supreme Court of Illinois. Dec. 18, 1903.)

MASTER—INJURIES TO SERVANT—ACTIONS—INSTRUCTIONS—APPLICABILITY TO EVIDENCE—MISLEADING INSTRUCTIONS—REDIRECT EXAMINATION—SCOPE—APPEAL—PREJUDICIAL ERROR—FINDINGS OF FACT—CONCLUSIVENESS.

1. In an action for injuries to a servant where there was evidence that plaintiff was ordered by the foreman to do the work in the performance of which he was injured, an instruction that, even though the rope used by plaintiff at the time of his injury was imperfect, yet if such condition was open and apparent, and such as plaintiff could observe, and plaintiff was not misled by defendant, plaintiff could not recover, was properly refused as ignoring the fact that plaintiff was acting in obedience to the foreman.

2. The fact that a servant who was directed by a foreman to put a defective rope on a spool knew of its condition and appreciated the danger incident to its use would not prevent a recovery for injury caused by such defect, unless the danger was so imminent that an ordinarily prudent man would not incur it, but would disobey the order.

3. In an action for injuries to a servant where it appeared that plaintiff was acting under the orders of defendant's foreman, it was not error for the court to refuse to instruct that the mere fact that plaintiff was in the employ of defendant did not imply an obligation on the part of defendant to take more care of plaintiff than plaintiff might be expected to take of himself.

4. In an action for injuries to a servant, an instruction that the preponderance of evidence is not determined by the number of witnesses, but that the jury should take into consideration the opportunity of the witnesses for seeing and knowing the things about which they testified, their conduct and demeanor, interest or lack of interest, probability or improbability of their statements, in view of all the other facts and circumstances, while unskillfully drawn and inaccurate as a statement of law, was not so far calculated to mislead the jury as to justify reversal.

5. In an action for injuries to a servant caused by a defective rope, an instruction that it was the duty of defendant to exercise reasonable care to furnish to the plaintiff safe "appliances," and to exercise like care in keeping the "appliances" in a safe condition, was not misleading, in that it permitted the jury to consider other appliances than the rope, where all the evidence in the case was solely confined to defects in the rope, and many instructions were given that there could be no recovery unless the rope was defective, and plaintiff's injury was occasioned thereby.

6. In an action for servant's injuries it was not error for the court to permit plaintiff to repeat all the testimony given by him on a former trial of the case on a certain point, where defendant itself opened the way for such testimony by interrogating plaintiff about it on cross-examination.

7. The questions of negligence, contributory negligence, and assumption of risk, in an action for servant's injuries involving controverted facts, are concluded by the finding of the appellate court affirming the judgment of the trial court.

Appeal from Appellate Court, First District.

Action by Joseph Wierzbicki against the Illinois Steel Company. From a judgment of the appellate court affirming a judgment for plaintiff (for opinion, see 107 Ill. App. 69), defendant appeals. Affirmed.

Kemper K. Knapp, for appellant. David K. Tone and H. M. Ashton, for appellee.

WILKIN, J. This is an appeal from the Appellate Court for the First District affirming a judgment of the superior court of Cook county for \$8,000, rendered in favor of appellee for personal injuries sustained.

Appellee was engaged, with other laborers, in the steel mill of appellant, under the direction of John Hannefin, foreman. It was his duty to take certain steel billets from freight cars and load them on trucks. These trucks were then pushed by hand along a track to the center of the mill. They were then hauled up an incline, about 15 feet long, to a platform. Upon this platform the trucks were stopped and the billets unloaded for use in the furnace. From the foot of the incline to the top the cars were pulled by a rope wound around a spool, which was turned rapidly by steam power. One end of the rope was attached to the car, then wound three times around the spool, it being the duty of an employé to take hold of the rope as it was unwound from the spool and hold it tight, so as to prevent it from slipping on the spool. Appellee had worked for about two months in the mill unloading billets, but during that time the rope in question had been operated by another employé. On the day of the accident, and for some time prior thereto, the rope had become ragged and unraveled at the end. Eight or nine days before the happening of the accident to the plaintiff an employé named Sweetwood had his hand pulled into the spool by means of the ragged condition of the rope, and sustained an injury to his hand similar to the one inflicted upon appellee. At the time of that accident the foreman was present, and four or five days prior to plaintiff's injury he was also informed and warned of the dangerous condition of the rope. On the day in question the foreman ordered appellee to handle the rope, and while he was obeying that order his hand was caught in the defective end, and drawn into the spool, and so crushed as to render amputation necessary. Upon a trial before a jury a verdict and judgment were rendered in favor of the plaintiff, which judgment has been affirmed by the Appellate Court.

The errors assigned here, being alleged errors of law, are the giving and refusing instructions and admitting improper evidence. Defendant offered three instructions:

"(1) The jury are instructed that even if they believe from the evidence that the rope used by the plaintiff at the time of his injury was raveled, split, or frayed or untwisted, yet if they believe from the evidence that such condition was open and apparent to the observation of the plaintiff, and that before the happening of the injury he had a reasonable opportunity to observe the same, and the danger, if any, caused thereby, and that the plaintiff was not misled or deceived as to

the danger, if any, by defendant, or by any one acting for the defendant, then the plaintiff cannot recover from any injury that may have been occasioned merely by the rope being in such raveled, split, or frayed or untwisted condition.

"(2) The jury are instructed that even if they believe from the evidence that the rope referred to in the evidence in this case was split, frayed, raveled, or untwisted, and even if they believe from the evidence that the plaintiff was directed by John Hannefin to put said rope on the spool just before he was injured, yet the jury are further instructed that if they believe from the evidence that an ordinarily careful and prudent man in the place of the plaintiff would, under all the circumstances and conditions shown by the evidence herein, at and before putting the rope on the spool, have known and appreciated the danger, if any, incident to the use of said rope, then there can be no recovery in this case.

"(3) The jury are instructed that even if they believe from the evidence that the rope referred to in the evidence in this case was split, frayed, raveled, or untwisted, and even if they believe from the evidence that the plaintiff was directed by John Hannefin to put said rope on the spool just before he was injured, yet the jury are further instructed that if they believe from the evidence that the plaintiff, at the time he put the rope on the spool, knew of the condition of the rope, and knew and appreciated the danger, if any, incident to its use, then there can be no recovery in this case."

The court refused to give the first and second instructions, and gave the third, after modifying it by changing the word "directed" to "ordered," as it appears before the name "John Hannefin," and by substituting in lieu of that portion of the instruction after the word "danger," in three from the last, the following: "and further believe that the danger was so imminent that an ordinarily prudent man would not incur it, but would disobey such order, then there can be no recovery."

The first instruction was properly refused, as it does not state the correct rule of law applicable to the facts in this case. It was claimed by appellee in his declaration, and there was evidence in the record tending to show, that he was ordered by the foreman to put the rope around the spool, and was hurt in obeying that order. Such directions or order might excuse him from knowing and appreciating the danger of the conditions which, in the absence of such order, he would have been bound to observe and appreciate. The instruction ignores altogether the alleged fact that plaintiff, at the time of his injury, was acting in obedience to the foreman's directions and order. The third instruction, as modified by the court, correctly stated the rule applicable to the facts in the case, as we have held in many previous decisions,

and it also covered any objection which might have been properly urged to the refusal of the second. Although the plaintiff may have undertaken the work, in obedience to the orders of the foreman, with knowledge of the unsafe condition of the rope, still he could recover for his injury unless the danger was so imminent that an ordinarily prudent person would not have incurred it, but would have refused to obey the orders. *Chicago Anderson Pressed Brick Co. v. Sobkowiak*, 148 Ill. 573, 36 N. E. 572; *Offutt v. World's Columbian Exposition*, 175 Ill. 472, 51 N. E. 651; *Illinois Steel Co. v. Ryska*, 200 Ill. 280, 65 N. E. 734.

The trial court refused the following instruction offered by the defendant: "The jury are instructed that it is the law that the mere fact that the plaintiff in this case was, at the time of the accident, in the employ of the defendant, did not imply an obligation on the part of the defendant to take more care of the plaintiff than the plaintiff might reasonably be expected to take of himself." In *Western Stone Co. v. Muscial*, 193 Ill. 382, 63 N. E. 664, 89 Am. St. Rep. 325, we held that an instruction like this one was not applicable to a case in which the plaintiff was acting under the orders of the defendant's foreman. There was no error in the refusal of the court to give the instruction asked. The record also shows that an instruction was given by the trial court which correctly laid down the rule intended to be stated by the instruction refused.

The trial court gave the following instruction at the request of plaintiff, as to the preponderance of evidence: "The jury are instructed that the preponderance of the evidence in a case is not alone determined by the number of witnesses testifying to a particular fact or state of facts. In determining upon which side the preponderance of the evidence is, the jury should take into consideration the opportunity of the several witnesses for seeing and knowing the things about which they testify; their conduct and demeanor while testifying; their interest or lack of interest, if any, in the result of the suit; the probability or improbability of the truth of their several statements, in view of all the other evidence, facts, and circumstances proved on the trial; and from all these circumstances determine upon which side is the preponderance of the evidence." The instruction is subject to criticism. It is unskillfully drawn, and does not accurately state the correct rule of law. We do not think, however, that the giving of the instruction as written was so far calculated to mislead the jury as to justify a reversal of the judgment below.

The trial court gave the following instruction on behalf of the plaintiff: "The jury are instructed that it was the duty of the defendant in this case, at the time of the accident in question, to exercise reasonable care to furnish to the plaintiff appliances that

were in a reasonably safe condition to be used by the plaintiff in the performance of his duty for said defendant, and that it was the duty of said defendant to exercise like reasonable care in keeping said appliances in a reasonably safe condition and repair."

The objection to this instruction is exceedingly technical. It is that by the use of the word "appliances" the jury might have been misled to believe that other appliances than the rope in question could be considered by them in making up their verdict. The evidence in the case is confined solely to the defects in the rope, as alleged in the declaration, and many instructions were given which told the jury that there could be no recovery unless it (the rope) was defective, and unless plaintiff's injury was occasioned thereby. The instruction could not have misled the jury.

It is objected by the appellant that the appellee was permitted to repeat testimony given by him on a former trial of the case. An examination of the record shows that upon his cross-examination counsel for defendant asked him with reference to certain testimony given upon that former trial, and on redirect examination the court permitted him, over the objection of defendant, to repeat the whole of his testimony in reference to particular facts about which he was interrogated on the cross-examination. The appellant itself opened the way for the testimony objected to. There was no error in the admission of the evidence. Neither do we think that it was so material as to call for a reversal of the case if it were otherwise.

It is finally contended that the appellant was not guilty of negligence, and that the appellee was guilty of contributory negligence, and that he assumed the risk incident to his employment; but, as both of these contentions involve controverted questions of fact, the finding of the Appellate Court affirming the judgment below is final.

We have been unable to discover any substantial error in the rulings of the superior court on questions of law. The judgment of the Appellate Court will accordingly be affirmed. Judgment affirmed.

(206 Ill. 404)

KNIGHTS TEMPLARS' & MASONS' LIFE INDEMNITY CO v. VAIL.

(Supreme Court of Illinois. Dec. 16, 1903.)

LIFE INSURANCE—ASSESSMENT LIFE ASSOCIATION—CONSTITUTION—ASSESSMENTS—GUARANTY OF SURPLUS FUND—TRUST—BOND—FORFEITURE—ESTOPPEL—WAIVER—RULES OF CONSTRUCTION.

1. An assessment life association organized under an act authorizing the formation of companies thereunder only for the purpose of furnishing life indemnity or pecuniary benefits to widows, orphans, heirs, relatives, and devisees of deceased members, or accident or permanent disability indemnity to members thereof, is but a trustee handling the funds paid by the members.

2. Where an assessment life association, as authorized by law, collects a guaranty fund

larger than necessary to pay death losses, indemnities, and the reasonable expenses of conducting the business, but its constitution requires the use of such fund in the payment of assessments, it cannot require assessments, which would otherwise be payable out of such fund, to be paid with a bond, issued by it, representing a member's interest in such fund, but containing conditions not imposed by the constitution.

3. Where the constitution of an assessment life association provides that a member shall receive a bond for his proportion of the surplus or guaranty fund after his policy shall have run 10 years, and gives the member the right to the use of such bond at par and accrued interest, at any time, without notice, in payment of assessments, such provisions do not authorize the issuance of a bond contrary to the intention of the Legislature in enacting the law under which the association was organized, and the membership when it formed the constitution, that the fund should rest in the company's hands, payable, without notice, so long as there was a sufficient amount to pay assessments.

4. Where the constitution of an assessment life association provides that a member shall receive a bond for his proportion of the surplus or guaranty fund after his policy shall have run 10 years, and gives the member the right to the use of such "bond," at any time, without notice, in payment of assessments, the use of the word "bond," as a medium of payment, instead of the share of the surplus fund, does not bind the member to abide the terms of a bond, issued by the company, requiring notice and a statement from him that he wishes to pay an assessment out of the fund.

5. Insured in an assessment life association, by receiving a bond for his proportion of the surplus or guaranty fund after his policy has been in force 10 years, such bond containing provisions depriving him of rights in the fund secured to him by the constitution of the association, does not thereby contract with the association that it shall hold the fund according to the provisions of the bond, since, in the absence of a change in the constitution with his consent, there would be no consideration for his release to the association of such valuable right.

6. Where insured in an assessment life association receives a bond for his proportion of the surplus or guaranty fund after his policy has been in force 10 years, such bond containing provisions depriving him of rights in the fund secured to him by the constitution of the association, he is not estopped to rely on the terms of the constitution in lieu of the terms of the bond.

7. Where insured in an assessment life association receives a bond for his proportion of the surplus or guaranty fund after his policy has been in force 10 years, such bond containing provisions depriving him of rights in the fund secured to him by the terms of the constitution of the association, he has a right to retain the bond as evidence of the amount of the surplus which the company had, and which might be used for the benefit of his policy, without thereby waiving any right, and without consenting to any modification of the contract or variation from the provisions of the constitution.

8. The laws and rules of an assessment life association should be liberally construed in favor of the insured and beneficiary, and, where an attempt is made to work a forfeiture by such association, its laws, rules, and regulations will be most strictly construed against it.

9. An assessment life association had in its hands a sum, evidenced by a bond, issued to insured, representing his proportion of a surplus or guaranty fund of the association, which sum it was by its constitution required to apply in payment of his assessments, without notice to or request from him or surrender of the bond, though the bond provided to the contrary. Its

constitution provided that failure to pay an assessment when due "shall thereby and ipso facto work a forfeiture and termination of his membership and all benefits arising therefrom." He had notice of an assessment, but, not having paid it when due, his policy was canceled on the books of the company. At the time of his death his share of the surplus named in the bond would have paid all assessments levied prior to his death. *Held*, that the company was liable on the policy, though insured had not complied with the conditions of the bond.

Appeal from Appellate Court, First District.

Action by Henrietta H. Vail against the Knights Templars' & Masons' Life Indemnity Company. From a judgment in favor of plaintiff, affirmed by the Appellate Court (105 Ill. App. 331), defendant appeals. **Affirmed.**

This is an appeal from a judgment of the Appellate Court for the First District affirming a judgment of the superior court of Cook county in favor of appellee and against appellant, for \$5,392.50, in an action of assumpsit on a benefit insurance certificate. The cause was heard upon a stipulation of facts, and with an agreement that all pleadings, other than the declaration, should be waived, and the cause disposed of according to certain issues formulated by the parties by their stipulation. The trial was before the court without a jury, and the questions of law were preserved by propositions of law submitted to the court to be held or refused.

Appellant is a corporation organized in 1884 under the provisions of "An act to provide for the organization and management of corporations * * * for the purpose of furnishing life indemnity or pecuniary benefits to widows, orphans, heirs, relatives and devisees of deceased members," etc., approved June 18, 1883. Laws 1883, p. 104. Section 8 of the act authorizes "the accumulation of a surplus, general or guaranty fund, which may be invested only in the corporate name of the association or society, in United States, state, county, city or other first-class convertible bonds or stocks, upon which interest has not been in default. Such funds, when so set apart and so invested, shall, with the increase thereof, belong to such corporation, association or society, and not to the directors, trustees, managers or officers thereof; and shall be used only for mortuary benefits, without assessment, or applied in payment of future assessments, or otherwise used for the promotion of the object or objects for which said funds are specially provided and set apart, and such use shall not be deemed or construed to mean a profit received by members within the meaning of the statutes of this state."

Appellant, upon its organization, adopted certain by-laws, which it termed a "constitution," and which, by the provisions thereof, could not be changed or modified except by a vote of the members of the company, upon a three-fourths vote of all voting, after a 30-day notice to every member of the society of the proposed amendment. The sur-

plus fund was provided for by applying 75 per cent. of the moneys arising from assessments to the credit of the death fund, and to be used for the payment of death losses only, and out of the remaining 25 per cent. the expenses and the emergencies were to be met, and the remainder was to form the surplus fund authorized by the statute above. By section 2 of the constitution, so made with reference to this surplus fund, it was provided as follows: "At the end of each ten years' continuous membership such member shall receive a bond, bearing three per cent. annual interest, for such a proportion of the surplus, on the first day of the month nearest preceding, as all the money paid during the ten years by him on his existing policy bears to the entire amount of money received by the company during the same period." By section 3: "Any such bond can be used at par, and accrued interest, at any time, without notice, in payments of assessments, and no bond shall run longer than the life of the member, but if unused shall be payable with his policy at death."

On October 26, 1888, Charles A. Vail made a written application for membership in the company, and a certificate or policy was issued to him of date November 2, 1888, of which the application and the constitution of the company were a part. In the application said Charles A. Vail agreed "to abide by the constitution, rules, and regulations of the company as they now are or may be constitutionally changed hereafter." Said insured held his policy and paid all assessments for more than 10 years, and appellant, as of date of the 2d of November, 1898, issued and delivered to him what it denominated its "bond" for his share of the accumulated surplus, in supposed compliance with the provisions of the constitution of appellant company. The bond recited that it was issued and received in pursuance of the provisions of sections 2 and 3, art. 7, of the constitution. This writing bears no resemblance to a bond, but is a written acknowledgment of appellant that the share of the surplus fund to which said Charles A. Vail, as holder of policy No. 6,261, was entitled, was \$66.80, which the company binds itself to pay, 'with interest at the rate of three per cent. per annum, in the manner, for the purpose and upon the terms and conditions following,' etc. The bond then contains the provision that "this bond, with accrued interest, may be used at par by the said member, at any time during his life, in payment of assessments or dues on said policy, but in that event this bond shall be surrendered by him to said company for cancellation, and the amount thereof, with accrued interest, shall be placed to his credit as a deposit in advance for the payment of such assessments or dues; that in order to use this bond in payment of assessments or dues on said policy the bond must first be surrendered to and in the possession of said company for

cancellation," etc. Attached to this bond was a red label, which again pointedly called the attention of the policy holder to the provision that no part of the bond could be applied to keep the policy in force except by its being surrendered to the company. This so-called "bond" was formulated and issued by appellant's board of directors pursuant to a resolution or by-law adopted by said board of directors, without any change having been made in sections 2 and 3, art. 7, of the constitution of the appellant company. After receiving this bond, Charles A. Vail continued to pay "assessments," as they were called, up to and including the assessment of May, 1899. On June 2, 1899, appellant issued notice of assessment No. 182, payable June 12, 1899, and mailed the same to Vail, and it was received by him. Section 2 of article 6 of the appellant's constitution provided: "Should any member fail to pay or to forward, as indicated in the notice, the amount thus due, for a period of ten (10) days after the depositing of said notice in the United States post-office or mail box in the city of Chicago, such failure to so pay or forward the amount due shall thereby and ipso facto work a forfeiture and termination of his membership and all benefits arising therefrom." The assessment called for June 2d was not paid by Charles A. Vail or any one for him. It was for the sum of \$15. At the expiration of the time provided in the notice, his policy was canceled on the books of the company for the nonpayment of this assessment. No assessment was levied against him after that time, and he never offered to pay the assessment or any subsequent assessment. The assessment notice informed him that the assessment was due and must be paid within 10 days from mailing thereof, and he was requested to give the same his immediate attention. He died on October 2, 1899, leaving appellee, his wife, surviving, who, under the provisions of the policy or certificate of membership, was the beneficiary.

Following the stipulation of facts, and as a part of the stipulation between the parties, were certain propositions, termed "propositions of law," as follows:

"It is admitted by the plaintiff that there was a valid forfeiture of the policy, membership, and all interest of the insured in the defendant company for the nonpayment of the June, 1899, assessment, unless such forfeiture was prevented, as a matter of law, in the manner hereinafter set forth in the plaintiff's claim.

"The plaintiff's claim is that said policy and membership did not forfeit for nonpayment of the June, 1899, assessment, because the insured had an interest in the funds of the defendant company, to the extent evidenced by the paper designated a 'bond,' at the time when forfeiture would otherwise have occurred by nonpayment of said assessment, which said interest was not forfeited,

and should have been applied, without any action on the part of the insured, to the payment of this and subsequent assessments.

"The defendant's claim is that, under the provisions of the contract and paper designated a 'bond,' the nonpayment of the June, 1899, assessment worked a forfeiture of the policy, membership, and paper designated a 'bond,' together with every interest of any kind which insured theretofore had in the defendant company, and terminated his connection with said defendant company.

"It is admitted that if the insured had offered the paper designated a 'bond' for surrender and cancellation at any time when the said June, 1899, assessment was payable, he would have received credit for the amount thereof, with accrued interest, and the amount so credited would have been applied first to the payment of the June, 1899, assessment, and the balance would have been applied to the payment of future assessments and dues until exhausted.

"It is admitted by the defendant that if said paper designated a 'bond' had been so offered and surrendered, and the amount thereof credited, such amount would have been sufficient to pay the June, 1899, assessment and all subsequent assessments levied on its membership prior to the death of the insured.

"It is further agreed that if the court holds, on the foregoing proposition of law, in favor of the plaintiff and against the defendant company, then a judgment may be entered against said defendant company for the sum of \$5,000, and interest thereon at the rate of 5 per cent. per annum from December 11, 1899, to the date of entering such judgment; and that if the court holds, on the foregoing proposition of law, in favor of said defendant company and against said plaintiff, then judgment may be entered herein against plaintiff herein for costs."

Appellant offered to the court 36 propositions of law, which it asked the court to hold, many of which were held as asked and many refused. The refused propositions were upon the contention of the appellant that the policy or benefit certificate of Charles A. Vall was legally forfeited, and that he could not have the surplus of \$66.30 and accrued interest, or any part of the principal or interest that was going to the benefit of his policy, applied toward the payment of the assessment called for, or any assessment without first surrendering the bond and permitting the whole of said amount thus accrued to be placed in his account as advanced payments upon assessments.

Ward & Graydon (E. M. Ashcraft, of counsel), for appellant. Elmer Allen Kimball and Spencer Ward, for appellee.

RICKS, J. (after stating the facts). The appellant does not claim that sections 2 and 3 of article 7 of the constitution of said com-

pany were changed or modified after the certificate or policy in question was issued, but contends that the bond is in substantial compliance and conformity with those sections; and further contends that if it be held that the bond is more favorable to it than the constitution authorized, or is not in substantial conformity to the constitution, then the rights of the parties were fixed by the terms of the bond as a matter of contract, and that the acceptance of the bond by the assured was, as to all its terms, binding upon the assured and the beneficiary. By section 1 of article 4 of the constitution it is provided that the policy of membership "shall constitute the basis of settlement with the beneficiaries." The constitution, as it then existed, together with the application, comprised a part of the policy of membership, which, by express contract of the parties, was binding until constitutionally changed.

In determining whether the so-called "bond" in question is in substantial compliance with the constitution, it is necessary that we take into consideration the statute authorizing the formation of such company (and which constitutes its charter), the constitution, and the contract or policy of membership.

It may first be observed that appellant is not an ordinary insurance company, which pays tribute to the state upon the theory that it reaps from the business pecuniary profit, but, on the contrary, its existence is only authorized upon the theory, as the title of the act authorizing it provides that it was organized "for the purpose of furnishing life indemnity or pecuniary benefits to widows, orphans, heirs, relatives and devisees of deceased members, or accident or permanent disability indemnity to members thereof." In the eye of the law the members, and those bearing certain relations to them, are the beneficiaries of all the funds realized by such corporation, and not the corporation itself. The corporation stands but as a trustee handling the funds paid by the members, and to be repaid to them, and the beneficiaries authorized by the act, according to the plain restrictions provided by the act. As such trustee, and in the absence of authority conferred by section 8 of the act, appellant would have had no right to collect funds from the membership, by way of dues or assessments, in excess of the amount necessary to pay death losses, indemnities, and the legitimate and reasonable expenses of conducting the business of such company. By authority of section 8 a greater sum than was necessary for the purposes last above mentioned was in fact collected from the members of the company to create the guaranty fund therein authorized. By that section the appellant was authorized to appropriate that fund to the payment of mortuary benefits, future assessments, or for other objects not therein specifically mentioned, but to be provided for by the company. The

company saw fit, by its constitution, to devote that fund only to the payment of future assessments, with the provision that such part of it as should not be used in the payment of future assessments should be paid, with the policy, at the death of the holder. It is true, the constitution says that the member shall receive a bond, bearing 3 per cent. annual interest, for his proportion of this surplus, after his policy shall have run 10 years. The statute expressly says that the fund thus set apart "shall not be deemed or construed to mean a profit received by members within the meaning of the statutes of this state," and in fact and in reason it could not reasonably be so considered, because, by the constitution of appellant providing for this fund, the member received the benefit of only that portion of the surplus which he himself had paid, and the enjoyment of this benefit was postponed to him until he had paid upon his policy for the full period of 10 years.

By section 3 of said article 7 it is said such bond can be used at par, and accrued interest at any time without notice, in payment of assessments, and the contention now is that, the constitution using the word "bond" as a medium of payment instead of the share of the surplus fund, such provision was binding upon the member, and that the bond in question is in compliance therewith. To this contention we cannot assent. If this association was of a fraternal character, as it purports to be, and its existence depended upon the continuance and enlargement of its membership, and it was not financially interested in the business, but was acting as trustee for the members of it, then it was to its interest and to the interest of the company, both in the light of a corporation and an aggregation of members, that the policies of the members should be kept up and continued. This company was not supposed to profit by lapses, and derive and have in its possession a large surplus from that source, which it could apply toward its individual profit or to the payment of its liability on policies generally. When, by its constitution, it devoted this surplus fund to the one particular object of paying assessments, and provided that such payment should be made without notice, it could not, as we think, make the payment in bonds, or require the assessment to be paid with bonds issued by it. By issuing this bond it was not divested of the fund, and did not promise to pay to the member, or to his order, or to anybody except to the beneficiary at his death, the sum of money therein mentioned; but the bond did contain the provision that the holder might, by presenting the bond and at once devoting the whole amount provided for in the bond to the payment of future assessments—or, rather, to the payment of advance assessments, which was even more than the statute or the appellant's constitution required or authorized—have the benefit of his pro-

portionate share of this fund. The statute is, "the payment of future assessments," and the appellant's constitution is, "in payment of assessments." The condition of the bond is that the bond must be surrendered and the money at once appropriated to the advance payment of assessments. In other words, by this bond the policy holder was required, at the very moment that he used any part of this fund, to then and there appropriate the whole of it, and at once, as a payment upon assessments in advance of their accrument. We think the intention of the Legislature, and of the membership when it formed its constitution, was that this fund should rest in the hands of the company, and that if, as in the case at bar, by misfortune, oversight, accident, or otherwise a member should fail to pay an assessment when called upon and within the provisions of the law, it was then the duty of appellant, without notice, so long as there was sufficient of that fund to pay the assessments, to apply and pay the same. Appellant's constitution, which was incorporated in the policy, does not require the policy holder to give notice, but the expression is, absolutely, "without notice"; yet the bond that it issues not only requires notice, because the surrender of the bond must be upon the express application of the holder, with the statement that he wants to pay an assessment out of the fund, but, in addition thereto, as we have said, he must, by the terms of the bond, then and there appropriate the whole of it to the advance payment of assessments. It was not to the benefit of the members unless sickness or inability to pay should require the appropriation of the whole of it to the advance payment of assessments, and in the case at bar the assured paid his assessment for several months after he received the bond.

It is said, however, that the policy holder, by receiving the bond, contracted with appellant that it should hold the fund according to the provisions of the bond. If the bond was not in accord with the provisions of appellant's constitution at the time the policy holder received his policy, and if that constitution was not changed in the manner therein provided, which was that the policy holder should have the right to vote upon the change, then how can it be said that there was any contract between the policy holder and appellant which changed his right? What consideration did he receive for releasing to appellant a valuable right he had? It cannot be claimed that he received any consideration, and if this bond can be binding upon any theory it must be upon a supposed theory of estoppel. But how can appellant insist upon an estoppel? The only change in its course was that it undertook to hold the money longer than, and to require of the policy holder more than, its constitution authorized. There is no pretense that, through reliance upon the acceptance of such bond by the policy holder,

appellant pursued a course of business that, if it be now required to change, would be to its injury. In fact, there is no show of claim of injury to appellant. The bond purported on its face to be issued "for value received, and in pursuance of the provisions of sections 2 and 3, article 7, of the constitution of said company." Whether it did comply with the provisions of that constitution and the policy was a question of law which we think the policy holder was not required to pass upon until the necessity arose. We think the policy holder had a right to receive and retain the bond as an evidence of the amount of the surplus which the company had, and which might be used for the benefit of his policy, without thereby waiving any of his rights in the premises, and without consenting to any modification of the contract or supposed variation from the provisions of the constitution of the appellant company. *Pray v. Life Indemnity Co.*, 104 Iowa, 114, 73 N. W. 485; *Shakman v. United States C. S. Co.*, 92 Wis. 366, 66 N. W. 528, 32 L. R. A. 383, 53 Am. St. Rep. 920; *Chicago Life Ins. Co. v. Warner*, 80 Ill. 410; *Welsh v. Chicago Guaranty Fund Life Society*, 81 Mo. App. 30; *Symonds v. Northwestern Life Ins. Co.*, 23 Minn. 491.

The laws and rules of such associations as the appellant should be liberally construed in favor of the policy holder and beneficiary, and, where an attempt is made to work a forfeiture by a benevolent association, its laws, rules, and regulations will be most strictly construed against it. *Coverdale v. Royal Arcanum*, 193 Ill. 91, 61 N. E. 915; *Grand Lodge v. Brand*, 29 Neb. 650, 46 N. W. 95; *Union Mutual Accident Ass'n v. Frohard*, 134 Ill. 228, 25 N. E. 642, 10 L. R. A. 383, 23 Am. St. Rep. 664.

Under the view we entertain, appellant had in its possession, from the time of the last payment made by the assured to the time of his death, ample funds in its hands which it was authorized by the constitution and contract with the assured to apply toward the payment of his assessments, without notice to him or without request from him, and without the surrender of the supposed bond. In *Supreme Lodge O. M. P. v. Meister*, 204 Ill. 527, 68 N. E. 454, we said (page 530, 204 Ill., and page 455, 68 N. E.): "In *Girard Life Ins. Co. v. Mutual Life Ins. Co.*, 97 Pa. 15, the court held that, where an insurance company has in its possession dividends belonging to a policy holder more than sufficient to pay an assessment, it cannot declare a forfeiture for nonpayment on the ground that the law does not favor forfeitures and never enforces them cheerfully, and will decline to enforce them when they are against equity and good conscience, and that it is not conscionable for a company to forfeit a policy when it has in its treasury more than enough of the assured's money to pay the assessment. And in *Elliot v. Grand Lodge*, 2 Kan. App. 430, 42 Pac. 1009,

it was held that where money sufficient to pay an assessment is in the treasury of the subordinate lodge, even though the latter may have made an appropriation of the fund which would show the assured in arrears, no forfeiture can be declared." See, also, *Niblack on Benefit Societies*, § 271.

The trial court did not err in refusing the propositions of law as complained of, or in holding that the policy in question was not forfeited, and the Appellate Court properly affirmed its judgment.

The judgment of the Appellate Court is affirmed. Judgment affirmed.

(206 Ill. 122)

CHADWICK et al. v. PEOPLE.

(Supreme Court of Illinois. Dec. 16, 1903.)

APPEAL FROM APPELLATE COURT—ABSTRACT—OPINION—DISMISSAL.

1. Under Sup. Ct. Rules 14, 15 (47 N. E. vi, vii), providing that appellants' abstract of record shall contain an index, and that the appellants shall, as an appendix to their brief or otherwise, print the opinion of the Appellate Court, an appeal from the Appellate Court, the abstract of record in which contains no index, and which does not print the opinion of the Appellate Court, will be dismissed.

Appeal from Appellate Court, Third District.

Action by the people against John H. Chadwick and others. From a judgment of the Appellate Court (108 Ill. App. 620) affirming a judgment for plaintiff, defendants appeal. Appeal dismissed.

John H. Chadwick, for appellants. Chas. G. Eckhart, for the People.

PER CURIAM. This was an action of debt on the official bond of a state's attorney, brought by appellee against appellants in the circuit court of Douglas county, which resulted in a judgment in favor of appellee in that court for the sum of \$219.06. This judgment has been affirmed by the Appellate Court for the Third District. A certificate of importance was granted by that court, and the appellants appealed from that judgment of the Appellate Court. They contend that the judgment should be for the sum of \$59.03, only.

The abstract of record filed herein contains no index, as required by rule 14 of this court (47 N. E. vi), nor have appellants filed in this court, as an appendix to their brief, or otherwise, the printed opinion of the Appellate Court in this cause, as required by rule 15 of this court (47 N. E. vii). The work of preparing an index to an abstract is slight in any one case, but such indices, if supplied to all abstracts, materially facilitate the dispatch of business in this court. Unless the rule be complied with in reference to filing the opinion of the Appellate Court, we are without means of ascertaining the reasons moving that court in arriving at its decision, as we do not otherwise have access to the opinions of the

Appellate Courts of the state until they are officially published.

The appeal herein will be dismissed by this court, of its own motion, for the failure of appellants to comply with rules of practice 14 and 15 of this court, as above indicated. Appeal dismissed.

(206 Ill. 536)

HOLMES et al. v. CITY OF CHICAGO et al.

(Supreme Court of Illinois. Dec. 16, 1903.)

APPEAL—STAY OF JUDGMENT—FILING OF APPEAL BOND—NECESSITY.

1. The granting of a prayer for an appeal from a judgment and the fixing of the time in which the bill of exceptions and the appeal bond must be filed do not suspend the operation of the judgment, but the filing and approval of the appeal bond are essential thereto; Practice Act, § 67 (Hurd's Rev. St. 1899, p. 1293), making the allowance of an appeal conditional on the filing of an appeal bond.

Error to Superior Court, Cook County; Jos. E. Gary, Judge.

Proceedings by the city of Chicago and others for the confirmation of an assessment to pay awards made in condemnation proceedings for the opening of a street. Judgment confirming the assessment, and William Holmes and others sue out a writ of error. Writ dismissed.

E. W. Adkinson, for plaintiffs in error. Robert Redfield and Frank Johnston (Edgar Bronson Tolman, Corp. Counsel, of counsel), for defendants in error.

BOGGS, J. This is a writ of error sued out to bring in review the judgment entered in the superior court of Cook county on the 24th day of January, 1903, confirming an assessment to pay awards made in a condemnation proceeding for the opening of Lafayette avenue from West Fifty-Fifth street to West Fifty-Seventh street, in the city of Chicago. Plaintiffs in error appeared, and filed a number of objections to the petition for confirmation, but such objections were overruled, and judgment entered as prayed. An appeal was prayed and allowed on condition the plaintiffs in error should in 80 days file an appeal bond, to be approved by the court; and also a bill of exceptions within the same time. Subsequently orders were entered extending the time for filing the bill of exceptions. A bill of exceptions was filed within the time extended, but an appeal bond was not filed. On the 3d day of September, 1903, the plaintiffs in error sued out this writ of error. The defendants in error entered a motion in this court to dismiss the writ of error, and this motion was reserved to the hearing. The grounds of the motion are that section 96 of the act of June 14, 1897, entitled "An act concerning local improvements," as amended by the act of May 9, 1901 (4 Starr & C. Ann. St. p. 202, c. 24, par. 133), limited the time in which a writ of error could be sued out to reverse this

judgment to the 1st day of June, 1903, and that no affidavit was filed in pursuance to and as required by the provisions of said section 96. In opposition to the motion, counsel for the plaintiffs in error insists that the proviso to the said section 96 authorizes the suing out of a writ of error in all cases of this character in which the warrant for collection has not been returned delinquent prior to April 1st of any year at any time before the 1st day of June of the year in which such warrant shall be issued and returned delinquent, and that it appears from the record in the case relative to the prayer for an appeal and the order granting the same that the judgment was suspended, and that no warrant could have lawfully issued thereon until after the 1st day of April, 1903, and consequently that there could have been no return of any such warrant as delinquent prior to the suing out of this writ of error.

Without conceding the facts so alleged to appear from the record in the cause can be invoked to excuse the filing of the affidavit mentioned in said section 96, the facts appearing in the record do not show that said judgment was suspended, and that a warrant of collection could not have issued thereon prior to the 1st day of April, 1903. The prayer for an appeal, the granting of the prayer, and the fixing of time in which the bill of exceptions and the appeal bond should be filed did not operate to render the judgment inoperative. The allowance of an appeal is made conditional by the statute on the filing of the appeal bond (Practice Act, § 67, Hurd's Rev. St. 1899, p. 1293), and the execution of a judgment is not arrested or superseded by the prayer for an appeal and an order granting such prayer and fixing a time in which the appeal bond and the bill of exceptions must be filed, but the filing of the appeal bond and the approval thereof are essential to stay or supersede the judgment. *Brangan v. Rose*, 3 Gilman, 123; *Simpson v. Alexander*, 5 Gilman, 260; 20 Ency. of Pl. & Pr. 1218. The judgment became effective at the close of the January term, 1903, of the court, and a warrant might have lawfully issued and been returned by the 1st day of April. The time limited by the statute for the suing out of a writ of error expired June 1st. The writ was not applied for or sued out until after that date, hence the motion to dismiss must prevail.

Writ dismissed.

(206 Ill. 288)

LAND et al. v. LAND et al.

(Supreme Court of Illinois. Dec. 16, 1903.)

COMMON-LAW MARRIAGE—EVIDENCE.

1. Complainant in a suit for divorce was in the courtroom when, at the close of the evidence, the judge said, "Decree," and the plaintiff thanked the judge and left the court. On the same evening a daily newspaper published an account of the hearing, and stated, in substance, that a decree had been entered. Five

days later, and before the decree had been in fact entered, defendant, who had seen the newspaper account of the divorce, went through a ceremony of marriage with the complainant in the divorce suit; and thereafter the parties lived together as husband and wife, being known among their friends as such. *Held* that, as the parties continued to cohabit as husband and wife after the entering of the decree, there was a valid common-law marriage, notwithstanding the fact that they assumed the marriage relation at a time when one of the parties was incapacitated.

Appeal from Appellate Court, First District.

Action by William Land and others, by F. L. Fry and others, against F. E. Land and others. From a judgment of the Appellate Court (108 Ill. 131) affirming a judgment for defendants, plaintiffs appeal. Affirmed.

The facts in this case, as stated by the Appellate Court in their opinion, are as follows:

"The appellant William B. Land, with other beneficiaries under the will of Nellie M. Land, deceased, and the appellant the Northern Trust Company, as trustee under said will, filed their bill seeking to have declared void the alleged marriage between said Nellie M. Land and the appellee Frank E. Land, and that said Frank be declared not to be entitled to any share in the estate of said Nellie; also for other and general relief. The other appellees, it is alleged, also claim an interest in said estate as assignees of the said Frank E. Land, and are made parties defendant. The defendants all answered, and filed their cross-bill, by which they seek a decree that said Frank E. and Nellie M. Land were lawfully married on April 14, 1887, and at other dates thereafter, and that said Frank be declared the lawful surviving husband of said Nellie, entitled to share in her estate, both real and personal. The cross-bill was answered, issues made upon both the bill and cross-bill, and the cause referred to a master to take testimony, which was done. The cause was tried by the chancellor upon the testimony and evidence taken and offered before the master, a decree entered dismissing the original bill for want of equity, and finding that said Nellie was during said years last prior to her death the lawful wife of said Frank, and that on her death, March 6, 1900, he became, and now is, her lawful widower, and, as such, entitled to his proper and lawful share in her estate; also that the cross-bill be retained for such further order or decree as might from time to time be advisable. * * *

"The evidence shows, in substance, among other things not necessary to be stated, that the maiden name of said Nellie was Lillian or Nellie Moore. She was lawfully married to one Ralph S. Tuttle August 29, 1872, but obtained a decree of divorce from him in the superior court of Cook county, which was entered of record April 19, 1887. A hearing on her bill for divorce, which resulted in said decree, was had on April 9, 1887, and at

the close of the evidence the judge, before whom the hearing was had, said, 'Decree.' Said Nellie then went up to the judge, and thanked him, and left the court, as the evidence tends to show, under the belief she had been granted a divorce from said Ralph S. Tuttle. On the same day, April 9, 1887, the evening issue of the Daily News of Chicago published an account of said hearing, and stated, in substance, that a decree had been entered. Said Frank saw the said account of the said hearing of the divorce case about five o'clock the same day, and was given the same information by Mrs. Tuttle and Mrs. Sophronia Baker, a friend of Mrs. Tuttle, who was present at the hearing. Mrs. Tuttle and Land on the 14th of April, 1887, went from Chicago to La Porte, Indiana, so that her adopted son, said William, who was then at school, could be present, and there they had a marriage ceremony performed between them, pursuant to a marriage license issued the same day by the clerk of the circuit court of La Porte county, Indiana; the ceremony purporting to have been solemnized by one 'W. Scott, Rector.' After said marriage the said Nellie and Frank lived and cohabited together, and were known among their friends and associates as husband and wife, for at least two years—first for a few days at La Porte, Indiana; then for a short period at a sporting house kept by said Nellie on Dearborn street, in Chicago; and the remainder of the time at the home of the said Frank, on Park avenue, in Chicago. In the spring of 1889, said Frank, who had been engaged in the shoe business, failed; and soon thereafter said Nellie left the Park avenue house, and from that time up to her death kept a house or houses of assignation in Chicago, though during a part of the time she rented rooms or flats elsewhere, which were, from time to time, occupied by her, said Frank, and her adopted son, the appellant William B. Land. At the places where she kept her houses of assignation the said Nellie was known and called by the name of 'Nellie M. Tuttle,' or 'Mrs. Tuttle,' the same name by which she was known prior to said marriage ceremony between her and Land. Prior to said marriage ceremony said Nellie for many years was the proprietress of and kept a house or houses of assignation in Chicago, and while engaged in that business made the acquaintance of said Frank about the year 1885, from which date up to the time of said marriage ceremony she associated from time to time with Land, though there is no positive evidence of any illicit relations between them."

Upon appeal from the decree of the circuit court to the Appellate Court, said decree was affirmed, and the present appeal is prosecuted from such judgment of affirmance so entered by the Appellate Court.

C. Stuart Beattie and Harry Vincent, for appellants. Cratty Bros. and Jarvis & Latimer, for appellees.

PER CURIAM. In its opinion deciding this case, the Appellate Court say:

"The principal and controlling question presented by the briefs of counsel and the oral arguments of the cause is as to whether said Nellie M. and Frank E. Land were lawfully married during the lifetime of the former, and, if they were, then the decree is correct. * * * It is apparent from the evidence she (Nellie M. Land, formerly Nellie M. Tuttle) began the divorce proceedings which resulted in the decree mentioned for the purpose of marrying said Frank; and it seems a fair and reasonable inference from the evidence that she intended, when she procured the divorce, to marry him, and pursue thereafter a different and respectable life, and did so, as the evidence tends to show, from the time they commenced to live at the Park avenue house until Land failed in business, about two years afterwards. There is no evidence which has been called to our attention, or which we have been able to discover, of any divided reputation as to the relations between said Nellie and Frank while they lived at the Park avenue house. On the contrary, during the whole of this period their ostensible relation was that of husband and wife, they being known as such among friends and acquaintances; and he introduced and spoke of her as his wife, and she introduced and spoke of him as her husband. During this period, and as late as the year 1891, Nellie M. Land, by that name, signed and acknowledged divers conveyances of real and personal property to different persons, and received conveyances under that name, in some of which she is described as the wife of Frank E. Land, and in others Frank E. Land is described as her husband. On February 3, 1889, she procured a judgment in the name of Nellie M. Land against Frank E. Land, a written satisfaction of which she acknowledged on January 30, 1891, before a notary public, under the same name. Under date of January 15, 1894, she executed her last will, under which the appellants in this case claim their rights, by the name of Nellie M. Land.

"The clear preponderance of the evidence is that the said Nellie and Frank fully believed on April 14, 1887, that she had been divorced from said Tuttle, and that they in good faith intended, by virtue of said marriage ceremony, to contract a legal marriage, and would have done so but for the fact that her decree of divorce had not been entered of record. It does not appear that during her lifetime either she or said Frank had any knowledge that the divorce decree had not been entered at the time of the marriage ceremony. He testifies that he did not know of that fact until after her death.

"By decree of the county court, appellant William B. Land was, February 3, 1883, upon the petition of Nellie M. Tuttle and Ralph S. Tuttle, legally adopted under the name of William Bliss Tuttle, by which name he

seems to have been known and called up to the time the said Nellie M. and Frank E. Land began living together as husband and wife. From that time he became and was known and called William B. Land.

"It is claimed on behalf of appellants—and numerous authorities are cited in support of the contention—that said Nellie did not become the lawful wife of said Frank, mainly because of the fact that at the time of the marriage ceremony her divorce decree from Ralph S. Tuttle had not been entered; that this attempted marriage was void, and, being void, their subsequent life, as is shown by the evidence, was not such as to create a valid common-law marriage. Especial reliance is placed upon the case of Cartwright v. McGown, 121 Ill. 388, 12 N. E. 737, 2 Am. St. Rep. 105, in which the court uses the following language: 'Where both parties are married in the honest belief, founded on an apparently good reason, that they are capable of entering into the marriage contract, when in fact one of them is not, if they continue to cohabit as man and wife after the removal of the impediment to their lawful union the law will presume a common-law marriage by the acts of the parties, in the absence of any evidence to prevent such presumption. In such a case there are many strong and cogent reasons for presuming a new marriage after the removal of the impediment, even though the parties may not have known of its removal. There the cohabitation, in ignorance of facts rendering it illegal, is not to be regarded as meretricious or criminal until the parties have knowledge of such facts. Their purpose in such a union is honorable marriage, which the law favors, and not mere illicit intercourse.' It is argued that there was no 'honest belief, founded upon an apparently good reason'—using the language of the Supreme Court—on the part of those parties, for believing at the time of the marriage ceremony a divorce from Tuttle had been granted; that they should have looked to the court record, instead of relying upon what the judge said, and the publication of the daily press. We think the parties were justified, under the circumstances above detailed, in believing that the divorce had been granted, and therefore the Cartwright Case is not controlling. We are also of opinion that the contention of appellants' counsel that their cohabitation was illicit in its inception is not supported by the evidence, and therefore what was said in the Cartwright Case in that regard does not avail appellants."

The Appellate Court, in its said opinion, makes reference to the cases, decided by this court, of Robinson v. Ruprecht, 191 Ill. 424, 61 N. E. 631, and Manning v. Spurck, 199 Ill. 447, 65 N. E. 342, and then proceeds as follows:

"In the last case cited [Manning v. Spurck, supra], the court, in its decision, makes reference to both the Cartwright and Robinson

Cases, and makes use of the language quoted below, which, considered with reference to the facts of the case at bar, is controlling and decisive. The court say: 'The petitioner in this case presents a much stronger and more meritorious case than was made in that one [referring to the Robinson Case]. She has been guilty of no wrong or immorality, and did not enter into an adulterous and meretricious relation with James Selby. It is beyond question that there never was a doubt in her mind as to the propriety or legality of her relation to him, and that she was wholly innocent of any intent to do wrong. * * *

It is probably a safe rule to say that if parties to a marriage, in the beginning, desire and intend marriage in good faith, as a matter of fact, but an impediment exists, and the desire and intention continue after the impediment is removed, and the parties continue in the relation of husband and wife, and cohabit as such, it is sufficient proof of a marriage. It cannot be doubted that both James Selby and Sarah Jane Selby believed at the time of this marriage that he had been divorced from her. It is not reasonable to suppose, from the manner in which the parties lived, the prominence of James Selby as a well-known citizen, and the presence of his former wife in the same city, that he willingly incurred the risk of a criminal prosecution with knowledge, in fact, that the divorce was void. It is true that a relation which is illicit and meretricious in its inception is presumed to continue of the same character, and there must be evidence in such a case that there has been a change, and the relation has become matrimonial in intent and character. In this case the original relation between these parties was not meretricious in its inception, which means merely lustful and pertaining to the character of prostitution. It is not possible to conceive that they intended anything except marriage when it was solemnized at Quincy, and from that time to the death of James Selby. When he procured the decree of divorce in Allen county, Indiana, it was not done with any intention of entering into any relation with the petitioner. Eight years elapsed between the divorce and their marriage, during which time there was no relation between them, and there is no evidence that they even met during that time. There was no necessity of any change to a new relation after the death of Sarah Jane Selby, and there necessarily could not be any such proof, from the fact that there was never any question of the legality of the marriage. It was not necessary, as it was in Robinson v. Ruprecht, supra, to prove that the cohabitation had lost its lustful character and become matrimonial in character. The relation of the parties after the impediment was removed by the death of Sarah Jane Selby was matrimonial in fact, as it had been in the honest belief and intent of the parties before that time. We think that the evidence proves a common-law marriage, and

that the master and chancellor were right in their conclusion that the petitioner was the wife of James Selby at the time of his death.'

"It seems to us unnecessary, in view of the decision in the Manning Case, which is so closely analogous in its facts to this case, to discuss the other claims of counsel or the application of the various other authorities referred to by him. We are of opinion that the evidence in that regard shows that said Nellie and Frank intended at the time of the marriage ceremony to enter into the marriage relation, and, having lived together continuously as husband and wife for two years after the entry of the decree of divorce in favor of said Nellie from said Ralph S. Tuttle, it cannot be said that their relation was meretricious, but it was matrimonial in character; that, as soon as the impediment against said Nellie's entering into the marriage contract was removed by the divorce, their relation became, as is said by the court in the Manning Case, 'matrimonial in fact, as it had been in the honest belief and intent of the parties before that time.'

"We think the evidence clearly sustains the decree of the chancellor, and it is therefore affirmed."

We concur in the views above expressed by the Appellate Court, and adopt the same as the opinion of this court. Accordingly the judgment of the Appellate Court is affirmed. Judgment affirmed.

(205 Ill. 598)

CHICAGO, B. & Q. RY. CO. v. JOHNSON.

(Supreme Court of Illinois. Dec. 16, 1903.)

EASEMENT—ADVERSE POSSESSION—EVIDENCE

1. To establish an easement by use, it must appear that the use was adverse, and enjoyed under circumstances indicating that it was claimed as a right, and not as a mere privilege.

2. Evidence held insufficient to show that one had used a passageway on a railway company's land and under its bridge uninterruptedly for 20 years under a claim of right.

Appeal from Circuit Court, Mercer County; Frank D. Ramsay, Judge.

Bill for an injunction by S. Quincy Johnson against the Chicago, Burlington & Quincy Railway Company. From a decree granting the injunction, the company appeals. Reversed.

Sweeney & Walker (Chester M. Dawes, of counsel), for appellant. Bassett & Carlstrom, for appellee.

BOGGS, J. The track of the railroad of the appellant company crosses from north to south a tract of land belonging to appellee, in Mercer county. A prior owner of the land conveyed a strip 100 feet wide to the company in 1879, upon which the track was laid. The track of the company was carried over a depression or ravine by a bridge, of the length of about 64 feet when the road was first constructed, but subsequently the length of the bridge was reduced to 48 feet. In

August, 1902, the company began the work of filling this depression under the bridge on its right of way with earth, providing an iron pipe of the requisite dimensions for the passage of water which might otherwise accumulate in the depression, when the appellee filed this his bill in chancery to restrain the construction of the fill, on the ground that he had acquired a permanent easement for a passageway of his teams and stock under the bridge by open, exclusive, adverse possession and use of such passageway for more than 30 years. An answer was filed to the bill, replication to the answer, and an order entered referring the cause to the master. The master, upon consideration of the proofs submitted, made a report finding that "neither the complainant nor those through whom he claims have at any time had 20 years' use and enjoyment of a passageway under that bridge which was adverse, under a claim of right, exclusive, uninterrupted, and with the knowledge and acquiescence of the defendant or those through whom it claims." Exceptions filed to the report were sustained by the chancellor, and a decree entered granting the relief prayed in the bill, from which decree this appeal has been perfected.

It appeared from the evidence the appellee and those who owned the land prior to him had used the opening under the bridge as a passageway for teams and vehicles, and for cattle and other animals, for more than 20 years; but a careful investigation of the proof has disclosed to us that, as found by the master, the use was not adverse or under claim of right, but only a privilege or license, revocable at the pleasure of the company. The case, in all its essential features, is not distinguishable from that of *Chicago, Burlington & Quincy Railroad Co. v. Ives*, 202 Ill. 69, 66 N. E. 940, where a like easement was claimed by Ives. The principles of law there announced are applicable to the facts of this case. We there held that to establish the easement it must be made to appear that the use was adverse, and "was enjoyed under such circumstances as to indicate that it was claimed as a right, and was not regarded by the parties as a mere privilege or license, revocable at the pleasure of the owner of the soil"; and the fact that the passageway was used "without objection or hindrance is not inconsistent with use by permission."

There is no proof in the case at bar of any oral claim of right to the passageway or of title thereto. The use made of the passageway under the bridge was not inconsistent with the fact or right of ownership in the railroad company, did not interfere in any way with the use of the property by the company or with the possession thereof by the company, or indicate in any manner that it was being used under any claim of right or with the intention of excluding the company. It was proven that at one time a prior owner of the tract of land put a gate under the bridge and nailed some boards to the piling

on either side of the gate, and this prevented his stock from passing under the bridge except as he should admit it through the gate; but it was further proven this fence was removed in 1884 or 1885, and in 1885 the company rebuilt the bridge and shortened it some 16 feet, which closed the opening where the gate had been; that the fence and gate were removed, and passage thereafter was under other portions of the bridge. In constructing this new bridge the railroad company entered upon the ground over which the easement is claimed without seeking permission from any one, and without objection on the part of any person removed the old piling and put in new piling and supports in other places, shortened the bridge, and treated and occupied the premises as its exclusive property, and as being in its undisputed control and possession. Nor did any one assert to the contrary, or in any way indicate any claim of ownership or right or easement therein.

The evidence was not sufficient to uphold the finding of the decree that an easement had been acquired by the appellee, or the order that the company should be restrained from constructing an embankment on which to carry its tracks over the depression, instead of continuing the use of a bridge for that purpose. The decree must be and is reversed, and the cause will be remanded, with directions to dismiss the bill.

Reversed and remanded, with directions.

Mr. Justice SCOTT took no part in the consideration or decision of this case.

(176 N. Y. 595)

IN RE HOPKINS' WILL.

(Court of Appeals of New York. Nov. 17, 1903.)

REARGUMENT—DENIAL—APPEAL—REVERSAL OR MODIFICATION—TRIAL BY JURY—POWER OF APPELLATE COURT.

1. Under Code Civ. Proc. § 2588, declaring that, where the reversal or modification of a decree by the appellate court is founded on a question of fact, that court must, if the appeal was taken from a decree made upon a petition to admit a will to probate, or to revoke the probate of a will, make an order directing a trial by jury of the material questions of fact, the court is imperatively required to make such an order in the case specified, and has authority to do so in any other case where, in its opinion, the ends of justice might be best promoted thereby.

On motion for reargument. Denied.

For former opinion, see 65 N. E. 173.

Joseph Middlebrook, for the motion. Clarence S. Davison, Charles Blandy, and Andrew J. Shipman, opposed.

PARKER, C. J. The motion for reargument must be denied, without costs, on the ground that the question presented is no longer open for discussion in this court. In reported and unreported cases we have often decided—too often to now discuss the question—that, since the enactment of the statute now to be found in section 2588 of the Code, an appellate court must "make an or-

der directing the trial by a jury of the material questions of fact arising upon the issues between the parties," where the reversal or modification of a decree by the appellate court is founded upon a question of fact, and that the appellate court may do it in any other case where, in its opinion, it would seem that the ends of justice might be best promoted by such a course.

O'BRIEN, BARTLETT, HAIGHT, VANN, CULLEN, and WERNER, JJ., concur.

Motion denied, without costs.

MEMORANDUM DECISIONS.

A. B. FARQUHAR CO., Limited, Respondent, v. TRUESDELL, Appellant. (Court of Appeals of New York. Oct. 6, 1903.) Nelson Smith and Jesse W. Olney, for appellant. F. H. Osborn, for respondent.

PER CURIAM. Judgment (66 App. Div. 616, 73 N. Y. Supp. 1134) affirmed, with costs.

PARKER, C. J., and O'BRIEN, BARTLETT, VANN, and WERNER, JJ., concur. CULLEN, J., not voting. MARTIN, J., absent.

A. B. FARQUHAR CO., Limited, Respondent, v. TRUESDELL, Appellant. (Court of Appeals of New York. Nov. 17, 1903.) No opinion. Motion for reargument denied, with \$10 costs. See 176 N. Y. —, ubi supra.

ACKERMAN v. TRUE. (Court of Appeals of New York. Oct. 13, 1903.) No opinion. Motion for reargument denied, with \$10 costs. See 175 N. Y. 353, 67 N. E. 629.

ARKENBURGH, Appellant, v. LITTLE, Respondent, et al. (Court of Appeals of New York. Oct. 13, 1903.) Charles Edward Souther, for appellant. Frank W. Arnold, for respondent.

PER CURIAM. Judgment (49 App. Div. 636, 64 N. Y. Supp. 742) affirmed, with costs.

PARKER, C. J., and GRAY, O'BRIEN, BARTLETT, VANN, CULLEN, and WERNER, JJ., concur.

BECKER et al., Appellants, v. KRANK et al., Respondents. (Court of Appeals of New York. Oct. 6, 1903.) John A. Delehanty, for appellants. R. J. Cooper and Frank Cooper, for respondents.

PER CURIAM. Judgment (75 App. Div. 191, 77 N. Y. Supp. 665) affirmed, and judgment absolute ordered for defendants, on the stipulation, with costs.

PARKER, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, MARTIN, and VANN, JJ., concur.

BIRRELL, Respondent, v. NEW YORK & H. R. CO. et al., Appellants. (Court of Appeals of New York. Oct. 13, 1903.) No opinion. Motion to amend remittitur (see 173 N. Y. 644, 66 N. E. 1105) granted, without costs, and remit-

titur amended by adding thereto: "That in said suit or action there was drawn in question the validity of chapter 339 of the Laws of 1892, and the acts amendatory thereof, and of the authority exercised thereunder, on the ground of their being repugnant to the Constitution of the United States, and particularly to section 1 of article 14, and the amendments thereto, and of section 10 of article 1 thereof, and thereupon the decision of this Court of Appeals was and is in favor of the validity of said statute and of the authority exercised thereunder."

BOARD OF EDUCATION OF UNION FREE SCHOOL DIST. NO. 6 OF TOWN OF CORTLANDT, Appellant, v. BOARD OF EDUCATION OF UNION FREE SCHOOL DIST. NO. 7 OF TOWN OF CORTLANDT, Respondent. (Court of Appeals of New York. Oct. 13, 1903.) Motion to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (76 App. Div. 355, 73 N. Y. Supp. 522), entered November 14, 1902, which reversed an order of Special Term overruling a demurrer to the complaint. The motion was made upon the ground that the Court of Appeals had no jurisdiction to entertain the appeal. D. S. Herrick, for the motion. Elbert P. James, opposed. No opinion. Motion denied, with \$10 costs.

BOYD, Appellant, v. NEW YORK SECURITY & TRUST CO. et al., Respondents. (Court of Appeals of New York. Oct. 13, 1903.) Motion to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (85 App. Div. 581, 83 N. Y. Supp. 539), entered August 4, 1903, affirming a judgment in favor of defendants entered upon a decision of the court on trial at Special Term. The motion was made upon the grounds that the judgment appealed from was not appealable of right to the Court of Appeals, and that permission to appeal had not been granted, nor had the Appellate Division certified that a question of law was involved which ought to be reviewed. James F. O'Beirne, for the motion. Lewis Johnston, opposed. No opinion. Motion denied, with \$10 costs.

BOYD v. NEW YORK SECURITY & TRUST CO. et al. (Court of Appeals of New York. Dec. 1, 1903.) Edward W. S. Johnston, for appellant. Lyman E. Warren, for respondents.

PER CURIAM. Judgment (85 App. Div. 581, 83 N. Y. Supp. 539) affirmed, with costs.

PARKER, C. J., and GRAY, BARTLETT, HAIGHT, VANN, CULLEN, and WERNER, JJ., concur.

BRANDEGEE, Respondent, v. METROPOLITAN LIFE INS. CO., Appellant. (Court of Appeals of New York. Nov. 10, 1903.) J. W. Rayhill, for appellant. F. G. Fincke, for respondent.

PER CURIAM. Judgment (78 App. Div. 629, 79 N. Y. Supp. 1126) affirmed, with costs.

PARKER, C. J., and GRAY, O'BRIEN, HAIGHT, MARTIN, CULLEN, and WERNER, JJ., concur.

BROOKLYN TEACHERS' ASS'N et al., Respondents, v. BOARD OF EDUCATION OF CITY OF NEW YORK et al., Appellants. (Court of Appeals of New York. Oct. 27, 1903.) George L. Rives, Corp. Counsel (James McKeen and Walter S. Brewster, of counsel), for

appellants. Ira Leo Bamberger, for respondents.

PER CURIAM. Order (85 App. Div. 47, 83 N. Y. Supp. 1) affirmed, with costs.

PARKER, C. J., and O'BRIEN, BARTLETT, MARTIN, VANN, CULLEN, and WERNER, JJ., concur.

BROTT et al. v. DAVIDSON et al. (Court of Appeals of New York. Nov. 24, 1903.) H. D. Bailey, for appellant. J. W. Atkinson, for respondents.

PER CURIAM. Appeal (87 App. Div. 29, 83 N. Y. Supp. 1075) dismissed, with costs.

PARKER, C. J., and O'BRIEN, BARTLETT, HAIGHT, VANN, CULLEN, and WERNER, JJ., concur.

BROWN et al., Appellants, v. CITY OF NEW YORK et al., Respondents. (Court of Appeals of New York. Oct. 30, 1903.) L. Latin Kellogg and Alfred C. Petté, for appellants. George L. Rives, Corp. Counsel (Theodore Connolly, of counsel), for respondents.

PER CURIAM. Judgment (78 App. Div. 361, 79 N. Y. Supp. 943) affirmed, with costs.

PARKER, C. J., and GRAY, HAIGHT, MARTIN, VANN, CULLEN, and WERNER, JJ., concur.

CENTRAL TRUST CO. OF NEW YORK, Respondent, v. NEW YORK & W. WATER CO. et al., Appellants. (Court of Appeals of New York. Oct. 6, 1903.) William L. Snyder, Arthur J. Baldwin, Leonard D. Baldwin, and Henry L. Rupert, for appellants. Arthur H. Van Brunt, for respondent.

PER CURIAM. Judgment (68 App. Div. 640, 74 N. Y. Supp. 135) affirmed, with costs.

PARKER, C. J., and O'BRIEN, BARTLETT, VANN, CULLEN, and WERNER, JJ., concur. MARTIN, J., absent.

CITY OF BUFFALO, Appellant, v. DELAWARE, L. & W. R. CO., Respondent. (Court of Appeals of New York. Nov. 17, 1903.) Motion to withdraw part of appeal from judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (68 App. Div. 488, 74 N. Y. Supp. 343), entered February 19, 1902, which affirmed so much of a judgment of the court on trial at an Equity Term as was in favor of the defendant, and reversed so much of said judgment as was in favor of plaintiff, and granted a new trial. The motion was made upon the ground that the appeal from that part of the judgment reversing on the law and the facts and granting a new trial was taken inadvertently, plaintiff's counsel not having in mind the provision of law that the Court of Appeals has no jurisdiction to review where disputed questions of law are involved. Charles L. Feldman, Corp. Counsel (Edward L. Jung, of counsel), for the motion. John G. Milburn, opposed. No opinion. Motion granted, upon payment of \$150, and the argument of the appeal remaining in this court is set down for the third Monday of January next.

CITY OF NEW YORK, Respondent, v. McCALDIN BROS. CO., Appellant. (Court of Appeals of New York. Nov. 10, 1903.) William L. Turner and Frank D. Arthur, for appellant. George L. Rives, Corp. Counsel (Theodore Connolly, Martin Saxe, and Henry M. Powell, of counsel), for respondent.

PER CURIAM. Order (81 App. Div. 622, 81 N. Y. Supp. 419) affirmed on opinion below,

and judgment absolute ordered for plaintiff on the stipulation, with costs.

PARKER, C. J., and GRAY, HAIGHT, MARTIN, VANN, CULLEN, and WERNER, JJ., concur.

OLINTON et al., Respondents, v. BOECKEL, City Treasurer, Appellant. (Court of Appeals of New York. Oct. 27, 1903.) Percy S. Lansdowne and Charles L. Feldman, for appellant. Ulysses S. Thomas, for respondents.

PER CURIAM. Order (79 App. Div. 645, 80 N. Y. Supp. 1132) affirmed, with costs.

PARKER, C. J., and O'BRIEN, BARTLETT, MARTIN, VANN, CULLEN, and WERNER, JJ., concur.

CONNORS, Respondent, v. NOONE, Appellant. (Court of Appeals of New York. Nov. 10, 1903.) Kilby & Norris, for appellant. John N. Carlisle, for respondent.

PER CURIAM. Judgment (84 App. Div. 632, 82 N. Y. Supp. 1097) affirmed, with costs.

PARKER, C. J., and GRAY, O'BRIEN, HAIGHT, MARTIN, CULLEN, and WERNER, JJ., concur.

In re CRUIKSHANK. (Court of Appeals of New York. Oct. 27, 1903.) George C. Case, for appellant. Hugo Hirsh, for respondent.

PER CURIAM. Order (82 App. Div. 645, 81 N. Y. Supp. 1122) affirmed, with costs.

PARKER, C. J., and O'BRIEN, BARTLETT, MARTIN, VANN, CULLEN, and WERNER, JJ., concur.

DICKESCHEID, Appellant, v. BETZ, Respondent. (Court of Appeals of New York. Dec. 1, 1903.) Theodore H. Lord and Ambrose F. McCabe, for appellant. Abram I. Elkus, James C. McEachen, and Carlisle J. Gleason, for respondent.

PER CURIAM. Judgment (80 App. Div. 8, 80 N. Y. Supp. 175) affirmed, with costs.

BARTLETT, HAIGHT, CULLEN, and WERNER, JJ., concur. PARKER, C. J., and O'BRIEN, J., dissent. VANN, J., not voting.

DR. DADIERRIAN & SONS CO., Respondent, v. HAUENSTEIN, Appellant. (Court of Appeals of New York. Oct. 13, 1903.) No opinion. Motion for reargument denied, with \$10 costs. See 175 N. Y. 522, 67 N. E. 1081.

DUNLOP, Appellant, v. JAMES, Respondent, et al. (Court of Appeals of New York. April 28, 1903.) O. J. Wells, for appellant. John P. Everett, J. Van Vechten Olcott, and Albert R. Lesinsky, for respondent.

PER CURIAM. Judgment (70 App. Div. 615, 75 N. Y. Supp. 78) affirmed, with costs, on opinion below.

PARKER, C. J., and GRAY, O'BRIEN, MARTIN, VANN, CULLEN, and WERNER, JJ., concur.

ECKERSON, Appellant, v. CITY OF NEW YORK, Respondent. (Court of Appeals of New York. Dec. 1, 1903.) George F. Langbein and William J. Walsh, for appellant. George L. Rives, Corp. Counsel (Theodore Connolly and Edward J. McGuire, of counsel), for respondent.

PER CURIAM. Order (80 App. Div. 12, 80 N. Y. Supp. 168) affirmed, and judgment ab-

volute ordered for defendant on the stipulation, with costs, on opinion below.

PARKER, C. J., and O'BRIEN, BARTLETT, HAIGHT, VANN, CULLEN, and WERNER, JJ., concur.

In re ELIAS' ESTATE. (Court of Appeals of New York. Oct. 6, 1903.) Franklin Bien, for appellants. Frederick B. Woodruff, William N. Cohen, Porte V. Ransom, and Frank W. Arnold, for respondents.

PER CURIAM. Appeal (60 App. Div. 630, 70 N. Y. Supp. 1138) dismissed, with costs.

PARKER, C. J., and O'BRIEN, BARTLETT, VANN, CULLEN, and WERNER, JJ., concur. MARTIN, J., absent.

EPISCOPO v. MAYOR, ETC., OF CITY OF NEW YORK et al. (Court of Appeals of New York. Oct. 30, 1903.) George L. Rives, Corp. Counsel (Theodore Connolly and Terence Farley, of counsel), for appellant. Gilbert Ray Hawes, for respondent. Episcopo. L. Laffin Kellogg, Alfred C. Petté, Charles W. Dayton, F. E. M. Bullova, J. Woolsey Shepard, R. A. Stacpoole, and Austin E. Pressinger, for other respondents.

PER CURIAM. Judgment (80 App. Div. 627, 80 N. Y. Supp. 1134) affirmed, with costs.

PARKER, C. J., and GRAY, HAIGHT, MARTIN, VANN, CULLEN, and WERNER, JJ., concur.

EPISCOPO v. MAYOR, ETC., OF CITY OF NEW YORK et al. (Court of Appeals of New York. Nov. 17, 1903.) No opinion. Motion to amend remittitur (see 176 N. Y. —, ubi supra) granted, and remittitur amended, so as to allow costs to attorneys who separately appeared and filed briefs in this court.

In re FERRIS. (Court of Appeals of New York. Nov. 24, 1903.) George H. Fletcher, for appellant. Milton A. Fowler and Irving Washburn, for respondent.

PER CURIAM. Order (86 App. Div. 559, 84 N. Y. Supp. 15) affirmed, with costs and question certified answered in the affirmative.

PARKER, C. J., and O'BRIEN, BARTLETT, HAIGHT, VANN, CULLEN and WERNER, JJ., concur.

In re GAWNE. (Court of Appeals of New York. Nov. 17, 1903.) Henry A. Forster, for appellant. Albert R. Moore, for respondent.

PER CURIAM. Order (82 App. Div. 374, 81 N. Y. Supp. 861) affirmed, with costs, on opinion below.

PARKER, C. J., and GRAY, HAIGHT, MARTIN, CULLEN, and WERNER, JJ., concur.

O'BRIEN, J. (dissenting). This proceeding was for a judicial settlement and accounting of the executor of the will of Ellen O'Reilly, who died in July, 1900, leaving a will. The only question involved is the meaning and construction to be given to the third clause of the will. All the estate was bequeathed to the executors, in trust, to pay the income of her husband during his life, and then disposed of by the third clause, as follows: "Third. It is my will, and I hereby direct, that upon the death of my said husband, James O'Reilly, my surviving executor shall divide the principal sum of my estate among my sons, James T. O'Reilly, William F. O'Reilly, Edward A. O'Reilly, and my adopted sons, William O'Reilly and

Franklyn O'Reilly, children of Franklyn Fletcher, and legally adopted by my husband and myself, in manner following, that is to say: To my son James T. O'Reilly, one equal one-fifth part; to my son William F. O'Reilly, one equal one-fifth part in trust for his wife, Sarah A. O'Reilly; to my son Edward A. O'Reilly, one equal one-fifth part in trust for his wife, Mary E. O'Reilly; to my adopted son William O'Reilly, one equal one-fifth part; and to my adopted son Franklyn O'Reilly, one equal one-fifth part." This appeal involves only the share of the son Edward A. O'Reilly, and the question is whether it should be distributed to him, as legatee absolutely, or to his wife. The surrogate held that he was entitled to it as legatee absolutely under the will, but the learned Appellate Division reversed the decree and awarded the share to the wife, and the husband appeals. If the clause of the will in question creates a trust in the husband in favor of the wife that the courts are competent to enforce, then the husband would take the share as trustee, and not the wife as legatee. If, on the other hand, there was no trust, but an absolute gift of the remainder, the question is, to whom was the gift made by the terms of the will? whether the husband or the wife. There are no words of absolute gift to the wife, but there are words of absolute gift to the husband. The testatrix directed that the remainder be "divided among my sons," naming the contestant as one of them, there being five in all. She directed that one equal one-fifth part be divided to the son Edward A. O'Reilly in trust for his wife, and it is said that these latter words destroy the absolute character of the gift to the husband and convert it into an absolute gift to the wife. If I understand a recent decision of this court, there was a good trust in this case created in the husband for the benefit of the wife. *Collister v. Fassitt*, 163 N. Y. 281, 57 N. E. 490, 79 Am. St. Rep. 586. I am unable to perceive any distinction between that case and the one at bar. In the present case the language, which is added to words of absolute gift, is much clearer and more satisfactory than in the case cited, and if there is a trust the share should go to the husband as trustee, and not to the wife as a beneficiary of a void trust. Section 73 of the real property law (Laws 1896, p. 570, c. 547, in regard to certain trusts of real property, has no application to trusts of personal property. *Holmes v. Mead*, 52 N. Y. 332; *Matter of Carpenter*, 131 N. Y. 86, 29 N. E. 1005. In my opinion, this clause of the will should be construed as an absolute bequest of one-fifth of the remainder to the husband, and so the surrogate held. The case is one in which there are clear words of absolute gift to the husband, and their legal effect is not changed by the subsequent words in regard to a trust, which have no legal force or effect, since it is admitted that they create no trust or estate whatever, and the clause must, therefore, be construed in the same way as if these words were not used at all. It is the case of an absolute gift, followed by qualifying, directory, or precatory words, which are wholly ineffectual in law, and in this state have always been rejected in the construction of wills. A brief reference to some of the cases will show how consistently the rule has been followed in this state. In *Boose v. Whitmore*, 82 N. Y. 405, 37 Am. Rep. 572, the provision of the will was: "I * * * give and bequeath all my property, real and personal, to my beloved wife, Mary, only requesting her, at the close of her life, to make such disposition of the same among my children and grandchildren as shall seem to her good." It was held that the gift to the wife was absolute, that the concluding words amounted to a mere suggestion, and did not create a trust or any charge upon the estate. In *Clarke v. Leupp*, 88 N. Y. 228, the testator declared that he deemed it his

duty to make a will for the benefit and protection of his wife and two children, and then proceeded as follows: "I do therefore make this, my last will and testament, giving and bequeathing to my wife Caroline all my property, real and personal, * * * and do appoint my wife * * * my true and lawful attorney and sole executrix of this my will, to take charge of my property after my death, and retain or dispose of the same for the benefit of herself and children above named." It was held that the wife took an absolute title to all of the testator's estate, that it was not intended by the words succeeding to limit or cut down the absolute gift, and that there was no trust created. In *Lawrence v. Cooke*, 104 N. Y. 632, 11 N. E. 144, after a gift of the residuary estate to the testator's daughter and her heirs and assigns, forever, the following words were added: "I commit my granddaughter * * * to the charge and guardianship of my daughter. * * * I enjoin upon her to make such provision for said grandchild out of my residuary estate * * * in such manner, at such times, and in such amounts as she may judge to be expedient and conducive to the welfare of said grandchild, and her own sense of justice and Christian duty shall dictate." It was held that no trust was created, nor any charge upon the property given by the will to the daughter; that the legatee took an absolute gift and the provision made for the granddaughter was left wholly to her discretion as to the amount and manner, as well as the time it should be made; and that this discretion could not be interfered with by the court. In *Matter of Gardner*, 140 N. Y. 122, 35 N. E. 439, the testator gave his residuary estate to his wife, to have and to hold the same to her and her assignee, forever, provided, however, that, if any part of it should remain unexpended or undisposed of at her death, this he gave to his son, his heirs and assigns. He then stated that it was his desire that his wife should not dispose of any of the estate by will in such way that what might remain at her death would go out of his own family and blood relations. The testator had one child, a son by a former wife. The widow died, leaving a will which disposed of so much of the residuary estate as remained at her death, giving a large portion thereof to the son, and also one-fourth of her residuary estate, after the expiration of a life estate therein of another fourth, to a sister of her husband. It was held that the estate of the wife was not limited or qualified by the concluding paragraph, expressing the testator's expectation and desire. In *Clay v. Wood*, 153 N. Y. 134, 47 N. E. 274, the testator gave certain real and personal property to his wife, to have and to hold, unto her and her heirs, executors, administrators, and assigns, forever, with legacies to others, which were declared not to be a charge upon the property given to the wife. He then gave all the residue of the estate to the wife, and to her heirs, executors, administrators, and assigns, forever, followed by these words: "And it is my request that my said wife do sustain, provide for, and educate Lucretia, the daughter of my said adopted daughter Josephine. And it is my further desire and request that my wife do make the said Lucretia, Josephine, and my nephews and nieces, the children of my brothers, C. and G., joint heirs after her death in the said estate which by this will I have bequeathed to my said wife." It was held that the testator intended an absolute gift to the wife, except the legacies to others, with an absolute right of disposition, and that such gift was not qualified by the subsequent precatory clause, and that, hence, no trust or power in trust in favor of the persons mentioned in that clause was created thereby. In the case at bar the words in regard to a trust, following words of absolute gift to the husband, amount to no more

than the expression of a desire or a wish on the part of the testatrix that the gift was to be enjoyed by the wife as well as the husband. It is a familiar rule that a will should be construed, whenever possible, in such a way as to vest the estate in the testator's children, or in persons of his own blood. Applying that rule, and the other considerations referred to above to this case, it is difficult to conclude that the intention of the testatrix was to pass over the claims of one of her own children, leaving him nothing whatever, and to vest one-fifth of the estate in his wife, who was not of her own blood. The more reasonable construction is that the mother intended, as her words fairly imply, to make an absolute gift to her son, in which the wife should be recognized or benefited. No trust having been created in her favor, the words used in that respect must be regarded as ineffectual and precatory, having no force or effect in the disposition of the remainder. I think the order of the Appellate Division should be reversed, and the decree of the surrogate affirmed, with costs to both parties to this appeal, payable out of the estate.

In re *GEORGE B. WRAY DRUG CO.* (No. 1.) (Court of Appeals of New York. Oct. 13, 1903.) Motion to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (82 App. Div. 645, 81 N. Y. Supp. 1126), entered May 1, 1903, which affirmed an order of Special Term denying a motion to set aside a final order dissolving the *George B. Wray Drug Company*. The motion was made upon the grounds that the order appealed from was not a final order in a special proceeding, that permission to appeal therefrom had not been granted, nor had the Appellate Division certified that any question was involved which ought to be reviewed by the Court of Appeals. *Ralph E. Prime, Jr.*, for the motion. *Waldo G. Morse*, opposed. No opinion. Motion denied, with \$10 costs.

In re *GEORGE B. WRAY DRUG CO.* (No. 2.) (Court of Appeals of New York. Oct. 13, 1903.) Motion to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (83 App. Div. 634, 81 N. Y. Supp. 1126), entered April 24, 1903, which affirmed an order of Special Term denying a motion to compel the clerk of Westchester county to certify appellants' papers on appeal. The motion was made upon the grounds that the order appealed from was not a final order in a special proceeding, that no allowance of the appeal had been granted, nor had the Appellate Division certified that any question was involved which ought to be determined by the Court of Appeals. *Ralph E. Prime, Jr.*, for the motion. *Waldo G. Morse*, opposed. No opinion. Motion granted, and appeal dismissed, with costs and \$10 costs of motion.

In re *GEORGE B. WRAY DRUG CO.* (Court of Appeals of New York. Nov. 24, 1903.) *Waldo G. Morse*, for appellants. *Ralph Earl Prime, Jr.*, for respondent.

PER CURIAM. Order (83 App. Div. 634, 81 N. Y. Supp. 1126) affirmed, with costs.

PARKER, O. J., and *O'BRIEN, BARTLETT, HAIGHT, VANN, CULLEN*, and *WERNER, JJ.*, concur.

In re *GIBBES' ESTATE.* (Court of Appeals of New York. Oct. 27, 1903.) *Bertram J. Kraus* and *Henry B. Wesselman*, for appellant.

Richard Reid Rogers and James F. Horan, for respondents.

PER CURIAM. Order (84 App. Div. 510, 83 N. Y. Supp. 53) affirmed, with costs.

PARKER, C. J., and O'BRIEN, BARTLETT, MARTIN, VANN, CULLEN, and WERNER, JJ., concur.

GLENNON, Appellant, v. ERIE R. CO., Respondent. (Court of Appeals of New York. Oct. 13, 1903.) Motion to withdraw an appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (86 App. Div. 397, 83 N. Y. Supp. 875), entered August 3, 1903, which affirmed a judgment of the court at a Trial Term dismissing the complaint after the rendition by the jury of a verdict in favor of plaintiff and an order denying a motion for a new trial. The motion was made upon the ground that the appeal was not properly taken. Robert H. Barnett, for the motion. Albert Hessberg, opposed. No opinion. Motion granted, upon payment of costs.

GOLDBERG v. JACOCKS et al. (Court of Appeals of New York. Oct. 27, 1903.) Alexander Lehman and Ambrose G. Todd, for appellant. C. F. Goddard, for respondent.

PER CURIAM. Order (86 App. Div. 626, 83 N. Y. Supp. 1106) affirmed, with costs.

PARKER, C. J., and O'BRIEN, BARTLETT, MARTIN, VANN, CULLEN, and WERNER, JJ., concur.

In re HATCH. (Court of Appeals of New York. Nov. 10, 1903.) Clarence W. McKay, for appellant. Hiram R. Wood, William A. Sutherland, and H. B. Hallock, for respondents.

PER CURIAM. Order (75 App. Div. 609, 77 N. Y. Supp. 1128) affirmed, with costs to respondents against appellant personally.

PARKER, C. J., and GRAY, O'BRIEN, HAIGHT, MARTIN, CULLEN, and WERNER, JJ., concur.

In re HOLMES. (Court of Appeals of New York. Nov. 24, 1903.) Edmund B. Jenks, for appellant. Nelson P. Bonney and E. E. Mellon, for respondents.

PER CURIAM. Order (79 App. Div. 264, 79 N. Y. Supp. 592) affirmed, with costs.

O'BRIEN, BARTLETT, HAIGHT, VANN, CULLEN, and WERNER, JJ., concur. PARKER, C. J., absent.

In re HOLMES' ESTATE. (Court of Appeals of New York. Nov. 24, 1903.) Edmund B. Jenks, for appellant. Nelson P. Bonney and E. E. Mellon, for respondents.

PER CURIAM. Order (79 App. Div. 267, 79 N. Y. Supp. 687) affirmed, with costs.

O'BRIEN, BARTLETT, HAIGHT, VANN, CULLEN, and WERNER, JJ., concur. PARKER, C. J., absent.

In re HOWE'S ESTATE. (Court of Appeals of New York. Oct. 27, 1903.) Robert B. Bach, for appellant. C. W. West, for respondents.

PER CURIAM. Order (86 App. Div. 286, 83 N. Y. Supp. 825) affirmed, with costs, on opinion below.

O'BRIEN, BARTLETT, MARTIN, VANN, CULLEN, and WERNER, JJ., concur. PARKER, C. J., not sitting.

HUGHES, Appellant, v. MAYOR, etc., OF CITY OF NEW YORK, Respondent. (Court of Appeals of New York. Nov. 10, 1903.) L. Laffin Kellogg and Alfred C. Petté, for appellant. George L. Rives, Corp. Counsel (Theodore Connolly and Chase Mellen, of counsel), for respondent.

PER CURIAM. Judgment (84 App. Div. 347, 82 N. Y. Supp. 905) affirmed, with costs, on opinion below.

PARKER, C. J., and GRAY, HAIGHT, MARTIN, VANN, CULLEN, and WERNER, JJ., concur.

JOSEPH, Appellant, v. RAFF, Respondent. (Court of Appeals of New York. Dec. 1, 1903.) Judson S. Landon, George Edwin Joseph, William L. Cahn, and Wilson B. Brice, for appellant. William B. Ellison, Walter L. McCorkle, and Arnold L. Davis, for respondent.

PER CURIAM. Order (82 App. Div. 47, 81 N. Y. Supp. 546) affirmed, and judgment absolute ordered for defendant, on the stipulation, with costs.

GRAY, BARTLETT, HAIGHT, VANN, CULLEN and WERNER, JJ., concur. PARKER, C. J., absent.

KEIRNS, Respondent, v. NEW YORK & H. R. CO., et al., Appellants. (Court of Appeals of New York. Oct. 13, 1903.) No opinion. Motion to amend remittitur (see 173 N. Y. 642, 66 N. E. 1110) granted, without costs; and remittitur amended by adding thereto: "That in said suit or action there was drawn in question the validity of chapter 339 of the Laws of 1892, and the acts amendatory thereof, and of the authority exercised thereunder, on the ground of their being repugnant to the Constitution of the United States, and particularly to section 1 of article 14 and the amendments thereto, and of section 10 of article 1 thereof, and thereupon the decision of this Court of Appeals was and is in favor of the validity of said statute and of the authority exercised thereunder."

LAFFERTY, Respondent, v. THIRD AVE. R. CO., Appellant. (Court of Appeals of New York. Nov. 10, 1903.) Charles F. Brown, Bayard H. Ames, and Henry A. Robinson, for appellant. Albert A. Wray, for respondent.

PER CURIAM. Judgment (85 App. Div. 592, 83 N. Y. Supp. 405) affirmed, with costs.

PARKER, C. J., and GRAY, O'BRIEN, HAIGHT, MARTIN, CULLEN, and WERNER, JJ., concur.

LANE, Respondent, v. BROOKLYN HEIGHTS R. CO., Appellant. (Court of Appeals of New York. Oct. 13, 1903.) Motion to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (85 App. Div. 85, 82 N. Y. Supp. 1057), entered June 19, 1903, which affirmed an order of Special Term denying a motion for a new trial upon the ground of alleged newly discovered evidence. The motion was made upon the grounds that the order appealed from was not a final order in the action, nor had permission to appeal therefrom been granted. James C. Cropsey, for the motion. George D. Yeomans, opposed. No opinion. Motion granted, and appeal dismissed, with costs and \$10 costs of motion.

LANGAN, Respondent, v. SUPREME COUNCIL AMERICAN LEGION OF HONOR, Appellant. (Court of Appeals of New

York. Nov. 17, 1902.) No opinion. Motion for reargument denied, with \$10 costs. See 174 N. Y. 266, 66 N. E. 932.

LEGGAT, Respondent, v. LEGGAT, Appellant. (Court of Appeals of New York. Nov. 10, 1903.) William A. Keener and A. Delos Kneeland, for appellant. Joseph A. Burr and Michael Furst, for respondent.

PER CURIAM. Judgment (79 App. Div. 141, 80 N. Y. Supp. 327) affirmed, with costs, on opinion below.

PARKER, C. J., and GRAY, O'BRIEN, HAIGHT, MARTIN, CULLEN, and WERNER, JJ., concur.

LEVY, Respondent, v. HUWER, Appellant. (Court of Appeals of New York. Dec. 1, 1903.) Herbert T. Ketcham and Joseph E. Owen, for appellant. Charles De Hart Brower and Edward H. Harrison, for respondent.

PER CURIAM. Judgment (80 App. Div. 499, 81 N. Y. Supp. 191) affirmed, with costs.

GRAY, BARTLETT, HAIGHT, VANN, CULLEN and WERNER, JJ., concur. PARKER, C. J., absent.

LIBBY, Appellant, v. VAN DERZEE et al., Respondents. (Court of Appeals of New York. Nov. 10, 1903.) J. J. Bennett, for appellant. William D. Gaillard, for respondents.

PER CURIAM. Judgment (80 App. Div. 494, 81 N. Y. Supp. 139) affirmed, with costs.

PARKER, C. J., and GRAY, O'BRIEN, HAIGHT, MARTIN, CULLEN, and WERNER, JJ., concur.

LONG, Appellant, v. RICHMOND, Respondent. (Court of Appeals of New York. Oct. 13, 1903.) No opinion. Motion for reargument denied, with \$10 costs. See 175 N. Y. 495, 67 N. E. 1084.

LYONS, Appellant, v. CITY OF NEW YORK, Respondent. (Court of Appeals of New York. Dec. 1, 1903.) Franklin Pierce, for appellant. George L. Rives, Corp. Counsel (Theodore Connolly and W. B. Crowell, of counsel), for respondent.

PER CURIAM. Judgment (82 App. Div. 306, 81 N. Y. Supp. 1079) affirmed, with costs, on the sole ground that the salary was not increased.

PARKER, C. J., and O'BRIEN, BARTLETT, HAIGHT, VANN, CULLEN, and WERNER, JJ., concur.

McCABE, Appellant, v. CITY OF NEW YORK, Respondent. (Court of Appeals of New York. Nov. 10, 1903.) Isidore S. I. Chirurg, for appellant. George L. Rives, Corp. Counsel (Theodore Connolly and Chase Mellen, of counsel), for respondent.

PER CURIAM. Order (77 App. Div. 637, 79 N. Y. Supp. 176) affirmed, and judgment absolute ordered for defendant on the stipulation, with costs.

PARKER, C. J., and GRAY, HAIGHT, MARTIN, VANN, CULLEN, and WERNER, JJ., concur.

MACK, Appellant, v. MAYOR, ETC., OF CITY OF NEW YORK, Respondent. (Court of Appeals of New York. Oct. 30, 1903.) L. Lafin Kellogg and Alfred C. Petté, for appellant. George L. Rives, Corp. Counsel (Theodore Connolly and Charles A. O'Neil, of counsel), for respondent.

PER CURIAM. Judgment (82 App. Div. 637, 80 N. Y. Supp. 1139) affirmed, with costs. PARKER, C. J., and GRAY, HAIGHT, MARTIN, VANN, CULLEN, and WERNER, JJ., concur.

MacKNIGHT FLINTIC STONE CO., Appellant, v. CITY OF NEW YORK et al., Respondents (two cases). (Court of Appeals of New York. Nov. 10, 1903.) L. Lafin Kellogg and Alfred C. Petté, for appellant. Louis Marshall, for respondents.

PER CURIAM. Judgments (78 App. Div. 640, 79 N. Y. Supp. 523; 78 App. Div. 641, 79 N. Y. Supp. 521) affirmed, with costs.

PARKER, C. J., and GRAY, HAIGHT, MARTIN, VANN, CULLEN, and WERNER, JJ., concur.

McNAMARA et al., Appellants, v. WILLCOX, Park Com'r, Respondent. (Court of Appeals of New York. Oct. 30, 1903.) Arthur C. Butts, for appellants. George L. Rives, Corp. Counsel (Theodore Connolly, of counsel), for respondent.

PER CURIAM. Judgment (81 App. Div. 635, 81 N. Y. Supp. 1134) affirmed, with costs.

GRAY, HAIGHT, VANN, and WERNER, JJ., concur. PARKER, C. J., and MARTIN, and CULLEN, JJ., dissent.

MANHATTAN FIRE INS. CO. et al., Appellants, v. FOX et al., Respondents. (Court of Appeals of New York. Oct. 13, 1903.) Motion to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (74 App. Div. 271, 77 N. Y. Supp. 657), entered July 23, 1902, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court at a Trial Term. The motion was made upon the ground that the undertaking required to perfect the appeal had not been filed. William H. Blain, for the motion. George M. Fannin, opposed. No opinion. Motion granted, and appeal dismissed, with costs, unless within 10 days after service of copy of order the appellants perfect an appeal by filing a proper undertaking and pay \$10 costs.

MARSHALL, Respondent, v. CITY OF BUFFALO, Appellant. (Court of Appeals of New York. Oct. 6, 1903.) Edward L. Jung and Charles L. Feldman, for appellant. Adolph Rebadow, for respondent.

PER CURIAM. Order (63 App. Div. 603, 71 N. Y. Supp. 719) affirmed, and judgment absolute ordered for plaintiff on the stipulation, with costs.

PARKER, C. J., and O'BRIEN, BARTLETT, VANN, CULLEN, and WERNER, JJ., concur. MARTIN, J., absent.

In re MERRITT. (Court of Appeals of New York. Dec. 1, 1903.) Washington H. Ransom, for appellant. S. Wallace Dempsey, for respondents.

PER CURIAM. Order (86 App. Div. 179, 83 N. Y. Supp. 213) affirmed, with costs, on opinion below.

PARKER, C. J., and O'BRIEN, BARTLETT, HAIGHT, VANN, CULLEN, and WERNER, JJ., concur.

In re NEW YORK CENT. & H. R. R. CO. (Court of Appeals of New York. Oct. 20, 1903.)

George P. Decker, for appellant. Edward Harris, for respondents.

PER CURIAM. Order (79 App. Div. 643, 80 N. Y. Supp. 1143) affirmed, with costs.

PARKER, C. J., and O'BRIEN, BARTLETT, MARTIN, VANN, CULLEN, and WERNER, JJ., concur.

O'BRIEN, Appellant, v. SUPREME COUNCIL CATHOLIC BENEVOLENT LEGION, Respondent. (Court of Appeals of New York. Nov. 17, 1903.) Rufus C. Maltby, for appellant. John C. McGuire, for respondent.

PER CURIAM. Judgment (81 App. Div. 1, 80 N. Y. Supp. 775) affirmed, with costs.

PARKER, C. J., and GRAY, O'BRIEN, MARTIN, and WERNER, JJ., concur. HAIGHT and CULLEN, JJ., dissent.

PEOPLE, Respondent, v. FILKIN, Appellant. (Court of Appeals of New York. Oct. 8, 1903.) John D. Teller, for appellant. Harry T. Dayton, Dist. Atty. (Albert H. Clark, of counsel), for the People.

PER CURIAM. Judgment of conviction (83 App. Div. 589, 82 N. Y. Supp. 15) affirmed, on opinion of HISCOCK, J., below.

PARKER, C. J., and O'BRIEN, BARTLETT, VANN, CULLEN, and WERNER, JJ., concur. MARTIN, J., absent.

PEOPLE ex rel. ARNOLD, Appellant, v. FEITNER et al., Commissioners of Taxes and Assessments, Respondents. (Court of Appeals of New York. Oct. 20, 1903.) Walter Large, for appellant. George L. Rives, Corp. Counsel (David Rumsey and James M. Ward, of counsel), for respondents.

PER CURIAM. Order (76 App. Div. 620, 79 N. Y. Supp. 1142) affirmed, with costs.

PARKER, C. J., and O'BRIEN, BARTLETT, MARTIN, VANN, CULLEN, and WERNER, JJ., concur.

PEOPLE ex rel. BEEBE v. WARDEN OF CITY PRISON OF BOROUGH OF MANHATTAN et al. PEOPLE ex rel. VAN LINDA v. SAME. (Court of Appeals of New York. Nov. 10, 1903.) I. Henry Harris and Leon Kronfeld, for appellants. William Travers Jerome (Arthur C. Train and Henry G. Gray, of counsel), for respondents.

PER CURIAM. Orders (86 App. Div. 626, 83 N. Y. Supp. 1113, 1115) affirmed.

GRAY, HAIGHT, MARTIN, VANN, CULLEN, and WERNER, JJ., concur.

PARKER, C. J. (dissenting). There is evidence tending to show that relator exacted more than 6 per cent. interest as the condition of making a loan of \$225 to complainant. Complainant neither offered nor gave security for the loan. The question presented to this court is whether a loan made under such circumstances constitutes a misdemeanor, under section 378, Pen. Code. My associates are of the opinion that it does. While I dissent from that view, I admit that the section, standing by itself, justifies it. Indeed, I think the concession is fairly called for that a natural and ordinary reading of the section, without having in mind other statutes and the circumstances attending the amendment of the section in 1895, would lead to the conclusion that the section makes the loan of money without security at a usurious rate of interest a misdemeanor. Courts do not, however, always construe a statute according to its strict letter. It is a cardinal principle of construction, often and wisely employed, that statutes should be construed according to the intent of the law-

making power, and to that end the letter must give way. As this court says in *Delafield v. Brady*, 108 N. Y. 524, 529, 15 N. E. 428: "Statutes framed in general terms frequently embrace things which are not within the intent of the lawmakers, and sometimes things within such intent are not within the letter. Hence, in construing statutes, it has frequently been held that a thing which is within the letter of a statute is not within the statute, unless it be within the intent of the lawmakers." The court cites in support of such proposition a number of authorities in this state, among them *L. S. & M. S. Ry. Co. v. Roach*, 80 N. Y. 339, 344, in which the court says: "It cannot be doubted that the lawmakers did not intend that this law should be applied in such cases, and yet they are within the letter of the law. The lawmakers cannot always foresee all the possible applications of the general language they use; and it frequently becomes the duty of the courts, in construing statutes, to limit their operation, so that they shall not produce absurd, unjust, or inconvenient results, not contemplated or intended. A case may be within the letter of the law, and yet not within the intent of the lawmakers; and in such a case a limitation or exception must be implied." It is true that, as the section stood prior to the act of 1895, the taking under any circumstances of a greater interest than that allowed by law constituted a misdemeanor, and it was made so by chapter 676, p. 913, Laws 1881 (Pen. Code). But very shortly the Legislature began to create exceptions, presumably because it was discovered that the statute injured those it was intended to benefit, and that, economically considered, it was framed on anti-business principles, without having behind it the power to make business principles give way. Rates of interest in the business world are at all times affected by the character of the security. Money may be borrowed with government bonds as collateral at half the legal rate, when a loan upon other securities, less marketable, and having something of a speculative character, will call for the full legal rate. So, too, money may be borrowed upon a bond secured by a mortgage on marketable real estate for less than half its value at 4 per cent. or less, when 5 per cent. or 6 per cent. will be required if so large a loan be applied for as will approximate the full value of the real estate; and this is so because the element of risk as to some part of the investment is introduced by the necessity for a greater loan, and whenever that element enters the more conservative financial institutions and individuals refuse to make a loan, and those who are willing to take something of a risk demand extra compensation for it, and, if they cannot secure it, the loan will not be made. The person who desires to borrow, having no personal property to offer as collateral security or real estate to mortgage, finds it difficult to borrow, however much he may need money, and however well intentioned and honest he may be, because there is in his case the possibility that sickness may postpone the payment of the loan, or death make its collection impossible; and in such case the risk of a loan is very considerable, and men of means will generally refuse to take the chances unless they receive compensation for the risk. A statute, therefore, which subjects a man to fine or imprisonment, or both, for accepting more than 6 per cent. interest naturally operates, in times, at least, when rates of money are ruling high, to deprive the man without securities to pledge of an opportunity to borrow money, however pressing may be the necessity for it, whether caused by illness in his family or impending disaster, which could be averted by the money which he would borrow, even should its repayment, with interest, require a very substantial part of all his possible earnings for a considerable period in the future. A statute accomplishing such a result should be entitled, "An act to prevent a man without

means from borrowing money." This statute should not be so construed as to accomplish such a result, if from an examination of it in the light of other statutes, and the circumstances surrounding their enactment, it is apparent that the Legislature intended otherwise. Now it seems that, as has already been suggested, almost immediately after the enactment of section 378, Pen. Code, in 1881, it was discovered by those charged with the responsibility of legislation that the section was too drastic, and the year following an exception to the general law was created by what is known as the "Demand Loan Act" (Laws 1882, p. 290, c. 237), entitled "An act in relation to advances of money upon warehouse receipts, bills of lading, certificates of stock, certificates of deposit and other negotiable instruments." It provided, in effect, that where moneys were advanced payable on demand in an amount more than \$5,000, with securities of the kind suggested in the title pledged as collateral for such payment, it should be lawful to receive as compensation for the loan any sum agreed upon in writing by the parties. Why it should then be insisted that a man without any collateral whatever to pledge should not be permitted to compensate one who should advance to him money at any rate agreed upon between them in writing is difficult of comprehension. Certainly it would seem that he would find it much more difficult to secure a loan of money than the one with good collateral to pledge. In 1883 another exception to the general usury law was created by section 7 of what is known as the "Pawnbrokers' Act" (Laws 1883, p. 509, c. 339). These statutes have no direct bearing upon the question of the construction to be given to the section in question, and are referred to only because they show the tendency to relieve certain parties from the drastic effects of the general usury law. But when section 378, Pen. Code, was so amended by chapter 72, p. 33, Laws 1895, as to present the question we now have before us—whether by it the Legislature intended to so modify the section as that the loan of money at a usurious rate of interest, when not secured by certain prohibited personality, should not constitute a misdemeanor—chapter 326, Laws 1895, was also enacted, creating another exception to the general usury law in favor of certain corporations loaning not more than \$200 at specified rates of interest for a certain limited period of time. Section 5 of that act reads as follows: "In any such county no person or corporation, other than corporations organized pursuant to this act, shall, directly or indirectly, charge or receive any interest, discount or consideration greater than at the rate of six per cent. per annum upon the loan, use or forbearance of money, goods or things in action less than two hundred dollars in amount or value, or upon the loan, use or sale of personal credit in any wise, where there is taken for such loan, use or sale of personal credit any security upon any household furniture, apparatus or appliances, sewing machine, plate or silverware in actual use, tools or implements of trade, wearing apparel or jewelry. The foregoing prohibition shall apply to any person who, as security for any such loan, use or forbearance of money, or for any such loan, use or sale of personal credit as aforesaid, makes a pretended purchase of property from any person and permits the owner or pledgor to retain the possession thereof, or who, by any device or pretense of charging for his services or otherwise, seeks to obtain a larger compensation in any case hereinbefore provided for. Any person, and the several officers of any corporation, who shall violate the foregoing prohibition, shall be guilty of a misdemeanor, and upon proof of such fact the debt shall be discharged and the security shall be void. But this section shall not apply to licensed pawnbrokers, making loans upon the actual and permanent deposit of personal property as security;

nor shall this section affect in any way the validity or legality of any loan of money or credit exceeding two hundred dollars in amount." It will be noted that this section prohibits the taking of a greater rate of interest than 6 per cent. per annum "upon the loan, use or forbearance of money, goods or things in action less than two hundred dollars in amount or value, or upon the loan, use or sale of personal credit in any wise, where there is taken for such loan, use or sale of personal credit any security upon any household furniture, apparatus or appliances, sewing machine, plate or silverware in actual use, tools or implements of trade, wearing apparel or jewelry." By this section, then, neither the loan, use, nor sale of personal credit without security at a greater rate of interest than 6 per cent. per annum is prohibited. Now, turning to section 378, Pen. Code, which was amended the same year the act from which we have quoted was passed, by which there is added to section 378 language never there before, either in substance or spirit, and which language added is almost identical with the language found in section 5 already quoted, we find that it is capable of such a construction as makes a difference between "loan or forbearance of money" and the "use or sale of personal credit," in that a loan at a usurious rate, whether the prohibited security be taken or not, constitutes a misdemeanor, while the use or sale of personal credit does not, unless secured "upon any household furniture, sewing machine, plate or silverware in actual use, tools or implements of trade, wearing apparel or jewelry." No good reason has been advanced, nor do I think can be, for any such distinction, and that the Legislature saw no reason for the distinction is evidenced by section 5 of the corporation loan law, which, as we have seen, places both upon the same footing. The Legislature attempted to amend section 378, as it seems to me, so that it should harmonize with the letter and the spirit of the corporation loan law, which was in process of enactment at the same time, and which called its attention to a direction in which the pledging of certain classes of security for money loaned at a usurious rate could be made to work most disastrously to families in humble financial circumstances, and it provided that a loan or sale of personal credit, where articles therein named were taken as security, should constitute a misdemeanor; otherwise, a usurious loan by such a corporation was not prohibited. Now, section 378, as it then stood, made it a misdemeanor to loan money at a greater than lawful interest, and the draftsman of the amendment to section 378, by which it was intended, as it seems to me, very clearly, to harmonize that section with section 5 of the corporation loan law, so prepared it that the section reads as follows: "A person who, directly or indirectly, receives any interest, discount or consideration upon the loan or forbearance of money, goods or things in action, or upon the loan, use or sale of his personal credit in any wise, where there is taken for such loan, use or sale of personal credit security upon any household furniture, sewing machines, plate or silverware, in actual use, tools or implements of trade, wearing apparel or jewelry, or as security for the loan, use or sale of personal credit as aforesaid, makes a pretended purchase of such property from any person, and permits the pledgor to retain the possession thereof, greater than six per centum per annum, is guilty of a misdemeanor." It will be seen that the original section was left standing, but before the words "greater than is allowed by statute is guilty of a misdemeanor" the substance of the provisions in section 5 was inserted, and in many substantial respects the phraseology of section 5 was employed, beginning with the words "or upon a loan." In its reference to pretended purchase of property, section 378, as amended, uses the words "or as security for the

loan, use or sale of personal credit," while section 5 reads, "as security for any such loan, use or forbearance of money, or for any such loan, use or sale of personal credit." This difference presents an opportunity for so reading the two statutes that the loan of money shall be placed on a different basis than the use or sale of personal credit; the Penal Code making it a misdemeanor under all circumstances, and section 5 of the other statute only when it is secured in some method by property of the kind mentioned in the statute. But this, I think, was not the intention of the lawmakers. The facts to which reference has been made and the inferences of fact fairly deducible therefrom may be summed up as follows: In 1895 the Legislature for the first time was forcibly impressed with the importance of enabling a man without means to secure a needed loan, although a greater than the legal rate of interest must be paid for that purpose, and at the same time to secure his family from the possibility of being subjected to the loss of household necessities in order to satisfy the debt; and a statutory scheme looking to that end was devised, which may have had behind it the intelligent direction and push of philanthropists. Because that proposed enactment, which subsequently ripened into law, found favor, it became necessary to amend the Penal Code, so that it should be in accord with the new policy regarding those having necessity for small loans; hence the amendment to section 378, Pen. Code, by incorporating therein the substance of the provisions of the new act. The amendment was apparently drawn by a different and less cautious draftsman, and led to an enactment which results in this controversy as to the intent of the Legislature. No reason has been presented, nor can there be, for the difference which it is contended exists between the two acts. Therefore it would seem, in the light of all the legislation bearing on the subject, that such difference was due to mistake rather than intention. If that be so, it would follow that we should read the statute as not declaring a person guilty of a misdemeanor who exacts more than the legal rate of interest upon a simple loan of money. As I think it should be so read, I advise a reversal of the orders appealed from.

PEOPLE ex rel. BLAIR, Respondent, v. FOLKS, Commissioner of Public Charities, Appellant. (Court of Appeals of New York. Oct. 27, 1903.) George L. Rives, Corp. Counsel (Theodore Connolly and William B. Crowell, of counsel), for appellant. Asa Bird Gardiner, for respondent.

PER CURIAM. Order (86 App. Div. 626, 83 N. Y. Supp. 1113) affirmed, with costs.

PARKER, C. J., and O'BRIEN, BARTLETT, MARTIN, VANN, CULLEN, and WERNER, JJ., concur.

PEOPLE ex rel. CHIRURG, Appellant, v. CALDER, as Superintendent of Buildings, Respondent. (Court of Appeals of New York. Oct. 27, 1903.) May & Fragner, for appellant. George L. Rives, Corp. Counsel (James McKeen, of counsel), for respondent.

PER CURIAM. Order (75 App. Div. 625, 78 N. Y. Supp. 1131) affirmed, with costs.

PARKER, C. J., and O'BRIEN, BARTLETT, MARTIN, VANN, CULLEN, and WERNER, JJ., concur.

PEOPLE ex rel. CLIFTON, Appellant, v. DE BRAGGA, Sheriff, et al., Respondents. (Court of Appeals of New York. Oct. 13, 1903.) Motion to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (73 App. Div. 579,

77 N. Y. Supp. 7), entered June 13, 1902, which affirmed an order of the Queens County Court dismissing writs of habeas corpus and certiorari herein, and remanding the relator to the custody of the defendant. The motion was made upon the ground that, the grand jury having failed to find an indictment against the relator, the complaint against him had been dismissed. John B. Merrill, for the motion. Charles S. Hayes, opposed. No opinion. Motion granted, and appeal dismissed, with costs of appeal and \$10 costs of motion.

PEOPLE ex rel. CONSOLIDATED TELEGRAPH & ELECTRICAL SUBWAY CO., Appellant, v. MONROE, Water Supply Com'r, et al., Respondents. (Court of Appeals of New York. Oct. 27, 1903.) Henry J. Hemmens and Samuel A. Beardsley, for appellant. James Byrne, for respondents.

PER CURIAM. Order (85 App. Div. 542, 83 N. Y. Supp. 382) affirmed, with costs.

PARKER, C. J., and O'BRIEN, BARTLETT, MARTIN, VANN, CULLEN, and WERNER, JJ., concur.

PEOPLE ex rel. DINSMORE, Respondent, v. VANDEWATER et al., Appellants. (Court of Appeals of New York. Oct. 13, 1903.) Motion to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (83 App. Div. 60, 82 N. Y. Supp. 626), entered May 25, 1903, which affirmed an order of Special Term denying a motion to quash a writ of certiorari. The motion was made upon the ground that the order appealed from was not appealable to the Court of Appeals. Edgerton L. Winthrop, Jr., for the motion. Harry C. Barker, opposed. No opinion. Motion granted, and appeal dismissed, with costs and \$10 costs of motion.

PEOPLE ex rel. GRESS, Appellant, v. HILLIARD, Special Deputy Excise Com'r, et al., Respondents. (Court of Appeals of New York. Nov. 24, 1903.) Frederic E. Perham, for appellant. Herbert H. Kellogg, for respondents.

PER CURIAM. Order (85 App. Div. 507, 83 N. Y. Supp. 204) affirmed, with costs, on opinion below.

PARKER, C. J., and O'BRIEN, BARTLETT, HAIGHT, VANN, CULLEN, and WERNER, JJ., concur.

PEOPLE ex rel. HARRIS v. GILL, Sheriff. (Court of Appeals of New York. Nov. 24, 1903.) T. D. Trumbull, Jr., for appellant. Erskine C. Rogers, for respondent.

PER CURIAM. Order (85 App. Div. 192, 83 N. Y. Supp. 135) affirmed.

PARKER, C. J., and O'BRIEN, BARTLETT, HAIGHT, VANN, CULLEN, and WERNER, JJ., concur.

PEOPLE ex rel. LEAZENBEE, Appellant, v. PARTRIDGE, Police Com'r, Respondent. (Court of Appeals of New York. Dec. 1, 1903.) Louis J. Grant, for appellant. George L. Rives, Corp. Counsel (Theodore Connolly and John W. Hutchinson, Jr., of counsel), for respondent.

PER CURIAM. Order (83 App. Div. 643, 82 N. Y. Supp. 1111) affirmed, with costs.

PARKER, C. J., and O'BRIEN, BARTLETT, HAIGHT, VANN, CULLEN, and WERNER, JJ., concur.

PEOPLE ex rel. McBAIN, Appellant, v. WISWALL et al., Town Auditors, Respond-

ents. (Court of Appeals of New York. Oct. 27, 1903.) J. S. Frost, for appellant. George W. Stedman, for respondents.

PER CURIAM. Order (84 App. Div. 635, 81 N. Y. Supp. 1140) affirmed, with costs.

PARKER, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, MARTIN, and VANN, JJ., concur.

PEOPLE ex rel. McCULLOUGH, Appellant, v. WILSON et al., Board of Public Works, Respondents. (Court of Appeals of New York. Oct. 30, 1903.) Robert H. Barnett, for appellant. C. L. Waring, for respondents.

PER CURIAM. Appeal (80 App. Div. 640, 81 N. Y. Supp. 1140) dismissed, with costs.

PARKER, C. J., and O'BRIEN, BARTLETT, MARTIN, VANN, CULLEN, and WERNER, JJ., concur.

PEOPLE ex rel. McGEE, Appellant, v. PARTRIDGE, Police Com'r, Respondent. (Court of Appeals of New York. Nov. 24, 1903.) Hyacinthe Ringrose, for appellant. George L. Rives, Corp. Counsel (Theodore Connolly and Terence Farley, of counsel), for respondent.

PER CURIAM. Order (84 App. Div. 641, 82 N. Y. Supp. 1111) affirmed, with costs.

PARKER, C. J., and HAIGHT, CULLEN, and WERNER, JJ., concur. O'BRIEN, BARTLETT, and VANN, JJ., dissent.

PEOPLE ex rel. NEW YORK CITY & W. RY. CO., Appellant, v. BOARD OF RAILROAD COM'RS et al., Respondents. (Court of Appeals of New York. Nov. 10, 1903.) David B. Hill and J. Tredwell Richards, for appellant. Judson S. Landon, William C. Trull, and Frank Sullivan Smith, for respondents.

PER CURIAM. Order (81 App. Div. 237, 81 N. Y. Supp. 26) affirmed, with costs.

PARKER, C. J., and O'BRIEN, BARTLETT, MARTIN, VANN, CULLEN, and WERNER, JJ., concur.

PEOPLE ex rel. STANDARD WATER METER CO., Appellant, v. MONROE, Water Supply Com'r, Respondent. (Court of Appeals of New York. Oct. 13, 1903.) George E. Waldo, for appellant. George L. Rives, Corp. Counsel (Theodore Connolly and Arthur Sweeny, of counsel), for respondent.

PER CURIAM. Appeal (84 App. Div. 241, 82 N. Y. Supp. 603) dismissed, with costs.

O'BRIEN, BARTLETT, MARTIN, VANN, CULLEN, and WERNER, JJ., concur. PARKER, C. J., absent.

PEOPLE ex rel. STEERS, Appellant, v. DEPARTMENT OF HEALTH OF CITY OF NEW YORK, Respondent. (Court of Appeals of New York. Nov. 24, 1903.) George W. McKenzie and George P. Beebe, for appellant. George L. Rives, Corp. Counsel (James McKeen, of counsel), for respondent.

PER CURIAM. Order (86 App. Div. 521, 83 N. Y. Supp. 800) affirmed, with costs.

PARKER, C. J., and O'BRIEN, BARTLETT, HAIGHT, VANN, CULLEN, and WERNER, JJ., concur.

PEOPLE ex rel. WILLIAMS, Appellant, v. McDONOUGH, Secretary of State, et al., Respondents. (Court of Appeals of New York.

Nov. 24, 1903.) Lewis E. Carr, for appellant. J. Newton Fiero, for respondents.

PER CURIAM. Order (85 App. Div. 162, 83 N. Y. Supp. 125) affirmed, with costs.

PARKER, C. J., and O'BRIEN, BARTLETT, HAIGHT, VANN, CULLEN, and WERNER, JJ., concur.

PEOPLE ex rel. YOUNG, Respondent, v. STURGIS, Fire Com'r, Appellant. (Court of Appeals of New York. Oct. 20, 1903.) George L. Rives, Corp. Counsel (James McKeen, of counsel), for appellant. Joseph A. Burr, for respondent.

PER CURIAM. Order (85 App. Div. 20, 82 N. Y. Supp. 953) affirmed, with costs.

PARKER, C. J., and O'BRIEN, BARTLETT, MARTIN, VANN, CULLEN, and WERNER, JJ., concur.

In re PIERIS. (Court of Appeals of New York. Oct. 27, 1903.) Thomas Abbott McKennell, for appellant. Francis A. McCloskey, for respondent.

PER CURIAM. Order (82 App. Div. 466, 81 N. Y. Supp. 927) affirmed, with costs, on opinion below.

PARKER, C. J., and O'BRIEN, BARTLETT, MARTIN, VANN, CULLEN, and WERNER, JJ., concur.

POTS, Appellant, v. SICHER, Respondent. (Court of Appeals of New York. Oct. 30, 1903.) Jesse W. Johnson, for appellant. Daniel P. Hays, for respondent.

PER CURIAM. Judgment (66 App. Div. 614, 73 N. Y. Supp. 1145) affirmed, with costs.

PARKER, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, MARTIN, and VANN, JJ., concur.

POTTER, Respondent, v. BOYCE, Appellant. (Court of Appeals of New York. Oct. 6, 1903.) Henry Thompson, for appellant. Marcus T. Hun and David B. Ogden, for respondent.

PER CURIAM. Judgment (73 App. Div. 383, 77 N. Y. Supp. 24) affirmed, with costs.

PARKER, C. J., and O'BRIEN, BARTLETT, VANN, and WERNER, JJ., concur. MARTIN, J., absent. CULLEN, J., not voting.

In re PUTNAM'S WILL. (Court of Appeals of New York. Dec. 1, 1903.) Edgar T. Brackett, A. Pennington Whitehead, and Nash Rockwood, for appellant. Charles H. Sturges, for respondents.

PER CURIAM. Order (75 App. Div. 615, 77 N. Y. Supp. 1138) affirmed, with costs.

GRAY, BARTLETT, HAIGHT, CULLEN, and WERNER, JJ., concur. PARKER, C. J., and VANN, J., not voting.

In re RICE'S WILL. (Court of Appeals of New York. Oct. 27, 1903.) John C. Tomlinson, Max J. Kohler, and Edgar J. Kohler, for appellant. William B. Hornblower, John M. Bowers, James Byrne, Leo N. Levi, and Mark W. Potter, for respondent.

PER CURIAM. Motion to dismiss above appeal denied, without costs. Order (81 App. Div. 233, 81 N. Y. Supp. 68) affirmed, with costs.

PARKER, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, MARTIN, and VANN, JJ., concur.

ROCHESTER & LAKE ONTARIO WATER CO., Respondent, v. **CITY OF ROCHESTER**, Appellant. (Court of Appeals of New York. Nov. 17, 1903.) No opinion. Motion for reargument denied, with \$10 costs. See 178 N. Y. 86, 68 N. E. 117.

In re **ROSE et al.** (Court of Appeals of New York. Nov. 10, 1903.) J. A. Cipperly, for appellant, Clarence W. Betts, for respondents.

PER CURIAM. Order (75 App. Div. 615, 77 N. Y. Supp. 1139) affirmed, with costs.

PARKER, C. J., and **GRAY, HAIGHT, MARTIN, VANN, CULLEN, and WERNER, JJ.**, concur.

ROSS, Respondent, v. **KING et al.**, Appellants. (Court of Appeals of New York. Oct. 6, 1903.) Henry Bacon and Joseph Merritt, for appellants. Frank S. Anderson and John F. Anderson, for respondent.

PER CURIAM. Judgment (66 App. Div. 617, 73 N. Y. Supp. 1146) affirmed, with costs, on authority of *Baer v. McCullough*, 176 N. Y. 97, 68 N. E. 129.

PARKER, C. J., and **O'BRIEN, BARTLETT, VANN, CULLEN, and WERNER, JJ.**, concur. **MARTIN, J.**, absent.

RUNDELL, Respondent, v. **SWARTWOUT**, Appellant. (Court of Appeals of New York. Nov. 10, 1903.) A. B. Steele, for appellant. George W. Ward, for respondent.

PER CURIAM. Judgment (78 App. Div. 628, 79 N. Y. Supp. 1145) affirmed, with costs.

PARKER, C. J., and **GRAY, O'BRIEN, HAIGHT, MARTIN, CULLEN, and WERNER, JJ.**, concur.

RUSSELL et al. v. HILTON et al. (Court of Appeals of New York. Oct. 13, 1903.) No opinion. Motion for reargument denied, with \$10 costs. See 175 N. Y. 525, 67 N. E. 1089.

SANDLES, Appellant, v. **LEVENSON**, Respondent. (Court of Appeals of New York. Dec. 1, 1903.) Herbert C. Smyth, Sumner B. Stiles, and Eugene F. Seymour, for appellant. Moses Feltenstein, for respondent.

PER CURIAM. Judgment (78 App. Div. 806, 79 N. Y. Supp. 959) affirmed, with costs.

PARKER, C. J., and **HAIGHT, VANN, and WERNER, JJ.**, concur. **O'BRIEN, BARTLETT, and CULLEN, JJ.**, dissent.

SOHLIVINSKI, Appellant, v. **MAXWELL**, City Superintendent of Schools, Respondent. (Court of Appeals of New York. Oct. 27, 1903.) Abram Shlivek, for appellant. George L. Rives, Corp. Counsel (Theodore Connolly, James McKeen, and Walter S. Brewster, of counsel), for respondent.

PER CURIAM. Appeal (80 App. Div. 818, 80 N. Y. Supp. 726) dismissed, with costs.

PARKER, C. J., and **O'BRIEN, BARTLETT, MARTIN, VANN, CULLEN, and WERNER, JJ.**, concur.

SEGER, Respondent, v. **FARMERS' LOAN & TRUST CO.**, Appellant. (Court of Appeals of New York. Nov. 10, 1903.) James F. Horan, for appellant. John C. Gullick, for respondent.

PER CURIAM. Judgment (78 App. Div. 293, 76 N. Y. Supp. 721) reversed, and new trial

granted, costs to abide event, on dissenting opinions of **INGRAHAM** and **LAUGHLIN, JJ.**, below.

PARKER, C. J., and **GRAY, O'BRIEN, HAIGHT, MARTIN, CULLEN, and WERNER, JJ.**, concur.

SHELDERBERG, Appellant, v. **VILLAGE OF TONAWANDA**, Respondent. (Court of Appeals of New York. Oct. 6, 1903.) Norman D. Fish, for appellant. W. B. Simson, for respondent.

PER CURIAM. Judgment (70 App. Div. 623, 75 N. Y. Supp. 1132) affirmed with costs.

PARKER, C. J., and **O'BRIEN, BARTLETT, VANN, CULLEN, and WERNER, JJ.**, concur. **MARTIN, J.**, absent.

SIMIS et al. v. WHITE et al. (Court of Appeals of New York. Oct. 20, 1903.) George W. McKenzie, Hamilton Anderson, and George P. Beebe, for appellant. Edward C. Rice, for respondent.

PER CURIAM. Order (85 App. Div. 618, 82 N. Y. Supp. 1115) affirmed, with costs.

PARKER, C. J., and **O'BRIEN, BARTLETT, MARTIN, VANN, CULLEN, and WERNER, JJ.**, concur.

SKILLIN, Respondent, v. **MAIBRUNN et al.**, Appellants. (Court of Appeals of New York. Nov. 10, 1903.) Jacob Fromme, for appellants. Charles Goldzier and Louis J. Vorhaus, for respondent.

PER CURIAM. Judgment (75 App. Div. 588, 78 N. Y. Supp. 436) affirmed, with costs.

PARKER, C. J., and **GRAY, HAIGHT, MARTIN, VANN, CULLEN, and WERNER, JJ.**, concur.

SOUTHGATE et al. v. CONTINENTAL TRUST CO. OF THE CITY OF NEW YORK et al. (Court of Appeals of New York. Nov. 10, 1903.) O. J. Wells, for appellant. Percival S. Menken, for trustee. Sherman Evarts, for Harriet A. Whitmore.

PER CURIAM. Judgment (74 App. Div. 150, 73 N. Y. Supp. 718, 77 N. Y. Supp. 687) affirmed, without costs, on opinion of **PATTERSON, J.**, below.

PARKER, C. J., and **GRAY, HAIGHT, MARTIN, VANN, CULLEN, and WERNER, JJ.**, concur.

STANDTKE, Appellant, v. **SWITS CONDE CO.**, Respondent. (Court of Appeals of New York. Oct. 6, 1903.) D. P. Morehouse and L. O. Rowe, for appellant. Elisha B. Powell, for respondent.

PER CURIAM. Judgment (64 App. Div. 625, 78 N. Y. Supp. 1148) affirmed, with costs.

PARKER, C. J., and **O'BRIEN, BARTLETT, VANN, CULLEN, and WERNER, JJ.**, concur. **MARTIN, J.**, absent.

STANNARD et al., Respondents, v. **GREEN**, Appellant. (Court of Appeals of New York. Oct. 30, 1903.) J. B. McCormick, for appellant.

PER CURIAM. Judgment (62 App. Div. 631, 71 N. Y. Supp. 1149) affirmed, with costs.

PARKER, C. J., and **GRAY, O'BRIEN, BARTLETT, HAIGHT, MARTIN, and VANN, JJ.**, concur.

STEVENS, Respondent, v. UNION RY. CO. OF NEW YORK CITY, Appellant. (Court of Appeals of New York. Dec. 1, 1903.) Charles F. Brown and Henry A. Robinson, for appellant. Thomas J. O'Neill and Cornelius J. Early, for respondent.

PER CURIAM. Judgment (75 App. Div. 602, 78 N. Y. Supp. 624) affirmed, with costs.

HAIGHT, MARTIN, VANN, and WERNER, JJ., concur. PARKER, O. J., and GRAY and CULLEN, JJ., dissent.

STEWART, Appellant, v. WARD, Public Works Com'r, et al., Respondents. (Court of Appeals of New York. Oct. 13, 1903.) No opinion. Motion for reargument denied; without costs. See 178 N. Y. 608, 66 N. E. 1117.

STRUCKS, Respondent, v. CORNING, Appellant. (Court of Appeals of New York. Oct. 6, 1903.) John Van Voorhis and Browne & Poole, for appellant. George D. Reed, for respondent.

PER CURIAM. Judgment (68 App. Div. 650, 74 N. Y. Supp. 1148) affirmed, with costs.

PARKER, C. J., and O'BRIEN, BARTLETT, VANN, CULLEN, and WERNER, JJ., concur. MARTIN, J., absent.

TRIPP, Respondent, v. CHESTER, Appellant, et al. (Court of Appeals of New York. Oct. 30, 1903.) Frank C. Ferguson, for appellant. Adelbert Moot, for respondent.

PER CURIAM. Judgment (66 App. Div. 623, 73 N. Y. Supp. 1149) affirmed, with costs.

PARKER, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, MARTIN and VANN, JJ., concur.

TWELFTH WARD BANK OF CITY OF NEW YORK v. SCHAUFFLER et al. (Court of Appeals of New York. Nov. 10, 1903.) Hubert E. Rogers, for appellant. Charles W. Dayton and Joseph E. Bullen, for plaintiff, respondent bank. Charles P. Rogers, for other respondents.

PER CURIAM. Judgment (71 App. Div. 168, 75 N. Y. Supp. 561) affirmed, with costs.

PARKER, C. J., and GRAY, O'BRIEN, HAIGHT, MARTIN, CULLEN, and WERNER, JJ., concur.

TWELFTH WARD BANK OF THE CITY OF NEW YORK v. SCHAUFFLER et al. (Court of Appeals of New York. Dec. 1, 1903.) No opinion. Motion to amend remittitur (see 176 N. Y. —, ubi supra) granted, and remittitur amended by giving costs to the Twelfth Ward Bank, the plaintiff, and without costs to either of the other parties.

In re UNITED STATES TRUST CO. OF NEW YORK. (Court of Appeals of New York. Oct. 20, 1903.) No opinion. Motion for reargument denied, with \$10 costs. See 175 N. Y. 304, 67 N. E. 614.

VENNER, Appellant, v. FARMERS' LOAN & TRUST CO., Respondent. (Court of Appeals of New York. Oct. 6, 1903.) George H. Yeaman, for appellant. David McClure, for respondent.

PER CURIAM. Judgment (54 App. Div. 271, 66 N. Y. Supp. 773) affirmed, with costs.

PARKER, C. J., and O'BRIEN, BARTLETT, VANN, CULLEN, and WERNER, JJ., concur. MARTIN, J., absent.

VOISIN v. THAMES & MERSEY MARINE INS. CO. (Court of Appeals of New York. Oct. 30, 1903.) H. A. Vieu and A. H. Parkhurst, for appellant. C. N. Bovee, Jr., and Wilhelmus Mynderse, for respondents.

PER CURIAM. Appeal (84 App. Div. 642, 82 N. Y. Supp. 1117) dismissed, with costs.

O'BRIEN, BARTLETT, MARTIN, VANN, CULLEN, and WERNER, JJ., concur. PARKER, C. J., absent.

WAGNER, Respondent, v. METROPOLITAN ST. RY. CO., Appellant. (Court of Appeals of New York. Dec. 1, 1903.) Charles F. Brown, Arthur Ofner, and Henry A. Robinson, for appellant. Henry A. Powell, for respondent.

PER CURIAM. Judgment (79 App. Div. 591, 80 N. Y. Supp. 191) affirmed, with costs, on opinion below.

PARKER, C. J., and O'BRIEN, BARTLETT, HAIGHT, VANN, CULLEN, and WERNER, JJ., concur.

WALSH, Respondent, v. HYATT et al., Appellants. (Court of Appeals of New York. Oct. 6, 1903.) Leo J. Kersburg and Herbert R. Limburger, for appellants. James M. Hunt, for respondent.

PER CURIAM. Judgment (74 App. Div. 20, 77 N. Y. Supp. 8) affirmed, with costs.

PARKER, C. J., and O'BRIEN, BARTLETT, VANN, CULLEN, and WERNER, JJ., concur. MARTIN, J., absent.

WALTER, Appellant, v. TOMKINS et al., Respondents. (Court of Appeals of New York. Oct. 13, 1903.) Motion to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (71 App. Div. 21, 75 N. Y. Supp. 557), entered April 22, 1902, affirming a judgment in favor of defendants entered upon a decision of the court at Special Term sustaining a demurrer to the complaint. The motion was made upon the grounds that the undertaking required to perfect the appeal had not been filed and the record on appeal had not been served upon the respondents. John S. Montgomery, for the motion. Samuel Fruchthandler, opposed. No opinion. Motion granted, unless appellant, within 10 days after service of order, files a proper undertaking and pays \$25 costs.

WEIDENFELD, Appellant, v. KEPPLER, Respondent. (Court of Appeals of New York. Oct. 20, 1903.) Herbert R. Limburger, Edward Lauterbach, Henry L. Scheuerman, and G. Thornton Warren, for appellant. Lewis Cass Ledyard, for respondent.

PER CURIAM. Order (84 App. Div. 235, 82 N. Y. Supp. 634) affirmed, with costs.

PARKER, C. J., and O'BRIEN, BARTLETT, MARTIN, VANN, CULLEN, and WERNER, JJ., concur.

WEIDMAN, Appellant, v. CITY OF NEW YORK, Respondent. (Court of Appeals of New York. Nov. 10, 1903.) W. M. Rosebault, for appellant. George L. Rives, Corp. Counsel (Theodore Connolly, of counsel), for respondent.

PER CURIAM. Judgment (84 App. Div. 321, 82 N. Y. Supp. 771) affirmed, with costs. **PARKER, C. J., and GRAY, HAIGHT, MARTIN, VANN, CULLEN, and WERNER, JJ.,** concur.

WELLE, Appellant, v. CELLULOID CO., Respondent. (Court of Appeals of New York. Oct. 13, 1903.) No opinion. Motion for reargument denied, with \$10 costs. See 175 N. Y. 401, 67 N. E. 609.

WERNER, Respondent, v. HEARST, Appellant (two cases). (Court of Appeals of New York. Oct. 13, 1903.) Motion to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (76 App. Div. 375, 78 N. Y. Supp. 788), entered January 16, 1903, affirming a judgment in favor of plaintiff entered upon a verdict, and an order denying a motion for a new trial. The motion was made upon the ground that the only questions of law involved which the Court of Appeals had jurisdiction to consider had become abstract. **Roger M. Sherman, for the motion. David B. Hill, opposed.** No opinion. Motion denied, with \$10 costs.

YOUNG, Appellant, v. EUGENE DIETZGEN CO., Respondent, et al. (Court of Appeals of New York. Nov. 10, 1903.) **John J. Schwartz and David Burr Luckey, for appellant. W. W. MacFarland, for respondent.**

PER CURIAM. Judgment (72 App. Div. 618, 76 N. Y. Supp. 123) affirmed, with costs.

PARKER, C. J., and GRAY, O'BRIEN, HAIGHT, MARTIN, CULLEN, and WERNER, JJ., concur.

ZAPF, Appellant, v. CARTER, Respondent. (Court of Appeals of New York. Oct. 30, 1903.) **John Conboy, for appellant. George C. Carter, for respondent.**

PER CURIAM. Appeal (70 App. Div. 395, 75 N. Y. Supp. 197) dismissed, with costs.

PARKER, C. J., and GRAY, BARTLETT, HAIGHT, MARTIN, and VANN, JJ., concur. **O'BRIEN, J.,** not voting.

CLEMENT v. BOSTON & M. R. R. (Supreme Judicial Court of Massachusetts. Hampshire. Oct. 22, 1903.) Exceptions from Superior Court, Hampshire County; **Elisha B. Maynard, Judge.** Action by Estella Clement against the Boston & Maine Railroad for personal injuries sustained while a passenger upon one of defendant's trains. At the trial it appeared that plaintiff was injured in consequence of trying to leave the train after it had started. It appeared that, when the train stopped at the station at which the plaintiff wished to leave it, the plaintiff left her seat, went out of the front door of the coach, and was about to step from the train, when it suddenly started. The jury returned a verdict for the plaintiff, and defendant excepted. The defendant's first and second requests were that on all of the evidence plaintiff was not entitled to recover, and that there was no evidence of any actionable negligence on the part of the defendant. Exceptions overruled. **John B. O'Donnell and John C. Hammond, for plaintiff. Wm. G. Bassett and Edw. L. Shaw, for defendant.**

HAMMOND, J. It would serve no useful purpose to rehearse in detail the evidence in this case. It is plain that the questions whether the plaintiff was careful, the defendant

careless, and any injury suffered by the plaintiff was attributable to this carelessness, were questions of fact for the jury, and we cannot say that the verdict in favor of the plaintiff was not warranted. The first two requests were, therefore, rightly refused. The instructions to the jury upon the subject-matter embraced in the third and fourth requests were clear, full, and sufficiently favorable to the defendant. Exceptions overruled.

BUCKINGHAM v. SPRINGFIELD BUILDING & LOAN ASS'N et al. (two cases). (Supreme Court of Ohio. Oct. 13, 1903.) Error to Circuit Court, Clark County. Actions by William L. Buckingham, individually and for himself and other creditors of the Springfield Provision Company, against the Springfield Building & Loan Association and Oliver H. Miller, its receiver. The facts in case No. 8,246 in substance are as follows: Upon the 21st day of June, 1901, the same day that the receiver was appointed, a proceeding was brought by William L. Buckingham for the benefit of himself and all other creditors of the Springfield Provision Company, to assess and collect on the liability of the stockholders under the laws of Ohio. In this proceeding the building and loan association, on the 8th of October, 1901, set up its claim. A referee was appointed to ascertain the creditors of the corporation, and on the 14th of April, 1902, reported to the court allowing the claim of the building and loan association for \$10,089.41, which report was confirmed, and judgment was rendered against each of the stockholders for the full amount of their stock liability, and Oliver H. Miller was appointed receiver to collect and distribute the money to be paid by the stockholders pursuant to the judgment of the court. In July, 1902, said receiver collected a sufficient amount to pay a dividend of 10 per cent, and on the 17th day of November was by the court ordered to pay a dividend of 10 per cent. to all creditors exhibiting their claims, and, in making such dividend, to pay the building and loan association 10 per cent. upon the balance of its claim as the same existed after the application of the proceeds of the sale of the mortgaged property, to wit, on the sum of \$2,621.64, retaining \$736.86, 10 per cent. upon the amount so paid to the association, for the further order of the court. The question arises in case No. 8,246, upon the distribution of this balance so reserved and upon the distribution of any future dividends from the stockholders' funds, as to whether a dividend should be paid upon the amount of the claim of the building and loan association as it stood at the time of the filing of the petition, or upon the amount as it stands after the application of the proceeds of the mortgaged property. The question raised in No. 8,247 is whether or not a creditor of an insolvent corporation, which is being settled in court, who has received a payment upon his claim from the sale by the receiver of securities held by such creditor, has a right to prove and receive a dividend upon the entire amount of his claim as it stood before the application of the securities, or is he entitled to receive a dividend only upon the balance that may remain due after the application of his security to the reduction of his debt? The facts in case No. 8,247 are in substance as follows: On June 21, 1901, Oliver H. Miller was appointed by the court of common pleas receiver of the Springfield Provision Company, a corporation existing under the laws of Ohio, and said receiver on that day took possession of the property of said corporation. Said corporation was insolvent, and indebted to the Springfield Building & Loan Association in the sum of \$9,990.30, secured by mortgage upon the real estate of

the corporation. On August 27, 1901, said association answered, setting up its claim. There was a large number of other creditors of said corporation. The receiver, under order of the court, sold the real estate upon which the association held its mortgage to said association, and on the 10th of June, 1902, paid the association the sum of \$7,368.66, being the net proceeds of the mortgage sale, leaving a balance due the building and loan association of \$2,621.64. On July 16th the receiver paid a 10 per cent. dividend to the general creditors of the Springfield Provision Company, paying to the building and loan association 10 per cent. on the balance due on its debt after the application of the proceeds of the mortgaged property, and retained for the further order of the court 10 per cent. on the amount paid from the sale of the mortgaged property, being \$736.86. The cross-petitioners herein are creditors of the corporation. The question arises, upon a proper distribution of the \$736.86 and of any further dividends to be paid out of the general assets of the corporation, as to whether the association's claim should receive a dividend on the basis of \$9,990.30, as it originally stood, or upon \$2,621.64, as it stood after the application of the proceeds of the mortgaged property. On these facts the court of common pleas held that the creditor of the in-

solvent corporation, the defendant in error, was entitled only to prove and receive dividends upon the balance of its claim after the application of the securities held by it, to wit, the proceeds of the sale of the real estate covered by its mortgage. The circuit court, on appeal, held to the contrary; that is, in substance, that the defendant in error was entitled to a dividend on the full amount of its claim, without being reduced by application of the amount received from the security. The cases are here on error to reverse the judgments of the circuit court. Reversed. Frank W. Geiger, Edwin S. Houck, and John L. Plummer, for plaintiff in error. M. T. Burnham and Bowman & Bowman, for defendants in error.

PRICE, J. As stated in the principal case, counsel for the parties in these cases were heard orally in the argument of *State National Bank v. Esterly, Receiver* (just decided) 68 N. E. 582, and their briefs have been read and considered with the briefs in that case. What we have said in *Bank v. Esterly, Receiver*, can well be applied to these cases, and further discussion of them is unnecessary. The judgment of the circuit court in each case is reversed, and judgment is rendered in each case for plaintiff in error. Judgments reversed.

BURKET, C. J., and SPEAR and DAVIS, JJ., concur. SHAUCK, J., dissents.

END OF CASES IN VOL. 68

